

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

**IN RE: LIVING HOPE SOUTHEAST, LLC,
Debtor**

**CASE NO: 4:12-bk-11082
CHAPTER 11**

**ADDENDUM TO:
ORDER GRANTING MOTIONS TO APPOINT TRUSTEE**

On April 19, 2013, the Court entered its *Order Granting Motions to Appoint Trustee* finding cause to appoint a Chapter 11 Trustee in this case (Dkt. #220). Since that order was entered, Michael E. Collins has been appointed trustee (Dkt. #227). This Addendum is intended to be read in conjunction with the Order Granting Motions to Appoint Trustee. The Court issues this Addendum because much of the evidence and testimony put into the record under oath is *at best* unreliable, and is *at worst* a record of misrepresentations.

Facts and testimony regarding the various individuals and entities, the Debtor, the Debtor's Chapter 11 filing, the above-referenced lawsuits, and the series of events that led to the Motions to Appoint a Trustee are described in this Addendum. The Court finds it necessary to burden each witness with a judicial record of his testimony given under oath, the exhibits put in evidence through that testimony, and the pleadings filed. The bedrock of the judicial system is truth. This Addendum records that which was *asserted* to be true. The court accepted the evidence into the record; it did not rely on its veracity in making its

decision to appoint a trustee.¹ Accordingly, this description does not constitute the Court's findings of facts as the Court could not credit all the testimony or even the legitimacy of some documents introduced into evidence. However, a description of all parties' allegations and assertions (*i.e.*, everyone's story) is necessary to provide overall context and the basis for the Court's disbelief in some versions of events. Finally, based on the evidence received at trial and described herein, the Court has already made most of its pertinent findings in the April 19, 2013 *Order Granting Motions to Appoint Trustee*: specifically, that Kimbro controlled and manipulated the Debtor for his own benefit. Any additional findings or conclusions in this Addendum will be clearly stated as such.

INTRODUCTION

The purpose of this introduction is to provide a broad historical context for the many detailed facts introduced into evidence during the four days of trial on the motions to appoint a trustee.

Several entities have used the name Living Hope, in some form, and provided psychiatric services in Arkansas and elsewhere for many years. All were owned directly or indirectly by members of the Stephens family, beginning with Wanda Stephens who owned and operated Living Hope Institute ("**LHI**"). Living Hope Southwest Medical Svcs, LLC ("**Southwest**" or "**Living Hope Southwest**") was owned by Wanda's son Kimbro and his

¹ All documents introduced at trial were ultimately accepted by the Court with the exception of Southwest Trustee Exhibit 35 which was proffered at the end of the fourth day of trial; the Court does not accept that exhibit into this record.

former wife Alice. Because many individuals named Stephens are involved in this case, Kimbro, Kimbro's former wife Alice, Kimbro's brother Greg, and Kimbro and Greg's parents, Ken and Wanda, will be referred to by their first names throughout this addendum.²

Southwest leased a building from Pinewood Enterprises, L.C. ("**Pinewood**"), and when it allegedly failed to make required lease payments to Pinewood, Pinewood sued Southwest in Miller County Circuit Court in 2006 (the "**Miller County Case**"). Southwest filed bankruptcy under Chapter 11 on July 18, 2006, halting the Miller County Case. Shortly before Southwest filed its Chapter 11 case, Kimbro Stephens created a new entity called Living Hope Southeast, LLC (the "**Debtor**", "**Living Hope Southeast**", "**Southeast**", or "**LHSE**") on May 5, 2006. Sometime thereafter and while Southwest's bankruptcy case was pending, Southwest's business was transferred to Southeast (as found by the Honorable James G. Mixon in what is later described in this Addendum as the Southwest AP). On August 15, 2008, Southwest's Chapter 11 converted to a case under Chapter 7, and Renee Williams was appointed trustee (the "**Southwest Trustee**").

As a trustee with a fiduciary duty to the creditors of Southwest to gather and monetize all assets of the Chapter 7 estate, the Southwest Trustee hired Thomas Streetman to represent her as Trustee and file lawsuits on her behalf to recover assets for the estate and distribution to its creditors. The Southwest Trustee sued Southeast, who was represented by James E.

² The Court notes there are also two trustees named Williams – Robert Williams, trustee of the A.K. Trust, and Renee Williams, the Southwest Trustee, and two attorneys named Henry – Craig Henry and Judy Henry – which at times necessitates the use of first names or other titles.

Smith, seeking to capture the monetary value of Southwest's transfer to Southeast. *Williams v. Living Hope Southeast (In re Living Hope Southwest)*, No. 4:09-ap-7023 (the "**Southwest AP**"). As described in more detail later in this Addendum, the Southwest Trustee and Southeast settled the Southwest AP, and Judge Mixon approved that settlement over the objection of Pinewood. Pinewood appealed to the District Court, and the District Court reversed the order approving settlement. On remand, Judge Mixon held additional hearings and approved the settlement again (over Pinewood's objection) but carved out certain alter ego/veil piercing claims. Pinewood again appealed the settlement to the District Court (along with other related decisions), and it was ultimately reversed in October 2012.

While the Southwest AP settlement was on appeal, the defendant, Living Hope Southeast, filed this Chapter 11 bankruptcy in February 2012. Following the District Court's second reversal of the settlement, the Southwest Trustee moved for and obtained relief from the automatic stay to allow the Southwest Trustee to file an amended complaint in the Southwest AP. This Court granted that relief, and the Southwest Trustee's amended complaint proceeded to trial on January 15, 2013. Pinewood also sought relief from the automatic stay in Debtor's case to attempt to intervene in the Southwest AP, in part, to oppose the imposition of a constructive trust; Pinewood's motion for relief was granted. Kimbro also attempted to intervene in the Southwest AP without first moving for relief from stay in this Court. Judge Mixon denied both Kimbro and Pinewood's motions to intervene, and the Southwest AP was tried. The Debtor defended the trial, and opposed the imposition of a constructive trust in the Southwest Trustee's favor. At the close of that trial, Judge

Mixon announced that the Southwest Trustee was entitled to a judgment of \$1.19 million. Judge Mixon also announced that he was taking under advisement the issue of whether the Southwest Trustee would be awarded a constructive trust on LHSE's assets. (Judge Mixon ultimately denied the Southwest Trustee's request for a constructive trust.)

The day after the Southwest AP trial, January 16, 2013, *before* Judge Mixon's written judgment could be entered on the docket, Kimbro, representing that he was the attorney for the Debtor, and his brother, Greg, representing cross-claimants in the Miller County Case, LHI, Ameriwest Health Services, Inc. ("**Ameriwest**"), and the Estate of Wanda Stephens,³ mailed a "Motion to Approve Settlement Agreement" to the Circuit Clerk in Miller County for filing along with a letter to Judge Kirk Johnson informing him that the cross-claimants and cross-defendants (*i.e.*, Kimbro, Alice, Mike Grundy, and various related entities of the Stephenses) in Miller County had settled the cross-claims and agreed to the entry of a consent judgment granting LHI's attorneys a \$50,000 judgment, and granting Ameriwest and the Estate of Wanda Stephens a \$1.2 million judgment plus pre-judgment interest from January 1, 2011, at 10%, and post-judgment interest at the same rate, and court costs. This consent judgment also granted Ameriwest and the Estate of Wanda Stephens a constructive trust and equitable lien on the assets of the Debtor and the A. K. Tennessee Irrevocable Trust (the "**A.K. Trust**") (99% owner of the Debtor). As described in more detail herein, this Court finds that the consent judgment was an attempt to place all of the Debtor's assets in a

³ Up until the Motions to Appoint Trustee were filed and heard, these entities had not filed claims or made any appearances at hearings held in this case; further, no mention had been made of them as creditors by any parties appearing before the Court.

constructive trust for the benefit of family owned entities before the Bankruptcy Court could possibly impose a constructive trust on the Debtor's assets in favor of the Southwest Trustee for the benefit of all of Southwest's creditors, including Pinewood.

On January 25, 2013, the Southwest Trustee filed her motion to appoint a trustee in this Chapter 11 case, and on February 12, 2013, the U.S. Trustee filed its motion to appoint a trustee. The motions to appoint a trustee were filed following Kimbro and Greg's attempt to obtain a constructive trust on the Debtor's assets by submitting a consent judgment to the judge in the Miller County Case on January 16, 2013, along with other actions taken by Kimbro, as described in more detail later in this Addendum, which include: the alleged creation of a "board of trustees" to control the Debtor; this board's firing of Debtor's counsel, Smith, in the midst of the Southwest AP trial; and Kimbro's filing of a lawsuit in District Court on the Debtor's behalf with no court approval of Kimbro as counsel or relief from the stay to file the lawsuit.

If a trustee were appointed in this case, Kimbro would lose control of the Debtor. Furthermore, any distribution to Kimbro as a beneficiary and to Pinewood as a creditor of Southwest (or as a creditor of Southeast if it is able to establish a claim against Southeast based on a reverse veil piercing theory it is pursuing in the Miller County Case), would be further reduced by trustee's fees which would have priority over all other fees and claims. Now Kimbro and Pinewood shared a common problem: the appointment of a trustee.

On January 28, 2013, Pinewood sought leave of this Court to sue Debtor's counsel and his law firm; simultaneously, Pinewood sought leave in Judge Mixon's court to sue the

Southwest Trustee and her counsel. The proposed complaint was to be filed in the Southwest bankruptcy case (although a jury trial was requested to be held in the District Court for the Western District of Arkansas), asserting counts for abuse of process, conspiracy, breach of fiduciary duty and waste, and malicious prosecution; the proposed complaint also sought punitive damages. *See Motion for Leave to File Complaint* (Dkt. #143).⁴

Additionally, as these events were occurring in mid-to-late January, Kimbro was attempting to remove Smith as Debtor's counsel by conjuring up malicious false accusations against Smith including: (1) that he would not defend the Southwest AP; (2) that he was cooperating with the Southwest Trustee's counsel Streetman in an effort to lose the Southwest AP trial; and (3) that he was not acting in the best interest of the Debtor by not supporting Kimbro's efforts to personally intervene in the Southwest AP. Kimbro attempted to lay the foundation to remove Smith, postpone the Southwest AP trial, and hire new counsel who, given the imminent date set for hearing on the motions to appoint trustee, could *not* possibly independently evaluate those then un-filed claims asserted against the Debtor by the entities controlled by Kimbro's brother Greg: LHI, Ameriwest, and the Estate of Wanda Stephens. Because Smith could not be dissuaded from fulfilling his duties as Debtor's counsel, Kimbro rejected Smith's legal advice and once again gained control of the Debtor by firing Smith and engaging Robertson. Whether such actions were taken by Kimbro, or on behalf of Kimbro

⁴ The Court notes that the attached complaint is not only stated against persons who were doing that which they were legally obligated to do, but it contains sadly malicious and inaccurate statements against Smith, Streetman, and the Southwest Trustee, and accuses these attorneys with fine reputations of personally committing conspiracy among other wrongdoings.

via the Board, by firing Smith, Kimbro ensured that the Debtor would make decisions that resulted in the maximum benefit to Kimbro and his family. Because Kimbro's decisions were motivated by his personal interest, he disregarded the significant expense and risk to the Debtor of firing its experienced, knowledgeable counsel to be replaced by a competent counsel, but one who had no experience or knowledge of this seven-year-old, excessively litigious case. The Court believes that Kimbro failed to share with his newly hired counsel the necessary facts to analyze and evaluate the claims asserted by Greg on behalf of LHI, Ameriwest, and the Estate of Wanda Stephens. The evidence is that no one analyzed these claims.

Although Kimbro (or his entities) and Pinewood could not reach a settlement for the seven years of their ongoing litigation, when the Southwest Trustee and the U.S. Trustee filed motions to appoint a trustee in this case and those motions were set for hearing, Pinewood, Kimbro and Greg (on behalf of LHI, Ameriwest and the Estate of Wanda Stephens), finally put aside their pronounced differences and worked on a settlement. Because the Southwest Trustee had a duty to the estate's creditors, and because the Trustee was not offered a reasonable amount given the strength of her claim (Judge Mixon had already entered a judgment for \$1.19 million), the Southwest Trustee could not agree to the proposed settlements, as described later in this Addendum. Even though the parties testified they were in the process of negotiating a settlement which was to ultimately be the basis of a Chapter 11 plan, the terms of the proposed settlement did not reflect the merit of the parties' respective rights to collect from the Debtor. Basically, under the proposed

settlement, the Southwest Trustee's claim was cut by more than half while Stephens family members retained control of the Debtor, and Pinewood's unliquidated claim, although reduced to a lesser extent, was to be paid without further risk and expense of complex litigation to establish its claim.

This Court finds that the Southwest Trustee, her attorney, and Smith, as attorney for the Debtor, acted pursuant to their obligations as delineated in the Bankruptcy Code. That the other parties, fearing loss of control and/or payment, put their prior differences aside to create an almost operatic performance under oath during the hearings on the motions to appoint a trustee to benefit themselves by attacking Smith and Streetman who were proceeding under the dictates of the Bankruptcy Code.

PROCEDURAL BACKGROUND

Two motions to appoint a Chapter 11 Trustee, one filed by Renee Williams, the Chapter 7 Trustee for Living Hope Southwest (4:06-bk-71484) (Dkt. #140), and one filed by the United States Trustee (Dkt. #162) (the "**Motions to Appoint Trustee**") were heard on February 14, 2013, February 18, 2013, March 8, 2013, and March 11, 2013. Thomas Streetman and Robert Gibson appeared on behalf of the Southwest Trustee, and Patti J. Stanley appeared on behalf of the U.S. Trustee. Smith was in attendance as counsel-of-record for the Debtor-in-possession. Appearing in opposition to the Motions to Appoint Trustee were: the Debtor who was represented by Jeannette Robertson (although she has not yet been approved as counsel for the debtor-in-possession); creditor Pinewood/Dr. James

Naples⁵ represented by Judy Henry, Kim Tucker, and Charles Coleman; creditor Estate of Wanda Stephens, represented by Greg Stephens, executor, *pro se*; creditors LHI and Ameriwest represented by Steve Gershner; and the A.K. Trust represented by Kimbro.⁶ The Court allowed only two parties in opposition to the Motions to Appoint Trustee to make opening statements and conduct cross-examination in the interest of time and order; the parties were allowed to choose between themselves who would present openings and conduct cross-examination as to each witness.⁷ This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) in which the Court has jurisdiction.

