IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

In Re:	**In Proceedings Under Chapter 11 (Jointly Administered)**
LEVEL PROPANE GASES, INC. ET. AL.,	**Case No.: 02-16172**
Debtor.	**JUDGE RANDOLPH BAXTER**

MEMORANDUM OF OPINION AND ORDER

Before the Court is William H. Maloof's ("Maloof") Third Amended Motion to Vacate Conversion Order of June 11, 2002 and Sale Order of Level Propane Going-Concern Assets of June 27, 2003 Pursuant to R. 60(b)(6) With Request For Evidentiary Hearing and Leave to Controvert Involuntary Chapter 7 Petition of June 6, 2002. Maloof was displaced as the Debtor's principal shareholder and CEO of the Debtors on the petition date. Debtors oppose Maloof's Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O). After considering both parties' pleadings, attachments thereto, and conducting a hearing, the Court rules as follows:

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These consolidated cases were commenced on June 6, 2002 by the filing of involuntary petitions for relief under Chapter 7 of the Bankruptcy Code (the Chapter 7 cases) against Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level Propane Gases, Inc., Level Energy Group, Inc. and WHM Enterprises, Inc.. On June 11, 2002, this Court entered an Agreed Final Order and Stipulation: a) Acknowledging the authority

of Charles Sweet as Sole Director of All Debtors; b) Converting Cases to Voluntary Cases under Chapter 11; c) Granting Order for Relief Under Chapter 11; d) Ordering Joint Administration of all Cases; and e) Granting Other Relief (the "Agreed Order").

The Agreed Order was supplemented on June 13, 2002 to clarify that orders for relief granted pursuant to the Agreed Order were to become effective June 17, 2002. On June 17, 2002, this Court entered its *Order Converting Cases to Cases Under Chapter 11 of the Bankruptcy Code*, wherein the subject cases were converted to relief under Chapter 11 of the Bankruptcy Code. No timely appeal of the Agreed Order was made. As discussed below, Maloof moved to vacate the Agreed Order three years later but that request was denied.

On February 26, 2003, the United States Trustee moved for the appointment of an examiner. (Docket 1107). The Trustee alleged that appointment was necessary 1) to investigate whether Debtors' counsel, Benesch Friedlander Coplan & Aronoff LLP, ("BFCA") misled the Court, United States Trustee and parties in interest and failed to provide objective advice regarding the conduct of operations and management of the case and 2) such appointment was required by 11 U.S.C. § 1104(c)(2) because the Debtors' debts exceeded $5,000,000.00. Maloof also moved for appointment of an examiner. On April 30, 2003, the Court granted the Trustee's Motion and appointed Professor G. Ray Warner to serve as examiner. (Docket 1356). Maloof's motion was denied as moot. The Examiner filed his report with the Court on June 6, 2003. (Docket 1616). No objections were filed with respect to the findings in the Examiner's Report.

Subsequent to the appointment of the Examiner, the Debtors moved to sell substantially all of its propane business assets. The sale of the Debtors' propane distribution business to Eaglerock was approved by Court order entered on June 27, 2003, over Maloof's objection. The

sale closing occurred on July 2, 2003, at which time Eaglerock assigned all of its rights under the asset purchase agreement to its assignee, Horizon Propane, LLC. On November 5, 2003, Debtors sought approval of the sale of Level Propane's parking lot assets. That sale was approved on December 10, 2003, without objection by Maloof. Maloof did not timely seek a stay of the either the June 27, 2003 or December 10, 2003 orders approving the sales. His untimely requests for stay, filed in January 2004 were denied. Maloof's appeals to the District Court with respect to both sale orders were dismissed and his Motion to Reconsider such dismissal denied.[1]

Subsequently, Horizon Propane, LLC sold substantially all of its assets to AmeriGas Propane L.P. in a transaction that closed on October 1, 2003. On October 3, 2003, AmeriGas Propane, L.P. filed a Notice of Assignment of Rights Between Horizon Propane, LLC, Assignee of Eaglerock Propane, LLP. to AmeriGas Propane L.P. (Docket No. 2002).

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Maloof's current Motion is at least his attempt fifth to undermine prior proceedings before this Court where no timely appeals or other objections were filed by Maloof. On June 6, 2006, Maloof filed a Motion to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered Into on June 11, 2002 and Motion for Leave to Controvert the Involuntary Bankruptcy Petition Filed June 6, 2002. (Docket 2969). In that motion, Maloof sought to vacate the Agreed Order, of which he was a signatory, on the basis that the order was a fraud upon the court and that the Bank Group and the Debtors had no intention at the time the

[1]*See* N.D. Ohio Case No. 1:04cv0092, Memorandum and Order (March 24, 2006) and Memorandum Order (March 19, 2007).

