UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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	Chapter 11
In Re:	**Case Nos. 01-21812, 01-21818, 01-21820, 01-21822, 01-21824,**
INTERNATIONAL TOTAL SERVICES, INC. et al.,	**01-21826, 01-21827**
	Jointly Administered Under Case No. 101-21812-478
Consolidated Debtor.	

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MEMORANDUM DECISION

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This matter comes before the Court pursuant to a motion made by Robert A. Weitzel ("Weitzel" or "Movant") seeking to vacate an order previously entered, approving a stipulation between various parties in this case and to reopen the matters settled by the stipulation. The basis for the motion as alleged by Movant is that entry of the stipulation was the result of collusion and the culmination of an effort to perpetrate a massive fraud on the Court. Based on the facts of this case and relevant case law, the Court denies Mr. Weitzel's motion. The following constitutes the Court's findings of fact and conclusions of law as mandated by Fed. R. Bankr. P. 7052.

BACKGROUND AND FACTS

On March 24, 2006, Weitzel filed a motion pursuant to Fed. R. Civ. P. 60(b)(6)[1] seeking to vacate a Stipulation and Order Resolving Consolidated Debtor's Objection to the Claim Filed by SMS Acquisition, Inc. for Allowance and Payment of Administrative Expenses (the "Stipulation") on the grounds that (i) a fraud on the Court was committed in connection with the presentation of the Stipulation to the Court, and (ii) the Stipulation was entered as part of a continuing fraud on the Court orchestrated by International Total Services, Inc. and its subsidiaries (collectively, "ITS," the "Debtors" or the "Consolidated Debtor"), SMS Acquisition, Inc. ("SMS") and Richard Garlitz ("Garlitz" or the "Liquidating Trustee") (the "Motion to

[1]Federal Bankruptcy Rule 9024 incorporates Fed. R. Civ. P. 60(b) into bankruptcy practice.

Vacate"). On June 6, 2006, SMS filed opposition to the Motion to Vacate, and on June 8, 2006, the Debtor filed opposition to the Motion to Vacate. Reply papers were filed by the Consolidated Debtor and SMS and Weitzel filed supplemental papers. Oral argument took place on June 13, 2006, and July 20, 2006.

This Chapter 11 case was initially assigned to Chief Judge Duberstein, and was reassigned to this Court on December 29, 2005. The Court has reviewed the substantial record made before the reassignment and has heard extensive oral argument. The following facts are relevant to the findings of this Court:

Weitzel is the former Chairman, Chief Executive Officer and a Director of ITS, the parent corporation of several domestic and foreign subsidiaries engaged in providing aviation services and commercial security services under contracts with various commercial entities. On October 19, 1999, Weitzel resigned from these positions and shortly thereafter he signed a Retirement and Consulting Agreement (the "Retirement Agreement") with ITS and a Voting Trust Agreement (the "Voting Agreement") with ITS concerning the shares he holds in ITS. The terms of the Retirement Agreement provide, among other things, that Weitzel would not interfere or compete with ITS' business in any way. Under the terms of the Voting Agreement, Weitzel gave up all voting and other control rights to his ITS shares. Weitzel is a creditor of the Debtors and has actively participated in these bankruptcy cases since their inception.

Shortly after the infamous events of September 11, 2001, on September 13, 2001, the Debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code (the "Petition Date"). As of the Petition Date, the Debtors operated four principal business lines:

(I) preboard screening services, consisting of pre-departure security screening of airline

passengers at airport terminals;

(ii) non-preboard screening services, including skycap, baggage handling and aircraft appearance services;

(iii) commercial security services including uniformed security officer services, security consulting and security assessment to commercial clients; and

(iv) U.K. aviation services, comprised of several small airport related businesses, which was conducted through International Total Services, Ltd., a wholly-owned, indirect U.K. subsidiary of ITS that is not in bankruptcy.

An official committee of unsecured creditors (the "Committee") was appointed on September 21, 2001. By order dated October 25, 2001, the Committee retained counsel, who have continued to serve in that capacity or as counsel to the Oversight Committee pursuant to the Consolidated Debtor's plan of reorganization.[2]

As a result of the terrorist attacks on September 11, 2001, the Transportation Safety Administration ("TSA") was established by the federal government to control civil aviation security as of February 17, 2002. The TSA was given until November 1, 2002 to transfer the employment and regulation of all preboard screening personnel at U.S. airports to the federal government with certain exceptions. During this interim period prior to November 1, 2002, the federal government allowed private companies to bid for preboard screening work. ITS succeeded in obtaining contracts with the federal government for preboard screening at 102 airports. The government advanced $29.5 million to enable the Debtor to provide these services

[2]The Oversight Committee is made up of members of the Committee and its role post-confirmation is to supervise and review the actions of the Liquidating Agent. The Oversight Committee also has the authority to seek to remove and replace the Liquidating Agent.

due to the Debtors' lack of operating cash.

Aside from the contracts financed by the federal government, each of the Debtors' remaining business lines required significant working capital to fund payroll and other expenses before the business lines could generate income. The Debtors' senior lenders would not agree to fund the Debtors' working capital requirements and as a result, the Debtors decided to either sell their remaining business lines or discontinue their operations. The Debtors' commercial security division was sold to Willard M, LLC pursuant to a court-approved sale on April 23, 2002. The Debtors' U.K. aviation division, which was not in bankruptcy, was sold to certain of the Debtors' senior United Kingdom employees. The Debtors' remaining business operations were: (I) temporary preboard screening services provided to and funded by the federal government and temporary checked baggage screening services provided to the federal government ("Preboard Screening Services"); and (ii) the remainder of the Debtors' aviation business ("Non-Preboard Screening Services"). On March 20, 2002, the Court entered an order approving the sale of the Non-Preboard Screening Services to SMS for a purchase price of $1.5 million. As a result of this sale, the Debtors' only remaining operations were the Preboard Screening Services being provided to the government

In connection with the sale of the Non-Preboard Screening Services, the Debtors and SMS entered into an Asset Purchase Agreement ("Asset Purchase Agreement") and a Transition Services Agreement ("Transition Services Agreement"), dated February 28, 2002. Under the Asset Purchase Agreement, SMS purchased all of the Debtor's Non-Preboard Screening Services including the following types of services:

- skycap;

- baggage handling;
- aircraft appearance services;
- de-icing;
- shuttle bus service;
- exterior aircraft cleaning;
- ramp access services;
- catering screening;
- bag-match operations; and
- electronic trace detection equipment maintenance.