⁵ On the fourth day of trial, March 11, 2013, Naples informed the Court that he sold Pinewood's stock to a third party but retained the Miller County lawsuit for himself individually. He testified that he learned of the stock sale that morning. A Motion to Substitute Naples for Pinewood was later filed (Dkt. #207), and sale documents attached to that motion indicate that the sale was effective December 31, 2012. The Motion to Substitute and objections to it are currently pending and set for hearing for July 9, 2013. The Court will continue to refer to Pinewood (not Naples) throughout this Addendum.

⁶ Kimbro served as counsel for the A.K. Trust and is also a beneficiary of the A.K. Trust. During the last day of hearing in this matter, it was brought to everyone's attention that Kimbro's license to practice law was suspended on November 17, 2012, for failure to complete continuing legal education requirements.

⁷ Other matters set for hearing on these dates included: *Motion for Relief from Stay* filed by Pinewood (Dkt. #106); *Motion for Entry of an Order Establishing a Bar Date to File Proof of Claim* filed by Smith on behalf of Southeast (Dkt. #138); *Motion Requesting Substitution of Attorney* filed by Jeannette A. Robertson on behalf of Southeast (Dkt. #145); *Application to Employ Attorney* filed by Robertson on behalf of Southeast (Dkt. #148); *Objection to Debtor's Application to Employ Attorney* filed by U.S. Trustee (Dkt. #153); *Amended Application to Employ Attorney* filed by Robertson on behalf of Southeast (Dkt. #157); and *Motion to Withdraw as Counsel for Debtor* filed by Smith on behalf of Southeast (Dkt. #158). These motions have either been ruled on or set for hearing.

FACTUAL BACKGROUND AND EVIDENCE

The Individuals & Non-Debtor Entities

Wanda and Ken had three sons (as far as the Court is aware): Greg, Kimbro and Philip. Steve Ward is Wanda's brother. Kimbro and Alice were married but are now divorced. Alice's father is Robert Williams who serves as Trustee of the A.K. Trust, 99% owner of the Debtor.

Wanda founded LHI, a provider of psychiatric services; it ceased operations in 2007 after losing a major contract with St. Vincent in Little Rock. Wanda Stephens filed a Chapter 7 bankruptcy in the Eastern District of Arkansas on October 8, 2008 (4:08-bk-16172). Greg became president of LHI when his mother died in 2010. Greg testified that as the executor of his mother's estate, he filed a small probate estate in Faulkner County (less than \$100,000) which was immediately closed as small estates routinely are; he claimed he had a year to revive her estate but did not recall when he opened the estate. According to Greg, LHI's only asset is a cause of action against Southeast. Ameriwest is the shareholder of LHI (and therefore successor-in-interest to LHI), and Greg serves as President of Ameriwest as well. Ameriwest is owned by the Ken Stephens Insurance Trust ("**KSIT**"). Ken serves as Trustee for the KSIT, and the beneficiary is a grandchildren's trust for the benefit of Wanda's eight grandchildren (who include Kimbro's two daughters, Greg's five children, and Philip's child).

Kimbro and Alice owned Living Hope Southwest. Kimbro was president, CEO, and Chairman of the Board of Directors as well as Chairman of the Board of Trustees of Living

Hope Southwest (which also used the name Living Hope Texarkana). *See* Southwest Trustee Exhibit 18. Southwest filed a Chapter 11 bankruptcy in 2006 which later converted to Chapter 7 in 2008, and Renee Williams was appointed Trustee. Kimbro filed a Chapter 7 bankruptcy case in the Western District of Arkansas on November 30, 2010 (6:10-bk-76216).

The Debtor

The Debtor is an Arkansas Limited Liability Company that provides outpatient psychiatric services. The A.K. Trust owns a 99% membership interest and Kimbro owns a 1% membership interest in the Debtor through the Kimbro Stephens Insurance Trust. Robert Williams is the Trustee of the A.K. Trust, and holds voting control of 99% of the Debtor.⁸ The beneficiaries of the A.K. Trust are Kimbro and his former wife Alice.⁹

Mike Grundy is the Debtor's CEO.¹⁰ The Debtor was formed in 2006. Grundy had

⁸ As noted in the Court's *Order Approving Application to Employ Attorney* entered October 4, 2012 (Dkt. #60), another trust, the A.K. Tennessee Irrevocable Residuary Trust, may own some membership interest, but both trusts will collectively be referred to as the "**A.K. Trust**" since it is not clear what the exact ownership interests are and the trustee and the beneficiaries are the same (it is the Court's understanding there is either one trust benefitting both Alice and Kimbro or two trusts owning equal amounts of the Debtor with each trust benefitting either Alice or Kimbro). In any case, Robert Williams is the Trustee of both the A.K. Trusts, and therefore holds voting control of 99% of the Debtor.

⁹ Greg's testimony illustrated his view of the Debtor's ownership: "I think [Kimbro and Alice are] the ones that are in control and they take the money from the company and profit from it, so I consider them personally the owners, yes." Transcript at 269: 22-24.

¹⁰ Grundy testified that Southeast has a management/leadership team chaired by him, and the members of that team report directly to him as does the medical director, Dr. Stollis. Grundy further testified that the management team acts autonomously since it was created and is not influenced by the Stephens family or Robert Williams as Trustee of the A.K. Trust. Kimbro also testified that he did not make management decisions on behalf of Southeast, but did provide Grundy with advice as to legal matters such as whether the company should defend the Southwest AP. Although Kimbro testified he was not involved in the day-to-day management of

worked with the Stephenses since 1996, previously working for both LHI and Living Hope Southwest. He had been the director of outpatient services for Living Hope Southwest since 2004 according to Kimbro. There was no gap between Grundy's employment with Southwest and Southeast according to Grundy; one day, he and about 20 other employees, worked for Southwest, and the next day (October 1, 2006) they went to work for Southeast. Grundy testified that both Southwest and Southeast as well as an entity called Living Hope Healing Waters, used the same symbols – three overlapping circles that formed an Ichthys, a Christian symbol, in the center, and that LHI had registered the trademark "Living Hope". Judge Mixon ultimately found in the Southwest AP (which is described in more detail below) that Southeast took over Southwest's business opportunities "beginning with the formation of Southwest in 2006 for which the Court has allowed an unsecured claim [of \$1.19 million]." *Supplemental Order*, No. 4:09-ap-7023 (Dkt. #130) (Bankr. W.D. Ark. Feb. 6, 2013), and *Order Approving Unsecured Claim*, No. 4:09-ap-7023 (Dkt. #104) (Bankr. W.D. Ark. Jan. 18, 2013).

On October 1, 2006, Southeast also executed a Management Services Agreement between itself and LHI whereby Southeast agreed to manage LHI's outpatient clinic in Little Rock. *See* Southwest Trustee's Exhibit 19. This agreement was signed by Wanda Stephens on behalf of LHI and Grundy on behalf of Southeast. Grundy testified that Southeast used LHI's provider number, and that LHI assigned to Southeast its depository account to facilitate LHSE's management services. Grundy testified that Southeast continued to provide

the Debtor, he testified extensively regarding the Debtor's business.

these services until 2008. In the meantime, Southeast obtained its own provider number in May 2007, and has not used LHI's provider number since 2008. Grundy testified no assets were transferred from LHI to Southeast in October 2006, and specifically noted that Bismarck was a separate book of business that came to Southeast after it was organized (the Court understood this statement to mean that Bismarck was the only new business obtained by Southeast).

The Debtor's Operations

As CEO, Grundy supervises the Debtor's 95 employees and manages its daily operations. Specifically, according to Grundy, Southeast provides outpatient mental health and psychiatric professional and para-professional services for various types of patients including those who are classified as seriously emotionally disturbed or seriously mentally ill under Medicaid standards. Grundy testified that Southeast is a contractor for Medicaid and for the Division of Behavioral Health Services to serve those individuals. Eighty-five percent of the Debtor's 1700 patients across the state are classified as seriously emotionally disturbed or seriously mentally ill. Grundy testified that Southeast operates clinics in Little Rock, Bismarck, Monticello, and Hot Springs among other locations. He testified the Little Rock operation is "robust" and growing. It also has contracts with several school districts to provide children with psychiatric services including: Little Rock, Drew County, Monticello, Bismarck, Kirby, Ouachita and Hot Springs. Grundy testified that a surveyor with The Joint Commission, an accreditation organization, told him that she had not seen an organization as consistently excellent in its services as Southeast in a long time. Grundy

testified that the review period included the almost 12 months Southeast had been in bankruptcy. Kimbro also testified that the Debtor had an excellent reputation in its line of business, but had lost one school-based client since filing bankruptcy and believed the company was on the verge of losing all its employees unless it got out of bankruptcy by the Fall.

The Debtor's Chapter 11 Filing

The Debtor filed its Chapter 11 bankruptcy petition on February 27, 2012. The Debtor's operating report for the month ending December 31, 2012, shows that the Debtor has been profitable most months since its Chapter 11 filing with positive net income for all months except two. The members' equity has steadily increased from \$880,242 to \$1,086,725. Southwest Trustee Exhibit 1. Grundy testified that he had prepared all operating reports for the Debtor. He testified the physical assets were not worth much. Grundy stated that the company had approximately \$500,000 in accounts receivable that were currently collectible, and that the Debtor should be able to collect another \$250,000 in the next month and potentially another \$100,000-150,000 in the next four months. He opined that the company could net \$250,000 a year and that it could move into the \$400,000-500,000 net income level in the future. Kimbro testified that the company's profits had fluctuated since 2008 due to litigation expenses, and that currently, the attrition of employees was causing the Debtor to not be as profitable as it once was. According to its schedules, in the year prior to filing bankruptcy, the Debtor made distributions totaling \$130,500 to the A.K. Trust.

Claims Filed in the Debtor's Chapter 11 Case

As of the last hearing date on the Motions to Appoint Trustee, five creditors had filed the following claims in this case:¹¹

- Dell Financial Services filed an unsecured claim for \$26,693.90 on August 8, 2012, based on an equipment lease;
- Renee Williams, the Southwest Trustee, initially filed a secured claim for \$1,150,000, which was later amended to reflect an unsecured claim for \$1,190,000 on February 13, 2013, based on a judgment entered by the Honorable James G. Mixon in a related Southwest AP (described below);
- The Internal Revenue Service filed a priority tax claim for \$1,392.15 on January 28, 2013;
- Greg as the representative for the Estate of Wanda Stephens filed an unsecured claim for \$1,200,000 on March 7, 2013, based on alleged tortious interference by Southeast with an employment contract between LHI and Wanda Stephens entered on April 22, 2010 (two pages of an employment contract were attached to this claim; Greg testified there was an additional page that is missing); and
- LHI filed an unsecured claim for \$1,250,000 on March 7, 2013, based on this

¹¹ Although several of these claims were introduced into evidence, the Court takes judicial notice of the claims register in this case and all documents filed in the current case. *See* Fed. R. Evid. 201; *In re Henderson*, 197 B.R. 147, 156 (Bankr. N.D. Ala. 1996) (“The court may take judicial notice of its own orders and of records in a case before the court, and of documents filed in another court.”) (citations omitted); *see also In re Penny*, 243 B.R. 720, 723 n.2 (Bankr. W.D. Ark. 2000).

statement: “LHSE acting through Kimbro Stephens and Alice Stephens, converted the business operating of LHI to that of LHSE.”

Greg elaborated in his testimony on the bases for the claims of his mother’s estate and LHI. Greg maintains that Southeast started managing LHI when Kimbro agreed to take over its management. He testified that LHI was “drained dry” by Southwest in that Southeast used LHI’s bank account from 2006 to 2007, used its provider number, took all LHI’s office equipment and furniture, all of LHI’s patients, all of LHI’s employment contracts, and LHI’s good will. Transcript at 267: 13-14. Greg also explained that although LHI granted Pinewood a \$1.2 million consent judgment in the Miller County Case, it should have been limited to \$500,000 based on the amount LHI agreed to guarantee Southwest for rent owed to Pinewood. Greg maintained that he mistakenly agreed to the \$1.3 judgment amount. He claimed that Ameriwest also had a claim (although it has not filed one in this bankruptcy) against Southeast as successor-in-interest to LHI, and also had a claim against Southeast based on an alleged joint venture the two planned to undertake but was thwarted by Southeast taking all the business for itself (referring to psychiatric services).

Greg alleges the claim on behalf of his mother’s estate was based on her employment contract with LHI, under which she was to be paid \$300,000 per year for 10 years beginning in 2001; Greg alleges that once Southeast began managing LHI, her salary was never paid. He explained that she was owed a total of \$1.2 million for the time she was not paid until she died, and by the terms of the employment contract, a lien for her unpaid salary was created on the assets of LHI. Greg’s other theory is that Southeast owes her estate this amount

because it was the recipient of a fraudulent transfer. Greg's testimony was wrought with inconsistencies, and his legal explanations were not grounded in established case or statutory law; accordingly, it is described only to provide context for the case as a whole and Greg's actions in particular.

Pinewood has been an active party-in-interest in this case as a creditor although it has not yet filed a claim. Its status as a creditor is premised on a triangular corporate-veil piercing action it has maintained in Miller County against Southeast (among other parties) which has not yet been tried and is described in more detail below.

**Litigation Against Debtor:
the Miller County Case & the Southwest AP¹²**

From this case's inception just over a year ago, the stated purpose of this Debtor's Chapter 11 filing has been to allow it to operate while defending litigation in several courts, and to bring that litigation to a close and liquidate claims against it in order to determine whether it could propose a feasible Chapter 11 plan. Specifically, the Debtor has been defending at least two lawsuits: the Miller County Case, and the Southwest AP. Both lawsuits essentially seek to reach the assets of Southeast for debts incurred by Southwest.

The Miller County Case was initiated in 2006 after Southwest allegedly breached a lease agreement with Pinewood, and Pinewood sued Southwest and certain related individuals and entities. Southeast was later added as a defendant. After the Miller County

¹² The facts here are abbreviated as much as possible while maintaining an overall "big picture" of what has occurred in the seven years of unending litigation since Living Hope Southwest allegedly breached its lease with Pinewood.

