

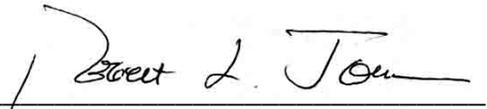


**ENTERED**

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

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

**Signed February 6, 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: §  
JEFFREY EDWARD CONDIT, § CASE NO. 02-51179-RLJ-7  
Debtor §

IN RE: §  
PAUL J. CONDIT, § CASE NO. 02-51180-RLJ-7  
Debtor §

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

WASHINGTON MUTUAL BANK, F.A., §  
Plaintiff §  
§  
§  
v. § ADVERSARY NO. 03-5008  
§ ADVERSARY NO. 03-5010  
§ ADVERSARY NO. 03-5011  
PAUL CONDIT, JEFFREY CONDIT, §  
and PAUL CONDIT II, §  
Defendants §

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Findings of Fact**

### **The Debtors and Texas Equipment Company, Inc.**

1. Jeffrey Edward Condit (“Jeff Condit”) and Paul James Condit II (“Jim Condit”) are sons of Paul Condit, deceased, and Patsy Condit.
2. Texas Equipment Company, Inc. is wholly owned by Texas Equipment Corporation. Jeff and Jim Condit each own 20.9% of Texas Equipment Corporation. Texas Equipment Corporation also owns 100% of a company named New Mexico Implement, Inc. Texas Equipment Company, Inc. owned and operated farm equipment dealerships in Texas; New Mexico Implement, Inc. owned and operated dealerships in New Mexico. Paul Condit was President of Texas Equipment Company, Inc., but was not a shareholder of Texas Equipment Corporation.

### **The Debt and Security**

3. On June 24, 1999, Texas Equipment Company, Inc. executed a term loan note in the original principal amount of \$4,930,000 in favor of Bank United (“First Note”).
4. The First Note was secured by:
  - (a) Loan and Security Agreement dated June 24, 1999, referencing eight dealership locations, thirty-four vehicles, and the assignment of four life insurance policies insuring the lives of Paul Condit, Paul Condit II, John Condit, and Jeffrey Condit, each in the amount of \$500,000;
  - (b) Ten deeds of trust and security agreements dated June 24, 1999, on real property throughout Texas, including a dealership in Pecos, Reeves County, Texas (the “Pecos Property”), recorded in the deed records of Reeves County on August 23, 1999; and
  - (c) Commercial Security Agreement dated February 15, 2000, in all accounts and contract rights, all chattel paper, documents, equipment, general intangibles, instruments, inventory and parts.

5. The First Note was the subject of a United States Department of Agriculture loan guarantee that required the borrower to grant Bank United a first lien deed of trust on the eight farm equipment dealerships owned by Texas Equipment Company, Inc., including the Pecos Property.

6. On June 24, 1999, Texas Equipment Company, Inc. executed a commercial variable rate revolving or draw note in the original principal amount of \$1,750,000 in favor of Bank United (“Second Note”).

7. The Second Note was secured by:

(a) Security Agreement dated June 24, 1999, in all accounts and contract rights, all chattel paper, all documents, general intangibles, all instruments, all inventory and parts, John Deere accounts receivable, trade accounts receivable, inventory of equipment (new and used), now owned or hereafter acquired by borrower, including all substitutions, replacements, additions, and attachments thereof.

(b) Commercial deeds of trust on real property located throughout Texas, including the Pecos Property, also dated June 24, 1999; and

(c) A commercial security agreement dated February 15, 2000.

8. On February 15, 2000, Texas Equipment Company, Inc. executed a Commercial Variable Rate Revolving or Draw Note in the original principal amount of \$750,000 in favor of Bank United (“Third Note”) and Loan Agreement.

9. The Third Note was secured by the Commercial Security Agreement dated February 15, 2000.

10. The bank’s security interest in all machinery, equipment, furniture and leasehold improvements now owned or hereafter acquired by Debtor, together with all

attachments, accessions, additions, substitutions, and replacements thereof, for property located at the nine real property sites in Texas, was perfected by filing a financing statement with the Texas Secretary of State on September 10, 1999. By addendum to the same financing statement, Bank United perfected its security interest in accounts, contract rights, chattel paper, all documents, equipment, all fixtures and general intangibles *wherever located*. This financing statement was later amended on July 20, 2000.

11. By separate financing statement filed with the Texas Secretary of State also dated September 10, 1999, the bank perfected its security interest in inventory and parts, John Deere accounts receivable, trade accounts receivable, inventory of equipment (new and used), now owned or hereafter acquired by Debtor, including all substitutions, replacements, additions, and attachments thereof.

12. On June 24, 1999, and February 15, 2000, Paul Condit, Jeff Condit, and Jim Condit executed personal guaranties, which unconditionally guaranteed payment on the three original notes to Bank United described above.

13. The Board of Directors of Texas Equipment Company, Inc. authorized the deeds of trust securing the debt of Texas Equipment Company, Inc. to Bank United, including the deeds of trust encumbering the Pecos Property.

14. Washington Mutual Bank, F.A. (“Washington Mutual”) is the successor in interest to Bank United and Midland American Bank and the owner and holder of the Notes described above.

15. Texas Equipment Company, Inc., as a primary obligor on the three notes outlined above, is in default on each of the three notes described above.

### **The Pecos Property**

16. On April 1, 1999, approximately two months before executing its two deeds of trust in favor of Bank United (Washington Mutual as successor) on the Pecos Property referred to above, Paul Condit, as President of Texas Equipment Company, Inc., executed a warranty deed with vendor's lien in favor of Pecos Valley Grain and Supply Co., Inc.