Each of these services are set forth in Exhibit 2.1(b) to the Asset Purchase Agreement.

The Asset Purchase Agreement excludes from the purchase any "assets owned or leased by, or licensed to [ITS]" besides those specifically enumerated in Exhibit 2.1(b) to the Asset Purchase Agreement.

Simultaneously with the Asset Purchase Agreement, the Debtors and SMS entered into the Transition Services Agreement, which obligated certain ITS managers to divide their time between working for the Debtors and working for SMS in order to assist with the contracts SMS had acquired under the Asset Purchase Agreement. Under the Transition Services Agreement, the Debtors provided SMS with certain transition services and access to the Debtors' mainframe computer system and computer software. The Debtors were compensated by SMS for the services and access provided under the SMS Transition Agreement. The Transition Services Agreement also included a non-exclusive license under which SMS could utilize the ITS name for a period of one year in connection with the Non-Preboard Screening Services it was acquiring. The license was conditioned upon SMS's agreement not to materially alter, modify, dilute or misuse the ITS name and SMS's agreement not to enter into any contracts or agreements using the "ITS" name.

On June 18, 2002, the TSA announced that in compliance with the Aviation &

Transportation Security Act, a pilot program was being implemented to evaluate the feasibility of returning the airport security work to the private sector. Under the program, the TSA would enter into preboard screening contracts with private companies at five airports, including the Kansas City, Missouri airport. The TSA identified qualified private screening companies that were eligible to participate, and then solicited those entities for the five contracts.

On August 13, 2002, the TSA sent a formal Request for Proposals to ITS, identifying ITS as a candidate eligible to submit bids for these contracts. According to the Debtors, a determination was made by the Debtors not to bid on the contracts. Mark D. Thompson, the President and Chief Executive Officer of ITS consulted with other members of the Debtors' senior management and the Debtors' counsel before making this determination. (Affidavit of Mark. D. Thompson, p. 3). Thompson based his decision on several factors. First, the Debtors could not provide a detailed demonstration of their financial capability to perform the contracts as required by the TSA. Second, Debtors did not have the necessary working capital to fund the performance of two of the significant pilot program contracts. Third, Thompson did not believe the Debtors could meet the stated award criteria of being the "lowest risk" provider of services.

SMS did participate in the bidding process. John DeMell, ITS's chief operating officer and one of the employees who was jointly employed by SMS and ITS, sent a response back that ITS, "a wholly owned subsidiary of SMS Holdings, Inc.," would be participating in the bidding process. On September 6, 2002, DeMell submitted a bid to the TSA under the name "ITS" seeking preboard screening contracts at three of the five airports chosen to participate in the pilot program. Included among the airports was the Kansas City International Airport ("Kansas City") located in Kansas City, Missouri.

On October 8, 2002, the TSA notified DeMell that the bid he had submitted had won the contract for Kansas City ("Kansas City Contract"). DeMell signed the Kansas City Contract on October 10, 2002 in his capacity as "the company's chief operating officer." In August 2003, SMS informed the TSA that ITS had changed its name to FirstLine Transportation Security ("FirstLine"). FirstLine is an independent company incorporated by SMS in March 2003. DeMell left the employment of ITS on December 31, 2002, and thereafter, he was hired solely by SMS. Today, he serves as president of FirstLine, which is still servicing the Kansas City Contract. According to Mr. Weitzel, SMS has netted approximately $20 million in profits from the Kansas City Contract to date.

On December 6, 2002, the Debtors filed the Amended Plan (the "Plan") and Amended Consolidated Disclosure Statement (the "Disclosure Statement"). On January 13, 2003, Weitzel filed an objection to the Plan (the "Weitzel Objection"). In the Weitzel Objection, Weitzel made the following relevant allegations:

(i) SMS was using the "ITS" name to engage in the preboard security business in violation of the Asset Purchase Agreement and the Transition Services Agreement;

(ii) Debtors transferred all of their existing commercial preboard aviation security accounts to SMS for no consideration, or abandoned such accounts to permit SMS to take them over;

(iii) Debtors' management, including John DeMell, assisted SMS in obtaining the Kansas City Contract using the ITS name and holding SMS out as the successor to the Debtors' preboard screening business;

(iv) Debtors failed to disclose consideration paid or promised to its management, including DeMell; and

(v) Debtors' selection of Garlitz, the Director of Financial Operations for the Debtors at the time, to investigate Weitzel's claims was in violation of Bankruptcy Code §1129(a)(3). Weitzel also pointed out that under the Plan, the Liquidating Agent, who was not a disinterested party, would have full, exclusive and complete authority to prosecute causes of action on behalf of the Debtors or to refrain from prosecuting such causes of action.

The Debtors filed a Response to the Objection of Weitzel, and thereafter, the parties engaged in discovery. Numerous depositions were taken and on February 10, 2003, in the middle of the Debtors' examination of Weitzel, Weitzel refused to continue and instructed his attorneys to settle with the Debtors.