Case was filed, Southwest filed a Chapter 11 bankruptcy that stayed the Miller County Case as to Southwest. Southwest later converted to Chapter 7 in 2008, and the Southwest Trustee was appointed.

The Southwest Trustee filed numerous adversary proceedings against multiple parties, including the Southwest AP against Southeast. The Southwest AP generally sought to avoid the transfer of Southwest's operations to Southeast, a newly created entity. The Southwest Trustee, Southeast, and the Stephensens settled the Southwest AP along with several other APs, and that settlement was approved over the objection of Pinewood.¹³ The Settlement Agreement, signed May 27, 2009, documented the settlement reached between the Southwest Trustee and the defendants in five adversary proceedings brought by the Trustee, including lawsuits against Kimbro and Alice (4:09-ap-7019 and 4:09-ap-7025) and the Southwest AP. The agreement provided for a consent judgment to be entered against Alice and Kimbro in the amount of \$1,150,000, on conditions, with at least \$750,000 to be paid by December 31, 2011. To secure payment of the consent judgment, Southeast agreed to allow the Southwest Trustee an inchoate judgment lien on all the memberships interests of Southeast (which are indirectly owned by Alice and Kimbro) and on all income derived from the operations of Southeast. The Settlement Agreement further provided that upon Alice and Kimbro's default, the inchoate judgment lien would "immediately and automatically ripen into a fully vested and perfected lien on all Southeast membership rights, and on all of its assets and

¹³ See *Order Approving Settlement, In re Living Hope Southwest*, No. 4:06-bk-71484 (November 20, 2009) (Dkt. #479).

income to the extent such is required to satisfy the balance due on the Consent Judgment.”

Pinewood appealed, and the approval of the settlement was reversed.¹⁴ On remand, Judge Mixon held additional hearings and approved the settlement again (over Pinewood’s objection) but carved out certain alter ego/veil piercing claims.¹⁵ The settlement was again appealed to the District Court (along with other related decisions) and ultimately reversed in October 2012.¹⁶ By that time, the Southwest Trustee had collected \$249,500, with \$500 remaining in escrow.

While the Southwest AP Settlement proceeded through the appeals process, the litigation in Miller County continued as to Southeast, Kimbro, Alice, and various related

¹⁴ On appeal, Judge Jimm Larry Hendren reversed Judge Mixon’s order approving settlement because the settlement encompassed alter ego/veil piercing claims personal to LHSW’s creditors which the Trustee did not have standing to bring. *See Copy of Order, In re Living Hope Southwest*, No. 4:06-bk-71484 (March 18, 2011) (Dkt. #584).

¹⁵ *See Supplemental Order Approving Settlement, In re Living Hope Southwest*, No. 4:06-bk-71484 (May 27, 2011) (Dkt. #609); *Amended Supplemental Order Approving Settlement, In re Living Hope Southwest*, No. 4:06-bk-71484 (August 24, 2011) (Dkt. #632).

¹⁶ Judge Mixon had also entered an injunction in June 2011 prohibiting Pinewood from pursuing Southeast and another individual in the Miller County Case finding that it was pursuing the Living Hope Southwest Trustee’s settled causes of action, and that while Pinewood could pursue its alter ego/veil piercing theories against Southeast and other individuals in Miller County, it could not pursue those causes of actions the Living Hope Southwest Trustee had previously settled. Pinewood appealed both the June 2011 injunction and Judge Mixon’s approval of the settlement to the Western District Court and also filed a motion for a stay pending appeal to stay the injunction entered by Judge Mixon. On January 12, 2012, the Honorable P.K. Holmes, III granted Pinewood’s motion for a stay in order to permit Pinewood to proceed against Southeast and Mike Grundy (LHSE’s manager) in the Miller County Case but not to collect until the District Court decided on the merits whether the Bankruptcy Court’s order granting the injunction should be reversed. In that order, Judge Holmes also consolidated the two appeals pending before him. *In re Living Hope Medical Services, LLC*, 2012 WL 79661 (W.D. Ark. Jan. 12, 2012). On October 5, 2012, Judge Holmes reversed both the approval of the settlement and the injunction against Pinewood, and remanded the matter to Judge Mixon for further proceedings. *In re Living Hope Medical Services, LLC*, 481 B.R. 485 (W.D. Ark. 2012).

trusts and partnerships. During this time, Greg, acting as attorney for LHI, Ameriwest (as successor to LHI), and the Estate of Wanda Stephens, filed a cross-claim and amended cross-claim in the Miller County Case against Southeast for damages totaling \$2,450,000 based mostly on allegations that Kimbro and Alice took over the business of LHI, placing it into Southeast and also doing the same with LHSW's business, thereby cutting out Greg and Kimbro's mother, Wanda, who had started LHI. The Amended Cross-Claim was filed in Miller County on October 17, 2011, and introduced into evidence in this trial as Pinewood Exhibit 5. During this time, Greg also executed a consent judgment in the amount of \$1.3 million in favor of Pinewood on behalf of LHI, based on LHI's guarantee of up to \$500,000 of Southwest's rent owed to Pinewood. Greg explained that he mistakenly agreed to the \$1.3 million amount, but did not pursue his motion to set that consent judgment aside because LHI had nothing with which to pay the judgment in any case.

On May 29, 2012, a few months after filing bankruptcy, Southeast removed the Miller County Case to the District Court for the Western District of Arkansas, and the case was assigned to the Honorable Susan O. Hickey. Pinewood then moved to remand the case to Miller County Circuit Court, and Judge Hickey granted that motion on December 5, 2012.¹⁷ *See Pinewood Enterprises, L.L.C. v. Stephens, et al.*, 2012 WL 6049148 (W.D. Ark. December 5, 2012). The Miller County case was also removed to federal court on a prior occasion due to the Chapter 7 bankruptcy of Kimbro Stephens, and a motion to remand filed

¹⁷ Normally, when a state court case is removed to federal district court because it is related to a pending bankruptcy case, the case is automatically referred to the bankruptcy court pursuant to Local Rule 83.1. That did not happen in this case.

by Pinewood was granted by Judge Richard Taylor. *Id.* at n. 1.¹⁸

Thus, by the end of 2012, the Miller County Case was back in Miller County, and the Southwest AP was once again before Judge Mixon. Yet, Southeast was in a pending bankruptcy before this Court and the automatic stay was in place preventing the cases from proceeding against Southeast. Accordingly, following Judge Holmes's reversal of the Southwest AP settlement, the Southwest Trustee moved for and obtained (over the objection of Pinewood) relief from stay to pursue the Southwest AP pending before Judge Mixon on November 28, 2012.¹⁹ Trial in the Southwest AP was later set for January 15, 2013. Pinewood moved to continue the hearing and filed an emergency motion for relief from stay in this Court. Kimbro moved to intervene in the Southwest AP on January 13, 2013, without first obtaining relief from stay. This Court held a hearing on Pinewood's motion on January 14, 2013, and granted Pinewood relief from stay to file a motion to intervene in the Southwest AP, and it filed its motion the same day. At trial on the 15th of January, Judge Mixon denied Pinewood's request for a continuance and denied both motions to intervene. Trial in the Southwest AP was then held and completed. At the close of trial, Judge Mixon

¹⁸ See also *Order Granting Motion for Abstention and Remand, Stephens v. Pinewood Enterprises, LLC (In re David Kimbro Stephens)*, No. 6:11-ap-7004 (Mar. 21, 2011) (Dkt. #28).

¹⁹ This Court heard the matter on November 27, 2012, and entered an order granting relief from stay on November 28, 2012 (Dkt. #99). The Southwest Trustee moved to amend her complaint against Southeast on November 30, 2012, and Judge Mixon entered an order allowing the amendment on December 3, 2012. The Southwest Trustee filed her Third Amended Complaint against Southeast on December 4, 2012. Judge Mixon scheduled a pre-trial hearing for his next division day in Texarkana, December 18, 2012. At the pre-trial hearing, Judge Mixon set a trial date for January 15, 2013. Southeast answered the Third Amended Complaint on January 3, 2013.

granted judgment in favor of the Southwest Trustee in the amount of \$1.19 million, but took under advisement the issue of whether the Southwest Trustee would be awarded a constructive trust on LHSE's assets. Judge Mixon later denied the Trustee's request for a constructive trust.²⁰ Pinewood appealed Judge Mixon's decision to not continue the trial and to not allow Pinewood to intervene. Following various motions and additional hearings, Kimbro filed an appeal in the Southwest AP on April 1, 2013.²¹

In the meantime, following Judge Hickey's remand of the Miller County Case to Miller County, Pinewood moved for relief from stay in LHSE's bankruptcy on December 19, 2012, so that it could proceed with its lawsuit against Southeast in Miller County. This Court initially set Pinewood's motion for hearing for its next division day, January 24, 2013. However, when Pinewood filed an Amended Motion for Relief From Stay seeking an emergency hearing, both the original motion and the amended motion were set for January 14, 2013. The Court heard and decided Pinewood's amended motion which sought relief to

²⁰ See *Order Approving Unsecured Claim* (Southwest AP, Dkt. #104) entered January 18, 2013, and *Supplemental Order* (Southwest AP, Dkt. #130) entered February 6, 2013.

²¹ Kimbro filed a *Motion for Reconsideration, to Alter or Amend Judgment and For New Trial Combined With Brief in Support of Motion* in the Southwest AP on February 2, 2013; Judge Mixon heard this motion along with the Southwest Trustee's response on March 5, 2013, and denied the motion in open court. See *Order* (Southwest AP, Dkt. #177). The Trustee's response noted that her third amended complaint did not name Kimbro as a defendant, as he had been just dismissed as a defendant in the case by stipulation dated November 28, 2012, which was signed by him. On behalf of the Debtor in this case, Southeast, Mike Grundy filed a *Motion to Extend Time to File Motion for Reconsideration, Motion for New Trial and Notice of Appeal* on February 4, 2013, despite his not being an attorney at all, let alone the court-approved counsel for the Debtor. (Smith was not relieved as counsel for the Debtor in the Southwest AP by Judge Mixon until February 11, 2013.) Grundy's motion for more time was also set for hearing for March 5, 2013, and denied by Judge Mixon in open court and documented in an order entered March 18, 2013. See *Order* (Southwest AP, Dkt. #178).

move to intervene in the Southwest AP (as described above), and continued the original motion. The original motion was then set to be heard on February 14, 2013, when the Motions to Appoint Trustee were filed as well as an application to employ Robertson as attorney for Southeast and Smith's motion to withdraw as counsel. All these matters were scheduled for a hearing for February 14, 2013, and the Court took up the Motions to Appoint Trustee first, and it took four days to try. Accordingly, Pinewood's motion for relief from stay to proceed in Miller County has not yet been heard but is currently set for hearing for July 25, 2013.

Events Leading to Motions to Appoint Trustee

Overview

The Motions to Appoint Trustee were filed in late January and early February following a series of events that occurred or became known around the time of the Southwest AP trial (January 15, 2013). At some point before the Southwest AP trial, Kimbro (a 1% owner of the Debtor and beneficiary of the Debtor's 99% owner, the A.K. Trust), developed a conflict with the Debtor's counsel and the Debtor's strategy in handling the Southwest AP. Kimbro, Greg, and Grundy testified this conflict developed much earlier – in August 2012 – when a meeting was held with Smith, Grundy, and other attorneys to discuss the Debtor's options. Kimbro testified that Smith pushed to convert the Debtor's case to one under Chapter 7, and in response, he called Greg to discuss alternatives. Greg claims he then came up with a plan to create a Board of Trustees (the “**Board**”) to take control of the Debtor from the Trustee of the A.K. Trust, Robert Williams, due to his declining health. Documents

introduced into the record of the hearing on this matter to support this version of events are described below. The Board allegedly established for Southeast consisted of: Steve Ward (Kimbrow's uncle); Greg (Kimbrow's brother); and Ken (Kimbrow's father). At that time, the new Board of Trustees also allegedly reached a settlement agreement with the cross-claimants in the Miller County Case: LHI, Ameriwest, and the Estate of Wanda Stephens. This settlement was documented as an "Agreement/Memorandum of Understanding" (hereinafter referred to as the "**Memorandum**"). The next day, August 16, 2012, the new Board of Trustees allegedly met to accept their appointments as Board members and implement the Memorandum, among other things, as described in more detail below.

Despite multiple hearings in this Court concerning the Debtor during the Fall of 2012 and in January 2013, and even the very day before the Southwest AP trial, the Court was not informed of this Board.²² The Court does not believe that this Board was created in August 2012 or that the documents evidencing the Board's creation or minutes of the August 16, 2012 meeting were drafted and executed at that time, for reasons described in more detail herein. However, cause exists to appoint a trustee no matter when these activities took place. They either happened in August 2012 and were simply kept hidden from the Court, Smith, and possibly even Grundy, or they were trumped up in January 2013 to somehow justify

²² Specifically, these hearings included: a *Motion to Compel Production of Documents* and a response concerning the production of certain subpoenaed documents from Robert Williams, Trustee of the A.K. Trust heard on October 16, 2012; the Southwest Trustee's *Unopposed Motion for Limited Relief From the Automatic Stay* to allow the trustee to proceed in the Southwest AP heard on November 27, 2012; and Pinewood's *Amended Motion for Relief From The Automatic Stay and Request for Emergency Hearing on Limited Relief* heard on January 14, 2013.

firing Smith during the Southwest AP trial.

In addition to allegedly creating a Board to take over control of the Debtor, and with no notice to or authorization by this Court and apparently no notice to Grundy, Debtor's counsel, or the new Board controlling the Debtor, Kimbro (listing himself as the Debtor's attorney) filed a complaint on behalf of the Debtor against Pinewood seeking in excess of \$20 million in damages in the U.S. District Court, Western District of Arkansas (4:12-cv-4137) (the "**December 3, 2012 Complaint**").²³ Southeast Exhibit 6. This occurred just five days after this Court granted relief from the stay to allow the Southwest Trustee to file an amended complaint in the Southwest AP.