17. The Board of Directors for Texas Equipment Company, Inc. ratified and approved the deeds of trust in favor of Bank United on the Pecos Property, as well as the warranty deed and vendor's lien transferring the Pecos Property to Pecos Valley Grain and Supply Co., Inc.

18. Following its execution, the deed to Pecos Valley Grain and Supply Company was held for approximately seven months – until Bank United had completed its loan to Texas Equipment Company, Inc. and accepted the personal guaranties – before being filed in the deed records of Reeves County, Texas on February 23, 2000.

### **Texas Equipment Company, Inc.'s Filing**

19. Texas Equipment Company, Inc. filed for relief under Chapter 11 on July 5, 2001.

20. Max Tarbox was appointed Trustee in the Texas Equipment Company, Inc. bankruptcy on July 31, 2001, and the case was converted to one under Chapter 7 on September 26, 2001. This case is still presently pending.

### **District Court Suit**

21. Washington Mutual sued Paul Condit, Jeff Condit, Jim Condit, and John Condit<sup>1</sup> in connection with their personal guaranties on the debt of Texas Equipment Company, Inc., such suit filed on August 29, 2001, in the United States District Court for the Northern District of Texas before the Honorable Sam Cummings and styled, *Washington Mutual Bank, F.A. v. Jeffrey Condit, Paul Condit, John Condit, and Paul Condit II, Cause No. 5:01CV0250-C; United States District Court for the Northern District of Texas, Lubbock Division.*

22. Judgment was rendered against Paul Condit, Jeff Condit, Jim Condit, and John Condit, jointly and severally, in the amount of \$6,730,472.03 in the District Court for the Northern District of Texas on February 27, 2002.

23. The judgment of the District Court for the Northern District of Texas was abstracted in Gaines County, Texas, on March 8, 2002, at volume 14, page 203; in Reeves County, Texas, on March 13, 2002, at volume AJ, volume 9, page 319; in Kendall County on March 18, 2002, at volume 14, page 518; in Bexar County, Texas, on March 11, 2002, at volume 9293, page 1433; in Lubbock County, Texas, on March 8, 2002, at volume 7535, page 191; and in Yoakum County on March 8, 2002, at volume 228, page 517.

24. Plaintiff's judgment liens in Gaines, Reeves, Kendall, Bexar, Lubbock, and Yoakum Counties, Texas, were abstracted more than ninety days before the Condits filed bankruptcy on July 29, 2002.

25. Paul, Jeff, and Jim Condit failed to answer post-judgment interrogatories that were served on them in connection with the judgment.

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<sup>1</sup>John Condit, brother of Jeff and Jim, is not a party to this adversary proceeding.

26. The District Court issued its order on July 3, 2002, compelling them to answer. They still failed to respond. The District Court, by order dated July 19, 2002, set a contempt hearing for August 1, 2002.

27. The contempt hearing set for August 1, 2002, prompted the bankruptcy filings of the Condit's on July 29, 2002.

### **Balance of Indebtedness**

28. The Third Note, with a balance of \$711,872.46, was fully paid out of proceeds of the liquidation of the estate of Texas Equipment Company, Inc.

29. The First Note has a balance of \$3,501,347.30, plus \$581,935.20 in accrued interest as of September 23, 2003; the Second Note has a current balance of \$1,739,805.20, plus \$205,288.97 in accrued interest as of September 23, 2003. Since the date of judgment against the guarantors on February 27, 2002, approximately \$905,341.24 has been disbursed to Washington Mutual from the liquidation of Texas Equipment Company, Inc.<sup>2</sup>

### **Filings of Jeff, Paul, and Jim Condit**

30. Jeff Condit, Paul Condit, and Jim Condit filed for relief under Chapter 11 on July 29, 2002.

31. The Condit's' original schedules and statements of financial affairs were also filed on July 29, 2002.

32. The Condit's filed amended schedules on November 8, 2002.

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<sup>2</sup>Washington Mutual has received a partial payment of approximately \$3 million on the USDA guarantee. The balance does not reflect this payment; the balance represents the amounts owing by the Condit's.

33. Jeff Condit and Jim Condit filed another set of amended schedules and statement of financial affairs on November 25, 2002. Paul Condit filed his second amended set of schedules on December 2, 2002.

#### **Death of Paul Condit**

34. Paul Condit died February 8, 2003. Patsy Condit, as representative of his estate, was substituted as a party defendant on April 18, 2003. Patsy Condit was appointed administrator of Paul Condit's estate on September 26, 2003.

#### **Financial Statements**

35. In connection with their personal guaranties - and as a precondition for entering into the above loan transactions - Jeff, Paul, and Jim Condit were required to submit true and accurate personal financial statements to the bank.

36. Paul Condit submitted personal financial statements to the bank dated April 10, 1998, May 31, 1999, and January 31, 2000; Jeff Condit submitted personal financial statements to the bank dated December 31, 1997, May 31, 1999, and December 31, 1999; Jim Condit submitted personal financial statements to the bank dated December 31, 1997, May 31, 1999, and December 31, 1999.

37. The value of certain assets on Jim and Jeff Condit's financial statements may have been overstated. The assets in question are so-called "investments," which ostensibly represent the value of their respective interests in several closely held companies, including Texas Equipment Company, Inc.