On February 27, 2003, the Debtors, Weitzel, Robert P. Weitzel and the Committee entered into a stipulation resolving the Weitzel Objection (the "Weitzel Stipulation"). In exchange for withdrawing his objections to the Plan and Disclosure Statement, Weitzel received the following concessions:

(i) Subject to certain limitations, Weitzel would retain his equity interests in the Consolidated Debtor and have the option to continue business operations after the bankruptcy estate was liquidated and distributed to the creditors under the Plan;

(ii) If Weitzel opted to continue business of the Consolidated Debtor, he would be entitled to the Consolidated Debtor's net operating losses, if any, and any assets or property of the Consolidated Debtor remaining after the Liquidating Agent liquidated the assets and paid the creditors' claims in full; and

(iii) The Debtors would dismiss certain lawsuits pending against Weitzel[3] and against members of Weitzel's family.

The Weitzel Stipulation also provided:

> [t]he Weitzel Parties specifically disclaim any . . . right, title or interest in or to (and agree that they shall not assert or attempt to assert or otherwise take any action in respect of) any and all causes of action held by the Consolidated Debtor.

On February 28, 2003, the Court entered an Order confirming the Plan (the "Confirmation Order"). The Weitzel Stipulation was incorporated into the Confirmation Order, and provided in relevant part:

> Without in any way limiting the provisions of Section V of the Amended Plan,[4] as of the Effective Date, the Causes of Action [(including any potential causes of action against SMS)] shall vest in the Consolidated Debtor, shall remain a part of the Consolidated Estate, may be prosecuted only by or at the direction of the Liquidating Agent, and shall be deemed extinguished upon the occurrence of a Continuation Event (as defined in the Weitzel Stipulation). The Liquidating Agent shall have the full, exclusive and complete authority to cause the Consolidated Debtor to pursue and prosecute such Causes of Action, or to refrain from pursuing any potential Causes of Action, based upon the Liquidating Agent's assessment of the net benefit expected to be received by the Consolidated Estate in connection therewith.
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> Confirmation Order at ¶ 15 (emphasis added).

Pursuant to Article V, § 6 of the Plan, the Liquidating Agent had:

> authority to cause the . . . Debtor to compromise, settle and resolve any Cause of Action upon such terms and conditions as . . . [he] deems appropriate and in the

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[3]The two pending lawsuits commenced by the Debtors against Weitzel were (i) Adv. Pro. No. 01-1437-260 under which the Debtors sought $25 million in damages from Weitzel and his son based on allegations that, *inter alia*, Weitzel tortiously interfered with the Debtors' prospective business relationships, and (ii) Adv. Pro. No. 02-1480-260 under which the Debtors sought the return of $300,000 from Weitzel as alleged preferential transfers under 11 U.S.C. § 547.

[4]Section V of the Plan sets forth all of the Liquidating Agent's obligations and duties.

> [estate's] best interests . . ., subject to court approval following Designated Notice.
>
> "Designated Notice" is defined as:
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> notice and an opportunity for a hearing as defined in section 102(a) of the Bankruptcy Code, with notice limited to the Debtors, the Consolidated Debtor, the members of the Oversight Committee, the Liquidating Agent, the United States Trustee, and their respective counsel, and other parties in interest who, after entry of the Confirmation Order, file a request for such notice with the clerk of the Court and serve a copy of such notice on counsel to the Debtors, counsel to the Oversight Committee and the Liquidating Agent.

Weitzel never filed a request for notice as required by the Debtors' Plan. Therefore, under the terms of the Plan, Weitzel was not entitled to receive notice regarding any agreement by the Liquidating Agent to settle claims or causes of action of the Debtors. In addition, Weitzel relinquished his rights to pursue certain claims or cause of action by the Debtor against SMS or any other party, and agreed to retain **no authority** over the Liquidating Agent's actions to settle, pursue or abandon claims or causes of action of the Debtors. In exchange, Weitzel retained his equity interest in the Consolidated Debtor, including the right to the Consolidated Debtor's net operating losses, and obtained the dismissal of substantial lawsuits commenced against him by ITS.

On August 11, 2003, SMS filed an administrative proof of claim against the Consolidated Debtors consisting of four claims in unspecified amounts. According to SMS, the claims had a value of approximately $400,000. On November 12, 2003, the Debtors filed an objection to the SMS claim. Garlitz, as the Liquidating Agent, was charged with settling or objecting to these claims. Garlitz consulted with the Oversight Committee, which represented the Debtors' unsecured creditors, to properly evaluate the claims filed by SMS. According to the Debtors,

these claims could possibly be valued in excess of $250,000. Garlitz considered many factors in his analysis including the likelihood that the Debtors would prevail in any action brought by the estate against SMS for alleged theft of contracts. Garlitz took into consideration the fact that the Debtors would have a difficult time establishing damages with respect to claims regarding the Kansas City Contract because the Debtors chose not to bid on the Kansas City Contract. In addition, Garlitz evaluated the costs to the Consolidated Debtor's estate to pursue claims against SMS, which would be substantial. Garlitz concluded in his business judgment that the claims against SMS were best used as a bargaining chip to settle the proofs of claim filed by SMS in the Debtors' cases. This conclusion was supported by the Oversight Committee. Ultimately, the Consolidated Debtor and SMS settled, and the parties agreed to have SMS's claims allowed in the reduced amount of $10,000, and to release SMS from any claims the Consolidated Debtor had against SMS.

