

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Woodlawn Community Development ) 18 B 29862  
Corp., ) Chicago, Illinois  
 ) 10:30 a.m.  
Debtor. ) February 27, 2019

TRANSCRIPT OF PROCEEDINGS BEFORE THE  
HONORABLE CAROL A. DOYLE

APPEARANCES:

For Debtor:	Mr. David R. Herzog;
For Lakeside Bank:	Mr. Steve Varhola;
For Chicago Housing Authority:	Mr. Kevin Morse;
For Official Committee of Unsecured Creditors:	Mr. Jeffrey Dan;
For Chicago Regional Council of Carpenters Funds;	Mr. Bruce Scalambrino;
For U.S. Trustee:	Mr. Stephen Wolfe;
 Court Reporter:	 Jackleen DeFini, CSR, RPR U.S. Courthouse 219 South Dearborn Room 661 Chicago, Illinois 60604.

1 THE CLERK: Woodlawn Community  
2 Development.

3 THE COURT: We'll start on your right  
4 and work across. (Indicating.)

5 MR. VARHOLA: Good morning, Your  
6 Honor. Steve Varhola on behalf of Lakeside Bank.

7 MR. MORSE: Good morning, Your Honor.  
8 Kevin Morse on behalf of the Chicago Housing  
9 Authority.

10 MR. HERZOG: Good morning, Your Honor.  
11 David R. Herzog on behalf of the debtor, debtor in  
12 possession.

13 MR. DAN: Good morning, Your Honor.  
14 Jeffrey Dan on behalf of the Official Committee of  
15 Unsecured Creditors.

16 MR. SCALAMBRINO: Good morning, Your  
17 Honor. Bruce Scalabrino on behalf of Chicago  
18 Regional Council of Carpenters Funds.

19 MR. WOLFE: Steven Wolfe on behalf of  
20 the United States Trustee. Good morning, Your Honor.

21 THE COURT: So, the main issue up  
22 today is the motion to appoint a trustee. I've read  
23 the committee's reply, and I was a little annoyed  
24 there were no citations to the transcripts of any  
25 sort.

1 MR. DAN: And, Your Honor, I do  
2 apologize for that, but the transcript of Dr.  
3 Finney's deposition came in in the afternoon and my  
4 secretary had been working feverishly to get the 341  
5 transcripts transcribed and she did not finish all of  
6 them until afternoon. So, I do apologize for that.  
7 I would have liked to have cited myself, but I could  
8 not do that.

9 THE COURT: So, I saw them and read  
10 the reply. So at some point in the afternoon you did  
11 file a transcript of Dr. Finney's deposition and then  
12 the transcript of more than one 341 meeting.

13 MR. DAN: All three of them were  
14 filed, Your Honor.

15 THE COURT: They got filed yesterday  
16 afternoon, so we were feverishly working through to  
17 digest all of that to see what's in there.

18 So, let me just say, I mean, I think  
19 there's more than an ample basis for appointment of a  
20 trustee. And, obviously, the committee wasn't  
21 persuaded by the plan in which they say Dr. Finney,  
22 you know, the debtor, based the plan on the sale of  
23 assets that are not owned by the debtor, that are all  
24 under the control of other people, and, you know, so  
25 a donation by other nonprofits controlled by the same

1 person who did some not very good things in this  
2 case. that would sound fairly serious to me.  
3 Although the parties might, you know, if the parties  
4 think there's something to work out here, you know,  
5 I'm always open to that.

6 I would like to hear from the U.S.  
7 Trustee. I'm assuming -- I think you said last time  
8 you were in support of me appointing a trustee in  
9 this case; is that correct?

10 MR. WOLFE: That is correct, Your  
11 Honor.

12 THE COURT: Okay. Here's what I'm  
13 going to do, and I don't really like to appoint a  
14 trustee, obviously. You know, the norm is that the  
15 current management stays in place, et cetera. But  
16 what I think should happen, I've never done this with  
17 a nonprofit, this is not a for profit company. What  
18 usually happens is a trustee is usually with a really  
19 big firm, then, you know, that person, he or she,  
20 becomes the trustee and then hires their firm at the  
21 hourly rates of, let's say, \$400 for a brand-new  
22 associate, up to who knows what for senior partners,  
23 come in and start, you know, charging hourly lawyer  
24 rates to do what needs to get done.

25 And my concern is I don't think that's

1 what we need here. I think we need somebody to come  
2 in to either run the business, him or herself, or  
3 more likely perhaps to hire actually a real  
4 professional manager for this kind of a company,  
5 okay, instead of the minister or Dr. Finney. You  
6 know, I think that's what is -- I have no idea what  
7 the academic credentials for Dr. Nixon are, but  
8 unless he's got some, you know, turnaround management  
9 skills or something like that.

10 But, nonetheless, I'm worried about  
11 the cost of this to the entity, if it's kind of a  
12 typical appointment of a Chapter 11 trustee. You  
13 know, a hundred thousand a month is just not going to  
14 work here for a trustee hiring his lawyer's, you  
15 know, staff to do whatever.

16 So, what would you envision, Mr.  
17 Wolfe?

18 MR. WOLFE: Well, Judge, let me say,  
19 if I may just back up a little bit.

20 When we were last here Your Honor did  
21 ask me the same question about whether or not the  
22 U.S. trustee supported the appointment of a trustee  
23 in this case, and I said yes. The court had a heavy  
24 call that day. I did not get an opportunity to make  
25 any lengthy remarks --

1 THE COURT: I didn't let you, so my  
2 apologies. So, go ahead now.

3 MR. WOLFE: I'll take the rap for  
4 that.

5 THE COURT: Go ahead.

6 MR. WOLFE: I did have some lengthy  
7 remarks, but the bottom line is we do support the  
8 appointment of a trustee.

9 Part of the process, if Your Honor  
10 does order the appointment of a trustee this morning,  
11 is for me to consult with the parties. We are  
12 required to do that under section 1104; get  
13 nominations for whom they think would best serve as a  
14 Chapter 11 trustee. I take all those back to  
15 Mr. Layng. Ultimately, it is his decision.

16 I'd like to --

17 THE COURT: Just a second. Is the  
18 pool of parties basically the Chapter 7 trustees? Is  
19 that who the U.S. Trustee looks at as the pool, or it  
20 can go outside of that.

21 MR. WOLFE: It can go outside, Judge.  
22 Certainly if a party were to suggest someone who is  
23 not a member of the panel, that person's name would  
24 go into the mix.

25 But having said that, we do have a,

1 sort of a predisposition to look to the panel, just  
2 experience, and those people that have been  
3 investigated and bonded and are very trustworthy,  
4 so...

5 I was just going to say that we try to  
6 be cost conscious in every case. The debtor's  
7 operations, though, appear to strike me to be pretty  
8 significant. It's not a small package food store or  
9 something like that. It's a big operation running  
10 4800 CHA apartments. So, I certainly anticipate  
11 there will be some administrative expenses, ideally  
12 we'd be able to keep them to a minimum, though.

