

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JOSEPH & D. MARGARET NELSON,	)	CASE NO. BK92-81389
	)	
DEBTOR	)	A94-8140
	)	
JOSEPH H. BADAMI, TRUSTEE,	)	
	)	CH. 11
Plaintiff,	)	
vs.	)	
	)	
JOSEPH & D. MARGARET NELSON,	)	
Co-Trustees for Yellow Canary	)	
Trust,	)	
	)	
Defendants.	)	

MEMORANDUM

Hearing was held on January 25, 1996, on Motion for Summary Judgment filed by the plaintiff. Appearances: Joseph Badami, Trustee; Lawrence Crosby for Nelsons as Co-trustees of Yellow Canary Trust. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(H).

**Background**

The debtors, Joseph S. Nelson and D. Margaret Nelson, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on August 10, 1992. This court approved the appointment of a Chapter 11 trustee to oversee the debtors' bankruptcy case on March 12, 1993, and Joseph H. Badami was subsequently appointed by the United States Trustee's Office to serve as the trustee of the bankruptcy estate.

On November 16, 1994, the trustee initiated this adversary proceeding against the debtors, in their capacities as co-trustees of the Yellow Canary Trust (the Trust), to avoid a fraudulent transfer pursuant to 11 U.S.C. § 548(a). Although the debtors are sued in their capacity as trustees, they shall be referred to in the memorandum as "the debtors" and Mr. Badami

shall be referred to as "the trustee." The complaint alleges that within one year of the bankruptcy petition, the debtors transferred to the Trust the title to an airplane (the airplane), described as a Model 180 Cessna Airplane, Serial No. 31772, FAA Registration N9324C, for the sum of \$20.00. The trustee is seeking to avoid this transfer and recover possession of the airplane on behalf of the bankruptcy estate. On December 4, 1995, the trustee filed a Motion for Summary Judgment to request that the court find as a matter of law that the transfer of the airplane to the Trust was a fraudulent transfer.

The debtors take the position that the transfer was valid and that the Trust legally owns the airplane. The debtors argue that the lack of consideration for the transfer does not void the transfer because reasonably equivalent value is not necessary when an asset is transferred into a trust for estate planning, that the transfer did not render the debtors insolvent, and that the transfer was for estate planning purposes, not to defraud creditors. In the alternative, if the court finds that the transfer of the airplane to the Trust was a fraudulent transfer, the debtors argue that the airplane will revert to the debtors, not to the estate, and that the two year statute of limitations for the trustee to bring an avoidance action against the debtors to recover the airplane has expired. The debtors also allege that they have a mechanic's lien against the airplane, which arose due to expenditures made by the debtors, and that the mechanic's lien is prior to all other interests in the airplane.

### **Decision**

The trustee's Motion for Summary Judgment is granted. The transfer of the airplane by the debtors into the Trust is an avoidable transfer under 11 U.S.C. § 548(a)(1).

### **Discussion**

#### **A. Standard for Summary Judgment**

When ruling on a motion for summary judgment, the standard is:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c); FED. R. CIV. P. 56(c) (emphasis added).

The burden is on the moving party to show that no genuine dispute exists concerning a material fact, City of Mt. Pleasant, Iowa v. Association Electric Corp., 838 F.2d 268, 273 (8th Cir. 1988), and once this burden is met, the nonmoving party must show that there is genuine dispute over a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 265 (1986). When evaluating the motion, inferences drawn from the underlying facts are to be decided in the light most favorable to the nonmoving party. United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1976). When conflicting inferences may be drawn from the facts, summary judgment is not appropriate. Kraciun v. Owens-Corning Fiberglas Corp., 895 F.2d 444, 447 (8th Cir. 1990).

"[T]he burden on the moving party may be discharged by "showing" ... that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. In addition, a failure by the nonmoving party to submit evidence to support its claims will result in summary judgment being entered. Metro North State Bank v. Gaskin, 34 F.3d 589 (8th Cir. 1994) (refusing to overturn the entry of summary judgments by a district court where nonmoving party failed to submit evidence in support of its claim). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp., 477 U.S. at 322-23.

Any deposition testimony that would be admissible at trial may be considered when determining a summary judgment motion. 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.11[1.--3], at 56-100 (2d ed. 1994).