On January 8, 2004, the Consolidated Debtor, the Oversight Committee and SMS executed a Stipulation and Order Resolving Consolidated Debtor's Objection to the Claim Filed by SMS for Allowance and Payment of Administrative Expenses (defined above as the "Stipulation"). Under the specific terms of the Stipulation, SMS would be allowed an administrative claim in the amount of $10,000. In addition, the Consolidated Debtor agreed to "unconditionally forever release, waive and discharge" SMS from, inter alia, any and all potential causes of action. SMS agreed to release the Consolidated Debtor from any and all potential causes of action under the same terms. Although Weitzel did not request that notice be given to him, on January 8, 2004, notice of presentment of the Stipulation was served on counsel to Weitzel, the Office of the United States Trustee (the "US Trustee") and other parties entitled

to Designated Notice under the Consolidated Debtor's Plan by UPS next day air. No objections were filed, and the Stipulation was signed by Judge Duberstein on January 20, 2004. On January 26, 2004, the Debtors served the Stipulation as so-ordered on the same parties, including counsel to Weitzel. Again, no objections to the Stipulation were filed.

Based on the facts of this case, there is no evidence to support a finding that Garlitz conspired with the Debtors and/or SMS to perpetrate a fraud on the Court. Garlitz acted in a responsible, professional manner and appropriately discharged his duties as Liquidating Agent.

Under the Plan, only the Consolidated Debtor's unsecured creditors and equity interests were impaired. To date, the unsecured creditors have received 100% on their claims, without interest, and the equity interests, except for the equity interest retained by Weitzel under the Weitzel Stipulation, have been canceled. Weitzel is the sole remaining claimant who does not consent to closing this case.

Weitzel brings this Motion to Vacate the Stipulation on the grounds that a fraud on the Court was perpetrated by the Consolidated Debtor, Garlitz and SMS in connection with the method of its presentment to the Court. According to Mr. Weitzel, the Stipulation resolving the claims of SMS was in fact a vehicle for obtaining "covert" approval of the release granted to SMS, and the presentment of the Stipulation was the final act of fraud perpetrated by SMS and the Debtors' principals against the Court and the Debtors' estates. Weitzel asserts that the Court most likely misconstrued the importance of the releases "buried" in the proposed order. According to Mr. Weitzel, the language regarding the releases was slipped into the proposed order resolving the objections to SMS's claims to prevent any real inquiry into the claims the Debtors had against SMS and the Debtors' former principals.

In support of his Motion to Vacate, Weitzel repeats many of the arguments contained in the Weitzel Objection which was filed with the Court in early 2003. The only difference in this is that he claims he now has additional evidence to support those original claims. For example, Weitzel alleges that 81 private aviation staffing contracts that ITS did not convey to SMS as part of the bankruptcy sale that took place in March, 2002 were fraudulently transferred from the Debtors to an affiliate of SMS in December, 2002. Weitzel has filed recent affidavits from former employees of ITS attesting to these unauthorized transfers. Weitzel also alleges that certain of the Debtors' preboard security contracts were re-classified as Non-Preboard Screening Contracts by the Debtors and fraudulently included in Schedule 2.1(b) of the Asset Purchase Agreement despite the fact that contracts for these types of services were specifically excluded from the sale. Weitzel recently gained access to the Debtors' internal computer codes to determine that this reclassification occurred prior to the date of the Asset Purchase Agreement. Both of these concerns were previously raised in the Weitzel Objection, wherein Weitzel alleged that the Debtors either abandoned or transferred to SMS contracts and other valuable assets, including preboard screening contracts with non-government entities. Weitzel also alleges that SMS masqueraded as ITS in order to procure the Kansas City Contract, which allegation is also contained in the original Weitzel Objection. Finally, Weitzel now points to Garlitz's actions as Liquidating Agent to support his prior assertion that Garlitz would not act in an impartial manner if he were appointed Liquidating Agent.

In the original Weitzel Objection, Weitzel requested authority to conduct discovery to determine the extent of these unauthorized transfers and the facts surrounding the awarding of the Kansas City Contract to SMS. Weitzel did undertake some discovery prior to the hearing on

confirmation of the Debtors' Plan but Weitzel withdrew his objection in February, 2003 and entered into the Weitzel Stipulation. Weitzel consciously agreed to withdraw these very claims, along with Weitzel's challenges to Garlitz's independence, in exchange for certain valuable consideration from the Debtor.

The remaining allegations raised by Weitzel in this Motion to Vacate, which were not directly raised in the prior Weitzel Objection, are that John DeMell inappropriately received a substantial bonus from the Debtors after he left the Debtors' employment, and that Garlitz not only violated his implied obligation of good faith and fair dealing when he agreed to settle with SMS, he acted as a co-conspirator in the fraud. According to Weitzel, these incidents are further evidence of a massive fraud that was perpetrated on the Court by the officers of the Debtors and Garlitz. However, Weitzel did not present any evidence of collusion or corruption by any officer of the Court, only mere allegations.

In addition to the matters before the Court, the United States Attorney's Office commenced a separate investigation regarding the circumstances surrounding the award of the Kansas City Contract to ITS. The Court received a letter dated July 17, 2006 from the U.S. Department of Justice reciting that the TSA agents involved with the Kansas City Contract were "aware at all pertinent times that the entity with which [the TSA] dealt and to which [the TSA] awarded the contract was not the [Debtors] but SMS, and that TSA understood SMS to be a separate entity from the liquidating [Debtors]." The findings of the Department of Justice do not control the outcome of the matters before this Court in this case, but these findings clarify that the TSA was not misled into believing that ITS was the actual bidder on the Kansas City Contract. It is with all these facts in mind that the Court makes the following conclusions of

law.

DISCUSSION

1. Legal Standard

Mr. Weitzel seeks to have the Stipulation vacated under Fed. R. Civ. P. 60(b)(6), based on his allegation that a fraud was perpetrated upon the Court by SMS, ITS and Mr. Garlitz as the Liquidating Agent when the Stipulation was "so ordered." However, a careful review of Fed. R. Civ. P. 60(b) in its entirety reveals that Weitzel is not entitled to relief under any of the enumerated provisions of Fed. R. Civ. P. 60(b) or under the general savings clause of Fed. R. Civ. P. 60(b). Pursuant to Fed. R. Civ. P. 60(b), orders may be vacated on several different grounds:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following 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.** The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. **This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.** (emphasis added).