13 I will certainly convey the court's  
14 thoughts to Mr. Layng.

15 MR. HERZOG: I'll speak to that issue,  
16 if I may, Your Honor.

17 THE COURT: Yes. I wanted to hear it  
18 from Mr. Wolfe, though. You can address, obviously,  
19 what was in the response, or say whatever.

20 MR. HERZOG: As Mr. Morse indicated a  
21 couple of weeks ago, there was a significant break in  
22 one of the sprinkler systems at one of the housing  
23 projects which are managed by the debtor. And the  
24 debtor had people there 24 hours a day, the number of  
25 people that had to work in order to keep the heat

1 going, provide temporary heating, and to provide for  
2 the correction of the problem.

3 I think that's the very reason why  
4 this management has to stay in place. Because we're  
5 putting in jeopardy, and I suggest to Your Honor that  
6 you're going to put in jeopardy some individual who  
7 doesn't know anything about the type of property  
8 management that's required in this particular case.

9 And I have other comments, Your Honor,  
10 about appointment of a trustee. I don't think that  
11 there are findings made by Your Honor. I can go  
12 through a whole response to the creditors committee  
13 reply, if you'll let me. But the bottom line here is  
14 I again urge you that we need an evidentiary hearing  
15 here. I will put on the stand Dr. Nixon, as well as  
16 other board people and other management or other  
17 folks employed by the debtor which will testify that  
18 new management is in place; that there's a new era  
19 here involved with respect to this organization.

20 And we can't simply take a 40-plus  
21 year organization, which has been an integral part of  
22 this community, and simply appoint a trustee which  
23 will cause, I respectfully submit to Your Honor, the  
24 liquidation of this debtor rather than, as we  
25 proposed, a payment to creditors.



1 Right now, besides the fact of these  
2 monies that we are promised by -- from the sale of  
3 these other entities, Dr. Nixon is out there in  
4 seeking funding from other sources, refinancing from  
5 other courses, and is close to receiving a commitment  
6 of \$3 million.

7 So before we jump into appointing the  
8 trustee, we filed a plan and disclosure statement, as  
9 Your Honor requested. We have a plan to reorganize  
10 rather than to liquidate. And I respectfully submit  
11 to Your Honor we're entitled to a hearing on this  
12 before Your Honor makes a ruling.

13 THE COURT: Well, actually you're not  
14 entitled to an evidentiary hearing. The only time I  
15 hold evidentiary hearings on this or any other matter  
16 is when there are disputed issues of fact in  
17 evidence.

18 And the only reason I wouldn't be  
19 willing today is I believe the undisputed facts  
20 support the conclusion. Otherwise, of course, I  
21 would hold an evidentiary hearing.

22 MR. HERZOG: The undisputed fact is --

23 THE COURT: No. You've made -- I've  
24 read the response. I've read the reply. I've now  
25 read quite a bit of the transcripts of the 341

1 meeting that just took place a few days ago. Okay?

2 I think what was said in that hearing by the  
3 employees of the debtor are admissions, I think, that  
4 I can take as undisputed facts. Okay?

5 So, and the only real question here  
6 is, is this current management or a change of  
7 management. And to me it's abundantly clear that  
8 there's no reason for putting anybody on the stand,  
9 okay, from the same management. Okay?

10 But here's what I will also say about  
11 this as a practical matter, I don't look at a trustee  
12 as shutting this place down, at all. And I don't  
13 think that's what's going to happen. The goal is to  
14 get somebody independent in charge, disinterested  
15 from the players, okay, who got the entity which --  
16 you know, I have no idea what this entity really  
17 does, but accepting the debtor's representation about  
18 its role in the community, and it's done plenty of  
19 good, okay, so, good. Go forward. But a new  
20 management isn't coming in to shut it down. It's, to  
21 me, to bring it to a level of professional management  
22 here that seems to have been lacking or it could not  
23 have gotten into the situation that it's in.

24 And to put in some management that  
25 everybody has confidence in, which isn't to replace

1 all the employees or anything, and get rid of anybody  
2 who's dealing with the, you know, on the, on the  
3 front lines -- and, by the way, those are all CHA  
4 employees anyway, right?

5 Mr. Morse, aren't those your employees  
6 out there?

7 MR. MORSE: Correct.

8 THE COURT: CHA people who are --

9 MR. MORSE: No, I understand.

10 THE COURT: -- managed by this debtor.  
11 But nobody wants to get rid of anybody like that. No  
12 person coming in as a Chapter 11 trustee in their  
13 right mind would want to change the people who know  
14 the housing units and how to deal with that, et  
15 cetera.

16 It's more the bigger picture issues  
17 where I think this debtor needs new management. And,  
18 hopefully, what would come from a Chapter 11 trustee  
19 is, you know, somebody's brought in to sort of get  
20 the bigger picture right, and then put someone in  
21 place to be, you know, a CEO-type person who can move  
22 it forward.

23 And perhaps there isn't a confirmable  
24 plan here. I don't really know. You know, a  
25 nonprofit is a very odd thing, and, you know, it's

1 not the typical -- it's not an odd thing, it's  
2 something of an oddity in a Chapter 11 case. And  
3 there would be nothing to stop, for instance, you  
4 know, new commitments being made, by whom I don't  
5 know, who wanted to take out what.

6 I mean, the problem you've got is a  
7 \$1.5 million tax liability here that was created by  
8 previous management's gross mismanagement,  
9 malfeasance. You know, you could put a whole bunch  
10 of words on that, but management, in my view, has  
11 just completely continued, almost seamlessly, into  
12 the present moment. So...

13 And I will put all of my reasons on  
14 the record for that. I just, as a practical matter,  
15 you know, it's just -- I just want to make sure that  
16 this doesn't basically gut the debtor.

17 Now, this debtor is willing to pay Dr.  
18 Nixon \$35,000 a month. It seems to me that should be  
19 enough to direct that to a Chapter 11 trustee, you  
20 know, for at least some amount of time. You know,  
21 that would be a more reasonable amount of money to be  
22 spending when not everybody can hopefully have  
23 confidence in the person coming in as being competent  
24 and neutral and trying to move this entity forward.

25 But, of course, I have no idea what

1 the realities are. So there is no guarantee of what  
2 a Chapter 11 trustee will do. But that's going to be  
3 controlled by the actual, real, fact situation  
4 entity, which I can't say what's the right result.  
5 Okay? It may be this is an organization that, for  
6 reasons related to how it got to this particular  
7 situation, just cannot function properly. I don't  
8 know.

9 But that's certainly not my goal in  
10 appointing a trustee, is not to do that, not to just  
11 like get rid of employees, you know, or anything like  
12 that, it is to change the basic day-to-day  
13 functioning of the different housing unit  
14 developments.