Order was signed "to preserve and protect the assets of Debtors' estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors."

Maloof claimed that Debtors' management disposed of or destroyed business and financial records of the Debtors. A large portion of the document destruction allegations related to an incident in March 2003, in which one member of the Debtors' postpetition management cleaned out his office. This incident, however, was thoroughly investigated by the Examiner, who "[b]ased upon the documents reviewed and the witness interviews, . . . found no evidence" that the Debtors destroyed any documents that were responsive to a pending subpoena. This Court denied Maloof's Motion to Vacate in part on the basis that Maloof had waited four years to challenge the Agreed Order which he himself had signed. (Docket 3039). This Court's decision was affirmed by the District Court on appeal.[2]

Maloof further attempted to upset these bankruptcy proceedings by making two repetitive challenges to the Examiner's investigation and report issued as a result of such investigation. On January 31, 2006, Maloof filed a motion styled Motion of William H. Maloof to Reopen Examiner's Investigation and for Substitute Examiner ("First Motion to Reopen"). (Docket 2887). In his First Motion to Reopen, Maloof stated that cause existed to reopen the Examiner's Investigation because Debtors' postpetition management had orchestrated a campaign of document destruction and that the documents destroyed would have established that the Debtor was solvent at the time of filing of the involuntary petition. After a duly-notice evidentiary hearing, the Court entered a Memorandum of Opinion and Order denying Maloof's First Motion to Reopen. (Docket 2974). No motion for reconsideration or notice of appeal was filed by

[2]See N.D. Ohio Case No. 1:07cv0153, Memorandum and Order (August 16, 2007)

Maloof or any other party.

On July 12, 2006, Maloof filed a motion styled, Renewed and Restated Motion to Reopen Examiner's Report and for Appointment of a Substitute Examiner ("Second Motion to Reopen"). (Docket 2981). In his Second Motion to Reopen, Maloof requested the Court examine alleged "multiple instances of document disposal and shredding." He alleged that new evidence had surfaced which showed that customer and financial records were destroyed and that such records would show that Debtor was solvent at the time of the filing of the involuntary petition. He further alleged that the Examiner had relied on statements by persons involved in an alleged fraud and that he had acquiesced to them.

The Court denied Maloof's Second Motion to Reopen, concluding, in part, that the motion requested unwarranted relief and violated the doctrine of laches and finality. (Docket 3037). The Debtors then sought sanctions against Maloof for filing duplicative, untimely and unwarranted motions and supplemental pleadings related to the Second Motion to Reopen. The Court granted the Motion for Sanctions in part and imposed sanctions in the form of attorneys' fees and costs relative to the filing and defense of the Second Motion to Reopen and the related supplemental pleadings. (Docket 3047). The Court further enjoined Maloof from requesting an examiner to investigate matters which have previously been examined and/or been adjudicated by this Court. Maloof appealed the imposition of sanctions and this Court was affirmed by the District Court on appeal.[3] This Court was also affirmed by the District Court with respect to its denial of the Second Motion to Reopen.[4]

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[3]See N.D. Ohio Case No. 1:07cv0150, Memorandum and Order (August 16, 2007).

[4]See N.D. Ohio Case No. 1:07cv0103, Memorandum and Order (August 16, 2007).

After those unsuccessful attempts, Maloof changed strategies and, on November 14, 2006, filed a Motion to Disqualify Debtor's Counsel Pursuant to 11 U.S.C. § 327. In that Motion, Maloof sought to undermine this entire bankruptcy case by alleging Debtors' counsel, after nearly five years of work, did not meet the disinterestedness standard under 11 U.S.C. § 327. That Motion was denied and Maloof's appeal thereon was dismissed by the District Court.

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The instant motion was filed on October 11, 2007 and is Maloof's fifth attempt to challenge these bankruptcy proceedings, far exceeding the proverbial "second bite" at the apple. Notably, Maloof's motion is unsupported by any party in interest, even the unsecured creditors, who typically stand to lose the most in a bankruptcy case. The current motion is brought, yet again, pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, and seeks to vacate the Agreed Order converting this case from Chapter 7 to Chapter 11, vacate the Sale Order of June 27, 2003, and leave to controvert the involuntary petition. Maloof conveniently piecemeals the District Court's ruling, which dismissed his appeal of this Court's denial of his first Motion to Vacate, to say such District Court ruling gives him a platform to revisit the subject motions with this Court. In that ruling, which Maloof did not appeal, the District Court stated:

> In an effort to obtain evidence that would be sufficient to support an allegation of fraudulent misrepresentation to the Court, an Examiner was appointed to determine if BFCA . . . had corrupted the adjudication process. The Examiner found that BFCA had acted in good faith, competently, and honestly. Like the Bankruptcy Court below, the court accepts the Examiner's findings of fact, since he reviewed many documents and conducted extensive interviews. There is no evidence of the type of deliberately planned and carefully executed scheme to defraud the court that was present in the Hazel-Atlas line of cases . . .
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> Even without relying on the Examiner's findings of fact, the court finds that there is insufficient evidence to prove fraud on the Bankruptcy Court, and the motion to vacate judgment under Rule 60(b)'s last sentence is denied.