In 1944, the Supreme Court ruled that an appellate court had the power to vacate a judgment based upon fraud on the court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322

U.S. 238*,* 64 S.Ct. 997, 88 L.Ed.1250 (1944). The Federal Rules of Civil Procedure expressly preserve this power within the text of Rule 60(b), which reads: "[t]his rule does not limit the power of a court to entertain an independent action…to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60. Weitzel made this Motion to Vacate under Fed. R. Civ. P. 60(b)(6) which provides that an order may be vacated for "any other reason justifying relief". The Court of Appeals for the Second Circuit and other circuit courts have applied this catch-all provision exclusively to grounds not covered by the preceding enumerated clauses of 60(b). *E.g., Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000); *Serzysko v. Chase Manhattan* Bank, 461 F.2d 699, 702 (2nd Cir. 1972), *cert. denied,* 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972); *United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002),("The clear import of the language of clause (b)(6) is that the clause is restricted to reasons other than those enumerated in the previous five clauses."); *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 651 (1st Cir. 1972) ("The reason asserted must be one *other* than those enumerated in 60(b) (1)-(5)…") (emphasis in original).

The Court shall consider each relevant clause of Rule 60(b), as well as the savings clause, serially. First, a motion under clauses (1) through (3) of this rule must be brought within one year of entry of the judgment. In this case, the Stipulation was so-ordered over two years prior to the filing of the Motion to Vacate. Therefore, Weitzel is procedurally barred from commencing this motion based on newly discovered evidence or fraud, misrepresentation or misconduct of an adverse party.

The only remaining provisions of this rule available to Weitzel are Rule 60(b)(6) and the savings clause of this rule which permits a party to bring an independent action for fraud on the

Court. As to clause (6), the only time requirement imposed is that the motion be brought "within a reasonable time." Fed. R. Civ. P. 60(b). However, the Court of Appeals for the Second Circuit has held that a movant cannot circumvent the one year limitation imposed on claims encompassed by clauses (1) through (3) by invoking clause (6). *Serzysko v. Chase Manhattan* Bank, 461 F.2d at 701.[5] Therefore, to the extent Weitzel's Motion to Vacate is based on allegations of newly-discovered evidence or fraud committed by the parties in this case, the Motion to Vacate is time-barred. In addition, most courts, including the Second Circuit, require a 60(b)(6) movant to "show extraordinary circumstances" justifying relief under this clause. *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 451, 462 (2nd Cir. 1994). Based on the discussion below, there are no extraordinary circumstances present in this case.

The sole avenue for relief left to Weitzel is if the Court views the Motion to Vacate as an independent action under the savings clause of Rule 60(b) and the *Hazel* line of cases. This clause of Rule 60(b) has no specific time limitations and has been employed to address allegations of fraud upon the court.

Within the Second Circuit and others, fraud upon the court is distinguished from simple fraud upon an adverse party and is strictly limited in scope:

> The concept of 'fraud on the court' embraces 'only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that

[5]An exception to the Second Circuit's requirement that the grounds under clause (6) not be duplicative of another clause is found in *In re eToys,* 331 B.R. 176, 188 (Bankr. D. Del. 2005). In *In re eToys,*professionals involved in a bankruptcy estate failed to disclose a conflict of interests prior to their retention. Thus, since the "parties did not have sufficient notice to seek relief under Rule 60(b)(1), (2) or (3) within the prescribed one-year time limit" a motion under Rule 60(b)(6) was appropriate. *Id.* Furthermore, the court in *eToys* found that "extraordinary circumstances existed" suggesting that the movant was without fault in the delay. *Id.* at 188.

> the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.'

Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995) (citing *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972)).

As the Court of Appeals for the Second Circuit noted in *Hadges v. Yonkers Racing Corp.*, the type of fraud that satisfies a finding of fraud on the court is more limited than the type that would satisfy clause (3) of Rule 60(b), and must seriously affect the "integrity of the normal process of adjudication." *Id.* (citing *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d.Cir. 1988) (other citations omitted). In addition, the moving party must present "clear and convincing" evidence of fraud in order to prevail. *Pearson v. First NH Mortg. Corp.,* 200 F.3d 30, 37 (1st Cir. 1999).

In the context of bankruptcy proceedings, courts have found that debtors-in-possession constitute "officers of the court." *In re Intermagnetics America, Inc.*, 926 F.2d 912, 917 (9th Cir. 1991) ("Officers of a debtor-in-possession are officers of the court because of their responsibility to act in the best interests of the estate as a whole and the accompanying fiduciary duties.") (citing *In re Tri-Cran, Inc.,* 98 B.R. 609, 617 (Bankr. D. Mass. 1989) ("*Tri-Cran*")).

In the *Tri-Cran case*, which is relied on by Weitzel, fraud upon the court was found in the context of the sale of a debtor's assets. In *Tri-Cran*, the trustee moved to vacate the court approved sale of assets belonging to the debtor, a cranberry farming operation, including land, machinery, and rights to the name "Tri-Cran." The court articulated the requisite elements of fraud on the court:

> Fraud on the court…is fraud committed by one who colludes with officers of the court – counsel for and a principal of debtor in possession – to obtain judgment in his favor

> through the corruption of those officers, which corruption prevents them from performing their usual functions in an impartial manner.

Id. at 617. The court found that fraud upon the court did exist where a principal of the debtor-in-possession along with its counsel had colluded with the purchaser to arrive at "the lowest selling price a Bankruptcy Court could approve." *Id.* at 624.