15 So, all right. And I take it still  
16 the creditors are all in favor of this.

17 Everyone is shaking their heads yes.  
18 Okay. So the only party opposing it is the debtor.  
19 So, okay.

20 Well, you know, I have to work on  
21 digesting all of this. I've read the 341 meeting  
22 testimony and various other things, but I think what  
23 I have to do is go over all of this for a few  
24 minutes.

25 (Whereupon a recess was had and the

1 following further proceedings were  
2 Had, to-wit:)

3 THE CLERK: Recalling the set matter  
4 of Woodlawn Community Development.

5 THE COURT: Sorry for the break.  
6 Sorry. Of course, it took me longer than I thought.  
7 I've got about six or seven pages of single-space to  
8 read into the record. Why don't you all have a seat?

9 MR. WOLFE: Judge, I wonder if, before  
10 we get started, you would indulge me to make a very  
11 few statements about how and why the U.S. Trustee  
12 supports the motion. I would appreciate that.

13 THE COURT: Sure.

14 MR. WOLFE: And I apologize if  
15 anything I say is duplicative of what Your Honor  
16 said, or what somebody else already said. And  
17 certainly if I misstate some fact, I would invite Mr.  
18 Herzog to correct me. I would welcome that.

19 Just kind of a little historical, sort  
20 of a little background, and then maybe a conclusion  
21 at the end.

22 Woodlawn has two divisions, one  
23 manages CHA property, the other is involved in what I  
24 would say is a real estate development investment.  
25 That's property that Woodlawn actually owns, real

1 estate it actually owns.

2           Early on in 2017, Woodlawn redirected  
3 CHA money from the CHA account to forestall a  
4 foreclosure on one of the properties that it owned  
5 itself. And I think that was one quarter of 941  
6 withholdings, and that was done at the direction of  
7 Dr. Finney, who at the time was an officer/director.  
8 That led to the filing of this case, ultimately.

9           We convened a 341 meeting back on  
10 November 28th. There were at least four  
11 representatives of the debtor who appeared and  
12 testified. Dr. Finney was hospitalized at the time.  
13 My sense, from listening to the four debtor  
14 representatives, was that they were sincerely trying  
15 to answer questions that our office had, and also the  
16 creditors had as well. Unfortunately, in many  
17 instances in response to significant questions, they  
18 were unable to do so, and really sort of had to defer  
19 to Dr. Finney. So we continued the 341 meeting to  
20 February 13th.

21           At that point Dr. Finney did testify.  
22 Some of the things that he testified about were that  
23 the debtor's fiscal year ends June 30th each year.  
24 As of February 13th of this year, the debtor's 2017  
25 yearend financials had not yet been prepared. The

1 same with the 2018 yearend financials. So now we're  
2 into early 2019 and the fiscal year ended the end of  
3 June last year. The target date for both of those  
4 was March of 2019. So we've got some inadequate  
5 financial reporting going on for a period of time.

6 Dr. Finney also testified that the  
7 debtor was tardy filing its form 990, which is kind  
8 of a corporate-type tax return for a nonprofit for  
9 2017 and 2018.

10 We also did discuss quite a bit the  
11 history surrounding this payroll tax nonpayment  
12 issue. And last time Your Honor did point to Dr.  
13 Finney's declaration, which was filed early on in the  
14 case. And that actually was a topic at the 341  
15 meeting, because by that time the IRS had filed a  
16 proof of claim, a significant proof of claim for  
17 multiple quarters of unpaid 941 taxes. And the  
18 sentence in question in Dr. Finney's declaration was,  
19 and it's on page four of the sixth page, from the  
20 caption here, it says, "however, the claim which  
21 precipitated the debtor's filing for Chapter 11  
22 reorganization is the recent claim and filing of  
23 federal tax liens by the Internal Revenue Service  
24 totaling approximately \$1.8 million for unpaid  
25 payroll tax liability for the second and fourth



1 quarters of 2017 and the first quarter of 2018.

2 Management was completely surprised by  
3 these unpaid tax liabilities because provision had  
4 always been made for the payment of these liabilities  
5 at the time employees receive their payroll checks."  
6 And that's the sentence that Your Honor highlighted  
7 last time.

8 That sort of raises the question,  
9 getting into a little bit of argument here, about who  
10 knew what, when. So management knew that these  
11 weren't being paid in a timely manner. That would  
12 qualify, I think, as mismanagement. Or if it didn't  
13 know, same thing. Either way, it's not a good  
14 reflection on management.

15 Dr. Finney also testified that he took  
16 full responsibility for the IRS situation, lack of  
17 internal controls, absence of a budget, books and  
18 records not closed out.

19 Your Honor's heard some discussion  
20 about this entity called Lincoln South Central, which  
21 Dr. Finney controls and is a tenant in one of the  
22 debtor-owned properties, but has not been timely  
23 paying rent.

24 At the end of the 341 meeting --

25 THE COURT: I thought he has -- he

1 owned, according to the debtor's response to the  
2 motion, I want to make sure I have this right, Dr.  
3 Finney owns Lincoln South.

4 MR. HERZOG: Yes, Your Honor.

5 THE COURT: Lincoln South, debtor owns  
6 the property. Lincoln South is the entity that has  
7 the master lease on this, which is kind of a shopping  
8 center or multi-unit commercial building. Lincoln  
9 South has a master lease with the debtor and then  
10 leases out to various tenants.

11 So it's not that he's just a tenant,  
12 he's got the master lease; he's collecting rents from  
13 various entities and then not paying them over to the  
14 debtor. So he's pocketing the rents from the  
15 property owned by the debtor. That's my  
16 understanding.

17 I just want to make sure that's right,  
18 because I thought you said it a little bit  
19 differently.

20 MR. WOLFE: No. Thank you for  
21 pointing that out. And I would certainly invite Mr.  
22 Herzog, if he disagrees with any characterization, to  
23 clarify. That information is more under his control,  
24 the debtor's control, than my personal knowledge.

25 Mr. Herzog did mention this morning

1 that there's a plan on file. And, yes, there is.  
2 That's one of the things we talked about at the  
3 conclusion of the 341 meeting is what's the debtor's  
4 exit strategy. I always ask that in every case.

5 I have some sort of generic issues  
6 with the plan about what happens if the property  
7 doesn't sell. But I always look at it in every case.  
8 But more fundamentally, Judge, and the committee had  
9 asked for this, and our office had suggested it as  
10 well, let's have something that's enforceable, that  
11 shows that these payments are going to be coming in.  
12 And I would have thought at a minimum that there  
13 might have been board resolutions from these two  
14 other not-for-profit corporations that say, yes, we  
15 authorize the sale; yes, we authorize the money to  
16 flow to our debtor. But it wasn't. It wasn't there,  
17 and maybe it's in the works. I'll let Mr. Herzog  
18 talk about that.