The next alleged activity of the Board was a meeting held January 3, 2013, at which the Board, Grundy, and counsel discussed the Southwest AP trial and the possible resignation of Smith. Subsequently, on January 15, 2013 – the same date as the Southwest AP trial – the Southeast Board allegedly resolved to place the Debtor under the control of Steve Ward, as chairman of LHSE's Board, and authorized Ward to accept the resignation of Smith as counsel for Debtor, or to terminate Smith as counsel if he did not accept or honor the decisions of the Board. The January 15, 2013 Resolution also appointed Kimbro as secretary of the Board.

The day after the Southwest AP trial was held and the Resolution supposedly executed, Greg mailed a "Motion to Approve Settlement Agreement" to the Circuit Clerk in

²³ Both Judge Mixon and this Court entered Orders to Show Cause requiring Kimbro to show cause why he should not be sanctioned for signing and filing pleadings on behalf of Debtor although not authorized to do so. This Court has not yet set its Order to Show Cause for hearing.

Miller County for filing along with a letter to Judge Johnson informing him that the cross-claimants and cross-defendants in Miller County had settled their dispute and agreed to the entry of a consent judgment in favor of LHI's attorneys, Ameriwest, and the Estate of Wanda Stephens. This consent judgment granted Ameriwest and the Estate of Wanda Stephens a constructive trust and equitable lien on the assets of the Debtor and the A.K. Trust in an attempt to lock up Debtor's assets with the Stephens family before Judge Mixon could possibly grant the Southwest Trustee a constructive trust on those same assets. Greg subsequently withdrew the motion to approve settlement and consent judgment on advice of counsel Steve Gershner, as described in more detail below.

On January 25, 2013, the Southwest Trustee filed her Motion to Appoint Trustee citing some of the events just described; the trustee's motion was set to be heard January 30, 2013. On January 28, 2013, Pinewood filed a Motion for Leave to File Complaint which sought permission under the Barton Doctrine to file a complaint against Smith and his law firm (the "**Motion for Leave**"); Pinewood noted that it was simultaneously seeking leave to sue the Southwest Trustee and her counsel in Judge Mixon's court.²⁴ Then, on January 29, 2013, the day before the scheduled hearing on the Southwest Trustee's Motion to Appoint a Trustee, Southeast filed a motion and an application seeking to substitute Jeannette Robertson for Smith as Debtor's counsel. These motions were also set for hearing for January 30, 2013. However, later on January 29, 2013, the parties requested and agreed to

²⁴ The Motion for Leave was set for hearing for February 14, 2013, and was orally withdrawn during the hearing held February 14, 2013, and subsequently documented by an order entered February 19, 2013.

continue the Southwest Trustee's Motion to Appoint a Trustee and the motions to hire Robertson until February 14, 2013 (Dkt. #150). The U.S. Trustee then objected to Robertson's application to be hired, and Robertson filed an Amended Application. On February 12, 2012, the U.S. Trustee filed its Motion for Appointment of Trustee citing the actions taken by Greg and Kimbro in Miller County, the creation of the Board, and its objections to Robertson's application to be hired.

Citing irreconcilable differences with the Debtor, principals of the Debtor and persons purporting to be principals of the Debtor, Smith moved to withdraw as counsel on February 4, 2013 (Dkt. #158). Both the motion and application to hire Robertson, and Smith's motion to withdraw were set for hearing along with the Motions to Appoint Trustee but have not yet been heard. As explained below and in the Court's April 19, 2013 *Order Granting the Motions to Appoint a Trustee*, the Court finds that Smith was fired because he honored his duty to creditors as the Debtor's counsel rather than take instructions to benefit the Stephens family.

This series of transactions and events in which members of the Stephens family seemingly took control of the Debtor and began to act as if Debtor was not in a pending bankruptcy led to the Motions to Appoint Trustee, and unequivocally establish cause for the appointment of a trustee. These events are described in more detail below.

The August 13, 2012 Meeting

Kimbro testified that at an August 13, 2012 meeting with Smith, Smith pushed to

convert the Debtor's case to one under Chapter 7 and close the company.²⁵ Kimbro testified he was at the meeting on behalf of Robert Williams as Trustee of the A.K. Trust, and individually as a beneficiary of the trust, and as a legal advisor to the Debtor. He testified he probably asked Alice to be there so she could listen and know what was going on, participate, and also to inform her father (Robert Williams). Kimbro testified that those present at the meeting included Grundy, his counsel Mark Hodge, and Debtor's counsel: Smith, Kimberley Woodyard, Chip Welch and Ashley Hudson. Grundy testified Smith did not contact him to discuss converting to Chapter 7 in August 2012, but conversations to that effect were had for some time, although it never reached the point of filing a motion to convert. The *First Application for Payment of Attorneys' Fees and Reimbursement for Expenses and Notice of Opportunity to Object* (the "**Application for Payment**") filed by the Debtor on November 27, 2012, was introduced into evidence as Southeast Exhibit 2; the billing statements attached to the Application for Payment show that such a meeting was held on August 13, 2012, and that a motion to convert was drafted.

Kimbro testified he called Greg as attorney for creditors of the Debtor after the meeting to discuss the impact of the company's liquidation on the creditors and about the

²⁵ The Court must note that Kimbro's testimony maligning Smith lacks credibility, as Kimbro has taken numerous actions to benefit himself at the expense of Debtor, such as representing himself as counsel for the Debtor when he filed a lawsuit in U.S. District Court on the Debtor's behalf and entered into a settlement agreement and consent order on behalf of the Debtor that agreed to grant those entities controlled by Greg a \$1.2 million judgment and a constructive trust on the Debtor's assets. Kimbro also sought to intervene in the Southwest AP on his own behalf, and fired Smith because Smith would not intervene to protect Kimbro's interests.

possibility of the creditors proposing a plan for the Debtor. Greg testified that he received a call from Kimbro and Alice after they left the meeting with Smith upset about the proposal to convert to Chapter 7. Greg testified he had a rocky relationship with Kimbro, and although he had made some agreements with Kimbro in the past, they had always fallen through; he testified this phone call was the first time he had spoken to Alice in probably 10 years and the first time Kimbro had asked him for help in 10 years. He testified Kimbro asked him if there was any alternative to liquidating the company. Greg testified:

And I said, yes, tell him not to do it. He's your attorney. And they said, well, he doesn't recognize our authority, he says he works for the organization. And I said, okay, well, who is the head of the organization? They just told me that Alice's father, Robert Williams. I said, well, then have Robert Williams call him and say, I'm your client, don't liquidate the company, reorganize it. And they told me that Robert was too sick, that he had cancer, and that he had told Kimbro he needed to be replaced, that he couldn't handle this stress. Because he had been deposed I think a week or two before, and he had told Kimbro at that deposition, I can't do this, get someone else. And I said, okay, I'll tell you what to do, I had an idea, because I had been involved in the Ward bankruptcy years ago where something like this came up, and I had been a creditor in some creditor bankruptcies, like Johns Mansville, where things like this had come up, and there was a resolution, and I copied that. I copied that style of resolving. And I drafted this document, very hastily, to appoint someone with backbone and with good health who could then tell Mr. Smith do not liquidate the company, we speak for the debtor, we want it reorganized. And I told them that I was going to come up with a plan to pay at least a million dollars or more for the company, and if it was liquidated it would get less than half a million, so it was senseless to destroy the company, especially in view of what that would do to the patients, because they wouldn't be able to get -- some of them, at least, wouldn't be able to get new doctors. And so we came up with this, basically to stop -- and whatever was going on between them, why they couldn't communicate, I wasn't there, but it was going to stop a horrible result of liquidating the company and it was basically designed to do that.

Transcript at 292: 17-25, 293: 1-23. Greg further testified that he did not know Smith wanted

to liquidate the Debtor, but that he had been told that and believed it. The Court finds that conversion to Chapter 7 was discussed as an option for the Debtor, but does not believe those persons whose self-interest distorts their judgment and memory.

The Memorandum

Kimbrow testified he then met with Robert Williams on August 15, 2012. Greg testified he drafted the Memorandum, also dated August 15, 2012, to stop the liquidation of the Debtor. The Memorandum purports to be an agreement between Ameriwest, Southeast, all cross-claimants in the Miller County Case (*i.e.*, LHI, Ameriwest, and the Estate of Wanda Stephens), and all cross-defendants in the Miller County Case (*i.e.*, Kimbro, Alice, the A.K. Trust, Mike Grundy, and various related entities of the Stephenses). The Memorandum, introduced as Southwest Trustee Exhibit 13, states that the parties agreed, subject to further preparation of documents, to:

- transfer all equity in Southeast to Ameriwest;
- infuse capital into Southeast in order to successfully conclude the Southeast bankruptcy case;
- release cross-defendants from personal indebtedness related to Southeast and the Miller County Case; and
- continue the business of Southeast under “healthier financial conditions, under continued management by current personnel, except for new ownership.”

The Memorandum further provided that immediately upon its execution, it would constitute the assignment in the nature of a stock proxy of all voting rights of all membership

or equity interests in Southeast to a voting trust made up of three parties each as trustee, who would serve as a “Board of Directors” as if the company were a corporation. Each trustee was to be nominated by the following parties: the A.K. Trust, Ameriwest, and KSIT. Robert Williams, as Trustee of the A.K. Trust appointed Steve Ward (Kimbrow and Greg’s uncle); Ameriwest appointed Greg (Kimbrow’s brother); KSIT appointed Ken (Kimbrow and Greg’s father). The Memorandum stated that these three trustees were to serve until replaced by their successors or until Bankruptcy Court approval is final for the acquisition of Southeast by Ameriwest.

The parties went on to provide that the principal claim against Southeast by Ameriwest on the cross-claim would be settled and stipulated to be \$1.2 million plus interest from 2010 and attorney fees of \$50,000 to Ameriwest’s counsel, and that this settlement would be effectuated by an agreed order to be executed in either State Court or Bankruptcy Court or both. Although all parties were given time to explain, no one testified that Ameriwest claim was evaluated, only that it was to be paid.

Finally, the Memorandum provided that Ameriwest and the new Board were to “arrange for satisfaction of all creditors, by agreement or by a Chapter 11 plan, or purchase [Southeast] (assets and/or stock/equity), via a sale in bankruptcy, or by any acceptable manner to do all things necessary to acquire the company free and clear of all claims.” The Memorandum then affirmed a Unanimous Resolution dated February 15, 2010, providing for the defense of the cross-defendants in the Miller County Case, and a Joint Defense Agreement (which is undated), and provided that in the event Pinewood’s claims were not

satisfactorily resolved, the agreement could be rescinded by mutual agreement. The parties also agreed to release Grundy as a cross-defendant from the Miller County Case.²⁶ The Memorandum was purportedly signed by Kimbro, Greg, Robert Williams, Ken and Alice (personally and in any necessary capacity for Southeast, the A.K. Trust, and other related entities).

Grundy testified he was not aware of the Memorandum until a few weeks before the trial on the Motions to Appoint Trustee began, and that he did not see the Memorandum until the first day of trial (February 14, 2013) indicating this important development in the Debtor's management was kept secret for six months (if it, in fact, occurred). He testified he was not involved in the discussions that led to the Memorandum, and he did not know why the memorandum came about. Although Grundy testified he was not specifically aware of any proposed transfer of the Debtor, he knew of some discussions to that effect and was aware of a potential plan being proposed by LHI and the Estate of Wanda Stephens.

Kimbro testified the purpose of the Memorandum drawn up by Greg was to infuse capital into the Debtor to pay off its unsecured creditors and allow for an equity interest to be acquired by Greg's entities. He determined that Tennessee law allowed Robert Williams to appoint a board of trustees to take over control for him; he also stated that the term "Board of Directors" was incorrect – it was actually meant to be a substitute for Williams as Trustee

²⁶ Grundy confirmed that his legal fees in connection with the Miller County Case were covered by the Joint Defense Agreement along with the Stephenses, and those fees were paid by Southeast. According to Grundy, Southeast stopped making payments pursuant to the Joint Defense Agreement on advice of counsel after Southeast filed bankruptcy. Southeast has not sought recovery of any payments made pursuant to this agreement.

of the A.K. Trust, not a board of directors for the company, although the documents creating the Board all stated it is was created by and for the Debtor. Kimbro further testified that once the Board was created, it determined to pursue reorganization, not conversion to Chapter 7, and this was communicated to Smith. Smith then continued negotiations, including discussing a possible creditor's plan with Greg's counsel, Gershner.

Although the Memorandum mentioned satisfaction of Pinewood's claims, neither Greg, Kimbro nor Grundy explained what that meant or why it was included.

The August 16, 2012 Minutes

The newly elected Board then allegedly met the next day at 4 p.m. at Ken's home in Conway, Arkansas. Grundy testified he called the meeting although he was not aware it was a meeting of the new Board. Neither Smith nor Robert Williams were present at this meeting. Grundy testified he along with the newly elected Board (*i.e.*, Greg, Kimbro, and Steve) discussed why the Board was formed, and he brought up the issue of whether they had authority to form it. Grundy testified the Board members stated they believed the Board was only contingent on Bankruptcy Court approval. Grundy testified that he told them he would continue to answer to Robert Williams until the Court authorized the creation of the Board. He further testified he did not raise any concerns about the Board because they did not meet again or take any other actions.

Greg testified he was appointed to the Board at the August 16 meeting but he resigned a couple of days later, on either the 17th or 18th. He testified he was merely on the Board to

appoint the others and then step aside.²⁷ He further testified that he understood Kimbro to be the secretary of the company, not the secretary of the Board, and acknowledged Kimbro would then be an officer of the Debtor. Greg believed no court approval was necessary to form the Board, but that court approval was required for everything else contemplated by the Memorandum. Greg stated that accordingly, only the Board was appointed, and there was no transfer to Ameriwest and no infusion of capital. Regarding the Board's creation, he testified, "I got the proxy from Robert [Williams] so no one else could use it. And I was trying to get this approved to keep anybody from taking the assets out of the company, and maintaining the status quo." Transcript at 344: 10-13. He said they began negotiating a plan to implement the other provisions of the Memorandum, and worked towards getting Kimbro and Alice released from personal liability in the Miller County Case.

Minutes of the "First Meeting of the Interim Board of Trustees of Living Hope Southeast, LLC" were purportedly executed that day and introduced at trial as U.S. Trustee Exhibit 1 (the "**August 16, 2012 Minutes**"). Grundy testified the minutes were not executed that day, and he had not seen the minutes before. Nevertheless, the minutes were signed by Greg, along with Ken and Steve Ward.²⁸ The minutes list the following persons as present

²⁷ The Court fully realizes that certain statements made are self-contradictory and, at best, vastly confusing. But, this is the evidence as put into the record.