Furthermore, the court found that the parties had concealed their relationship with the purchaser and falsely characterized the sale as an arms length transaction. In fact, the parties to the scheme shared personal as well as familial ties. In its holding, the court reiterated that the "insider dealing, concealment, and misrepresentation" by the attorneys for and principal of the debtor, as officers of the court, "short circuited the judicial machinery and prevented it from performing its usual function in an impartial manner" and caused the attorneys for the debtor and its principal to breach their fiduciary duties to the estate and to the court. *Id.*

In the context of a sale of a Chapter 7 debtor's assets, after-discovered evidence of a price-rigging conspiracy constituted grounds to vacate the judgment on account of fraud upon the court. *In re Clinton St. Food Corp.*, 254 B.R. 523 (Bankr. S.D.N.Y. 2000) ("*Clinton St. Food*"). In the *Clinton St. Food* case, the conspirators secured, with the court's approval, the sale of assets valued at $2,000,000 for a mere $320,000 by affecting the outcome of the auction sale. The trustee in the case had no knowledge of the fraud and brought a motion to set aside the sale based on fraud on the court. Thus, since the grounds for the motion to vacate were unknown and therefore could not have been litigated in the original proceeding, a motion to vacate for fraud on the court was appropriate. *Id.* at 533 ("the trustee lacked the opportunity to discover the fraud in light of the summary nature of the sale proceeding…[a]ccordingly, the amended complaint states

a legally cognizable claim for "fraud on the court"). Furthermore, the court ruled that general releases given by the trustee to the purchasers did not bar relief as the fraud was unknown and therefore the trustee could not have intended the release thereof. *Id.* at 535-36.

Unlike in the *Tri-Cran* and *Clinton St. Food* cases, there is no evidence of insider dealing, concealment of facts or misrepresentation of facts by SMS, the Debtors, their principals, their counsel, or the Liquidating Agent. In addition, there is another key difference between the *Tri-Cran* and the *Clinton St. Food* cases and the facts of this case which mandate denial of the Motion to Vacate. In this case, Weitzel had knowledge of the allegations contained in the Motion to Vacate at least two years prior to bringing this motion. He brought these same allegations to the attention of the Court in the Weitzel Objection, and he agreed to settle his objections, which settlement was so-ordered by this Court.

2. Weitzel's Agreement to Settle Prior Objections to the Debtors' Plan

Although Weitzel argues vociferously that ITS wrongfully transferred assets to SMS, and the Liquidating Agent failed to conduct a proper inquiry into the transfers, Weitzel's claims are barred by his prior actions in this case. Unlike in *Tri-Cran* and *Clinton St. Food*, where the movants became aware of the wrongdoing only after entry of the order approving the sales, Weitzel previously raised the majority of these arguments in the Weitzel Objection to confirmation of the Debtors' Plan and agreed to withdraw them. The Court of Appeals for the Second Circuit has consistently denied motions to vacate an order based on fraud upon the court when the issue of fraud could have been raised pre-judgment. This standard appears to be an objective one by disallowing claims for "after-discovered evidence which could have been discovered in the original action." *Gleason v. Jandrucko,* 860 F.2d at 559 ("*Gleason"*); *M.W.*

Zack Metal Co. v. Int'l Navigation Corp. of Monrovia, 675 F.2d 525, 529 (2d Cir. 1982), *cert. denied*, 459 U.S. 1037, 103 S.Ct. 449,74 L.Ed.2d 604 (1982) (*"M.W. Zack Metal Co.")*; *Tesser v. Bd. of Educ. of the City of New York*, 2005 WL 2977766, *6 (E.D.N.Y. 2005) (revisiting the issue and, in a fact-sensitive holding, finding after-discovered perjury not to constitute fraud upon the court). Thus, a key consideration in a motion to vacate due to fraud upon the court is whether the fraud could have been discovered pre-judgment. "An independent action for fraud [upon the court] may not be entered if 'there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action'" *M.W. Zack Metal Co*., 675 F.2d at 530 (citing *Serzysko v. Chase Manhattan Bank*, 461 at 702, n.2).

In *Gleason*, a case involving perjured testimony by two police detectives implicating a politician in a bank robbery, after-discovered evidence of the witnesses' perjury was insufficient grounds to set aside a judgment. *Gleason,* 860 F.2d 556. The Second Circuit ruling in *Gleason* turned on the fact that the movant had ample opportunity to challenge the veracity of the witness's statements during the original proceeding. The movant, who had been the plaintiff in the original action, had taken significant discovery and ultimately agreed to settle the claim. Subsequent to the signing of the settlement agreement, it was revealed to the movant that the police detectives had clearly fabricated their testimony. The court held that since the movant had the opportunity to challenge the officer's testimony before signing the voluntary stipulation, he was barred from raising the issue as it could have been fully litigated in the previous action. *See Trowbridge v. Inst. for Basic Research in Developmental Disabilities,* 2003 U.S. Dist. LEXIS 25040 (E.D.N.Y. 2003) (dismissing motion to vacate for fraud on the court since the very same issues were raised by the party in the original action and were in fact considered by the court)

(citing *Gleason*, 860 F.2d at 559); *Weldon v. U.S.,* 70 F.3d 1, 15 (2d Cir. 1995). These decisions are applicable to the case before this Court and are appropriate for this Court to consider due to their factual similarity to Weitzel's situation.

In this case, Mr. Weitzel voluntarily agreed to withdraw the same objections to the Debtor's plan that he now seeks to raise pursuant to the Motion to Vacate. Weitzel actually raised concerns that SMS had appropriated ITS's preboard screening contracts without properly compensating ITS, and that SMS obtained the Kansas City Contract by wrongfully using the "ITS" name. While the conduct described in Weitzel's Objection to the Plan was not as detailed as what Mr. Weitzel now describes in his Motion to Vacate, the core of the conduct at issue is the same. The Weitzel Stipulation was entered into as of February 27, 2003 between the ITS parties, the Creditors' Committee, and the Weitzel parties and the Weitzel Objection to the Plan was withdrawn with prejudice. In exchange for withdrawing the Weitzel Objection to the Plan, Weitzel, received valuable consideration from the Debtors. The Weitzel Stipulation, which was incorporated into the Debtors' Plan also provided "[t]he Weitzel Parties specifically disclaim any ... right, title or interest in or to (and agree that they shall not assert or attempt to assert or otherwise take any action in respect of) any and all causes of action held by the Consolidated Debtor [(including any potential claims against SMS)]. . . .".