19 Kind of moving to the U.S. Trustee's  
20 position, after the last hearing, which was  
21 February 20th, we had the continued 341 meeting yet  
22 again. Dr. Nixon appeared and testified. One of the  
23 reasons he came back was at some point, maybe later  
24 in December, we got some amended schedules on file.  
25 It's always good to have someone verify and affirm

1 schedules under oath, which is the primary reason for  
2 the continuance. But then we did talk about some  
3 other things.

4 Dr. Nixon did testify that pre- and  
5 post-petition, the same officers are in charge of the  
6 debtor, except for Dr. Finney. And pre- and  
7 post-petition, the board is essentially the same as  
8 well. So I think Your Honor has alluded to this  
9 earlier, about whether a distinction between current  
10 management and former management. We would take the  
11 position that there is the same management both  
12 pre-petition and post-petition.

13 But beyond that, Dr. Finney, no  
14 question, has some health issues. But that raises  
15 the question of when he's unable to perform his  
16 duties, where are the other officers? Where's the  
17 board?

18 Your Honor I know has seen Dr. Nixon's  
19 application, and he talks about the things he's  
20 accomplished post-petition. It's a very impressive  
21 list. It talks about establishing regular staff  
22 meetings; providing regular status reports to the  
23 board; establishing and scheduling quarterly board  
24 meetings; putting in cash disbursement controls;  
25 establishing financial reporting system on a monthly

1 and yearly basis; developing an annual budget  
2 process; developing annual performance evaluation  
3 systems for both corporate staff and the board.

4           These are all good things, but, again,  
5 that raises another question: Why weren't those in  
6 place from 2017 to now. Like I say, I think  
7 responsibility to run the corporation, in addition to  
8 Dr. Finney, falls on the other officers, and the  
9 board as well. Even if he's present, they've got to  
10 have input and control.

11           My sense is if there were proper  
12 internal controls in place pre-petition, the  
13 redirection of all of the CHA money might not have  
14 happened. That might have led to the loss in  
15 foreclosure of a debtor-owed property, but the IRS  
16 would have been paid; the 941s would have been  
17 current; there would have been no lien, which the IRS  
18 ultimately slapped on Woodlawn's bank accounts, and  
19 maybe no Chapter 11 either.

20           I will note that as an officer, Dr.  
21 Nixon reports to the board. And the employment  
22 agreement attached to the motion to employ him says  
23 Dr. Nixon is an at-will employee, and neither he or  
24 Woodlawn can terminate the agreement with or without  
25 cause, and with or without notice. So it's a

1 little -- it makes the control, I'd say a little  
2 bit -- maybe not as firm as we would like.

3 MR. DAN: Tenuous?

4 MR. WOLFE: Tenuous is a good word.

5 I will also note that the previous  
6 case, I had the opportunity, the reason to cite a  
7 case called In re: Eagle Creek Subdivision, LLC,  
8 it's a 2009, Westlaw, 613173. It's from a bankruptcy  
9 court, Eastern District of North Carolina, in 2009.  
10 The facts of it are different, but the court in that  
11 case found that when the creditor body lost  
12 confidence in management, that in and of itself was  
13 gross mismanagement and warranted the appointment of  
14 a Chapter 11 trustee under 1104(a)(1). That is kind  
15 of my sense of what we have here.

16 And I appreciate Your Honor indulging  
17 me to listen to my comments here.

18 Appointing a Chapter 11 trustee is a  
19 serious action in a case. That's certainly not  
20 something that our office takes lightly. We will  
21 note that the Woodlawn Community Development  
22 Corporation has been a longtime positive force in  
23 Chicago, and provided valuable services to the people  
24 of Chicago.

25 Last time we were here, I think I

1 mentioned that our office takes the position that the  
2 preponderance of evidence is the correct standard  
3 here. And I will just cite a Seventh Circuit case,  
4 Ramirez versus T&H Lemont, Incorporated, 845 F.3d  
5 772. Obviously, the facts would be different, but it  
6 talks about --

7 THE COURT: Rameriz versus Lemont, you  
8 said? What was it?

9 MR. WOLFE: Rameriz versus T&H Lemont,  
10 Incorporated. at 845 F.3d 772.

11 And then what the Seventh Circuit says  
12 there, it talks about a couple of other cases, Herman  
13 and Huddleston, it says: "What Herman and Huddelston  
14 make clear, unless the governing statute specifies a  
15 higher burden, the Constitution demands a higher  
16 burden because of the nature of the individual  
17 interest at stake, proof by a preponderance of the  
18 evidence will suffice in a civil setting."

19 THE COURT: And was that 1104,  
20 appointing a trustee motion?

21 MR. WOLFE: I don't believe so, Judge.

22 THE COURT: Okay. Because I'm aware  
23 of -- I'm going to agree with you on that. And I  
24 think it was the Eighth Circuit, got it right, for  
25 the same reasons you're saying. Okay. That's good

1 to know.

2 MR. WOLFE: Wrapping up here, Judge.  
3 Earlier on in a poll, the creditors who are standing  
4 before you, I think there was silence. I will take  
5 that as either support or lack of opposition to the  
6 motion for the appointment of a Chapter 11 trustee.

7 THE COURT: Well, what I did was I  
8 asked, I said, does everybody here think, you know,  
9 besides the debtor, there should be one and  
10 everyone -- I should have said, okay, let the record  
11 reflect that every lawyer in the room was nodding  
12 their head yes, in agreement.

13 MR. WOLFE: So to conclude: Applying  
14 the law to the facts in this case, the U.S. Trustee  
15 feels that cause exists to appoint a Chapter 11  
16 trustee.

17 I thank you for indulging me, Your  
18 Honor.

19 MR. HERZOG: Your Honor, if I may just  
20 very briefly?

21 THE COURT: Sure.

22 MR. HERZOG: A couple of things.

23 Mr. Wolfe, by and large, is correct in  
24 many of the facts. First of all, the only officer of  
25 Woodlawn is the CEO and president, which had been Dr.



1 Finney up until the date of the filing, and then had  
2 been replaced by Dr. Nixon. There are no other  
3 officers and directors.

4 With respect to board members, they're  
5 volunteered, they're not paid, and as Dr. Nixon  
6 indicated in his affidavit, were unaware of the tax  
7 liability situation until the resolution was brought  
8 before them concerning the filing of this Chapter 11.

9 So, to say that the new management  
10 under Dr. Nixon is a continuation is simply not the  
11 case. The old management, in essence, was Dr.  
12 Finney, he ran the organization. He did everything.  
13 He's the one who directed it, and he has been  
14 replaced, and new management has endeavored to do  
15 everything in its power in these last couple of  
16 months to correct the situation, including all of the  
17 controls that have been put in place.

18 With respect to the 990s, Mr. Wolfe is  
19 correct, they had not been filed. Again, the 990s  
20 have now been prepared. They're in review and will  
21 be -- and are being filed, so that any delinquent tax  
22 returns which hadn't been prepared under Dr. Finney's  
23 administration has been corrected. And if you've  
24 gone down the list of "trying to collect," I filed a  
25 proposed cash collateral order which, again, reflects

1 the fact of collecting these payments now from  
2 Lincoln South Central.