²⁸ It is not clear when the minutes may have been signed since Grundy testified he had not seen them before and they were not executed that day. Greg also testified he resigned from the Board on the 17th or 18th. These discrepancies give the Court further reason to question whether this Board was actually created in August 2012 or whether it was something Kimbro and Greg later created along with the documentation.

at that meeting: (1) Ken; (2) Ward; (3) Greg; (4) Grundy; and (5) Kimbro, as attorney for A.K. Trust. The Board resolved it was meeting to perform the intended purposes of the Memorandum signed the day before; each member of the new board verbally acknowledged that he accepted his appointment and agreed to serve on the Board. Then, the Board purportedly turned to resolving LHSE's pending Chapter 11 bankruptcy and claims against its members, officers, and related parties; the minutes reflected a lengthy discussion was held and the following resolutions were unanimously adopted:

RESOLVED, That the purpose of the Interim Board of Trustees is to provide stability and leadership to [LHSE] in order to accomplish a plan of reorganization.

RESOLVED, That the Board of Trustees approves and authorizes the officers of [LHSE] to keep operations going and to continue business as usual pending future Court approval of a plan of reorganization.

RESOLVED, That the Board of Trustees authorizes [LHSE] and its attorneys, officers and agents to engage the authorized representatives of Ameriwest Health Services, Inc. in mutual contract negotiations with the purpose to provide a viable plan for reorganization and a smooth transition of ownership to its eventual successor.

RESOLVED, That the Board of Trustees approves the continuation of current management and supports the continuation of [LHSE]'s ordinary course of business, pending a successful plan of reorganization and eventual change of ownership.

Greg testified he sent the August 16, 2012 Minutes to Smith to stop Smith from liquidating the Debtor, and to let him know he should take directions from the new Board. Despite Greg's earlier testimony that he only agreed to serve on the Board to vote on the other members and always planned on resigning, he later testified he resigned because Smith said

the Board was illegal and he resigned to take away one of Smith's arguments as to the Board's legality. Greg also testified he never met with Smith personally as he (Greg) always attended meetings by phone.

The December 3, 2012 Complaint

Kimbro testified that he filed the December 3, 2012 Complaint (listing himself as the Debtor's attorney) on behalf of the Debtor against Pinewood seeking in excess of \$20 million in damages in the U.S. District Court because he woke up in the middle of the night realizing that it had been about a year since a lawsuit filed by Living Hope Southwest against Pinewood had been dismissed, and the statute of limitations would soon run. He testified he called to check on the date and it was indeed exactly a year since the case had been dismissed; he testified he worked all day on it and did not have time to consult with Smith, and that in any case, he had broken off communication with Smith by that time. He also testified he was not aware that an attorney representing a debtor in bankruptcy had to be authorized by the Court before representing a debtor or filing lawsuits on the debtor's behalf. He further testified he was not aware he needed relief from the automatic stay to file litigation on behalf of the Debtor. He testified that he believed the lawsuit would bring assets to the Debtor's estate and to his own bankruptcy estate, and that he did it for no benefit to himself, but that he "fell on his sword" for the benefit of others. Transcript at 430: 6. Kimbro further testified that he called Streetman to let him know about the lawsuit. Kimbro filed this lawsuit just five days after this Court granted relief from the stay to allow the Southwest Trustee to file an amended complaint in the Southwest AP. Additionally, there

were multiple motions for relief from stay filed in Kimbro's personal bankruptcy.

Given Kimbro's law license and his deep involvement in numerous bankruptcy proceedings (including a lengthy hearing and two written opinions by this Court in connection with hiring Smith and Welch as counsel for the Debtor), the Court cannot accept Kimbro's explanation that he did not know that Debtor's counsel had to be approved by the Court. It is simply incredulous Kimbro did not know he needed Court approval to act as Debtor's attorney or relief from stay to file this lawsuit.

Late December Southwest AP Planning Meeting

Grundy testified that he arranged a meeting with Kimbro and Smith on the 20th or 21st of December to discuss the Southwest AP. Kimbro testified that he wanted to "vigorously defend the actions" and that he felt they could do so successfully; he stated that Smith did not agree, and Grundy did not want to see the facility close. Transcript at 52: 3. Kimbro testified that he was particularly concerned about the Southwest AP because the Trustee's complaint sought a constructive trust on the Debtor's assets. He said:

. . . we were concerned that, you know, if we lost something at trial, it would jeopardize the business, of course. So we wanted to defend the – the claims, because we didn't know what would happen. They had requested, I think, a constructive trust and things of that nature, so it was quite frightening. Because if we had lost the AP, it seemed to me, the company could be liquidated. That was – that was our perception of the issue.

Transcript at 435: 2-9. Kimbro explained that they were concerned about a constructive trust when they saw the complaint, but that he became more frightened when the Southwest Trustee's pretrial brief brought up the idea of seizing future income – he said it appeared to

him “an attempt to seize the operations and the cash and to liquidate.” Transcript at 576: 19-20. Kimbro confirmed that his concern then also became Grundy’s concern, and that Grundy listened to him instead of Smith.

Contrary to Smith’s testimony regarding his strategy for the Southwest AP and the allegations made against him (described below), Grundy testified that he believed Smith had always intended for the constructive trust to be awarded in favor of the Southwest Trustee, and that the constructive trust was essential to Smith’s strategy. Grundy explained that he understood the strategy was to allow a judgment to be awarded, which would only create an unsecured debt, but if the Southwest Trustee were awarded a constructive trust on all past, present and future assets of the Debtor, the Southwest Trustee could force the resolution of the Chapter 11 case in its favor. He said that this would theoretically gut the Miller County Case because there would be no assets for Pinewood to pursue there. Grundy testified he was aware of a brief filed by Smith opposing the imposition of a constructive trust but was not specifically aware of its contents (implying he had not in fact read the brief).²⁹

During the Southwest AP trial, Debtor’s counsel opposed imposition of a constructive trust and prevailed on that issue. As explained in the Order Appointing Trustee, when Smith insisted on fulfilling his duties as Debtor’s counsel and gave advice that harmed Kimbro or the Stephenses’ family interest, then Smith became an obstacle. The way to remove the obstacle was to remove Smith. Kimbro’s testimony illustrates execution of his need to

²⁹ Grundy’s perception of Smith’s legal plan was not accurate. By appointment of a trustee, Grundy is no longer involved in legal decisions.

discredit and remove Smith.

The January 3, 2013 Meeting and Minutes

Despite several hearings held in the case as well as hearings held and pleadings filed in the Southwest AP against Debtor before Judge Mixon, the Board allegedly took no action on behalf of the Debtor until it met again on January 3, 2013, in a meeting called by Grundy. This was the second time, according to Grundy, that he called a Board meeting without realizing it was a Board meeting. Grundy testified he called the meeting to discuss legal options with respect to the Southwest AP, and although he recognized the Board members were there, he did not organize it as a Board meeting and had actually not given the Board “another thought” since the August 16, 2012 meeting. According to Grundy, Smith was at the January meeting to discuss liquidating the Debtor, and that it was Smith’s opinion that the Debtor could no longer support litigation and it would be futile to continue litigating and exhausting Debtor’s available resources. According to Grundy, Smith also believed the case had been reviewed by so many courts and the large number of negative sentiments expressed about the Debtor were making it less likely there would be a favorable outcome for the Debtor. Grundy testified that Smith did not believe Pinewood would come to the table to attempt to reach a settlement. Grundy further testified that Smith wanted to stipulate in the Southwest AP trial and allow the Southwest Trustee to obtain a judgment against Debtor as well as a constructive trust on the Debtor’s assets. Grundy testified that Kimbro, on the other hand, was advising the Debtor that the constructive trust sought by the Southwest Trustee was too broad and that it gave her the unilateral ability to liquidate the Debtor (although

Grundy said Smith had been assured that the Southwest Trustee would leave the Debtor in business to continue paying on the judgment). Grundy testified that Smith was not receptive to Kimbro's arguments, that Smith resigned at least twice during the meeting, and that when they left the meeting, Grundy was convinced Smith could not get the Debtor to confirmation. Without any alternatives for counsel, however, Grundy felt they had no choice but to proceed to trial with Smith as counsel.

Kimbro testified he was at the January 3, 2013 Meeting as attorney for the A.K. Trust and as a recorder of what had transpired. Kimbro testified that Smith would not agree to vigorously defend the Southwest AP, but there was no indication from Grundy or the equity owners as to how they should proceed. Kimbro stated that between this meeting and the date of the trial on January 15, 2013, there was no communication regarding preparation for the trial.

Kimbro testified he prepared minutes of the January 3 meeting titled "Minutes Emergency Meeting of Living Hope Southeast, LLC Board of Directors"; these were introduced as Southwest Trustee Exhibit 8 (the "**January 3, 2013 Minutes**"). Grundy testified he had not seen the Minutes until the trial on the Motions to Appoint Trustee, but that he had reviewed the Minutes and believed they were consistent with what he recalled about the meeting. The Minutes reflect that the meeting was called to consider the resignation of Smith and to consider other matters related to the Southwest AP trial. The Minutes also reflect that Board members Ward and Ken were present along with Grundy, Hodge, Smith, Woodyard, and Kimbro as the Board's secretary and counsel for the A.K.

Trust. The Minutes state:

The meeting was held at 2:30 p.m. in the offices of Mark Hodge. Before beginning the meeting, Jim Smith was introduced to Steve Ward and Kenneth Stephens, representing a quorum of the Board of Directors. Mr. Smith became angry upon being notified of the Board's existence and accused Mr. Stephens of violating bankruptcy rules. Mr. Stephens said the reason for the Board was because Robert Williams, Trustee of the [AK Trust], was suffering from cancer and too ill to be exposed to the stress of litigation and so Mr. Williams authorized the creation of a Board of Trustees, to serve under his authority until he can be replaced as Trustee of the [AK Trust], to guide the company through the litigation. The Board was also established to consummate a settlement with LHI and Ameriwest and to propose a plan of reorganization based upon the anticipated settlement with LHI.

The Minutes go on to state that Smith informed those present that early on in the Southwest AP, he and another attorney had decided the case was not winnable and therefore entered into settlement negotiations with the Southwest Trustee resulting in the settlement that was ultimately overturned on appeal. The Minutes reflect that Smith stated the Debtor should intentionally lose the Southwest AP so that the Southwest Trustee could "supersede" the interests of Pinewood, and recommended

that LHSE concede judgment to the [Southwest] Trustee and consent to a money judgment based for [sic] the full value of the company upon a fair market evaluation [sic] of the company and to give the [Southwest] Trustee a constructive trust on all the assets of the company. Upon stipulating to the judgment, Mr. Smith stated he would file a plan to pay the judgment over 7 years at which time the company would revert back to the equity security holders.

According to the Minutes, Smith and Kimbro then argued about the basis for the Southwest AP. Smith allegedly stated that Southeast was formed with the "financial and human resources of LHSW" and used the same bank account as LHSW "to perpetuate unauthorized

transfers from LHSW to LHSE” including an income stream. Southwest Trustee Exhibit 8. Kimbro allegedly replied that no assets were transferred and the same bank account was not used, and that “the only thing that went from LHSW to LHSE were the employees who resigned LHSW because they were dissatisfied with LHSW and whom then went to work for LHSE.”³⁰ *Id.* The Minutes also reflect that Kimbro stated Living Hope Southwest only operated two clinics which were closed and whose employees then went to work for Southeast; other clinics were operated under the provider number of LHI and could not have been transferred from Living Hope Southwest, and therefore could not be owed to the Southwest Trustee.

According to the Minutes, Smith threatened to resign as Southeast counsel if the Debtor wanted to defend the Southwest AP; the parties argued further about Smith’s handling of the Southwest AP, and Kimbro asked Smith if he would object if Kimbro personally attempted to intervene in the Southwest AP and Smith said he would not. The Minutes further reflected that when asked what the hurry was to allow the Southwest Trustee to obtain a judgment, Smith replied that the company should liquidate the Southwest Trustee’s claim which would then force a settlement with Pinewood and that was why he had agreed to an early trial date. Kimbro then again expressed concern for his own personal liability, and Smith told him he would have no liability because he was dismissed from the lawsuit, but Kimbro reiterated that he believed issues decided in the trial might have collateral estoppel

³⁰ As explained earlier, Grundy’s testimony confirmed that the employees worked for Southwest one day and started work at Southeast the next. Clearly, the Debtor’s potential defense was weak.

effect in pending lawsuits by the Trustee in his personal bankruptcy, Richard Cox, and lawsuits filed by Pinewood and LHI. The Board meeting purportedly concluded by taking Smith's recommendation under advisement and informing him that the Board would inform him of its decision within 48 hours.

Kimbrow wrote the Minutes. The tone and allegations concerning Debtor's counsel evidence Kimbro's ease in saying and writing that which furthered his interest.

The Southwest AP Trial

This section reviews the evidence introduced during the trials on the Motions to Appoint Trustee which concerns the Southwest AP trial and allegations concerning the Debtor's defense put on at that trial, and the actions taken by Kimbro and the alleged Board during the trial.

Kimbrow testified that before beginning the Southwest AP trial on January 15, 2013, Judge Mixon first took up the two pending motions to intervene: one filed on behalf of Pinewood, and one that he filed on behalf of himself, individually, as the sole managing member of Living Hope Southwest. He later testified that he tried to intervene to have more time to obtain exhibits and line up witnesses and "to be there to help defend the case and to ask for continuances to allow us [the] opportunity to properly defend the case."³¹ Transcript

³¹ At the January 14, 2013 hearing, Judy Henry appeared on behalf of Pinewood, Streetman appeared on behalf of the Southwest Trustee, and Woodyard appeared on behalf of the Debtor. Henry noted that Kimbro had moved to intervene in the January 15, 2013 Southwest AP trial, and Woodyard advised the Court that the Debtor did not know of or approve of that motion to intervene; nor did it consent to a continuance because delaying the matter would not be in the best interests of the Debtor. Kimbro stated that the Debtor did not object to the Trustee's motion for relief to appear in Mixon's court; the Debtor would like to go to Judge Mixon's Court and

at 477: 3-10. Judge Mixon denied both motions to intervene.