#### **Gift Deed - Jim and Jeff Condit**

38. On August 14, 2001, following the appointment of Max Tarbox as Trustee in the Texas Equipment bankruptcy on July 31, 2001, a gift deed was executed that purports to bear the signatures of Jeff Condit, Jim Condit, and John Condit, which transferred their interest in a building in downtown Seminole (the “Merle Norman Building”) to Patsy Condit.

39. In Jeff Condit’s 2004 examination, he denied any knowledge of how title to the Merle Norman Building was held.

40. In Jim Condit’s 2004 examination, he failed to disclose the transfer of the Merle Norman Building as a gift.

41. Jeff Condit and Jim Condit did not disclose the transfer of their interest in the Merle Norman Building by gift deed to their mother in their schedules and statements of financial affairs or any supplements or amendments thereto.

42. Jim and Jeff Condit both deny knowledge of this transaction, as well as the genuineness of their signatures on the gift deed. Both Jim and Jeff Condit failed to list any gifts within one year of bankruptcy on their schedules.

43. Jim and Jeff Condit’s *pro se* answers to Washington Mutual’s complaint initiating this suit state, “Defendant admits that the accurate legal title to his mother’s building in Seminole, Texas, was formalized with 1 year of his filing for bankruptcy protection, as contained in paragraph 25, of Plaintiff’s complaint.” Pl.’s Exs. 145 and 146.

44. Both Jeff and Jim Condit were aware of their interest in the Merle Norman Building conveyed by the gift deed. They both failed to disclose on their respective

schedules either the transfer of the property, or, assuming they were unaware of the transfer, their ownership interest in the property.

#### **Conservation Reserve Program Payments - Jeff and Jim Condit**

45. Jeff and Jim Condit each own an undivided interest in land that is subject to the Conservation Reserve Program arrangement (“CRP”). Under the CRP program, Jeff and Jim each received specified payments over a ten year period through 2007.

46. Jeff and Jim Condit, on November 13 and 15, 2001, respectively, transferred their right to 80% of these payments for five years to the First National Bank of O’Donnell (“FNB-O’Donnell”). Under each contract, FNB-O’Donnell thereby receives five payments of \$24,202 each, or a total of \$121,012. FNB-O’Donnell paid Jim and Jeff Condit each a lump sum of \$72,052 for the assignments.

47. In connection with the transfer of their interest in the CRP payments, on November 16, 2001, Jeff Condit, Jim Condit, along with the John Condit No. 1 Limited Partnership, executed a deed of trust in favor of the First National Bank of O’Donnell encumbering their interest in Blocks 4, 5, 6, 7, 8, and 9, League 312, Gaines County School Lands, Gaines County, Texas.

48. Jim and Jeff Condit transferred the bulk of these proceeds to Palestine Apartments, Inc. and the remainder was used for living expenses.

49. Palestine Apartments, Inc. is one of the various closely held businesses of the Condit.

#### **Conservation Reserve Program Payments - Paul Condit**

50. On November 13, 2001, Paul Condit, as president of Condit Agribusiness, Inc., entered into a similar transaction with FNB-O'Donnell concerning the sale of future CRP proceeds on land owned by Condit Agribusiness, Inc.

51. Condit Agribusiness, Inc. assigned its right to seven annual payments of \$10,421 each in return for a lump sum payment of \$43,774.

52. On the same date, Paul Condit, this time as president of Highland Farms, Inc., entered into yet another sale of CRP proceeds with FNB-O'Donnell . Under this arrangement, Highland Farms, Inc. assigned its right to six annual payment of \$35,401 each in return for a lump sum payment of \$138,786.

53. Patsy Condit, on behalf of Paul Condit, now deceased, did not introduce any evidence to show what happened to the proceeds of these transactions. Checks and bank statements were offered into evidence by Washing Mutual concerning the two entities. Two checks dated September 29, 2001, from Sims, Kidd, Hubbert & Wilson IOLTA Trust Account revealed the receipt of proceeds from the CRP assignment. Pl.'s Exs. 98 and 99. One check was made payable to Condit Agribusiness, Inc. in the amount of \$43,137; the other was made to Highland Farms, Inc. in the amount of \$80,775. *Id.*

54. The account activity of Condit Agribusiness, Inc. shows that from March 2001 to September 30, 2001, the bank balance steadily increased from \$136 to \$30,266. Pl.'s Ex. 90. During these months, many debits and credits were made to this account, several in excess of \$10,000. *Id.* During the month of October 2001, the \$43,137 check from Sims, Kidd, Hubbert & Wilson was deposited into the account. *Id.* Other debits and credits were made in October. *Id.* The account balance as of October 31, 2001, was

\$71,299. *Id.* From November to December, 2001, the account had no unusual activity, with ending balances for the month of \$56,585 and \$65,865, respectively. *Id.* In January, one check was written on the account of \$8,794. *Id.* After this check, the remaining balance of \$57,071 in the account was withdrawn on January 7, 2002. *Id.*

55. The account activity of Highland Farms, Inc. shows that the account had a balance of \$64 on September 30, 2001. Pl.'s Ex. 99. During October, the \$80,775 check from Sims, Hubbert & Wilson was deposited into the account. *Id.* The account had other activity that month, including a check was written to John Deere Company for \$39,396. *Id.* The balance of the account on October 31, 2001 was \$29,211. *Id.* From November to December, 2001, the account had no unusual activity, with ending balances of \$23,720 and \$27,063, respectively. Pl.'s Exs. 100 and 101. Like the bank account of Condit Agribusiness, Inc., the remaining balance of \$27,063 in the account was withdrawn on January 7, 2002. Pl.'s Ex. 102.