Weitzel had an opportunity to press his objections but instead voluntarily withdrew them in exchange for valuable consideration. Weitzel's conscious decision to settle his objections precludes this Court from finding that a fraud on the Court was committed as to these particular allegations. Under the controlling law of this Circuit as set forth in the *Gleason* and *M.W. Zack Metal Co.* cases, Weitzel is precluded from re-asserting the claims he previously withdrew from

consideration. Even if the Court considers the substance of Weitzel's claims, it is clear that Weitzel is objecting to the Liquidating Agent's method and analyses in deciding to settle with SMS. Unfortunately for Weitzel, under the clear language of the Weitzel Stipulation, Weitzel relinquished his right to challenge Garlitz's decision-making process as to any matter, including with respect to claims against SMS.

3. Merits of Claim That SMS Obtained Debtors' Assets for No Consideration

Even if this Court were to find that Weitzel had the right to present these allegations in support of the Motion to Vacate, these allegations evidence nothing more than Weitzel's dissatisfaction with Garlitz's actions, and do not establish that a fraud on the Court took place. Weitzel alleges that SMS and ITS fraudulently reclassified a number of contracts as "non-preboard screening" work when in reality those contracts involved preboard screening work, which contracts were excluded from the Asset Purchase Agreement. ITS explained that the division between Non-Preboard Screening Services and Preboard Screening Services was done merely to differentiate between aviation services that the Federal government would fund and aviation services that the Federal government would not fund. According to the parties to the Asset Purchase Agreement, the intention was to sell all of the contracts and services that comprised the ITS aviation division except for anything that the TSA was going to directly fund. With respect to the 81 contracts that Weitzel alleges were fraudulently transferred to SMS in December 2002, SMS counters that these contracts are in fact specific ticket checking services performed under a more general contract with an airline or airport authority. At the time the Asset Purchase Agreement and Exhibit 2.1(b) was prepared, the TSA had not yet determined

whether it would fund the ticket checking services that ITS had previously provided to airlines and airport authorities. Ultimately, the TSA decided that it was not going to fund this service. Therefore, according to all of the parties involved (excluding Weitzel), the ticket checking service fell under the plain contractual definition of the "Non-Preboard Screening Services" that SMS purchased under the Asset Purchase Agreement. The ticket checking services, standing alone, would not likely have any monetary value.

In a nutshell, the intent of the parties to the Asset Purchase Agreement was to transfer to SMS any aviation services which were either not funded by the TSA or were not part of the commercial security business or the U.K. aviation business (both of which were sold to third parties during the course of the Debtors' bankruptcy cases). Any errors contained in Exhibit 2.1(b) were oversights and the 81 "contracts" only pertained to ticket checking services that the TSA determined not to fund.

With respect to the Kansas City Contract, the Office of the United States Attorney is satisfied that the TSA was aware that it was dealing with SMS and not the Debtors. There is no evidence that the TSA was deceived into believing that it was dealing with the Debtors and not SMS. Therefore, neither the Debtors, which did not bid on the Kansas City Contract, nor the federal government suffered damages as a result of the form of bid SMS used to obtain the Kansas City Contract. Based on the above facts, even if Weitzel was not barred from obtaining this relief due to his prior agreement to settle these claims, Weitzel has not proven by clear and convincing evidence that these issues constitute grounds to vacate the Stipulation under Fed. R. Civ. P. 60(b)(6) or the savings clause. The evidence does not come close to upending the integrity of the relevant orders entered by the Court. At most, there is evidence that the Asset

Purchase Agreement was not worded as precisely as it should have been, and perhaps the Asset Purchase Agreement should have been amended to reflect that the ticket checking services were to be included in the sale after the TSA made its determination. However, this does not substantiate Weitzel's claim that a fraud on the Court took place as to approval of the Stipulation.

4. Garlitz's Actions as Liquidating Agent, and the Bonus Awarded to John DeMell

Having disposed of Weitzel's claim that the transfer of certain contracts to SMS evidences a fraud on the Court, the Court is left to consider whether Garlitz's agreement to settle with SMS perpetrated fraud on the Court, and whether DeMell's receipt of a bonus from the TSA somehow constituted fraud on the Court. Weitzel claims that despite the fact that Garlitz was given the sole authority under the Weitzel Stipulation and the Plan to settle, compromise or resolve any claims against SMS Garlitz had an implied obligation to act in good faith in making any settlement with SMS. According to Weitzel, Garlitz breached the implied covenant of good faith and fair dealing imposed by the Plan under applicable contract law, and this breach is further evidence that Garlitz participated in the fraud. An implied covenant of good faith and fair dealing does exists in connection with any contract subject to New York law. *Carvel Corp. v. Diversified Management Group*, 930 F.2d 228 (2d Cir. 1991). Presumably, this implied covenant would apply to the Plan, which set forth Garlitz's responsibilities as the Liquidating Agent. Weitzel has not demonstrated to the Court how Garlitz breached this implied covenant. The duties of good faith and fair dealing encompass "'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *In re Eurospark Industries, Inc.,* 288 B.R. 177, 183 (Bankr. E.D.N.Y. 2003) *(quoting 511 W. 232nd*

Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496, 500-501 (2002). The contract as written governs the obligations of the parties and the Court is not permitted to impose new obligations which conflict with the actual terms of the contract. *Fasolino Foods Co. v. Banca Nazionale del Lavoro,* 961 F.2d 1 (2d Cir. 1992). In other words, this Court cannot use the concept of good faith and fair dealing to "read into" a contract terms which conflict with its actual language.