Kimbro testified that after his motion to intervene was denied, but before the trial began, he stepped out into the hall with Grundy and Ward; they talked, and Ward then terminated Smith because Smith's co-counsel, Woodyard, had objected to Kimbro's intervention despite Smith's earlier agreement to "stand silent." Kimbro claimed that they did not fire Smith to delay the trial but because Smith's refusal to let Kimbro intervene violated their prior agreement and created an irreconcilable conflict between them. Kimbro testified that following this meeting, he was allowed to meet with Woodyard over lunch to discuss the Debtor's defense of the trial. He testified he had not seen any of the 83 exhibits stipulated to by Smith, and that neither he nor Grundy ever saw the appraisal report before trial. Kimbro further testified that Woodyard did not agree to introduce any of his proposed exhibits because there was not enough time for him to go home and retrieve them. Kimbro testified he was the only witness called by the Debtor, and that he testified for approximately 20-30 minutes. Grundy testified he was present at the Southwest AP trial on January 15,

resolve those issues while avoiding a race to the assets. He explained that both the Trustee and Pinewood were trying to get a constructive trust on the Debtor's assets and that the Debtor wanted to resolve those one at a time to avoid chaos and simultaneous litigation in two forums. Kimbro also stated that he filed a motion to intervene on behalf of himself personally as an interested party, and that it had nothing to do with the Debtor. He said he wanted to defend the case in Judge Mixon's court. Although these statements are not a part of this record, they are a part of the record in this Debtor's bankruptcy case, as they occurred in *this* Court and in *this* case. These statements discredit Kimbro's testimony refuting the need for a Chapter 11 trustee in this case and are therefore highly relevant; he represented he wanted to intervene for one purpose before this Court on January 14, 2013 (for himself personally), and provided an entirely different rationale during the trial on the Motions to Appoint a Trustee (to properly defend the Southwest AP and prevent the imposition of a constructive trust).

2013, and testified on behalf of the Debtor.

Smith also testified regarding the Southwest AP trial and his representation of the Debtor. Smith denied that he consented to a judgment being entered against Southeast in any amount following the reversal of the settlement Southeast and the Southwest Trustee had previously reached.³² He explained that regardless of the amount of the judgment ultimately awarded, it was important that the Debtor liquidate and determine the amount of the Southwest Trustee's claim. Smith testified that the Southwest Trustee was the Debtor's only direct creditor. He explained that the Pinewood claim in Miller County alleges that the Debtor is the alter ego of one of the other defendants. Smith believes Pinewood has a direct claim against Southwest, and whatever claim Southwest had against the Debtor accounted

³² The Court's limited review of the Southwest AP trial transcript, which was proffered by Pinewood as well as Debtor's proposed counsel, shows that Debtor's counsel Woodyard zealously defended the lawsuit. At the close of the Trustee's case, she moved to dismiss the case, stating:

Your Honor, I would move that the Court dismiss the complaint in this case for failure to meet the proof that's required under the Bankruptcy Code under Section 549.

This is basically a story of two companies, one of which failed and one which did not. Living Hope Institute and Southwest operated a number of entities throughout the state of Arkansas. And the Trustee has tried to construct that there's a transfer of property because Living Hope Southeast took over the management of three of those. The only evidence he has is that Living Hope Southeast's bank account had the wrong name on it. Everything that went into that account was property of Living Hope Southeast. All of the disbursements that were made were property of Living Hope Southeast. The employees of Living Hope Southwest were in an uproar and they were ready to walk out and they were able to find employment with Living Hope Southeast. The provider numbers were -- Living Hope Southeast used the provider number that it was authorized to use, it didn't borrow anything from Living Hope Southwest.

There was no transfer of anything -- much [sic] anything that is property of the estate, and accordingly the complaint should be dismissed.

for what was alleged to have been taken from Southwest and transferred to Southeast. Regarding the alleged claim of LHI, Smith testified he believed LHI had abandoned its trademark and logo, and if it did not, any claim LHI had against the Debtor was abandoned through either the personal bankruptcy of Wanda Stephens or her probate estate. The only way Smith could propose a plan for the Debtor was to get the Southwest Trustee's claim liquidated, and then get Pinewood to come into bankruptcy and argue they had a claim against Debtor that was not derivative of the claim against Southwest. If the Southwest Trustee's claim were \$2.8 million, the Debtor could not propose a feasible plan; if the Southwest Trustee's claim were \$1.19 million, there was a chance Debtor could pay it.

Smith testified that following the reversal of the Southwest AP settlement, he had discussions with the Southwest Trustee and her counsel, Streetman, regarding the complaint, and they agreed to dismiss the individual defendants including Kimbro and Southeast's management and to pursue only § 549 post-petition transfers.³³ He explained that following a review of the transcript of a 2004 exam conducted by Pinewood's counsel on behalf of Pinewood in connection with the Southwest case, and after reviewing the transcript of the hearing on the motion to convert the Southwest case to one under Chapter 7, he felt certain § 549 transfers had occurred and that Henry had made "an almost dispositive" case that § 548(a) fraudulent transfers had occurred as well, and that issues under 18 U.S.C. § 153 or §

³³ Kimbro acknowledged that he had signed a stipulation dated November 28, 2012, dismissing him as a defendant in the Southwest AP.

157 (bankruptcy crimes)³⁴ may exist which would render Southeast completely unreorganizable. Smith testified he had meetings with Grundy and Kimbro discussing this, and then Streetman filed the complaint under § 549 only seeking recovery for value of property transferred post-petition. Streetman subpoenaed financial records; Smith got them from Grundy and reviewed them with Grundy, and they identified what they thought were the questionable transfers. In lieu of a deposition, Streetman agreed to meet with Smith and Grundy and review those transfers. Streetman also agreed that Smith could meet with the

³⁴ Smith was not clear as to which code section he was referring. 18 U.S.C. § 153 provides:

(a) Offense.--A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined under this title, imprisoned not more than 5 years, or both.

(b) Person to whom section applies.--A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

18 U.S.C. § 157 provides:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--

- (1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;
 - (2) files a document in a proceeding under title 11; or
 - (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,
- shall be fined under this title, imprisoned not more than 5 years, or both.

accountant doing the valuation of the company about the transferred assets in lieu of a deposition. Smith testified he was comfortable with the accountant's methodology and that he believed the value the accountant arrived at – \$1,190,000 – was in line with what Kevin Keech (who was representing Kimbro at that time), Smith, and the Southwest Trustee had agreed upon in connection with the settlement they had previously reached.

Smith testified that during these pre-trial discussions, Kimbro became concerned that his own interests would not be protected in the trial; Smith explained to him that the only question under § 549 was the value of the assets or property transferred from Southwest to Southeast post-petition. Smith confirmed that he, Grundy, and Kimbro had a very contentious meeting, at which he told Kimbro that Kimbro's intervention in the AP was not only "wrong-headed but was idiotic" as Smith had gotten him out of the case, and now he wanted to jump back in. Transcript at 829: 21. Smith testified that he told those at the January 3, 2013 meeting that he would resign, and that he did not think the actions proposed by Kimbro were in the best interests of the Debtor or its creditors. He said they asked him to reconsider, and he finally agreed that he would "stand silent" on Kimbro's motion to intervene. The trial was on a Tuesday, but on Sunday night, Kimbro filed a motion to intervene that stated that Southeast "consented" to Kimbro's intervention. On the Monday night before trial on Tuesday, Pinewood's counsel filed a motion to intervene and a motion to continue on behalf of Pinewood. At the trial, which was handled by Woodyard for the Debtor, Judge Mixon inquired about the motions to intervene and the motion to continue. In Smith's opinion, the only way Judge Mixon was going to allow intervention in the case

was if he, as counsel for the Debtor, agreed to it; he could see no logical way he could agree to one but not both motions to intervene. He explained that they had tried the case three times (twice while having their settlement approved over the objection of Pinewood and then during the Southwest AP trial), and he felt Woodyard made an innocuous statement that the Debtor did not consent to Kimbro's intervention and did not think his intervention was necessary.³⁵ Most of Woodyard's comments were directed towards Pinewood's motion to intervene. Judge Mixon denied both motions and the lawsuit was tried.

At the trial, Smith stipulated to the admissibility of the 83 exhibits Streetman introduced, and explained that he did so because the Debtor had furnished those documents to Streetman during discovery. Smith stated to the Court that he had reviewed the valuation, that it was done according to "generally accepted valuation principles," and that if the appraiser were called, he would testify as he stated in his report.³⁶ Smith explained he did that because at a previous trial on the settlement between the Debtor and the Southwest

³⁵ The Court took into evidence that portion of the January 15, 2013 trial transcript, proffered as Pinewood Exhibit 11, regarding the dispute between Smith and Kimbro over Kimbro's intervention and how that led to Smith allegedly being fired as counsel for the Debtor. The court has reviewed the argument regarding Kimbro's intervention in the trial transcript and finds that Smith's description of Woodyard's objection to the intervention as "innocuous" was accurate. Woodyard hardly spoke to Kimbro's intervention at all, other than to state that res judicata or collateral estoppel would not apply to Kimbro since he is not a party to the action and that he had no interest in the case. The rest of her argument was entirely directed at why Pinewood should not be allowed to intervene.

³⁶ Proposed counsel for the Debtor and Pinewood's counsel attempted to discredit Smith by pointing out that the CPA report at issue was not technically an appraisal and was not done according to "Generally Accepted Accounting Principles". The Court does not find this distinction discredits Smith; Smith believed the CPA report was a fair valuation of the Debtor. More importantly, Judge Mixon heard the testimony, reviewed the report, and based his findings on the evidence before him.

Trustee, Henry had called Sheryl Sheffield who had testified that the company was worth between \$2.6 and \$2.8 million. Smith testified that Streetman called Grundy to testify, and over the course of a long day, they went through the transfers Streetman had identified as problematic. Smith said that for the most part, Grundy admitted that those transfers of business opportunities were made post-petition. Smith testified that he did not intend to call Kimbro as a witness since Judge Mixon had previously found Kimbro not credible, but following denial of his motion to intervene, Woodyard worked with Kimbro for 45 minutes over lunch and he was called to testify regarding his intent with respect to the alleged transfers.

Smith testified he never consented to allow the Southwest Trustee to have a constructive trust on the assets of Southwest. Smith said he believed that Judge Mixon could not impose a constructive trust on the assets of the Debtor as a matter of law – that would equate to pre-judgment attachment under State law, and in the bankruptcy system, the assets of the Debtor belong to all creditors. Smith explained the Debtor had denied the trustee was entitled to a constructive trust in its Answer, had filed a brief regarding the issue, and ultimately prevailed on that issue as Judge Mixon denied the Southwest Trustee’s claim for a constructive trust on the Debtor’s assets. Again, at the close of trial, Judge Mixon granted the Southwest Trustee a judgment in the amount of \$1.19 million. *See Supplemental Order*, No. 4:09-ap-7023 (Dkt. #130) (Bankr. W.D. Ark. Feb. 6, 2013), and *Order Approving Unsecured Claim*, No. 4:09-ap-7023 (Dkt. #104) (Bankr. W.D. Ark. Jan. 18, 2013).

The January 15, 2013 Resolution and Ward Affidavit

Kimbro testified that he prepared a resolution for the Debtor after the conclusion of the Southwest AP trial to document the Board's decision during the trial to defend the case. This resolution was then purportedly executed by Ward and Ken on January 15, 2013 at 6 p.m., and introduced during the trials on the Motions to Appoint Trustee as Southwest Trustee Exhibit 8A (the "**January 15, 2013 Resolution**"). Grundy testified he had not seen the Resolution prior to the trial on the Motions to Appoint a Trustee just as he had not seen any of the other documents concerning the creation of the Board and documenting its activities. The January 15, 2013 Resolution states that a quorum of the Board had convened, that Ward was appointed chairman of the Board to represent it in actions and decisions of the Board, and that Ward was the only authorized individual to speak for Southeast regarding litigation between Southeast and Smith. (The Court notes it is aware of no such litigation but that the resolution may have meant Ward was the only authorized individual to speak with Smith about Southeast's ongoing litigation.) The January 15, 2013 Resolution further provided that Ward was authorized to accept the resignation of Smith, or to terminate Smith if he refused to honor or violated the Board's decisions; that the Board should continue to confer with Greg, attorney for LHI and others about defending the Southwest AP; and that

no employee of the [LHSE] shall manage or be responsible for the litigation involving [LHSE] in order to allow them to devote themselves to the ongoing operations of [LHSE] and in order to prevent Counsel Jim Smith from polling different company agents for consent to his actions since [LHSE] needs to speak with one consistent voice;

The Resolution then stated that Kimbro would serve as secretary of the Board and keep

Robert Williams apprised of the Board's actions.

An affidavit allegedly executed by Ward on January 23, 2013, was attached to the January 15, 2013 Resolution. Southwest Trustee Exhibit 8A. In that affidavit, Ward averred that he attended the January 3, 2013 Board meeting and that following more deliberation after the meeting, the Board decided to reject Smith's recommendations, to defend the Southwest AP, and to not object to Kimbro's motion to intervene in the Southwest AP. Ward further swore that he did not realize the allotted 48 hours following the meeting ended on a Saturday and called Smith on Monday with the Board's decision. (The Monday following January 3 would be January 7.) Ward averred that Smith did not return his call, and Kimbro told him that Grundy would contact Smith to let him know of the Board's decision. Ward then stated he appeared at the January 15, 2013 trial in time to hear Woodyard object to Kimbro's motion to intervene, and after Kimbro's motion was denied by Judge Mixon, he conferred with Smith during a break and informed Smith he was relieved of his duties as counsel because he had violated the Board's decision to allow Kimbro to intervene. According to Ward, Smith ignored him and returned to trial, and later, Judge Mixon allowed Ward to address the Court regarding Smith's termination. Ward informed the Court that Smith had violated his engagement with Southeast by not allowing Kimbro to intervene, by not defending the case, and by delegating his responsibilities as defense counsel to Woodyard, counsel whom Southeast did not consent to hire. Finally, Ward averred:

The Board of Trustees was initially formed, not only due to Mr. Williams failing health, but also due to the fact that Mr. Smith demanded that the company file for Chapter 7 liquidation in August 2012. The company refused

Mr. Smith's demand, so instead, Mr. Smith set about to arrange to lose the lawsuit filed by Renee Williams, seeking for [sic] turnover of all company assets in order to accomplish his plan to close down and liquidate the company contrary to his client's wishes. As a result, the Board was formed to protect the company from the undue influence of Mr. Smith against his client's wishes and to promote the continuation of the company in spite of Mr. Smith's demand to close the company.