3 Rome wasn't built-in a day. There  
4 were tremendous, as Your Honor alluded to, problems  
5 in prior management which are being addressed by what  
6 is new current management.

7 And I would point out the fact that  
8 Dr. Nixon has been actively engaged in the process of  
9 seeking the replacement of the existing board members  
10 to have very professional, as well as very concerned  
11 individuals from the community, in particular, Dr.  
12 Nixon has solicited and actively -- has actively  
13 participating a Mr. James Compton, who is the head of  
14 the Chicago Urban League. as part of the audit  
15 committee and as part of the board of directors.

16 So this is an evolving process in  
17 which he's seeking to change the whole history, as  
18 well as really the culture of this organization.

19 So I respectfully disagree with  
20 Mr. Wolfe, and I disagree with Your Honor, and with  
21 the committee. I don't believe that this is the same  
22 old management, and I think that the debtor has  
23 undertaken, endeavors to correct the mistakes of the  
24 past.

25 MR. MORSE: Your Honor, I just have

1 one small correction with respect to the fact. I  
2 believe Mr. Wolfe said the debtor took CHA funds that  
3 were in a CHA account. The way it actually works is  
4 the CHA deposits funds into a payroll account, which  
5 is the debtor in possession payroll account.

6 THE COURT: Right.

7 MR. MORSE: That would be the only  
8 correction.

9 THE COURT: Okay.

10 MR. MORSE: So the vast majority of  
11 the funds likely came from the CHA, but we don't have  
12 any evidence that it was all CHA money.

13 THE COURT: All right. Well -- and  
14 thank you for adding those details, as I let you  
15 weigh in earlier, Mr. Wolfe.

16 So, you know, everything Mr. Wolfe  
17 says supports what I am going to do. So, to the  
18 extent I left out any details that he mentioned, I am  
19 relying on the fact that he's asserted as well, which  
20 cannot really be contested by Mr. Herzog because  
21 they're just not contestable. It's not that Mr.  
22 Herzog isn't doing a good job. You have done the  
23 best job you possibly could under the circumstances,  
24 but, you know, you can't contest the essence of the  
25 problem here that supports the imposition of a

1 trustee.

2                   And I hope, as I stated before, I hope  
3 it has a positive impact on this reorganization, not  
4 a negative one. But that's going to all be  
5 determined by the underlying facts, which are really,  
6 you know, just the facts on the ground as to the  
7 organization and property. So, we just have to see  
8 how it turns out. But I've got to do what the Code  
9 directs me basically, in light of what I find are the  
10 uncontested facts.

11                   So the following are my -- well, you  
12 can all sit down now. You know, I talk too fast in  
13 the first place, but I will try to talk as fast as  
14 possible without making it impossible for everyone,  
15 and the court reporter to actually get it down.

16                   So, the following are my findings of  
17 fact and conclusions of law with respect to the  
18 motion of the Official Unsecured Creditors Committee  
19 to appoint a trustee. I am going to grant that  
20 motion.

21                   The Official Committee of Unsecured  
22 Creditors of Woodlawn Community Development, Corp.,  
23 filed a motion to appoint a Chapter 13 trustee under  
24 11 U.S.C. §1104(a). The committee is permitted to  
25 file the motion under §1103(c)(4). The committee

1 alleges multiple instances of gross mismanagement and  
2 potential fraud, dishonesty and incompetence by the  
3 people in charge of the debtor, both before the  
4 filing of the bankruptcy petition and afterwards,  
5 after the petition was filed.

6 They contend that a Chapter 11  
7 trustee, the committee contends that a Chapter 11  
8 trustee must therefore be appointed under  
9 §1104(a)(1). They also argue that the appointment of  
10 a Chapter 11 trustee is in the best interests of  
11 creditors, that would be the basis for appointment  
12 under §1104(a)(2).

13 The debtor filed a written response to  
14 the motion. It contested a few of the factual  
15 allegations in the motion, but it did not and cannot  
16 contest most of the factual allegations in the  
17 motion. Based on the uncontested facts alleged in  
18 the motion, and as further briefed by the parties, as  
19 well as the transcripts that I reviewed, that were  
20 filed in the record, I find that the appointment of a  
21 Chapter 11 trustee is appropriate under both  
22 §1104(a)(1) for fraud, dishonesty, incompetence or  
23 gross mismanagement by current management, and under  
24 §1104(a)(2) because the appointment is in the best  
25 interests of creditors.

1 Under §1104(a)(1) a court "shall"  
2 appoint a Chapter 11 trustee if it determines that  
3 there is "cause." The section does not define  
4 "cause," but instead offers a non-exclusive list of  
5 conditions that may each establish "cause" to appoint  
6 a trustee: Fraud, dishonesty, incompetence or gross  
7 mismanagement of the affairs of the debtor by current  
8 management. There are a million cases that say this,  
9 but I will point to Ontario Entm't Corp., versus  
10 Chicago Title & Trust Co., and In re (In re Ontario  
11 Entm't Corp.) bankruptcy case, 237 BR 460 at 472,  
12 (Bankr. N.D. Ill. 1999).

13 In examining whether a particular set  
14 of circumstances amounts to "cause" under  
15 §1104(a)(1), courts may also take into account  
16 whether (1) the alleged misconduct was material; (2)  
17 the debtor treated insiders differently from other  
18 creditors; (3) the debtor was unwilling or unable to  
19 pursue causes of action belonging to the estate; (4)  
20 conflicts of interest on the part of management  
21 interfered with its ability to fulfill its fiduciary  
22 duties to the debtor; and (5) management engaged in  
23 self-dealing or squandering of corporate assets.  
24 Those factors are also in many cases, but I will cite  
25 In re LHC, LLC, 497 BR 281 at 292, (Bank. N.D. Ill.

1 2013); In re Intercat, Inc., 247 BR 911 at 921,  
2 (Bankr. S.D. Ga. 2000). A debtor in possession has  
3 all the duties of a trustee in a Chapter 11 case,  
4 including the duty to protect and conserve property  
5 in its possession for the benefit of creditors.  
6 That's in §1107 of the Bankruptcy Code and also  
7 stated in many places, but including In re Ionosphere  
8 Clubs, Inc., 113 BR 164 (Bankr. S.D.N.Y. 1990).

9 The moving party has the burden of  
10 proving grounds that justify the appointment of a  
11 Chapter 11 trustee, and, in doing so, must overcome a  
12 presumption, debtor to remain in possession. That's  
13 In re LHC, LLC, the case I cited earlier, at page  
14 291.

15 The Seventh Circuit has not yet  
16 specifically determined the burden of proof for  
17 appointment of a Chapter 11 trustee. Some bankruptcy  
18 courts in this district have applied a clear and  
19 convincing standard, including the LHC case. And  
20 there are also others, others cited by the debtor in  
21 its brief.