56. On January 7, 2002, Paul Condit withdrew approximately \$85,000 from the bank accounts of these two corporations. Pl.'s Exs. 90 and 102.

57. On November 13, 2001, Paul Condit executed purchase and assignment agreements transferring 80% of unencumbered CRP payments held in the names of Highland Farms, Inc. and Condit Agribusiness, Inc. to First National Bank of O'Donnell. Pl.'s Ex. 81 and 91. A short time after those transfers, the proceeds were withdrawn from the corporate accounts and the accounts were closed.

58. In connection with the transfer of the CRP payments in the name of Highland Farms, Inc. and Condit Agribusiness, Inc., Paul Condit executed deeds of trust in favor of the First National Bank of O'Donnell dated September 19, 2001.

**Martens-First United Bank, Seagraves**

59. On February 1, 2002, Paul Condit, Jeff Condit, Jim Condit, and John Condit executed a real estate lien note in favor of First United Bank, Seagraves ("FUB, Seagraves) in the amount of \$221,000 which refinanced existing debt and extended additional credit to the Defendants. As security, the Defendants granted First United Bank a lien in:

Tract 1: the west one-half (w/2) of Section Eleven (11), Block A-33, Public School Lands; and

Tract 2: the south 159 acres of Section 22, Block A-23, Public School Lands in Andrews County, Texas, and being more fully described by metes and bounds in a deed dated January 10, 1977, recorded in volume 417, page 160, deed records of Andrews County, Texas, from N. M. Barham, Jr. and wife Bobbie Jean Barham to Boyd Smith; and

Tract 3: the center 161.5 acres of the south part of Section 1, Block A-33, Public School Lands in Andrews County, Texas, and being more fully described by metes and bounds in a deed dated January 10, 1977, recorded in volume 417, page 165, deed records of Andrews County, Texas, from William A. Curry and Novis Curry to Boyd Smith; and the west 161.5 acres of the south part of Section 1, Block A-33, Public School Lands, Andrews County, Texas, and being more fully described by metes and bounds in a deed dated January 10, 1977, recorded in volume 417, page 162, deed records of Andrews County, Texas, from J. B. Curry and Hattie Jo Curry to Boyd Smith; and

Tract 4: Lot 11, Block 49, original town of Seminole, Gaines County, Texas, according to a map or plat of said original town of record in the office of the County Clerk of Gaines County, Texas.

Tract 5: Two Quarter Mile Zimmatic Irrigation Systems, serial numbers 054796 and 054722; and one Half Mile Zimmatic Irrigation System, serial number 74347; and three pumps, serial numbers 004862, 001204, and 003967.

60. The deed of trust, dated February 1, 2002, and covering the real property, contains the following recital under ‘Prior Liens’:

As to Tracts 2 and 3 of Property described in Exhibit “A” attached hereto for all purposes, a Deed of Trust of even date has been executed by John Martens dba J & M Farms for the purchase of those tracts, to John T. Condit, Paul James Condit and Jeffrey E. Condit, as Beneficiaries (Grantor’s herein), such Deed of Trust lien being transferred by Beneficiaries to First United Bank, in Seagraves, Texas, as evidenced by written assignment dates February 1, 2002.

Pl.’s Ex. 107.

61. Apparently, Jim, Jeff, and John Condit had sold two of the tracts of land to John Martens prior to the transaction with FUB, Seagraves.<sup>3</sup> John Martens executed a deed of trust in a seller-financed arrangement. Jim, Jeff, and John Condit then transferred the deed of trust to FUB, Seagraves as collateral for the \$221,000 loan. At trial, Jim Condit testified that Paul Condit orchestrated the entire transaction and received any cash that was generated by the transaction with FUB, Seagraves.

62. Jeff Condit denied that he or his wife actually signed any of the documents regarding the FUB, Seagraves loan. He testified that he did not know if he currently owns or has ever owned an interest in the property pledged to FUB, Seagraves. However, the

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<sup>3</sup>A Farm and Ranch Contract dated February 19, 1998, contemplates a sale of 310.8 acres out of Section 1, Block A33, Andrews County, from John, Jim, and Jeff Condit to John Martens. This appears to cover Tract 3 described above (Finding 59). The Farm and Ranch contract provides for a seller-financed transaction with a sales price of \$124,400. Ex. D-9.

property pledged is listed on his bankruptcy schedules. He testified that the listing of the properties on his schedules had to be based on information provided by his father, Paul Condit, to his attorney.

63. Of the \$221,000 loan proceeds, approximately \$195,000 was used to pay John Deere, with the balance of \$26,000 going to Paul Condit.

64. On February 3, 2000, Jim Condit and Jeff Condit each received a check for \$9,044.61 from their father, Paul Condit, who had, in turn, on the same day deposited \$31,454.46 from John Martens. Pl.'s Ex. 58. The court infers that this payment resulted from the prior sale of the two tracts to John Martens.

#### **\$19,100 Payment to Patsy Condit – Jeff Condit**

65. On May 5, 2002, Jeff Condit paid his mother, Patsy Condit, the sum of \$19,100 by check issued to her. Although not on his original schedules, Jeff Condit amended his schedules on November 25, 2002, to reflect a payment of \$19,100 to the IRS. Jeff Condit testified that Patsy Condit had paid his 2001 income tax liability for that amount and the subsequent check to Patsy was a repayment of that sum.

#### **Affordable Asset Development, Inc.**

66. Jim, Jeff, and John Condit each own interests in Affordable Asset Development, Inc. Affordable Asset Development, Inc. owned two airplanes as its only assets. Washington Mutual held a lien against one of the airplanes.

