

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Re:)
Level Propane, Gases, Inc., et. al.) Case No. 02-16172
)
) Ch. 11
)
) Hon. Randolph Baxter

MOVANT'S RESPONSE TO OPPOSITION OF DEBTORS TO MOTION OF WILLIAM H. MALOOF 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.

Now comes William H. Maloof, sole shareholder of the Debtors in the above-captioned case, by and through counsel undersigned and for his Response to Debtor's Opposition to his Motion to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings entered into June 11, 2002, pursuant to R. 60(b)(6), F.R.C.P, as incorporated by reference in the Rules of Bankruptcy Procedure, and for his Motion for Leave to Controvert the Involuntary Bankruptcy Petition filed June 6, 2002, pursuant to 11 U.S.C. Sec. 303, states as follows:

1.) The Debtors' counsel is stalwart in his refusal to recognize the thrust of the Movant's argument, and likewise stalwart in his refusal to grapple with the facts. Rather than the signatures of the Bank Group, it is the Movant's signature that had been procured by fraud, a fraud that was actualized and hence revealed by the unfolding of subsequent events. By means of this fraudulent signature the Bank Group excluded the Movant utterly from the management of the affairs of the Debtors and put itself squarely in position to work its will, to exclusion of every other party, in the administration of this

Estate. Far from a stipulation that created an independently administered estate, in which the going concerns continued to operate, but under the protection of the Bankruptcy Code, the stipulation excluded every party from the going concern, and indeed from the administration of the Estate's affairs, but the Bank Group.¹

2.) The Opposition characterizes the Movant's fraud claim as "disingenuous" because he, himself, sought to pre-empt the Bank Group with a Chapter 11 petition. The Opposition reasons that since Agreed Order of June 11, 2002 resulted in a Chapter 11 case, the Movant cannot reasonably complain since the case was converted to a Chapter 11 proceeding by the Agreed Order. The Opposition's logic fails, however, when the terms of the Agreed Order are examined. The terms unmistakably put the control of the Debtors in the hands of the Bank Group, which was able to dictate the outcome of events at will, far more than were a Trustee appointed.² A Trustee, independent of the will of Bank Group, could independently assess what was in the best interests of the Debtors, the

¹ The Opposition argues that the Movant's signature was voluntary, and, as such, created a judgment that was could be changed only under exceptional circumstances, citing *United States Steel Corp. v. Fraternal Association of Steelhaulers*, 601 F.2d 1269, 1274 (3rd Cir., 1979). In relying on this case, the Opposition seeks the evade the central argument of the Movant: *that the Agreed Order of June 11, 2002 was itself a sham thrust upon the Court to advance the strangle-hold of the Bank Group on the Debtors*. It was so bold a sham that counsel for the Bank Group said to your Movant, in the midst of meeting in a boardroom full of lawyers, to settle the Motion to Appoint Trustee, "Don't worry about a thing, when it's all over, you can buy me a beer." In contrast to the case cited, in which a labor dispute previously resolved by re-ignited and the Plaintiff sought relief under the prior order, the Agreed Order of June 11, 2002 was an object of contention from the moment that the Movant saw the promises made to induce him sign the Agreed Order simply broken one after another, see the Affidavit of Sebraien M. Haygood.

The behavior of the Bank Group on June 11, 2002 was entirely consistent with its behavior pre-petition, when it ***frustrated the Star Gas offer, which had been made after a thorough-going due diligence of 60 days, and the renewed Ferrell Gas offer, which also was made informed by a prior, thorough-going, due diligence just months earlier***. A review of the BFCA billing will make plain that the sale of the home-heat business to Star Gas was well beyond that of an offer, since transaction documents were drafted well into May, 2002.

² The terms of the Agreed Order unmistakable exclude your Movant from any voice in the management of the Debtors' affairs, going so far as to specifically exclude him from setting foot in the Debtors' headquarters in Westlake, Ohio.

very result the Bank Group needed to avoid. Indeed, a party independent of the will of Bank Group, the United States Trustee, called for an Examiner. Indeed, other independent parties, the Equipment Lessors, pursued an equitable subordination claim against the Bank Group. The Bank Group swiftly acted to frustrate these independent efforts to bring its conduct to light. It hurried a sale of Level Propane in order to render the Examiner's report moot and force a settlement of the equitable subordination action with the Equipment Lessors.