See N.D. Ohio Case No. 1:07cv0153, Memorandum and Order (August 16, 2007) at pg. 7-8.

Maloof latches on to piecemeal statements by the District Court that "The Court finds that the *Hazel-Atlas* line of cases to stand for the proposition that where fraud on the court can be proved, even a final judgment may be upset in the interest of justice" and that "Indeed, if Maloof's Motion is denied even though it is supported by the evidence, this court will likely conclude that the Bankruptcy Court's decision was clearly erroneous" as an invitation to further conduct a fishing expedition and continue his attempt to vacate orders that this Court approved in 2002 and 2003 and that have already been re-examined by this Court as a result of Maloof's filings. Even the *Hazel-Atlas* line of cases mentioned by the District Court, and relied upon by Maloof, does not disregard the applicable procedural rules pertinent to a disposition of Maloof's Motion. Attached to the Motion is more than 20 exhibits, all of which the Court has reviewed and considered.

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The dispositive issue before the Court is whether Maloof's current Motion is barred by the doctrines of finality and laches, as having raised issues previously decided by this Court and to the extent not previously decided by this Court, whether such issues were raised in a timely manner.

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A Rule 60(b) motion may be granted *only for certain specified reasons:*

> 1) mistake, inadvertence, surprise, or excusable neglect;
> 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> 3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> 4) the judgment is void;
> 5) the judgment has been satisfied, released, or discharged, or a prior judgment

upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
6) any other reason justifying relief from the operation of the judgment.
Fed.R.Civ.P. 60(b).

Relief under Rule 60(b) is not a matter of right. Rather, it rests in the trial court's sound discretion. *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 132-33 (6th Cir. 1990). Such relief granted only in extraordinary circumstances *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988). The burden of proof rests with the movant who must "show that its case comes within the provisions of the rule." *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993). In the Sixth Circuit, a party alleging fraud upon the court must prove five elements: 1) conduct on the part of an officer of the court; 2) the conduct is directed at the "judicial machinery" itself; 3) the conduct consists of intentionally false statements; 4) the false statements are averments or concealments when under a duty to disclose; and 5) the false statements actually deceive the court. *Demjanjuk v. Petrosvsky*, 10 F.3d 338, 348 (6th Cir. 1993).

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Although not clear in his Motion, Maloof clarifies in his response to the Debtors' objection that he is alleging four courses of fraudulent conduct: 1) the pre-petition seizure of control of the companies by the Bank Group; 2) document concealment, disposal and destruction to leave no means of testing the accuracy of the customer database; 3) manipulation of the tank count and the customer count in order to misrepresent the customer base level; and 4) waylaying of customer payment checks before assets were sold. Maloof further alleges that these four courses of fraudulent conduct, and evidence attached to support the courses of conduct, are proof that there existed a conspiracy to conceal and destroy the going concern value of Level Propane. Despite Maloof's assertions to the contrary, this is simply a recasting of the arguments he has

repeatedly and unsuccessfully made before this Court and on appeal.

Maloof's Motion is barred by the doctrine of finality. Indeed, the purpose of the finality doctrine is to conserve judicial and other societal resources, and to foster confidence in judicial determinations, by putting to rest matters that have been litigated previously in the same case. *See, e.g., Steuter v. Browner*, 121 F.3d 1262 (9th Cir. 1997) (citing *United States v. ITT Rayonier, Inc.*, 627 F.2d 966, 1000 (9th Cir. 1980)). One court has described the doctrine as requiring that "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result.*" *LaShawn, et.al, v. Barry, et.al.*, 87 F.3d 1389, 1398-99 (D.C. Cir. 1996) (en banc) (emphasis in original). The arguments advanced herein were either earlier advanced by Maloof or his legal counsel on his behalf.