#### B. Conclusions of Law and Facts

The trustee may avoid a fraudulent transfer pursuant to 11 U.S.C. § 548(a) of the Bankruptcy Code. The portion of Section 548(a) which is relevant to the present transfer provides:

- (a) The trustee may avoid any transfer of an interest of the debtor in property, ..., that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

(1) made such transfer ... with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made ..., indebted; or

(2) (A) received less than a reasonable equivalent value in exchange for such transfer ...; and (B)(i) was insolvent on the date that such transfer was made ..., or became insolvent as a result of such transfer....

11 U.S.C. § 548(a). The trustee argues that the undisputable facts of this case show that the transfer of the airplane into the Trust is avoidable under both subsections (a)(1) and (a)(2) of Section 548. The trustee may show that no material issue of fact exists under either Subsection (a)(1) or under Subsection (a)(2) to be entitled to a grant of summary judgment.

1. Transfer on or within One Year of Petition

The debtors executed a Bill of Sale transferring ownership of the airplane from the debtors to the Trust on April 1, 1992. Since the petition for relief was filed on August 10, 1992, said transfer was with the one year limitation imposed under Section 548.

2. Section 548(a)(1)

On April 1, 1992, the date that the debtors transferred the airplane into the Trust, the debtors were still in Chapter 12 bankruptcy case that was eventually dismissed on May 22, 1992. The Trust document lists the debtors as co-trustees and it was registered in the appropriate Nebraska public office on May 22, 1992. At approximately the same time this Trust was created, the debtors transferred all of their other assets, which consisted of two pieces of real estate and farm equipment, into other trusts. According to the debtors, the airplane was moved to Montana during the pendency of this bankruptcy case and is currently in the possession of one or more friends in Montana, who do not provide any compensation for possession of the airplane.

Mr. Nelson testified in a deposition that he transferred all of his property into the trusts, including the Trust, because he thought that the transfer was the only way to save his net worth, and he noted that no liens had yet attached to the airplane prior to the transfer. Mrs. Nelson corroborated his testimony by noting that the Trust was for estate planning purposes. They

believed the value of their assets before all of the trusts were created was greater than their liabilities. She stated that they put all of their equity into trusts and she believes that the purpose of the transfers was to preserve their assets from unfair prices at foreclosure sales.

The debtors did not report the transfer of the airplane into the Trust or the transfers of their other assets to other trusts at that part of their bankruptcy schedules where they were to list all transfers of property made within one year of the bankruptcy petition. Mrs. Nelson stated at first that the debtors did not report the transfer because they did not believe the transfer was completed because it was not properly filed and perfected with the Federal Aviation Administration (FAA) in Oklahoma City, Oklahoma. Then, Mrs. Nelson stated that the person advising them during the preparation of their bankruptcy schedules, who was not an attorney, told them if they did not know whether the transfer was valid, they should not report the transfer.

A finding of fraud under the Bankruptcy Code is a factual finding. Graven v. Fink (In re Graven), 936 F.2d 378, 382 (8th Cir. 1991) (applying fraud standards under § 548(a) to conversion for fraud under § 1208(d) [Graven I]; see also Fink v. Graven Auction Co. (In re Graven), 64 F.3d 453 (8th Cir. 1995) (stating that Graven I is controlling authority in § 548(a)(1) case) [Graven II]. Fraudulent intent may be inferred from the circumstances of the transaction in question. Graven I, 936 F.2d at 383; Brown v. Third Nat'l Bank (In re Sherman), 67 F.3d 1348, 1353 (8th Cir. 1995). The common law "badges of fraud" may conclusively indicate whether fraudulent intent exists for the purposes of Section 548(a)(1). Sherman, 67 F.3d at 1353-54. Nebraska has codified the common law badges of fraud at Section 36-705(b) of the Nebraska Revised Statutes, which provides:

(b) In determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

NEB. REV. STAT. § 36-705(b) (Reissue 1993). To find fraudulent intent under Section 548(a)(1), the bankruptcy court must find more than one badge of fraud, but is not required to find that each badge of fraud exists, rather "the confluence of several [badges of fraud] can constitute conclusive evidence of an actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose." Sherman, 67 F.3d at 1354 (quotation omitted).

After close consideration of badges of fraud and the action of the debtors, this court finds as a fact that the debtors transferred the airplane into the Trust to hinder, delay, or defraud their creditors. The transfer in question was to an insider because the debtors retained control over the Trust by naming themselves as co-trustees of the Trust. The debtors have also retained control over the airplane in the Trust. Even though the debtors have loaned the airplane to friends without consideration, their testimony shows that this arrangement is

solely by the debtors' design and that the friends have no legitimate right to possession beyond the permission of the debtors to possess the airplane. Permitting the airplane to be taken to Montana, a separate jurisdiction, is an indication that the debtors intended to keep the airplane away from the reach of their creditors. The debtors did not offer an explanation as to why they moved the airplane to Montana.