67. In September 2001, Affordable Asset Development, Inc. began negotiations with Washington Mutual for release of its lien against the airplane upon payment of the indebtedness presumably secured by the airplane. The payment was done in connection with

a trade between Affordable Asset Development, Inc. and a third party in which the airplanes were traded for encumbered real property located in Kendall County, Texas.

68. Washington Mutual released its lien upon payment of the indebtedness, and the airplanes were traded for the real property.

69. Washington Mutual released its lien on an airplane owned by Affordable Asset Development, Inc., which allowed the corporation to swap the two airplanes for the real estate in Kendall County, Texas.

### **Problems with Texas Equipment Company, Inc. Filing**

70. The corporate filing of Texas Equipment Company, Inc. was filed under the name "Texas Equipment Corporation" with "Texas Equipment Company, Inc." listed as another name under which it operated. The listed tax i.d. number was that of Texas Equipment Company, Inc. The Trustee, Max Tarbox, discovered this when negotiating a sale of real property. The Trustee filed a motion which recognized Texas Equipment Corporation as the parent company and Texas Equipment Company, Inc. as the debtor entity.

71. Paul Condit was president of Texas Equipment Company, Inc., but failed to cooperate with the Trustee in connection with the filing. Schedules were not filed by Texas Equipment Company, Inc. upon its filing and neither Paul Condit nor his sons Jim and Jeff Condit appeared at the initial 341 meeting. The Trustee rescheduled the 341 meeting and specifically requested the attendance of Paul Condit. Paul Condit failed to appear again.

72. From July 5, 2001, the filing date, to July 31, 2001, Texas Equipment Company, Inc. used cash collateral without the consent of the lienholders, Washington Mutual and John Deere, and without court approval. Both Washington Mutual and John

Deere were forced to file motions seeking the court's order prohibiting Texas Equipment Company's use of cash collateral.

73. The Trustee, with the help of an individual named Peter Theisen, prepared the schedules. Jeff Condit arranged to have Mr. Theisen assist with the schedules. Mr. Theisen is neither an officer or director of Texas Equipment Company, Inc. At least three tracts of real property were left off the schedules and subsequently discovered by the Trustee. Such properties were located in Reeves County, Texas, El Paso County, and Tornillo, Texas.

74. The bankruptcy schedules filed by Max Tarbox, Trustee, on behalf of Texas Equipment Company, Inc., reflect assets in excess of \$28,000,000. The actual value is much less.

75. If appropriate, these findings of fact shall be considered conclusions of law.

### **Conclusions of Law**

76. This court has jurisdiction of this matter under 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J).

77. Washington Mutual seeks to have the debt owed it by the Condit declared non-dischargeable under 11 U.S.C. § 523(a)(2)(A) and (B). Alternatively, Washington Mutual seeks a denial of the discharge as to each of the Condit under 11 U.S.C. § 727(a)(2)(A) and (B), (a)(3), (a)(4)(A) and (D), (a)(6)(C), and (a)(7).

### **Discharge or Dischargeability**

78. Section 727 provides that “(a) the court shall grant the debtor a discharge, unless . . .” one of the grounds exists to deny the debtor his discharge in full. Section 523 provides that “(a) a discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . .” that falls within any of the particular types of debts set forth. The court first determines whether a debtor is entitled to discharge before determining the dischargeability of a specific debt. The court therefore first analyzes whether the Condit are entitled to discharge under 11 U.S.C. § 727.

79. Washington Mutual objects to the Condit receiving a discharge under several provisions of section 727. With respect to each provision, Washington Mutual contends that the various problems associated with Texas Equipment Company, Inc. bankruptcy filing (Findings 70 through 74) were caused by the Condit, thereby constituting violations of subsections (a)(2), (a)(3), (a)(4), and (a)(6) and justifying a denial of discharge under section 727(a)(7).

80. A debtor may be denied a discharge under section 727(a)(7) if he commits any of the acts specified by such subsections “on or within one year before the date of the filing of the petition, or during the case, in connection with another case . . . , concerning an insider . . . .”

81. Before addressing whether the acts and omissions by any of the Condit constitute violations of section 727, the court first considers whether Texas Equipment Company, Inc. is an insider.

#### **Texas Equipment Company, Inc. as Insider**

82. The Bankruptcy Code provides a non-exclusive list of ‘insiders’ of the debtor. 11 U.S.C. § 101. *See also In re Applegate Prop., Ltd.*, 133 B.R. 827, 832 (Bankr. W.D. Tex. 1991). An insider includes any of the specific examples given by the statute or any such relationship that is consistent with the intended scope of § 101(31). *Id.* Whether a party in an ‘insider’ of the debtor is a fact question. *In re Hillside Park Apartments, L.P.*, 205 B.R. 177, 183 (Bankr. W.D. Mo. 1997) (quoting *In re Friedman*, 126 B.R. 63, 67 (9th Cir. B.A.P. 1991)). However, the language of 11 U.S.C. § 727 provides that an individual may be denied a discharge if that individual actually committed or otherwise took part in the act prohibited by 11 U.S.C. § 727. *See, e.g. Haywood Props., Ltd. v. Jacobs (In re Jacobs)*, 116 B.R. 463, 467 (Bankr. E.D. Va. 1990) (“an individual chapter 7 debtor's discharge may be denied if the individual committed acts prohibited by § 727 as an insider of a debtor in another bankruptcy case.”). Accordingly, even if this court does find that Texas Equipment Co., Inc. was an ‘insider’ of either Jim, Jeff, or Paul Condit, only those acts attributable to the particular individual can provide a basis for denying discharge.