If not advanced earlier, Maloof herein has failed to demonstrate sufficient cause why such arguments were not advanced in a timely manner. Under the doctrine of laches, a court may dismiss an action where there exists inexcusable delay in instituting an action, resulting in prejudice to the non-moving party. *In re Levy*, 256 B.R. 563, (Bankr.D.N.J.2000). In the case of *Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534, 543, 5 L.Ed.2d 551 (1961), the United States Supreme Court stated that the two elements of laches are: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

Maloof challenges orders entered by this Court in 2002 and 2003. Maloof was represented by counsel at the time he signed the Agreed Order. It is unrefuted that, Maloof did not seek an adjournment of the meeting which resulted in the signing of the Agreed Order so he could conduct his own investigation. Nor did Maloof appeal the order approving the sale of the Debtor's business. Furthermore, Maloof has participated in the Debtors' bankruptcy case since

its inception. Thusly, the doctrine of laches applies to the relief sought herein.

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Finally, even if the Court was to consider each of Maloof's arguments, he has failed to allege extraordinary circumstances that would justify this Court essentially "undoing" these bankruptcy cases. Instead, Maloof continues to make vague allegations of a conspiracy to deflate the value of the Debtors' assets and that this conspiracy amounts to fraud on the Court:

> Here, the extraordinary circumstances are . . . that [the] Chapter 11 proceeding created by the [Agreed Order] created a platform for various officers of the court to engage in a concerted effort to destroy the going concern they were bound by the terms on the face of the Order and their status as officers of the court to preserve and protect . . . The unheard-of conduct narrated above constitutes the extraordinary circumstances justifying relief under Rule 60(b)(6).

Motion at 15. The Court has reviewed each evidentiary submission attached to Maloof's Motion and finds that they offer no support for his vague conspiracy allegations. Although the Court finds it unnecessary to address each evidence submission individually, a few examples will demonstrate Maloof's complete failure to meet the extraordinary circumstances required for relief under Rule 60(b)(6). For example, Maloof attaches two email exchanges concerning an employee's statement that he is too busy to continue retrieving the mail as part of his job duties as evidence that customer checks were withheld in order to misrepresent the Debtors' cash flow prior to the sale. Also, Maloof attaches an email exchange concerning one employee's request to use excess customer payment envelopes for a church project as evidence. It is unclear to the Court which of the alleged four courses of fraudulent conduct this email exchange supports, but such evidence does not lead to a conclusion that the Debtors' going concern value was purposely deflated.

Finally, Maloof continues to allege document destruction in order to conceal the true

value of the Debtors' assets. Maloof attaches an affidavit from Kirk Beck which states that he observed a bonfire of business record file boxes. The affidavit lacks specificity to support the alleged fraud. The affidavit provides no information about specific documents in the boxes, but makes the general statement that he believes they contained customer contracts and service orders. Nor does Beck state whether the documents were duplicates of other records or hard copies of electronically stored data. This affidavit does not, individually or collectively with other submissions provided by Maloof, provide any sustainable evidence to substantiate Maloof's allegations of a campaign of document destruction. Alleged document destruction was an issue thoroughly investigated by the Examiner, who stated:

> ...the Examiner previously found that the Debtors and Benesch conducted a competent investigation of the alleged document destruction and found no evidence that any documents were improperly discarded or destroyed. Likewise during the course of his investigation, the Examiner found no evidence that documents were purposefully destroyed to prevent parties from obtaining such documents in discovery. The Examiner believed no further investigation of this matter was warranted. (See Examiner's Report p. 105).

Neither does Beck's affidavit substantiate Maloof's allegation that the customer records and financial history of the business were compromised. Maloof's other evidentiary submissions are of similar quality and fail to demonstrate fraud upon this Court.

With respect to Maloof's request for an evidentiary hearing, the Court has considered the attachments to Maloof's Motion and finds an evidentiary hearing would not assist the Court in rendering a decision. *See U.S. v. Certain Land Situated in the City of Detroit, Wayne County*, 450 F.3d 205, 213 n. 3 (6th Cir. 2006)("[g]iven the amount of material submitted by the parties, however, we detect no abuse of discretion on the part of the court in denying an evidentiary hearing.") and *In re Eagle-Picher Industries*, 963 F.2d 855, 859 (6th Cir. 1992)(because plaintiff

"did not present significant questions of disputed facts in its offer of proof, the bankruptcy court did not err in reaching its own conclusions without benefit of a full evidentiary hearing.") Maloof has had more than sufficient opportunity to litigate the issues he raises in the Motion now before the Court, including an evidentiary hearing. Affording Maloof another evidentiary hearing would result "in efficient management of judicial resources and impose . . . unnecessary expense." *Id.*

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Accordingly, Maloof's Motion is not well-premised and is hereby denied. The Debtors' objection thereto is sustained.

IT IS SO ORDERED.

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT

Dated, this 28th day of February 2008.