3.) The author of the Opposition does not address the facts central to the Motion: (a) that absent your Movant's signature, there would be no conversion; (b) that your Movant's signature was a fraud -- being the result of *fraudulent assurances made in the very agreement that he signed* upon which he had every reason to rely -- no less than had it been forged by a third party; and (c) that, consequently, the stipulations that were necessary predicates to the agreements were frauds upon the court, when one of the parties necessary to those stipulations, your Movant, was fraudulently induced to enter those stipulations he would not have otherwise entered. The Opposition makes much of the fact that these events took place in 2002 and it now 2006. These arguments are of no avail.³

³ Its jurisdictional arguments from the one-year time limits of R. 60 (b), particularly with respect to newly discovered evidence, fail because it was only in November, 2005, in his chance encounter with Patrick Tighe, that your Movant discovered the evidence, that documents had been continuously destroyed throughout the life of the Estate. Only with this evidence of ongoing document destruction did the inexplicable become comprehensible: how a going concern that was poised to transfer its home-heat business for over \$160MM in May, 2002, could be sold for little more than \$20MM in July, 2003, after the tender ministrations of those reporting to and under the direct control of the Bank Group. It was the evidence of document destruction that revealed that those running the estate had very much to hide, and much to hide quickly: the bad faith designs of the Bank Group on Level Propane from at least November, 2001.

The fraud to which this Motion is addressed clearly satisfies the test set out by Sixth Circuit in *Demjanjuk vs. Petrovsky*, 10 F.3d 338 (6th Cir, 1993).

4.) A Bankruptcy Court has every reason to rely on the genuineness of stipulations brought before it. The stipulations here included specific assurances to the Movant: as to BFCFA's temporary engagement; as to the Movant's absolute rights to financial and other company information; and as to the employment of DSI. The very purpose of such stipulations is to make the work of the Court possible: absent such stipulations, the Court's work would grind to a halt. To present a false stipulation to the Court in this case met every element of the test for fraud upon the Court articulated in *Demjanjuk, supra*.

5.) The *Demjanjuk* test has five elements, see at 10 F.3d 338 at 348. (i) The conduct must be by an officer of the Court. Here, the Agreed Order was offered to the Court by the Bank Group's attorneys. (ii) The conduct must be directed to the judicial machinery itself. Here, the stipulations cut off the hearing for appointment of a Trustee and precluded a motion and hearing as to a conversion of the case, in which the Court would independently assess the facts bearing on such a conversion. (iii) The representation must be intentionally false, blind to the truth or is in reckless disregard for the truth. Here, the signature of the Movant, essential to the Agreed Order, *a fraud no less than a forgery*, was presented to the Court as an essential part of the Agreed Order. (iv) There is a positive averment, or is concealment when one is under a duty to disclose. Here, the Bank Group's attorneys vouched for the genuineness of the Movant's signature

by presenting the Agreed Order to the Court, while concealing that it had procured the Movant's signature by deception. (v) The positive averment or concealment deceives the Court. Here, the Bank Group represented that the Agreed Order was the result of a voluntary accord and therefore operational and effective, when in fact it was void as the direct and proximate result of deceit.

6.) The Opposition's invocation of *Demjanjuk vs. Petrovsky*, 10 F.3d 338 (6th Cir, 1993) necessarily invokes the unsettling and unmistakable parallels between *Demjanjuk, supra*, and the case at bar: for years prior the decision of the Sixth Circuit, counsel for Demjanjuk insisted that he was not, in fact, Ivan the Terrible of Treblinka, only to have his claim resolutely rebuffed. Only after he was imprisoned awaiting the death by hanging in Israel, were the documents exonerating him wrenched from a Soviet archive. Only after his return to the United States exonerated of the crime in Isreal, was his claim of fraud given any hearing. In like manner, the Movant in this case has consistently attempted to demonstrate that the Bank Group controlled the administration of the bankruptcy estate with the singular purpose of wrecking Level Propane. In *Demjanjuk, supra*, the Special Master appointed to investigate the conduct of the government lawyers with respect to the prosecution of the claims against Demjanjuk cleared them wrongdoing, because "they acted in good faith" at 349. In the case at bar, the Examiner found that, ultimately, an absence of wrongdoing by the Bank Group or BFCA. Additionally, this Court has the new evidence presented in support of the previous Motion to Re-open Examiner's Report and the affidavit of Timothy Conklin with which to make its decision.

7.) The parallels between these two cases, *Demjanjuk*, supra, and the case at bar, should inform the decision in this case, since the Sixth Circuit rejected the special master's conclusion and, finding fraud upon the court, vacated the Demjanjuk denaturalization. This Court, with more evidence at its disposal, has a similar opportunity to correct a wrong, , before its disastrous impact has become altogether irremediable. The misconduct of the Bank Group, so thorough-going that no contrasting proper conduct can be set against it, cries out for correction.

WHEREFORE, for the reasons set forth above, your Movant prays that the Agreed Order of June 11, 2002 be vacated as a fraud upon the Court and that your Movant be granted leave to answer and controvert the Involuntary Bankruptcy Petition as brought in bad faith. Your Movant prays further for such damages as this Court may deem just in the premises.

Respectfully Submitted,

/s/ _____
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SERVICE

Service was made by ordinary mail on those listed on the attached form this 26th day of June, 2006.

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