83. An ‘insider’ includes a “corporation of which the debtor is a director, officer, or person in control.” 11 U.S.C. § 101(31)(A)(iv). Under this definition, control by the debtor of the corporation can be a sufficient basis for finding insider status; a formal relationship or title of the debtor is not required. *See In re Fabricators, Inc.*, 926 F.2d 1458, 1465 (5th Cir. 1991). Whether a debtor exercises sufficient ‘control’ over the corporation for insider status is a fact question. *Id.* If this court is satisfied that the evidence shows that Paul, Jim or Jeff Condit were directors, officers, or persons in control of Texas Equipment Co, Inc., then any pertinent acts or omissions committed by either Paul, Jim or Jeff Condit in connection with the Texas Equipment Co., Inc. bankruptcy may be used as a basis to deny Paul, Jim, and Jeff Condit their individual discharges.

84. Washington Mutual contends that each of the Condits are directors of Texas Equipment Company, Inc., as reflected by the Articles of Resolution of Texas Equipment Company, Inc. dated June 23, 1997, that represents that Jim, Jeff, and Paul Condit are all members of the board of directors of the company. Jim and Jeff Condit do not dispute that they signed this document. Jim and Jeff Condit contend that they signed this documents, as well as many others, at the insistence of their father, Paul Condit. They claim that at some point subsequent to the execution of the Articles of Resolution, Texas Equipment Company, Inc. underwent a change in management and that they were replaced by other board members. No documentary evidence of such change in management was introduced.

85. Jim and Jeff Condit deny any further involvement with Texas Equipment Company, Inc. besides signing documents at the request of their father, Paul Condit. They allege that they never participated in a formal meeting of the board of directors of Texas

Equipment Company, Inc. and that they never participated in any informal meetings or discussions as board members.

86. Jim and Jeff Condit testified that Paul Condit was in charge of all the affairs of Texas Equipment Company, Inc. and that he would routinely request their signatures on documents without any explanation.

87. The court must make a factual determination of whether Jim and Jeff Condit were in fact members of the board of directors of Texas Equipment Company, Inc. during the events in question. *See In re Fabricators, Inc.*, 926 F.2d at 1465. Notwithstanding the contradictory testimony of Jim and Jeff Condit, the unequivocal documentary evidence reflects that Jim and Jeff Condit are members of the board of directors. The court therefore finds that Jim and Jeff Condit were ‘insiders’ of Texas Equipment Company, Inc.

88. As noted, the Articles of Resolution of Texas Equipment Company, Inc. state that Paul Condit is a member of the board of directors. The evidence reflects that Paul Condit had a direct involvement in and control of Texas Equipment Company, Inc. Virtually every document executed on behalf of Texas Equipment Company, Inc. at issue in this case includes Paul Condit’s signature in his capacity as president of Texas Equipment Company, Inc. Texas Equipment Company, Inc. is an ‘insider’ of Paul Condit. Any acts or omissions by Paul Condit in the corporate bankruptcy case that are actual under subsections 727(a)(2) through (6) may provide a basis to deny Paul Condit his discharge.

**Section 727(a)(7) – Jim and Jeff Condit**

89. Jim and Jeff Condit had little ongoing involvement with the company, especially with respect to Texas Equipment Company, Inc.’s bankruptcy case. The evidence reflects that Paul Condit managed the affairs of the bankruptcy case as president. While Jim and Jeff Condit’s relationship to Texas Equipment Company, Inc. satisfies the ‘insider’ requirement, Jim and Jeff Condit did not personally take an active involvement in the filing or the prosecution of the bankruptcy case of Texas Equipment Company, Inc. They did not actively participate in any acts that would constitute a violation of section 727 concerning the Texas Equipment Company, Inc. case and are not primarily responsible for the omissions of Texas Equipment Company, Inc. in connection with its bankruptcy case.

**Section 727(a)(7) – Paul Condit**

90. Paul Condit was responsible for the bankruptcy filing of Texas Equipment Company, Inc. and must be held responsible for the various problems associated with the filing.

91. Texas Equipment Company, Inc. apparently filed under the wrong name, failed to file schedules, used cash collateral without approval or court order, and generally failed, through the conduct of Paul Condit, to cooperate with the Trustee in any fashion. Paul Condit did not apprise the Trustee of valuable tracts located in Reeves and El Paso counties. Paul Condit failed to appear for the 341 meetings and 2004 exams.

92. Paul Condit’s acts and omissions satisfy section 727(a)(3). Texas Equipment Company, Inc., through the acts and omissions of Paul Condit, “concealed . . . failed to keep or preserve any recorded information, including books, documents, records, and papers,

from which [Texas Equipment Company, Inc.'s] financial condition or business transactions might be ascertained . . . .”

93. Paul Condit’s failure to appear and testify at the 341 meetings and the 2004 exam is a violation of section 727(a)(6)(C) as a refusal in such case to appear and testify.

94. Paul Condit’s violations of section 727(a)(3) and (a)(6)(C) in the Texas Equipment Company, Inc. case constitutes a violation of section 727(a)(7). Paul Condit’s discharge is therefore denied.

**Section 727(a)(2) and (a)(4)(A) and (D) – Jim and Jeff Condit**

95. Apart from acts or omissions alleged concerning the Texas Equipment Company, Inc. case, Washington Mutual contends that Jim and Jeff Condit should each be denied a discharge under section 727(a)(2) (transfer, concealment with intent to hinder, delay, and defraud), and (a)(4)(A) and (D) (knowingly and fraudulently making a false oath or withholding information from an officer regarding property or financial affairs) for acts and omissions in their individual bankruptcy cases.

