

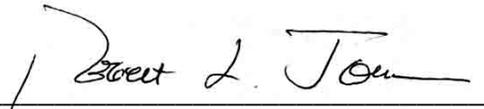


**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed February 25, 2004.**

  
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**United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

IN RE: §  
TEXAS EQUIPMENT COMPANY, INC., § CASE NO. 01-50829-RLJ-7  
Debtor §

IN RE: §  
JEFFREY EDWARD CONDIT, § CASE NO. 02-51179-RLJ-7  
Debtor §

IN RE: §  
PAUL JAMES CONDIT II, § CASE NO. 02-51181-RLJ-7  
Debtor §

**MEMORANDUM OPINION AND ORDER**

John Taylor Condit (“John Condit”), a Chapter 7 debtor whose case is presently pending in the United States Bankruptcy Court for the Western District of Texas, seeks a dismissal of the motion filed by Washington Mutual Bank, F.A. (“Washington Mutual”) requesting that venue of his case be transferred to this court. The motion to transfer venue

was filed in the above-styled cases, presently pending before this court, based on the relationship between John Condit and each of the debtors filed with this court – Texas Equipment Company, Inc., Jeffrey Condit (“Jeff Condit”), and Paul Condit II (“Jim Condit”). Jeff Condit and Jim Condit are John Condit’s brothers. Their father, Paul Condit, now deceased, also has a Chapter 7 bankruptcy case pending with this court. A hearing on the matter was held February 19, 2004.

The sole issue to be decided is whether this court, as opposed to the Western District Bankruptcy Court, shall decide the venue question. Rule 1014(b) states:

If petitions commencing cases under the Code are filed in different districts by or against (1) the same debtor, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing . . . the court may determine . . . the district . . . in which the case or cases should proceed.

FED. R. BANKR. P. 1014(b). The three cases filed with this court were pending at the time John Condit filed his case. Rule 1014(b) provides four limited categories in which venue for related cases may be jointly decided. *In re Feltman*, 285 B.R. 82, 85 (Bankr. D. D.C. 2002) (discussing that the debtors must fall under one of the express provisions, and only then, may a court consider whether joint administration is ‘appropriate’ and ‘just’). Venue for related cases can only be disposed of under this provision if the cases fall under one of the four categories, regardless of the degree or extent of the relationship between the debtors. *Id.* (holding that husband and wife would not fall under 1014(b) as a per se rule because the relationship was not expressly covered under the four categories). Washington Mutual

contends that Texas Equipment Company, Inc. and John Condit are affiliates or, alternatively, that John Condit is a general partner of Jim or Jeff Condit.

John Condit and Texas Equipment Company, Inc. are affiliates if John Condit “directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities” of Texas Equipment Company, Inc. 11 U.S.C. § 101(2). Texas Equipment Corporation owns 100% of Texas Equipment Company, Inc. Texas Equipment Company, Inc. would be an affiliate of Texas Equipment Corporation. *In re Baton Rouge Marine Repair & Drydock, Inc.*, 57 B.R. 19, 22 (Bankr. M.D. La. 1985) (“Under § 101(2)(B), the term ‘affiliate’ includes a 100% subsidiary of the debtor”).

Attributing a parent’s ownership of a subsidiary to a shareholder of the parent is not correct in every case. *In re Elephant Bar Rest., Inc.*, 196 B.R. 747, (Bankr. W.D. Pa.1996) (discussing limiting the use of such attribution in multiple tiered ownership structures to cases in which more than 50% ownership exists as to each tier of ownership). However, Texas Equipment Company, Inc. is a wholly owned subsidiary of Texas Equipment Corporation. The voting power held by each share of stock in Texas Equipment Corporation translates to a direct share-for-share impact on the exercise of such power in the case of Texas Equipment Company, Inc. Such a relationship certainly constitutes indirect ownership under section 101(2).<sup>1</sup> John Condit owns or controls stock in Texas Equipment Co., Inc. to the extent that he owns or controls stock in Texas Equipment Corporation.

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<sup>1</sup> “The use of ‘directly or indirectly’ in subparagraphs (A) and (B) is intended to cover situations in which there is an opportunity to control, and where the existence of that opportunity operates as indirect control.” H.R. Rep. No. 595, 95th Cong, 1st Sess. 308-09 (1977). *See also, In re Interlink Home Health Care, Inc.*, 283 B.R. 429, 439 (Bankr. N.D. Tex. 2002) (“Yet it is certain that the term ‘affiliate’ was intended to be broad enough to include a parent of a parent. . .”).