22 I am more persuaded by the courts that  
23 apply the preponderance of evidence the standard.  
24 See, e.g., In re Keeley versus Grabanski Land  
25 Partnership, 455 BR 153, at 162-163 (8th Cir. BAP

1 2011); In re Veblen West Diary, LLP, 434 BR 550 at  
2 555-56 (Bankr. D.S.D. 2010). See also, the case  
3 cited by Mr. Wolfe for the United States Trustee  
4 today, which is Rameriz versus T&H Lemont, 845 F.3d,  
5 772, a Seventh Circuit case, that because the statute  
6 does not expressly require a heightened standard of  
7 proof. In Keeley and Grabanski and, thanks to Mr.  
8 Wolfe citing the Rameriz case, 8th Circuit BAP --  
9 well, 8th Circuit BAP explained in Keeley that it was  
10 following the Supreme Court's decision in Grogan  
11 versus Garner, 498, U.S. 279 (1991) which held that  
12 the preponderance of evidence standard, which applies  
13 in civil actions between litigants, unless there is  
14 some particularly important right at stake, applies  
15 to §523 exceptions to discharge in bankruptcy. The  
16 BAP in Keeley decided that since a Chapter 11  
17 debtor's desire to maintain control of its  
18 reorganization is no more important than a Chapter 7  
19 debtor's interest in obtaining a discharge, the  
20 standard of proof should be the same. I agree.

21 The Seventh Circuit apparently has  
22 issued -- has said similar things, although they're  
23 not exactly in the 1104 context. In the Ramirez  
24 case, referring also to the Grogan case, and how we  
25 should be applying preponderance of the evidence



1 unless the statute directs otherwise. Here it does  
2 not, so I believe the preponderance of evidence  
3 standard is the correct one.

4 I also find, however, that under  
5 either standard, preponderance of the evidence or  
6 clear and convincing evidence standard, the motion  
7 should be granted.

8 Also a bankruptcy court is not  
9 required to conduct a full evidentiary hearing. See  
10 *In re Ionosphere Clubs, Inc.*, 113 BR 164 (Bankr.  
11 S.D.N.Y. 1990); *In re Casco Bay Lines, Inc.*, 17 BR  
12 946 (1st Cir. BAP 1982). In fact, even sua sponte  
13 appointments are authorized. See, for example, *In re*  
14 *Bibo, Inc.*, 76 F.3d 256 (9th Cir. 1996).

15 Mr. Herzog has demanded an evidentiary  
16 hearing on his motion. But I find that the essential  
17 facts on which I base my ruling are all uncontested,  
18 admitted by the debtor, or established by the  
19 testimony, admitted by the debtor's briefs, or court  
20 filings established by the testimony of debtor's  
21 representatives at the 341 meetings. Mr. Herzog has  
22 failed to show me there is any disputed fact that  
23 would justify holding an evidentiary hearing in these  
24 circumstances.

25 It is uncontested that the debtor

1 misappropriated approximately \$1.5 million of its'  
2 employees' payroll taxes, someplace it says 1.8, but  
3 I'll go with the lower number of 1.5 million, of the  
4 debtor's employees' payroll taxes, which are wages  
5 earned by employees that the employer is obligated to  
6 pay to the government taxing agencies to satisfy the  
7 employees' tax obligations. So the debtor used those  
8 funds to pay various other debts of the debtor. And  
9 as the UST's counsel, Mr. Wolfe, this morning  
10 explained, the money -- the debtor does have two  
11 distinct kinds of operations: It manages properties  
12 owned by the Chicago Housing Authority, that we refer  
13 to as the CHA, and it manages employees of that  
14 organization; and then it has its own properties that  
15 it owns and manages itself. And the money that at  
16 least -- a lot of the money, not all of the money  
17 that was misappropriated by the debtor from the wages  
18 that were -- it was money that the CHA transferred to  
19 the debtor's payroll account for purposes of paying  
20 the CHA's employees all of their payroll.

21 So the debtor committed a pretty  
22 serious, I'll call it at least malfeasance. You  
23 could call it fraud. You could call it dishonesty.  
24 You could call it gross mismanagement. You could  
25 call it incompetence. It is all of those things.

1 Actually I wouldn't call it incompetence because it  
2 was obviously intentional in taking that money that  
3 was reserved for payroll, payroll taxes, and using it  
4 for their own properties to forestall foreclosures.

5 So all of that has been admitted,  
6 uncontested facts. These actions are, to me, the  
7 equivalent of theft of the employees' wages. On  
8 October 24, 2018, when the debtor filed this case and  
9 sought various first day orders in the case, it filed  
10 an affidavit of its president and CEO, Dr. Leon  
11 Finney, in which he stated under oath that the debtor  
12 had been involved in various types of pre-petition  
13 litigation. But that the reason it filed the  
14 bankruptcy case was because the IRS imposed a tax  
15 lien on its assets for failure to pay the  
16 approximately \$1.5 million in payroll taxes for three  
17 quarters in the -- up to two years preceding the  
18 bankruptcy filing.

19 Dr. Finney stated, under oath, in his  
20 declaration, that "management was completely  
21 surprised by these unpaid tax liabilities because  
22 provision has always been made for these liabilities  
23 at the time employees receive their payroll checks."  
24 That's from the Finney declaration at page 4, docket  
25 number 5.

1           The debtor does not contest that Dr.  
2     Finney, who has more recently admitted in his  
3     deposition or at the section 341 meeting of creditors  
4     that, I believe this was in his deposition, in  
5     effect. that past statements that he made under oath  
6     in his first day declarations was false. He knew  
7     exactly when he made that declaration, what happened  
8     to the payroll taxes. And he had directed the  
9     misappropriation, the payroll tax money, the funds  
10    that were to be used to pay the payroll taxes.

11           He caused the debtor to change payroll  
12    service providers from ADP, which had previously  
13    forwarded tax payments to the taxing entities when it  
14    issued paychecks, to another payroll service  
15    provider. That new payroll service provider was told  
16    that the debtor would make those payments to the  
17    taxing entities itself. Instead of making those  
18    payments, Dr. Finney caused, and other employees  
19    obviously permitted and carried out, that the payroll  
20    tax money would be used for other purposes, including  
21    to forestall various foreclosures against properties  
22    owned by the debtor. So, debtor's management, which  
23    does not include only Dr. Finney, I might add,  
24    intentionally engaged in fraud, dishonesty,  
25    incompetence, or gross mismanagement for purposes of

1 §1104(a)(1) by taking employees' payroll taxes for  
2 other purposes. The debtor does not and cannot  
3 contest this gross mismanagement, fraud or dishonesty  
4 with respect to the payroll taxes.

5 I'm sorry, I know this is repetitious  
6 because I haven't had time to edit it, but I'm just  
7 going to go with it.

8 The committee also alleges various  
9 other instances of fraud, dishonesty, mismanagement  
10 or incompetence for purposes of 1104(a)(1), most of  
11 which the debtor does not dispute in any meaningful  
12 way.