**Section 727(a)(2)**

96. To sustain Washington Mutual’s objection under section 727(a)(2), the court must find that:

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A)-(B).

97. Washington Mutual must prove:

(1) that the act complained of was done at a time subsequent to one year before the date of the filing of the petition (2) with intent to hinder, delay, or defraud a creditor or an officer of the estate, (3) that the act was that of the debtor or of his duly authorized agent, and (4) that the act consisted of transferring, removing, destroying, or concealing any of the debtor's property, or permitting any of those acts to be done.

*Langston v. Balch (In re Balch)*, 25 B.R. 22, 24 (Bankr. N.D. Tex. 1982).

98. Direct evidence of the debtor's actual intent to hinder, delay, or defraud creditors is not required to sustain a creditor's objection under 11 U.S.C. § 727(a)(2).

*Womble v. Pher Partners (In re Womble)*, 289 B.R. 836, 853 (Bankr. N.D. Tex. 2003).

Because of the inherent difficulty of producing such evidence, actual intent can be proven by circumstantial evidence. *Id.*

99. The Fifth Circuit has adopted several 'badges of fraud' from which actual intent can be inferred from the debtor's conduct. *Id.* (discussing *Pavy v. Chasnat (In re Chasnat)*, 873 F.3d. 89, 91 (5th Cir. 1989)). Such an inference can be founded upon:

(1) the lack or inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry.

*Id.* at 854. While an accumulation of one or more of these factors strongly supports a finding of actual intent, the existence of even one may support such a finding. *Id.*

100. A gratuitous transfer of property or a transfer of property to a relative creates a presumption of actual fraudulent intent. *Pavy v. Chastant (In re Chastant)*, 873 F.2d 89, 90 (5th Cir. 1989). A gratuitous transfer of property to a close relative establishes a *prima facie* case of fraudulent intent, which shifts the burden to the debtor to prove a lack thereof. *Pavy v. Chastant (In re Chastant)*, 873 F.2d 89, 90 (5th Cir. 1989). However, the particular circumstances of the transaction must be evaluated by the court. *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 702 (5th Cir. 2003) (holding that the court must weigh the value of a transfer to a relative against the other assets of the debtor in determining whether the transaction was fraudulent); *In re Brown*, 108 F.3d 1290, 1293 (10th Cir. 1997).

101. A debtor is entitled to take reasonable steps in an attempt to keep his business alive before resorting to bankruptcy protection. *See In re Brown*, 108 F.3d 1290, 1293 (10th Cir. 1997); 2 Collier on Bankruptcy ¶ 727.02[3][a]. Such a good faith attempt will not warrant a denial of discharge, even if the transaction carries a ‘badge of fraud’. *See id.* The court can look at several factors to determine whether the transfer was for a legitimate business purpose, such as:

- (1) whether the transfer was pursuant to a standard business practice;
- (2) whether the transfer was an arm's length transaction;
- (3) whether the debtor transferred the funds fully voluntarily, or whether the situation effectively forced the transfer upon the debtor; and
- (4) whether the debtor received proper consideration for the transfer.

*Womble v. Pher Partners (In re Womble)*, 289 B.R. 836, 855 (Bankr. N.D. Tex. 2003) (citing *Moreno v. Ashworth (In re Moreno)*, 892 F.2d 417, 420 (5th Cir. 1990)).

(1) The Five Transactions

102. Five transactions form the underlying factual basis for Washington Mutual's objection under section 727(a)(2) to Jim and Jeff Condit receiving a discharge: (1) the gift deed transaction (Findings 38 through 44); (2) the Conservation Reserve Program transaction (Findings 45 through 58); (3) the Martens-First United Bank, Seagraves' transaction (Findings 59 through 64); (4) the \$19,100 payment to Patsy Condit (Finding 65); and (5) the Affordable Asset's transaction (Findings 66 through 69).

103. Each of these transactions involved a transfer of money or assets and resulted in a loss of such money or assets (or value of assets) held by the party effecting the transfer.

104. The gift deed was an outright gift of a building in Seminole, Texas, to Patsy Condit, mother of Jim and Jeff Condit. Both Jim and Jeff Condit deny signing the deed. No expert testimony was offered regarding their signatures on the deed. In comparing their signatures on the deed with other signatures on other undisputed documents, the court notes that the signatures are different. Despite this, they were aware of the transfer as evidenced by their answer to Washington Mutual's complaint in which they state the "accurate legal title to [their] mother's building in Seminole . . . was formalized within 1 year of [their] filing for bankruptcy protection . . . ." Pl.'s Exs. 145 and 146.

105. Jim and Jeff Condit failed to disclose the transfer. If they are contending the transfer never occurred, they should have scheduled property on their schedules, which they did not.

106. With the Conservation Reserve Program transaction, both Jeff and Jim Condit transferred funds they received to Palestine Apartments, Inc., an entity they each owned an interest in. They excuse this transaction by contending the deal was orchestrated by their father and the funds were needed by Palestine Apartments, Inc. However, there was no evidence of consideration for the transfers to Palestine Apartments, Inc. The transfer was not carried as a loan. Palestine Apartments, Inc. was not listed as a creditor of either Jim or Jeff Condit.