There is also undisputed evidence that the debtors concealed this transaction from their creditors. The debtors did not report the transfer of the airplane into the Trust in their bankruptcy schedules allegedly because they were not sure if the conveyance was valid. Under 49 U.S.C. § 1403(c), a party must file an instrument of conveyance of an airplane with the FAA for the transfer to be valid against an innocent third party. Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 409-10, 103 S. Ct. 2476, 76 L. Ed. 2d 678 (1983). In this case, an innocent third party is not implicated, and therefore, the transfer of title is presumably valid between the debtors and the Trust and should have been reported in the bankruptcy schedules as a transfer within one year of the bankruptcy petition.

The debtors listed their interest in the Trust as an asset of the estate, but did not indicate what assets belonged to the Trust. If the debtors were really "uncertain" about the validity of the Trust, and/or the conveyance of title to it, the debtors would have listed the airplane as an asset of the bankruptcy estate. The only reasonable inference from the conflict between the bankruptcy schedules and the debtors' explanation is that the debtors did not intend to disclose the existence, location, or ownership of the airplane to the creditors of the bankruptcy estate.

The evidence does not show that a specific lawsuit triggered the transfers of all of the debtors' assets into the trusts, but both debtors admitted that they transferred their property into the trusts to keep the property away from their creditors who might somehow attach liens to the debtors' equity in the property. The debtors stated that the transfer of the airplane to preserve their equity was for estate planning purposes. Even though the debtors couched the transfer as "estate planning," the debtors admitted that "estate planning" in this case was a response to a fear that creditors would obtain judgments or cause liens to attach to the debtors' property.

Even though the Trust is the only trust subject to this avoidance action, intent to defraud creditors is further

supported by the admitted fact that the debtors placed all of their unencumbered assets into trusts during this period and drew all of their income from these trusts. Thus, all of the debtors' equity was transferred into the trusts.

Finally, there is irrefutable evidence that the transfer was for less than reasonably equivalent value. Since this is considered under the discussion for Section 548(a)(2), the findings made under the subheading for Section 548(a)(2) are incorporated here without further discussion. See infra at 8-9.

When intent is at issue in a case, the court should be cautious in granting summary judgment. Demerath Land Co. v. Sparr, 48 F.3d 353, 355 (8th Cir. 1995) (citation omitted). However, summary judgment may be appropriate for a finding of intent to defraud where the nonmoving party has "adduced no evidence whatsoever of the requisite intent to defraud." Id. (citation omitted). The undisputed circumstances of this case show that the debtors engaged in certain behavior, which they do not dispute, and under the law, that behavior represents several badges of fraud under common law. Since a finding of fraud under common law constitutes fraudulent intent under Section 548(a)(1), the court finds that the debtors intended to hinder, delay and defraud their creditors under Section 548(a)(1), and the transfer of the airplane into the trust is an avoidable fraudulent transfer.

### 3. Section 548(a)(2)

#### (A) Reasonably Equivalent Value

In the debtors' bankruptcy schedules, the value of the Trust, the only asset of which is the airplane, is listed at \$30,000.00. The Bill of Sale received by debtors when the airplane was purchased shows that the debtors paid \$20,500.00 for the airplane. The Bill of Sale for the transfer of the airplane into the Trust shows that the Trust paid \$20.00 and "other good and valuable consideration." The debtors confirmed that the consideration paid was \$20.00.

The Supreme Court of the United States ruled in a 5-4 opinion that "reasonably equivalent value" under 11 U.S.C. § 548(a)(2)(A) for a mortgage foreclosure sale of real estate is any price received at a state foreclosure sale when the sale is conducted in compliance with state foreclosure laws. BFP v. Resolution Trust Corp., \_\_\_ U.S. \_\_\_, 114 S. Ct. 1757, 128 L. Ed. 2d 556, reh'g denied, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2771, 129 L. Ed. 2d 884 (1994). Since this transfer does not involve a real estate foreclosure sale or a forced sale, this formula is not

applicable to this case. However, the majority in BFP did emphasize that the underlying principle inquiry to determine reasonably equivalent value is: "[W]hether the debtor has received value that is substantially comparable to the worth of the transferred property." Id. at 1767. The dissent concurred with the majority to the extent that reasonably equivalent value is determined by comparing the price received to the fair market value of the property. Id. at 1772. Reasonably equivalent value is an issue of fact for the bankruptcy court. Drewers v. FM Da-Sota Elevator Co. (In re Da-Sota Elevator Co.), 939 F.2d 654, 656-57 (8th Cir. 1991); First Federal Savings & Loan Assoc. v. Hulm (In re Hulm), 738 F.2d 323 (1984).