Southwest Trustee Exhibit 8A, January 23, 2013 Affidavit, Paragraph 15. Ward did not testify at trial on the Motions to Appoint a Trustee.

The Motion to Approve Settlement Agreement and Consent Judgment and Order

At the conclusion of the Southwest AP trial, Judge Mixon orally ruled in favor of the Southwest Trustee, granting a judgment in the amount of \$1.19 million and taking under advisement the issue of whether a constructive trust could be imposed on the Debtor's assets to secure the judgment. On January 16, 2013, the day after the Southwest AP trial was held and the Resolution was allegedly executed, Greg mailed a "Motion to Approve Settlement Agreement" to the Circuit Clerk in Miller County for filing. Greg also sent Judge Johnson a letter informing him that the cross-claimants (*i.e.*, the entities represented by Greg) and cross-defendants (*i.e.*, the individuals and entities represented by Kimbro) in Miller County had settled their dispute and agreed to the entry of a consent judgment granting LHI's attorneys a \$50,000 judgment, and granting Ameriwest and the Estate of Wanda Stephens a \$1.2 million judgment plus pre-judgment interest from January 1, 2011, at 10%, and post-judgment interest at the same rate, and court costs. The proposed Consent Judgment and Order sent to Judge Johnson also imposed a constructive trust and equitable lien on all assets of Southeast and the A.K. Trust. This proposed Consent Judgment and Order is signed by

Greg on behalf of the cross-claimants and Kimbro on behalf of the cross-defendants, which include the Debtor. Subsequently, on advice of counsel Steve Gershner,³⁷ Greg sent an undated letter to Judge Johnson withdrawing the Motion to Approve Settlement and the proposed Consent Judgment and Order because Gershner had advised that the filing of these documents might violate the automatic stay in the Debtor's bankruptcy case.

Despite the testimony of Greg and Kimbro (described below) as to their intent regarding this proposed Consent Judgment, the Court finds they executed it and attempted to file it to create a debt owed by the Debtor to the entities represented by Greg, and to impose a constructive trust on the Debtor's assets so that the assets were within the control of the Debtor's family and outside the reach of the Southwest Trustee or other creditors.

Kimbro testified he signed the Consent Judgment either on January 15, 2013, after the Southwest AP concluded, or the next day, and then left it with Greg so that Greg could decide what to do with it and when. He testified he signed it to carry out the buyout arrangement with Greg. He testified he believed it was okay to sign because it was subject to further court approval. Kimbro acknowledged that despite his great fear of a constructive trust being imposed in the Southwest AP, he agreed to grant one in favor of Ameriwest and his mother's estate before Judge Mixon could decide the constructive trust issue. He testified that he did so because Ameriwest was putting money into the Debtor in order to make money as opposed to his perception that the Southwest Trustee was seizing the Debtor's operations

³⁷ The letter to Judge Johnson states that Steve Gershner had previously represented LHI but was no longer involved in the Miller County Case; Gershner did represent LHI and Ameriwest in the hearing on the Motions to Appoint Trustee in this Court.

and cash in order to liquidate the Debtor. He stated that the constructive trust in favor of Ameriwest and his mother's estate was intended to preserve the assets of the estate in order to continue the Debtor's operations. Ameriwest's proposed infusion of capital into the Debtor does not explain why Kimbro agreed to allow his mother's estate to have a constructive trust on the Debtor's assets.

Greg testified that he talked to Kimbro before drafting the Consent Judgment, and was under the impression that Kimbro was acting as "ad hoc" counsel for the Debtor although he was not certain what Kimbro thought that meant. Greg thought "ad hoc" meant "as to this matter". Greg testified that Kimbro knew that Greg would send the Consent Judgment to Miller County at some point, but did not know when. Greg explained that he sent it when he did because he thought Smith was trying to allow the Southwest Trustee to obtain a constructive trust on the Debtor's assets and then liquidate the Debtor, thereby accomplishing a Chapter 7 in a "roundabout way." Transcript at 587: 16-21. Greg further testified he attempted to file the Consent Judgment because three people who were in Court the day of the Southwest AP trial told him that "there had been a lay down" and that Smith had not adequately defended the trial and stipulated to facts that would allow the Southwest Trustee to obtain a constructive trust on the Debtor's assets. Transcript at 587: 13. He testified he would not seek to enforce the constructive trust until he had bankruptcy court approval to do so; he simply wanted to get it in place. Greg testified he tried to find an exception to the automatic stay because he was afraid he would not be able to get it filed in time (before the Southwest Trustee got a constructive trust in the Southwest AP) if he had to first file a

motion for relief from stay. He also stated he did not really mean to get a constructive trust on the Debtor's assets:

I was trying to find an exception to the stay where I didn't have to take the time to file a motion for relief from stay because by then I was afraid that the company would be gone through its constructive trust that Mr. Streetman was going to get. Now, I did not mean to get a constructive trust. What I meant to do was get a constructive trust for the seven defendants who were conceding, and to get a constructive trust agreed to by the parties subject to going back to Bankruptcy Court to approve it, because I didn't think – I mean, I couldn't get a constructive trust from the state court and go grab assets from a debtor in bankruptcy. You can't do that. So I never intended to do that. I'm smart enough to know that if I tried to do that, somebody would come arrest me and stop me. I – I wasn't going to – but it looks like – that's what it looks like, but I'm not that crazy. What I meant to do was to get the judge to say, okay, these parties have agreed to this, now go to Bankruptcy Court to get it approved as to the debtor. The other parties, I wanted to bind them, so that I didn't have to worry about them backing out of it later.

Transcript at 305: 12-25, 306: 1-6. Greg further elaborated on why he mailed the Consent Judgment:

That's exactly what I wanted to present to Judge Mixon and Judge Evans. I wanted to get this agreement out of Miller County and then bring it to the court and say, look, we're both similarly situated here. We both have the same constructive trust allegations. No one is entitled to priority over the other. We're entitled to be treated as same class creditors and share and share alike, not for you to get preference and get all of your money first and then – and then we get nothing. That was the point. I wanted to present the agreement to the Bankruptcy Court to establish that.

Transcript at 596: 8-17. Greg also testified that he had planned to withdraw the Consent Judgment if anyone objected and that he told everyone this. He testified that on January 24, 2013, Judy Henry and Gershner called him and inquired as to whether he had lost his mind. He explained that he felt an exception to the automatic stay applied, and after arguing for

approximately 30 minutes, he agreed to withdraw the Consent Judgment and motion to approve settlement. On January 25, 2013, Gershner called to confirm it had all been withdrawn, and he sent a second letter to the clerk in Miller County because Gershner did not think his first letter was clear enough in that it did not use the word “withdraw.”³⁸

Grundy testified he had not seen the Consent Judgment or letter sent to Miller County. He only knew that they had been sent but then withdrawn, and that no order had been entered. He testified that although he did not condone Greg’s actions with respect to the Consent Judgment and proposed Miller County settlement, those actions had not negatively affected the Debtor’s operations. Grundy also testified that the \$1.2 million Consent Judgment would have been bad for the Debtor, and he would have concerns that those amounts were actually owed, but some sort of settlement with those entities would be a practical solution to resolve litigation.

The Court finds that Greg and Kimbro orchestrated the attempted filing of the Consent Judgment to benefit their families and their entities and to win the “race to the courthouse” by imposing a constructive trust on the Debtor’s assets in their favor before a trust could be imposed by Judge Mixon in the Southwest AP. By preparing, signing, and submitting a consent judgment to the Miller County Court, Greg and Kimbro: (1) violated the statutorily

³⁸ When asked why the withdrawal letter was faxed from an Southeast clinic, Greg testified that he was driving on I30 on the way back to Shreveport near Bismarck when Gershner called him and told him to fax a withdrawal letter to Miller County. Greg testified that although he did not know where Bismarck was, he generally knew where the Debtor’s Bismarck clinic was so he drove there and faxed the withdrawal letter. The Court found this testimony defies logic.

imposed stay; (2) ignored this Court's *Order Approving Application to Employ Attorney* appointing certain named attorneys to represent the Debtor; and (3) acted to put assets in a constructive trust while these precise assets were found to have been transferred from the Southwest debtor's estate to the Debtor's estate and were the subject of a motion under advisement before Judge Mixon as to whether these very assets were placed in a constructive trust for the benefit of Southwest's creditors. Having taken these actions in total disregard of judicial authority, Greg and Kimbro ask this Court to believe that the consent judgment would not be effective until it was approved by the bankruptcy or other appropriate court. The evidence on this issue fully supports the Court's conclusion that Greg and Kimbro are not dissuaded or delayed from seizing personal advantage in deference to the court system. Similarly, that they later withdrew the submitted consent judgement, does not eradicate the intent evidenced in creating and submitting it.

Additionally, the justification for Greg and Kimbro's actions in executing and submitting the Consent Judgment to Miller County – that they were worried about the Southwest Trustee obtaining a constructive trust on the Debtor's assets and then liquidating the Debtor is not convincing. Via the settlement in the Southwest AP (prior to its reversal), the Southwest Trustee had a judgment secured by an inchoate lien on the Debtor's assets and did not attempt to liquidate the Debtor during that time. Because the Southwest Trustee's purpose is to be paid so that she can pay her costs and fees and make a distribution to creditors, it makes no sense for the trustee to want to liquidate the Debtor when the Debtor had no assets and only an income stream – keeping the Debtor in business is not only the

Southwest Trustee's only hope, but the only hope of any of its creditors.

Applications to Hire Robertson

Although the Debtor proceeded to trial in the Southwest AP with Smith as counsel, and then the Board terminated him as counsel during the trial and subsequently executed the January 15, 2013 Resolution, the Debtor did not immediately find replacement counsel. Grundy testified that once the Resolution was signed, they had a discussion with Robertson about hiring her as counsel, and he had no reservations about hiring her. The initial *Motion Requesting Substitution of Attorney* (Dkt. #145) filed on January 29, 2013 (the “**Motion to Substitute**”) included a Resolution by the Board dated January 28, 2013 (the “**January 28, 2013 Resolution**”), approving the hiring and engagement of Jeannette Robertson as counsel for the Debtor with a retainer of \$55,000 to be paid, with \$20,000 advanced by Ken to be repaid by the Debtor once approved by the Court. The January 28, 2013 Resolution further ratified the termination of Smith by Ward at the Southwest AP trial on January 15, 2013. The January 28, 2013 Resolution approved the Debtor's representation by Robertson in all litigation matters currently pending. It was signed by Ward as Chairman and Ken as a member of the Board. The Motion also included an Employment Contract/Retainer Agreement signed by Ward on behalf of Southeast. The *Application to Employ Attorney* (Dkt. #148) (the “**Application**”) filed the same day included an affidavit by Robertson stating she was disinterested as defined by 11 U.S.C. § 101 and had no adverse interest to the estate, and that she had no connections to the debtor or principals of the debtor and had not represented any related debtors or principals. The U.S. Trustee objected to the Application,

specifically noting that Robertson's employment contract included a nonrefundable provision which is inconsistent with certain Bankruptcy Code provisions requiring compensation be approved only for reasonable and necessary services, and that the Debtor's refund of the retainer paid by Ken amounted to either a post-petition retainer with no notice to creditors and no approval by the Court, or the bankruptcy estate was incurring an unsecured debt outside the ordinary course of business with no court approval.

Robertson then filed an *Amended Application to Employ Attorney* on February 1, 2013 (Dkt. #157) (the "**Amended Application**")³⁹ on behalf of Southeast, and attached an affidavit of Ken averring that he would not seek reimbursement of the \$20,000 retainer he paid to Robertson from the Debtor or its managing members. Grundy testified that he was familiar with Ken's signature, and that the affidavit appeared to be signed by Ken. Ken further averred that he has no financial relationship with the Debtor although he is Kimbro's natural father, that he is not a creditor of the Debtor, and that the Debtor does not have a cause of action against him. Robertson attached an amended declaration to this effect as well. Ken's affidavit states that he has not been and is not currently the Trustee of the A.K. Trust.

The Court notes that Kimbro testified the Board was actually meant to replace Robert Williams as Trustee of the A.K. Trust, although the documentation clearly stated the Board

³⁹ Two additional motions to hire with requests to expedite hearing have since been filed and denied. See *Order Denying Motion to Expedite Ruling on Motion to Substitute Counsel for Debtor* (Dkt. #192) entered March 1, 2013, and *Order Denying Amended Motion to Expedite Ruling on Motion to Substitute Counsel for Debtor* (Dkt. #216) entered March 28, 2013.

was created to control the Debtor. A later motion to be hired by Robertson stated that Ken was co-trustee of the A.K. Trust. All parties involved appear confused about the Board's creation and who exactly it was created for. It is, however, very clear that the family intended to maintain family control by creating this board and having it hire new counsel.

*Settlement Negotiations*⁴⁰

Grundy testified that he was “ecstatic” when parties began settlement negotiations in January 2013 after consulting with Robertson. According to Grundy, the first settlement meeting they had was the first time all the parties had sat down together – he testified the following persons were there besides himself: Robertson, Gershner, Craig Henry (another attorney for Pinewood), Judy Henry, Tucker, Naples, Kimbro, Hodge, the Southwest Trustee, and Gibson. He stated they were in the room for a number of hours and talked earnestly about how to move towards a settlement. He felt very encouraged, and stayed for several more hours to work on a plan with Robertson. Grundy testified he still did not know what the basis for the claims of LHI or the Estate of Wanda Stephens was, and he had not been aware of those claims.