13 For example, the debtor owned property  
14 at 1500 East 63rd Street in Chicago. The debtor  
15 entered into a master lease with an entity called  
16 Lincoln South Central Real Estate. The debtor  
17 concedes that Dr. Finney was and is the owner of  
18 Lincoln South. Lincoln South has subleases with all  
19 the tenants of this commercial property. While  
20 presumably collecting rent from these tenants at the  
21 property a representative of the debtor testified at  
22 the 341 meeting that he was unaware of any rent  
23 payments being made by Lincoln South to the debtor  
24 since 2012, so for over seven years.

25 This obvious case of self-dealing by

1 Dr. Finney constitutes fraud, dishonesty, or at a  
2 minimum gross mismanagement by the debtor. The  
3 debtor does not really contest the substance of these  
4 allegations. It states in its response that Dr.  
5 Finney contends he made at least some of the lease  
6 payments over the years. That is not enough to rebut  
7 the implicit admission that management allowed Finney  
8 to breach the lease and keep all the rent he  
9 collected from subtenants without paying the debtor  
10 what was owed.

11 The debtor also hired Dr. Clarence  
12 Nixon to be a consultant to the debtor on the day  
13 before the bankruptcy case was filed. Dr. Nixon, who  
14 served on the board of the debtor for many years  
15 before the bankruptcy filing, was to be paid \$35,000  
16 per month for his services, apparently, under the  
17 consulting arrangement. The debtor sought to pay  
18 this amount to Dr. Nixon through the cash collateral  
19 motion it filed on the first day of the bankruptcy  
20 case. Many parties raised objections to any such  
21 payment, so the court did not permit this payment in  
22 the order authorizing use of cash collateral. The  
23 debtor chose, nonetheless, to pay \$35,000 to Dr.  
24 Nixon in November 2018. Dr. Nixon ultimately agreed  
25 to repay the amount, and did eventually repay it, but

1 it should never have been paid in the first place.

2 A debtor may use a secured creditor's  
3 cash collateral only with the consent of the secured  
4 creditor or by court order. That's 11 USC section  
5 363(c). Here, the debtor had neither, and the court  
6 expressly eliminated this payment to Dr. Nixon from  
7 the cash collateral budget. The payment to Dr. Nixon  
8 was, at a minimum, post-petition gross incompetence  
9 or mismanagement.

10 Finally, the committee also contends  
11 that the debtor forgave various loans totaling --

12 I should say about that last one, that  
13 there hasn't been any real defense raised to this by  
14 the debtor representatives.

15 The debtor also failed to maintain,  
16 the committee alleges, important insurance policies  
17 pre-petition, as demonstrated by various motions  
18 filed post-petition to authorize financing of  
19 insurance premiums for pre-petition, as well as  
20 post-petition time periods.

21 Finally, the committee also contends  
22 that the debtor forgave various loans totaling 13  
23 million owed to entities in which Dr. Finney had an  
24 interest.

25 The debtor contests this final

1 assertion, contending that the debts were owed to the  
2 debtor under surplus cash notes, whatever those are,  
3 because those are not explained. The debtor says  
4 that both notes are still owed to the debtor, and  
5 that the committee is somehow confusing this with  
6 some deferred developer fee owed on certain low  
7 income apartments, and that some non-cash capital  
8 contribution, what that is, was made.

9               Neither party has provided sufficient  
10 information to decide if either party is correct on  
11 this, so I will not base my decision on this  
12 allegation by the committee.

13               But, having no real defense to most of  
14 the factual allegations in the committee's motion,  
15 the debtor instead argues primarily that any fraud,  
16 dishonesty, mismanagement or incompetence was caused  
17 by previous management, not current management. The  
18 debtor says that because Dr. Finney has been replaced  
19 by Dr. Nixon post-petition as CEO and president,  
20 there is entirely new management who cannot be held  
21 responsible under section 1104 for what previous  
22 management did. That's not correct.

23               To the contrary, based on the  
24 testimony given by various representatives of the  
25 debtor at the 341 meetings of creditors, it is clear



1 that the same management team is in place, with the  
2 exception of Dr. Finney as CEO; and that that same  
3 management team that permitted all the instances of  
4 fraud, dishonesty, mismanagement or incompetence that  
5 I just discussed and found to occur.

6 The standard under §1104(a)(1), with  
7 respect to "current management," is that "the court  
8 is satisfied that current management is free from the  
9 taint of prior management."

10 So, that wasn't a very eloquent way to  
11 quote it, but the meaning is that I should find that  
12 current management is not responsible for acts that  
13 happened in the past, even if those acts would  
14 satisfy the standard of 1104(a), if the court's  
15 satisfied that the current management is free from  
16 the taint of the previous management. That's in  
17 various places, but I'll cite two cases: In re The  
18 1031 Tax Group, LLC, 374 BR 78 at 86 (Bankr. S.D.N.Y.  
19 2007); In re Microwave Products of America, Inc., 102  
20 BR 666 (Bankr. W.D. Tenn. 1989).

21 In this case current management for  
22 this debtor is nowhere near free from the taint of  
23 prior management that would be required to not  
24 appoint a trustee under §1104(a)(1) because it is  
25 almost exactly the same management. Dr. Nixon, who

1 is now the post-petition CEO, was on the board of  
2 directors when Dr. Finney and other employees were  
3 acting improperly. In Illinois, the "affairs of [a  
4 nonprofit corporation] shall be managed by or under  
5 the direction of a board of directors." That's from  
6 805 ILCS 105/108.05.

7 So it is the statutory duty of a board  
8 of a nonprofit to manage the debtor - for the  
9 nonprofit, in this case the debtor.

10 As recently as February 20th, Dr.  
11 Nixon testified that the debtor had not made a formal  
12 demand upon Lincoln South Central, the entity owned  
13 by Dr. Finney, to pay the rent under its agreement  
14 with the debtor because "there has been a willingness  
15 and an openness and a commitment to make those  
16 payments." That's what Dr. Nixon said. That's from  
17 the transcript that's in the docket from February  
18 20th, 2019, a few days ago, at pages 4-5.

19 Dr. Nixon is unwilling to take a hard  
20 position against his former colleague, Dr. Finney.  
21 Dr. Finney himself testified that going forward he  
22 will "help the organization as a volunteer..."  
23 That's from transcripts in the record from February  
24 13, 2019.

25 So, in effect, Dr. Nixon, who is

1 supposed to have undertaken management since the day  
2 of the filing of the bankruptcy case, has been at the  
3 helm for four months now, still has done nothing  
4 concrete to oust Dr. Finney's company from the master  
5 lease on which Lincoln South has been in default for  
6 many, many years, while collecting rents for itself.