Reasonably equivalent value was not exchanged in this transfer. The \$20.00 listed in the Bill of Sale and mentioned in the debtors' deposition as the consideration paid by the Trust for the airplane is grossly lower than the \$30,000 value listed in the bankruptcy schedules. Mr. Nelson stated that he believed that the \$30,000.00 value assigned in the bankruptcy schedules was accurate at the time the debtors filed bankruptcy. When asked if she thought the airplane was worth more than \$20.00, Mrs. Nelson responded, "I hope so." **Ex. B**, at 12 (lns. 22-23). When the trustee asked Mr. Nelson whether he transferred a \$30,000.00 airplane for \$20.00, Mr. Nelson responded: "Yes, it was part of the estate planning." **Ex. A**, at 19 (lns. 10-12). It is clear from the deposition testimony that the debtors knew \$20.00 was not a fair market price for the airplane and that the debtors believed that the airplane's worth was closer to \$30,000.

The debtors do not dispute that the consideration was not adequate. Instead, the debtors argue that because the transfer was to a Trust with the debtors as co-trustees, the debtors are not required to exchange reasonably equivalent value. The debtors' argument is without merit. The plain language of the Bankruptcy Code at Section 548(a)(2)(A) states that all transfers of the debtors' property within one year of the bankruptcy petition must be for reasonably equivalent value. Transfers to trusts for "estate planning" are not excluded from the language of Section 548(a)(2)(A), and are, therefore, subject to the "reasonably equivalent value" requirement. The debtors have failed to recognize that a transfer to a trust is not, standing alone, a fraudulent transfer, but a transfer to a trust when the elements of fraud are present as set forth under Section 548(a)(2) is avoidable under the Bankruptcy Code. This result is not a "punishment" for the act of filing bankruptcy because a transfer to a trust for less than reasonably equivalent value would be considered a fraudulent conveyance under Nebraska law as

well, even without a bankruptcy filing. See NEB. REV. STAT. § 36-705 (a) & (b) (Reissue 1993).

(B) Insolvency

The debtors' schedules show that their secured creditor claims totaled \$1,106,649.00, their unsecured priority claims totaled \$80,000.00, and their unsecured claims totaled \$31,490.14. The debtors, although they transferred all assets to trusts before filing bankruptcy, listed \$1,537,125 in real estate and \$75,112 in personal property as assets of the debtors. The personal property total includes the \$30,000.00 value of the Trust and the \$45,000 value of another trust.

Mr. Nelson stated that the trusts contained all of the debtors' real estate and personal property and that they transferred their assets to the trusts to preserve the remaining equity in the property of the debtors. The four trusts were established by transferring a ranch to one trust, all of the farm machinery to another trust, a second farm to a third trust, and the airplane to the Trust. Thus, the bankruptcy schedules for assets are not accurate because the real estate parcels are listed as assets of the debtors, when in fact the real estate parcels were transferred into trusts prepetition. In addition, the debtors listed the value of the personal property trusts as assets of the estate, but if the trusts are actually valid legal entities, unless the debtors have some beneficial interest in the trusts, the value of those assets may not be used to determine the debtors' solvency.

"Insolvent" is defined by the Bankruptcy Code at Section 101(32), which states:

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of--

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; ...

11 U.S.C. 101(32).

Mrs. Nelson admitted that the purpose of the Trust, which she helped draft, was estate planning because the debtors' assets outweighed their liabilities. When she tried to guess the value of the assets before the transfer, Mrs. Nelson stated at a fire

sale the assets would be less than their total liabilities, but at what she characterized as a sale where the assets are sold "fairly," the debtors would have been solvent before the transfers to the trusts. Mrs. Nelson stated it was her belief that if the debtors placed the all of their assets into the trusts, then, if the assets were sold, any proceeds would go to the debtors, instead of having the proceeds go to the debtors' unsecured or undersecured creditors who would have otherwise attached liens to the assets or to the proceeds therefrom.