The Court has examined Garlitz' decision to settle with SMS in the context of the Plan and does not find that his actions breached any implied covenant of good faith and fair dealing. Under the Plan, Garlitz was charged with the responsibility of prosecuting or settling any claims the Debtors had against SMS as he deemed "appropriate and in the [estate's] best interests." Plan, Article V, § 6. Based on the facts before this Court, it is clear that Garlitz acted within the parameters of his obligations under the Plan, and he consulted with the proper parties to make his determination. Garlitz had no obligation to consult with Weitzel or to take into consideration Weitzel's sole interests. In fact, under the Plan, Weitzel was specifically excluded from the decision making process on this matter. Any duty of Garlitz to act in good faith in executing his obligations under the Plan does not include an obligation to protect Weitzel's interests over the interests of the other creditors of the Debtors' estate. Garlitz took into consideration the benefits of pursuing these claims versus the costs to the entire estate. He made a considered determination to settle the claims against SMS. Garlitz consulted with the Oversight Committee and Debtors' counsel in making his determination, and they concurred with his decision. Therefore, Garlitz complied with any implied covenant of good faith and fair dealing applicable to the Plan, and his actions do not evince an intent to further a scheme to perpetrate a fraud on

the Court. Weitzel's unhappiness with Garlitz's decisions as the Liquidating Agent is insufficient to support a finding that Garlitz acted improperly under the Plan.

Weitzel also takes issue with the fact that he was not given special notice that the Liquidating Agent was settling with SMS. However, Weitzel did not seek to be included in the group entitled to Designated Notice, as required under the Plan. Despite the fact that Weitzel failed to preserve this right, Debtors' counsel served Weitzel's counsel with notice of presentment of the Stipulation, and with the Stipulation as so-ordered by the Court. The Stipulation was presented to the Court in accordance with the Plan requirements, and no objections were received, not even from Weitzel. Therefore, there is no merit to Weitzel's argument regarding this issue.

Finally, Weitzel points to the bonus DeMell received as evidence that the Liquidating Agent was involved in a scheme to perpetrate a fraud on the Court. According to Weitzel, the Liquidating Agent awarded the bonus to DeMell, who "orchestrated the use of [ITS's] identity and good will to procure [the Kansas City Contract]." Supplemental Memorandum in Support of Motion of Robert A. Weitzel to Vacate January 20, 2004 Stipulation Under Fed. R. Civ. P. 60(b)(6). Weitzel alleges that DeMell received the bonus after the Plan was confirmed and in violation of the Plan, which indicated that any employee of the Debtors would forfeit any right to receive a bonus from the FAA if the employee voluntarily resigned from ITS. Since DeMell was not qualified to receive the bonus from the FAA, the funds could only have come from the Debtors' estate, and only Garlitz would have been authorized to award such a bonus.

The Debtors dispute these facts and provided evidence that the Debtors had no discretion with regard to the amount of these bonuses, and state that the funds came from the FAA

Incentive Bonus Plan ("Incentive Bonus Plan") which was disclosed in the Disclosure Statement. On June 26, 2003, the FAA and the TSA jointly authorized the Consolidated Debtor to make the payments under the Incentive Bonus Plan. The Liquidating Agent distributed the bonuses in accordance with the Incentive Bonus Plan, which included a bonus to DeMell. The funds came from the FAA, and not the Debtors. According to the Debtors, DeMell did qualify to receive the bonus because he was still an employee of the Debtors during the relevant time period.

The Court is satisfied that the Liquidating Agent did not have discretion with respect to distributions under the Incentive Bonus Plan, and that the funds did not come from the Debtors' estate. Therefore, these allegations are meritless and do not support a finding that the Liquidating Agent was involved in perpetrating a fraud on the Court.

CONCLUSION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

2. The Motion to Vacate is time-barred under Fed. R. Civ. P. 60(b)(1) through (3). Weitzel cannot be granted relief under Fed. R.Civ. P. 60(b)(6) because his grounds for relief based on fraud are duplicative of claims under Fed. R. Civ. P. 60(b)(3), which are time-barred.

3. Weitzel's decision to settle his prior similar objections to the Plan in exchange for valuable consideration from the Debtors precludes Weitzel from utilizing the savings clause of Fed. R.Civ. P. 60(b) to have the Stipulation vacated on the same grounds he previously raised.

4. Even if Weitzel had not previously raised the same objections in 2003, Weitzel's present allegations do not support a finding that a fraud on the Court was committed.

5. Weitzel relinquished and waived his right to challenge the Liquidating Agent's methods of analyses and his procedures for making decisions under the Plan. Garlitz acted in accordance with his obligations under the Plan, including any implied obligation of good faith or fair dealing, when he reached a determination to settle with SMS and to release SMS against any claims the Debtors may have against SMS. There is no evidence of a conspiracy to defraud, insider dealing, collusion or corruption by an officer of the Court.

6. Weitzel has failed to carry the burden of demonstrating that a fraud on the Court was committed by any of the parties in interest who appeared in this case. Therefore, since any allegations pursuant to clauses (1) or (3) of Fed. R. Civ. P. 60(b) are time- barred, and clause (6) is inapplicable, Weitzel has failed to persuade the Court that the Stipulation and Order should be vacated. The Motion to Vacate is denied.

A separate order shall be entered simultaneously with this memorandum decision.

Dated: Central Islip, New York
August 15, 2006

By: */s/ Dorothy Eisenberg*
UNITED STATES BANKRUPTCY JUDGE