Grundy testified that the parties held a second settlement conference by phone in which he, Robertson, Gershner, Greg, Judy Henry, Craig Henry, Tucker, Kimbro, Hodge,

⁴⁰ Although the parties opposing the Motions to Trustee strenuously objected to the introduction of evidence concerning the settlement negotiations between Southeast, Pinewood, and other members the Stephens family, those objections were ultimately overruled due to the relevance/importance of those negotiations and the fact that they are not barred by Fed. R. Evid. 408, which prohibits the introduction of settlement negotiations for the purpose establishing liability or validity of a disputed claim or for impeachment purposes. *See generally In re Eurospark Industries, Inc.*, 424 B.R. 621 (Bankr. E.D.N.Y. 2010).

the Southwest Trustee, and Gibson participated. Grundy testified that during that telephone conference, it was stated that the Southwest Trustee could not agree to the proposed settlement unless Pinewood withdrew the Motion for Leave to File a Complaint against the Southwest Trustee, Streetman, and Smith. (During the trial on the Motions to Appoint a Trustee, the Court noted that such a condition was reasonable given the unfair and unwarranted accusations made in the Motion for Leave to File a Complaint.)

Robertson drafted a preliminary settlement proposal dated February 8, 2013 (the “**February Proposal**”), that proposed a plan to pay Pinewood, the Southwest Trustee, and Greg Stephens on behalf of LHI and the Estate of Wanda Stephens (the “**Creditors**”) certain sums in exchange for all state and federal litigation between the parties to be withdrawn with prejudice or stayed pending completion of the proposed Chapter 11 plan. *See* Southwest Trustee Exhibit 12. The February Proposal⁴¹ proposed to pay the following:

- A guaranteed debt amount of \$650,000 to Pinewood over 10 years at 3% interest with monthly payments to begin 180 days after confirmation of a Chapter 11 plan. These payments would be made out of the Debtor’s current estimated annual net profit of \$250,000. Once the Debtor earned more than that, and certain set-asides for taxes and cash reserves were made, 50% of the additional net profit would be paid to the Creditors until additional payments totaling \$650,000 were paid to Pinewood for a “total cap amount” of \$1,300,000.

⁴¹ Only the key provisions of the settlement proposals are outlined in this Addendum in the interest of brevity (where it can be achieved).

- A guaranteed debt amount of \$500,000 to the Southwest Trustee. The Trustee would retain \$250,000 she is currently holding as a result of the prior settlement of the AP which was ultimately reversed on appeal, and Southeast would make additional payments totaling \$250,000 to the Trustee over 10 years at 3% interest with monthly payments to begin 180 days after confirmation of a Chapter 11 plan. Once the Debtor earned more than \$250,000 annual net profit, and certain set-asides for taxes and cash reserves were made, 50% of the additional net profit would be paid to the Creditors until additional payments totaling \$250,000 were paid to the Southwest Trustee for a “total cap amount” of \$750,000.

- A guaranteed debt amount of \$500,000 to Greg Stephens (presumably on behalf of LHI and the Estate of Wanda Stephens).⁴² Southeast would make payments totaling \$250,000 to Greg (or the entities) over 10 years at 3% interest with monthly payments to begin 180 days after confirmation of a Chapter 11 plan. Once the Debtor earned more than \$250,000 annual net profit, and certain set-asides for taxes and cash reserves were made, 50% of the additional net profit would be paid to the Creditors until additional payments totaling \$700,000 were paid to Greg Stephens for a “total cap amount” of \$1,200,000.

- Once the Debtor earned more than \$400,000 annual net profit, Grundy would receive a bonus totaling \$180,000 (to be paid over the course of a year) to make up for lost salary and bonuses since Southeast filed bankruptcy. Likewise, Shannon Centers would receive a similar \$90,000 bonus. The proposal also provides three-year employment contracts for Grundy and Centers and other provisions related to their compensation and

⁴² The February Proposal listed “G. Stephens/Entity” as the creditor.

employment.

- Equity may receive annual distributions from the annual net profit above \$250,000 after the Creditors had received their share of the 50% of this amount and the set-aside for taxes was deducted and paid.

The February Proposal further provides that settlement should be reached with Richard Cox, Trustee of the Bankruptcy Estate of Kimbro, on an outstanding complaint for \$140,000 that could result in a claim against the Debtor. Finally, the proposal contemplated that the A.K. Trust may need to transfer its ownership interest in the Debtor to its beneficiaries or to another entity for tax purposes. Grundy's testimony confirmed the terms of the February Proposal, particularly that his attorney's fees would be paid by the Debtor and he would receive an increased salary, three-year employment contract, and a potential bonus if the Debtor became more profitable.

Another settlement proposal was made by letter dated March 1, 2013 (the "**March Proposal**"), indicating that counter proposals had been received by Pinewood and the Southwest Trustee but not Greg. *See* Southwest Trustee Exhibit 23. The March Proposal altered the February Proposal as follows:

- The "total cap amounts" were removed, and Pinewood and the Southwest Trustee were to be paid in full. Although the Southwest Trustee has a liquidated claim of \$1.19 million, the amount of debt owed to Pinewood is not defined in the March Proposal. At trial on the Motions to Appoint Trustee, Dr. Naples testified the total debt owed was approximately \$2.6 million based on \$1.3 million in back rent, \$250,000 in damages to the

building before he regained possession, over \$500,000 in attorneys' fees, and seven years worth of interest which made up the difference.

- Pinewood's guaranteed debt amount was increased from \$650,000 to \$1,500,000 to be paid at 3% interest and amortized over 15 years but ballooning after 5 years from the beginning of payments; the Debtor and Pinewood would then negotiate the remaining payments.

- The Southwest Trustee's guaranteed debt amount and terms of payment were unchanged.

- Beginning in the year 2014 and continuing until Pinewood and the Southwest Trustee are paid in full, the Debtor would divide annual net income above \$250,000 between Pinewood and the Southwest Trustee. Pinewood would receive 60%, and the Southwest Trustee would receive 40%.

- The Debtor would settle the claims of LHI and the Estate of Wanda Stephens by transferring the beneficiary interest of Alice Stephens in the A.K. Trust to the Estate of Wanda Stephens. A home also owned by the A.K. Trust would then be transferred to Alice Stephens, and Alice Stephens would be released from all pending federal or state court litigation.

- The Debtor would offer a \$2 million consent judgment to Pinewood to be filed in the Miller County Case which would then be held in abeyance and not executed upon unless the Debtor defaulted in its plan payment to Pinewood. (Grundy testified this was an attempt by the Debtor to end the Miller County litigation.)

- The A.K. Trust and the Estate of Wanda Stephens (or its assignee) would not receive any distributions from the Debtor until Pinewood and the Southwest Trustee were paid in full under a confirmed Chapter 11 plan.

Grundy testified that he supported the March Proposal and that he was familiar with its terms from discussions with counsel but that he had not specifically read the written proposal submitted into evidence (although it had been attached to an email sent to him), and the transfer of 49% interest in the Debtor to LHI and the Estate of Wanda Stephens, even though he had earlier stated he did not know the bases of their claims. He also testified that he had multiple discussions with Robertson about the three main claims and how to settle those while complying with the Bankruptcy Code. He further testified the March Proposal was not the final settlement, but that the parties were still negotiating.

Greg testified the March Proposal subordinated his claims to that of Pinewood and the Southwest Trustee. He further testified (on March 8, 2013) that he and his counsel were working on a disclosure statement they planned to file the following week, and that once his proposed plan was approved, he would own the Debtor and then he would have standing to appeal Judge Mixon's ruling; he also mentioned allowing others to intervene, and if denied, asking Judge Mixon to reconsider and then appealing that decision, if his motion were denied. The Court notes that Greg's statements reveal an unrealistic optimism - due to constraints under the Bankruptcy Code as well as the certainty of litigation over Greg's proposed plan, it would be impossible to get a plan confirmed before Judge Mixon's ruling became final.

Kimbro testified that as of the date of his testimony (March 8, 2013), there was an agreement with Pinewood, the Estate of Wanda Stephens, and LHI to put forth a confirmable plan. He further testified the infusion of \$300,000 by Greg was to help fund a plan and ease issues associated with employees' attrition. He confirmed the March Proposal's terms in general, and in particular, he confirmed that the settlement included a provision to settle the claim of his personal bankruptcy trustee against him. Kimbro also testified that he believed \$250,000 a year was a reasonable expectation for the Debtor and that it could fund the proposed plan.

Regarding the proposed settlement, the Court reiterates its conclusions made in the *Order Granting Motions to Appoint Trustee*, specifically that the efforts of Greg and Kimbro to reach a settlement and plan, at best, amounted to favoring some creditors over others. The entities represented by Greg and Pinewood are treated much more favorably than the Southwest Trustee even though the Trustee is the only creditor with a liquidated claim. This is true even though the proposed settlements allowed the Southwest Trustee to retain the \$250,000 she is currently holding as a result of the now-overturned settlements in the Southwest AP. The most recent March Proposal guaranteed payments to the Southwest Trustee of only \$500,000, which is just 42% of her liquidated claim of \$1,190,000. In contrast, the March Proposal guaranteed payments to Pinewood of \$1,500,000, which is 57.7% of its asserted claim of \$2,600,000. Moreover, Pinewood's claim is not yet liquidated and is still speculative given that it is dependent on being successful on a reverse veil-piercing theory against the Debtor (amongst other defendants). The March Proposal also

included a provision allowing the Debtor to give Pinewood a \$2 million consent judgment in the Miller County Case to be executed in the event the Debtor defaulted on its plan payments resulting in an even larger judgment against the Debtor than the Southwest Trustee holds (and one based on no trial and despite the presence of multiple defendants). Finally, despite the claims of Greg's entities being both unliquidated and speculative, the March Proposal would transfer a 49% equity interest to Greg. As the Court previously explained:

. . . the Court has serious reservations about the validity of any claim by LHI, Ameriwest or the Estate of Wanda Stephens – the entities on whose behalf Greg appears. Claims were only just filed on behalf of those entities after two days of hearing on the Motions to Appoint Trustee. Although the proposed consent judgment Greg caused to be filed in Miller County was almost immediately withdrawn once bankruptcy attorneys warned him of bankruptcy code violations, the scheme to include Greg as a creditor of the Debtor continues in the form of settlement proposals in which Pinewood and Greg would be paid the bulk of their claims while the Southwest Trustee – who now has a liquidated claim of \$1,190,000 – would receive no more than \$750,000, if that.⁴³

Although the validity of the claims asserted by Greg have not yet been tried, and the Court cannot pre-judge those, the Court does find that the settlement of those claims without further analysis was unacceptable. Based on the testimony and record in this case, the Court finds that no one (apart from Smith who believed the claims had no merit) had analyzed the claims asserted by Greg. Even Grundy testified he did not understand the bases for these claims. The Southwest Trustee put in enough evidence for the Court to find that there are defenses

⁴³ The Court notes that in the *Order Granting Motions to Appoint Trustee* it referred to the cap amount of \$750,000 as the most that would be paid to the Southwest Trustee; while that was the case under the February Proposal, the March Proposal proposed to pay the Southwest Trustee in full over time. The Court will amend the *Order Granting Motions to Appoint Trustee* to the extent necessary by separate order.

to payment of these claims, which demanded further investigation, particularly when these claims seek to significantly dilute the payment of Debtor's other creditors. Greg is not a bankruptcy expert or a practicing attorney – he is a practicing physician – his legal explanations are not informed or based on correct statutory or case law, and do not justify a settlement proposing to transfer 49% of the Debtor to entities controlled by its principal stakeholder's brother.


In sum, the settlement negotiations were undertaken, at a minimum, to thwart the appointment of a trustee. While the Court believes that Debtor's proposed counsel undertook these negotiations in good faith, the Court believes she could only do so because she believed there were legitimate bases for the claims of Pinewood and Greg's entities. Without the time to fully research and understand the history of this and related cases, and taking these parties at their word, she moved forward with the information she had. The Court, however, does not believe that all parties were negotiating in good faith or that Debtor's proposed counsel was provided with accurate information. Rather, the proposed settlements were an attempt to retain ownership of the Debtor with the family while negating the impact of the judgment recently won by the Southwest Trustee (*i.e.*, paying the Southwest Trustee as little as possible) and resolving Pinewood's case against the Debtor and related entities and individuals (such as Kimbro, Alice, and Grundy).

The settlement proposals provided sound evidence that a trustee – a knowledgeable person who has control of the Debtor and the responsibility to treat all creditors fairly – was needed. As the Court pointed out in its *Order Granting Motions to Appoint Trustee*, the

newly appointed trustee will respect the Bankruptcy Code and “engage in fair and transparent claim litigation, and if possible, propose a plan that distributes the cash flow of this Debtor to legitimate creditors as provided under the Bankruptcy Code, and preserves equity for the owners *after* the plan is complete.”

CONCLUSION

As explained in the Court’s April 19, 2013 Order, the Court finds cause exists to appoint a Chapter 11 trustee in this case, and therefore, the appointment of a trustee is mandatory pursuant to 11 U.S.C. § 1104(a)(1). The Court also finds appointment of a trustee is in the best interests of the creditors and the estate, and therefore, such appointment is appropriate pursuant to 11 U.S.C. § 1104(a)(2). The Court cited the legal standard for appointment of a trustee under both §§ 1104(a)(1) and 1104(a)(2) in its April 19, 2013 Order, and will not repeat that here. The Court also does not repeat its reasoning for finding that the appointment of a trustee was necessary and appropriate in this case. However, the Court makes additional findings in this Addendum and offers this detailed account of these proceedings for the purpose of expediting and clarifying pending and future litigation.


Audrey R. Evans
United States Bankruptcy Judge
Dated: 07/09/2013

cc: Mr. Michael Collins, Trustee
Ms. Jeanette Robertson, proposed attorney for the Debtor
Mr. Kimbro Stephens, *pro se* and as attorney for A. K. Tennessee Irrevocable Trust
Ms. Renee Williams, Trustee of Living Hope Southwest Medical Svcs
Mr. Tom Streetman and Mr. Robert Gibson, attorneys for Renee Williams as the
Southwest Trustee
Mr. Steve Gershner, attorney for Living Hope Institute, Inc. and Ameriwest Health
Services, Inc.
Dr. Greg Stephens, *pro se* as executor of the Estate of Wanda Stephens
Ms. Judy Henry and Ms. Kim Tucker, attorneys for Pinewood
Ms. Patti Stanley, attorney for the U.S. Trustee
Mr. Jim Smith