There is overwhelming evidence that the debtors intended to place all of their assets into trusts and out of the reach of their creditors. However, since the trust documents were not submitted and since the debtors did not accurately disclose information in their bankruptcy schedules, a material issue of fact remains concerning what, if any, beneficial interest the debtors held in the trusts. There is evidence that the trusts generated some income for the debtors. Therefore, the debtors may have a beneficial interest in the trusts which may be of value to the estate. The court cannot determine as a matter of law that the debtors were insolvent without factoring the debtors' potential beneficial interests into the value of their assets.

Under Section 548(a)(2), the trustee has shown that the debtors did not transfer the airplane to the Trust in exchange for reasonably equivalent value, but the trustee has not shown that the debtors were either rendered insolvent by the transfer or were insolvent at the time of the transfer because the trusts may have a beneficial value to the debtors. Since the issue of insolvency is a material fact, summary judgment is not granted under Section 548(a)(2).

#### 4. Statute of Limitations

The trustee filed this complaint on November 17, 1994, more than two years after the petition for relief was filed, but within two years of the trustee's appointment. The Statute of Limitations to bring an avoidance action in effect in 1992, when this bankruptcy petition was filed, provided:

An action or proceeding under Section ... 548  
... of this title may not be commenced after the  
earlier of--

(1) two years after the appointment  
of a trustee under Section ... 1104 of  
this title.

11 U.S.C. § 546(a)(1). (Norton Bankr. Code Pamphlet 1992-1993 ed.).

Since this adversary proceeding was filed within two years of the trustee's appointment, the trustee's action against the debtors as co-trustees of the trust is timely within the statute of limitations. See McCuskey v Central Trailer Servs., Ltd., 37 F.3d 1329 (8th Cir. 1994).

The debtors argue that if the court finds that the transfer to the Trust was an avoidable fraudulent transfer, the trustee may not recover the airplane because the trustee failed to name the debtors, in their individual capacities, as parties to this lawsuit and because the trustee has failed to bring an action against the debtors to collect the airplane within the two-year statute of limitation. The debtors are mistaken in their assumption that by avoiding the transfer to the Trust, the debtors are entitled to the property instead of the bankruptcy estate. See, e.g., Fink v. Graven Auction Co., Inc. (In re Graven), 64 F.3d 453 (8th Cir. 1995) (affirming finding that debtors fraudulently transferred debtors' assets into other entities controlled by debtors and ordering the debtors to return the fraudulently transferred property to the bankruptcy estate). After the transfer is avoided as a fraudulent conveyance, the airplane will become the property of the estate as if the transfer never occurred and the property became part of the estate on the date of the petition.

#### 4. Mechanic's Lien

The debtors' final argument is that if the airplane is property of the estate, the debtors have a mechanic's lien against the airplane which has priority over all other potential claims against the airplane. The debtors have requested that the court recognize this lien as superior to the trustee's interest in the airplane. The alleged mechanic's lien is for \$16,471.58 and was filed by the debtors with the Secretary of State for the State of Nebraska in June of 1992. The debtors did not file their mechanic's lien with the FAA in Oklahoma City pursuant to 49 U.S.C. § 1403, which is required for the lien to be valid against third parties. In addition, the mechanic's lien is entirely based on expenditures made by the debtors for storage and maintenance between 1980 and 1990, when the debtors still owned the airplane.

The debtors do not have any interest in the mechanic's lien against the airplane, and therefore, the debtors possess no interest in the airplane which they can assert against the bankruptcy estate. A lien is an "interest in property to secure

payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). The bankruptcy estate comprises "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Thus, any lien that the debtors held against the airplane passed to the bankruptcy estate on the date of the petition and became property of the bankruptcy estate. The court will leave for the trustee, who holds any and all rights to the mechanic's lien, to determine whether any action needs to be taken to avoid the claimed lien.

Separate judgment to be filed.

DATED: February 20, 1996

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

BADAMI, JOSEPH

8-402-474-5777

Copies mailed by the Court to:

Lawrence Crosby, 25 Empire Drive, St. Paul, MN 55103-1800  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT  
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JOSEPH & D. MARGARET NELSON, )  
Co-Trustees for Yellow Canary )  
Trust, )  
)  
Defendant(s) )

JUDGMENT

The transfer of the subject airplane by the debtors to the trusts was a fraudulent transfer under 11 U.S.C. § 548(a)(1). Plaintiff's motion for summary judgment is granted. Judgment avoiding such transfer is entered in favor of plaintiff and against defendants. See memorandum entered this date.

DATED: February 20, 1996

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

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