Much evidence was adduced regarding John Condit's ownership of Texas Equipment Corporation. In an affidavit filed with the court, he stated that he owns 18.8% of Texas Equipment Corporation. He testified at the February 19 hearing that he owns 12.07%. The Form 10-K filed by Texas Equipment Corporation for the fiscal year ended December 31, 2000, states that John Condit has "beneficial ownership" in 779,022 shares, which constitutes an 18.8% interest in the company. John Condit's so-called beneficial ownership interest includes stock options that he owns and under which he has a right to acquire 348,069 additional shares of common stock. *See* Condit Ex. 1 at 28-29. He accrues stock options under an agreement with the company that pays him a "guaranty fee," payable in stock options, in return for his guarantee of company debt. *Id.* The beneficial ownership of 18.8% is a function of dividing his total shares of 779,022 (consisting of actual shares of 430,953 plus the options of 348,069) by 4,152,671 shares. The latter number, the denominator, is derived from adding John Condit's options of 348,069 to the total outstanding shares of the company, 3,804,602. *Id.* By disclosing the common stockholders in this manner in the 10-K, the aggregate beneficial ownership of all stockholders exceeds 120%. This is presumably required by the regulations governing the information contained in a 10-K. *See* 17 C.F.R. § 240.13d-3 (2000). John Condit accrued additional options, at least through the second quarter of 2001, which increased his "beneficial ownership" beyond 20%.

John Condit does not "own" or "hold" with power to vote the requisite shares. To be an affiliate, John Condit must "control" 20% or more of the company's "outstanding" common stock. The definition of "affiliate" at section 101(2) does not refer to "beneficial

ownership” as such term is used in the 10-K. The percentage of ownership as stated in the 10-K assumes, as to John Condit, that John Condit exercises his option and all other stockholders do not. The court will not engage in such an assumption. John Condit did not exercise his options by purchasing the stock they represent. The ownership of a stock option allows the holder to purchase stock at a set price. Many factors may influence a decision to exercise the option, including the option price relative to the market price and the holders’ financial ability to exercise the option. And assuming the option is exercised, the resulting percentage of ownership would be affected by how many other option holders exercise their options. Whether John Condit would exercise his options is too speculative for this court to assume and use as a basis for imputing control or ownership. *See In re Elephant Bar Rest., Inc.*, 196 B.R. 747, 750 (Bankr. W.D. Pa. 1996) (refusing to recognize similar stock shares under an unexercised stock sale agreement as a basis for “affiliate” status because of the uncertainty as to whether the agreement would be exercised). *See also In re Piece Goods Shop Co., L.P.*, 188 B.R. 778, 797 (Bankr. M.D. N.C. 1995) (refusing to recognize a contingent voting right before the right was exercised as a basis for “affiliate” status).

The calculation for “affiliate” status turns on whether the debtor owns 20% or more of the *outstanding* stock of the allegedly affiliated corporation. *See* 11 U.S.C. § 101(2). Outstanding stock represents, “[s]tock that is held by investors and has not been redeemed by the issuing corporation.” BLACK’S LAW DICTIONARY 1148 (7th ed. 2000). The stock that might be purchased by John Condit under this option is not outstanding stock, but rather stock held by the corporation. For each share of stock purchased by any individual through such an option, the total number of outstanding shares increases as well. This dilution of

relative voting power as a result of the exercise of such an option precludes this court from simply factoring in John Condit's purchase option alone. The meaning of "control" under the statute, as opposed to "own" or "hold with power to vote," is not clear to this court. Regardless, the court cannot conclude that the ownership of stock options constitutes "control" of outstanding shares of stock.

Washington Mutual also presented evidence reflecting that John Condit has an interest in multiple companies and partnerships. Included within this was his one-third interest in a partnership named C&C Cosmetics, which he transferred to the 1977 Condit Family Trust in 2001; his interest in the partnership named Three J Farms, which interest he transferred to the John T. Condit No. 1 Limited Partnership in 1997; his sole ownership of a corporation named Domicile Property Management, Inc., a property management company in San Antonio; his interest in Palestine Apartments, Inc.; and his interest in Affordable Assets, Inc. Much of the evidence also concerned John Condit's establishment of the 1997 Condit Family Trust, under which he and his wife are the stated settlors, his longtime attorney, Mike Carper, is the trustee, and his two children are the beneficiaries. This trust holds numerous assets, including an approximate 10% interest in Texas Equipment Corporation, which he transferred to the trust in 1998; an interest in C&C Cosmetics, which, as stated, he also transferred to the trust; real estate lots adjacent to his home in San Antonio; and an office building located at 601 Howard in San Antonio, which was ostensibly sold by Domicile Property Management, Inc. to the trust and leased back to Domicile at a rental rate of \$7,000 per month. The evidence also suggests that John Condit had some input in the

trust's decision to convey certain properties to an individual named William Wenson in Luly 2003. *See* Washington Mutual Exs. 30 and 31.

John Condit testified that the only asset of value that he presently owns is his home in San Antonio as all other assets are held in receivership by order of the federal District Court. Such order was issued in connection with post-judgment collection actions taken by Washington Mutual after obtaining judgment against the Condit's in federal District Court.

John Condit's interests in the various entities were, for the most part, shared with Jim and Jeff Condit, as were transactions involving these entities. However, there is no present, formalized expression of any partnership between John Condit and either of his brothers. The shared interests and transactions, as well as John Condit's present situation, may indeed be relevant to the venue question. As stated, the court is simply deciding which court, in accordance with Rule 1014(b), must decide the venue question.

In light of the court's findings, the Bankruptcy Court for the Western District of Texas, where John Condit's case is presently pending, must decide the venue question. It is, therefore,

ORDERED that the motion to transfer venue filed by Washington Mutual is dismissed.

### End of Order ###