107. The court further notes that the transaction with the First National Bank-O'Donnell in connection with the Conservation Reserve Program payments is, to say the least, atypical. The bank purchased the Conservation Reserve Program payments. In return, it paid a discounted sum for the purchase and assignment. In addition, Jim and Jeff Condit pledged by deed of trust their interest in the Gaines County School Lands. *See* Finding 47. The net effect of this entire transaction was to strip Jim and Jeff Condit of money and land of significant value with nothing to show in return. Were the funds used to pay other creditors of Jim and/or Jeff Condit, the transaction would be of little concern. It would perhaps then constitute a preference. By transferring the funds to an affiliated entity, apparently without consideration, it smacks of a fraudulent conveyance.<sup>4</sup>

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<sup>4</sup>The court has previously concluded that Paul Condit's discharge should be denied because of his involvement with the various problems associated with the filing of Texas Equipment, Inc. The court would note, however, that Paul

108. The Martens-FUB, Seagraves' transaction is less egregious. In a complicated transaction (Findings 59 through 64), the majority of the loan proceeds were ultimately used to pay John Deere, ostensibly a creditor of Texas Equipment Company, Inc., with the balance of approximately \$25,000 transferred to Paul Condit. Again, there is no apparent consideration for the transfer of funds from Jim and Jeff Condit. As with most transactions, Jim and Jeff Condit disavow any involvement with this transfer. Jeff Condit testified that he and his wife did not sign the documents involved in the transaction and that he was unaware of any interests in the properties pledged to secure the loan from the First United Bank, Seagraves. Despite this, the property was listed on his schedules. He testified that such listing was made without his input.

109. The \$19,100 payment to Patsy Condit, given Jeff Condit's explanation, is likely a preference. A preference does not normally constitute a fraudulent conveyance. He testified that he was repaying Patsy for her payment of his IRS debt. To bolster his explanation, he notes that he did list the IRS debt on his amended schedules. However, by disclosing the transaction as an IRS debt, he effectively concealed the payment to his mother.

110. The transfer involved in the Affordable Assets, Inc. transaction appears, at first blush, not relevant to Washington Mutual's section 727(a)(2) claim against the Condits. By this transaction, Affordable Assets, Inc. traded two airplanes, one of which was

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Condit withdrew approximately \$85,000 from the accounts of Condit Agribusiness, Inc. and Highland Farms, Inc. *See* Findings 50 through 58. Paul Condit took otherwise unencumbered property in such a fashion to allow him to hide over \$85,000 as judgment was nearing in the District Court litigation. This carries with it the requisite badge of fraud and constitutes a separate basis for denying discharge to Paul Condit.

unencumbered, for encumbered real estate in Kendall County, Texas. Washington Mutual released its lien against one of the airplanes as part of the transaction. Both Jim and Jeff Condit owned an interest in Affordable Assets, Inc., the value of which was diminished as a result of this transaction.

## (2) Credibility of Jim and Jeff Condit

111. Each of the five transactions occurred within one year of the bankruptcy filing. Jim and Jeff filed bankruptcy on July 29, 2002. The gift deed is dated August 14, 2001. Though the Condits deny signing the deed, they acknowledge the transfer. The court can only conclude that the transfer occurred on or about August 14, 2001. Plus, their concealment of the transfer or, alternatively, their ownership, continued at least to the time of their respective bankruptcy filings. The Conservation Reserve Program transaction occurred in mid-November, 2001. The Martens-First United Bank, Seagraves' transaction took place in February, 2002. The \$19,100 payment to Patsy Condit was on May 5, 2002, shortly before the bankruptcy filing. Finally, the Affordable Assets, Inc. transaction occurred in September, 2001.

112. The timing of Jim and Jeff Condit's bankruptcy filing was triggered by the impending contempt hearing scheduled for August 1, 2001. The District Court suit was filed August 29, 2001, two weeks after the gift deed transaction. Judgment in the District Court suit was entered February 27, 2002, which is proximate in time to the five transactions.

113. The five transactions stripped the Condits of assets. They involve relatives and insider entities. Jim and Jeff Condit contend their father orchestrated each of these

transactions. During testimony at trial, they claimed ignorance of many facts, including information contained on schedules they filed with the court.

114. Paul, Jim, and Jeff Condit sought the protections afforded by the Bankruptcy Code when they filed their respective cases. Paul Condit failed to cooperate in any manner whatsoever. Jim and Jeff Condit either blamed their father or claimed ignorance of the various questionable transactions. The court is of the opinion that the bankruptcy system demands much more. Once debtors file, it is their responsibility to come clean. The Code generally forgives debtors of past deeds, but, in return, debtors must disclose and be candid. Jim and Jeff Condit cannot avoid their responsibilities of disclosure and candor by blaming their father and stating “I don’t know” to the many questions posed to them. They knew their father and how he transacted business. At best, they allowed him to manipulate their assets and affairs. At worst, they conspired with him. The circumstances and effect of these various transactions, along with Jim and Jeff Condit’s failure to disclose and cooperate in connection with the District Court lawsuit, convinces this court that Jim and Jeff Condit had the requisite intent to hinder, delay, and defraud.

115. Jim and Jeff Condit’s discharge is denied under section 727(a)(2).

116. In light of the court’s conclusions with respect to Paul Condit under section 727(a)(7) and with respect to Jim and Jeff Condit under section 727(a)(2), it is not necessary for the court to consider the claims under section 727(a)(4)(A) and (D) and Washington Mutual’s claim that the indebtedness should be declared non-dischargeable under section 523 of the Bankruptcy Code.

117. If appropriate, these conclusions of law shall be considered findings of fact.

### End of Findings of Fact and Conclusions of Law ###