7 I will refer specifically to some of  
8 the testimony from the February 20th 341 meeting, at  
9 pages 4 and 5, at which Dr. Nixon was asked about the  
10 rent due to the debtor from Lincoln South. He  
11 acknowledged that the debtor has made no formal  
12 demand for all the past rent due because of that  
13 "willingness and openness and a commitment to make  
14 payments."

15 And, by the way, it wasn't clear  
16 whether those were going to be future payments or all  
17 the many years of past payments that were due.

18 He said that there has not been a need  
19 for a demand letter. This approach of not forcefully  
20 exercising the debtor's rights against an entity  
21 owned by Dr. Finney, who has been, in effect, keeping  
22 significant amounts of money owed to the debtor under  
23 the master lease for at least seven years, and  
24 colloquially I would describe this as just ripping  
25 off the debtor, for lack of time to find a more

1 genteel way to describe this.

2 Dr. Nixon is obviously not willing to  
3 act forcibly against Dr. Finney, and they've done  
4 nothing to cancel the lease. They undoubtedly have  
5 many legal remedies available for the obvious  
6 long-term breach of the lease and have chosen not to  
7 exercise any of them still. And it's distressing to  
8 know that Dr. Finney is still physically in the  
9 offices of the debtor "volunteering" his time, and  
10 therefore, presumably, still influencing the affairs  
11 of the debtor despite his admitted malfeasance.

12 There's also no indication that any of  
13 the other directors are leaving, other than now Mr.  
14 Herzog has said today that Dr. Nixon is looking for  
15 new board members. But as of now, we have the exact  
16 same board who was there supposedly managing this  
17 debtor back when everything that's causing me to  
18 impose a Chapter 11 trustee was taking place.

19 Of particular concern is Leon Jackson,  
20 the chairman of the board, who was supposed to  
21 co-sign every check issued by the debtor. That's in  
22 the transcript from November 28th of 2018, at page  
23 47. Kristin Finney Cook, Dr. Finney's daughter, has  
24 been on the board since 2002. That's in the  
25 transcript of February 13, 2019. It seems unlikely

1 that she would be willing to sue her father or accuse  
2 him of any kind of bad acts.

3 In-house counsel, I was astonished by  
4 the fact there was in-house counsel of this  
5 organization when all these things were happening.  
6 But in-house counsel, apparently Georgette Reynolds,  
7 and controller Ray Smith, both of whom were with the  
8 debtor when the malfeasance occurred, are still  
9 employed by the debtor. Mr. Smith has been with the  
10 debtor for approximately ten years. That's in the  
11 transcript of February 13th of 2019. They prepared  
12 the schedules, that's in the transcript of February  
13 2nd of 2019, at page 2, and were present at the 341  
14 meetings.

15 At the 341 meetings neither seemed to  
16 know much about the rent that was owed to the debtor  
17 from the Lincoln South Central entity owned by Dr.  
18 Finney. That's in the transcript from November 28th  
19 of 2018, at page 13. Ms. Reynolds testified that the  
20 debtor's master lease with Lincoln South Central goes  
21 back to 2012, and no rent has ever been paid to the  
22 debtor. That's the lawyer, speaking on behalf of the  
23 debtor, saying no rent was ever paid. So I think  
24 that eliminates any assertion by Dr. Finney that  
25 maybe some rent was paid at some point.

1                   It doesn't matter. Clearly, virtually  
2 no rent was ever paid.

3                   Ms. Reynolds either knew or she should  
4 have known about the particulars of these contracts  
5 entered into with the debtor. And she and Mr. Smith,  
6 and who knows who else was involved in payroll,  
7 should have known about the essentially stealing of  
8 the payroll taxes to pay debt that had no relation to  
9 payroll.

10                  So, I reject Mr. Herzog's argument,  
11 which is a new argument made today, but nonetheless I  
12 listened to, that management, technically this  
13 company somehow is limited just to the CEO because  
14 only Dr. Finney was an official officer of the  
15 company. Now, presumably, only Dr. Nixon is an  
16 officer of the company. I don't know if that's  
17 correct. I find it hard to believe they don't have  
18 to have a secretary and treasurer, but it doesn't  
19 matter. Management is not limited to an official  
20 officer, and in this case one person, in a 160- or  
21 70-person organization. Management is the people who  
22 lead, you know, various parts of the organization for  
23 purposes of this statutory provision.

24                  So there are multiple people involved  
25 in management besides Dr. Finney, and they are all

1 still at the company -- or the entity, the debtor,  
2 which is being run by someone who is now the CEO, who  
3 was on the board when all of the bad things happened.

4 So I reject the debtor's principal  
5 defense to the appointment of a trustee; that it is  
6 not "current management" who has caused the fraud,  
7 dishonesty, mismanagement or incompetence. I am not  
8 "satisfied that current management is free from the  
9 taint of prior management." In fact, the opposite is  
10 true, there has been no material change besides  
11 swopping out Dr. Nixon, a board member when all the  
12 problems were created.

13 As I mentioned, I'm sorry this is  
14 repetitive, but the management goes well beyond the  
15 CEO and includes all the employees, as far as I'm  
16 concerned, who were aware of these problems and  
17 permitted them to occur.

18 So, there has been no change in  
19 management that is sufficient to remove the taint of  
20 prior management for purposes of 1104(a)(1).

21 And I will also note that, as the U.S.  
22 Trustee has pointed out to me, Mr. Wolfe, there's  
23 also testimony at the various 341 meetings that I  
24 failed to talk about in my draft that I'm going to  
25 add about just the lack of governance mechanisms at

1 this organization. There is a lack of just internal  
2 controls and management, and management tools  
3 basically that should prevent all these things from  
4 happening, basically. They weren't in place in this  
5 company, and they don't seem to still be in place in  
6 this place right now, although Dr. Nixon may be  
7 trying to sort of plug up some of the holes in the  
8 dike. But still, all of that is all a function of  
9 current management, as far as I'm concerned.

10 So, management's failure to comply  
11 with the debtor's pre-petition tax obligations  
12 permitting Dr. Finney to engage in obvious  
13 self-dealing with respect to the lease with Lincoln  
14 South, its failure to prioritize and maintain  
15 insurance, its payment to Dr. Nixon in violation of  
16 the cash collateral order altogether constitute more  
17 than sufficient grounds to meet both the  
18 preponderance of evidence standard, that I would  
19 apply, and also the clear and convincing evidence as  
20 well for the appointment of a trustee under  
21 1104(a)(1).

22 I guess I can cite various cases. I  
23 guess I will: In re Euro-American Lodging Corp., 365  
24 BR 421 (Bankr. S.D.N.Y. 2007) (failure to pay taxes  
25 pre-petition was grounds for appointment of a



1 trustee); In re Great Northeastern Lumber & Millwork,  
2 Corp., 20 BR 610 (Bankr. E.D. Pa. 1982) (failure to  
3 pay sales taxes, grounds for appointment of a  
4 trustee); In re Evans, 48 BR 46 (Bankr. W.D. Tex.  
5 1985) (failure to pay estate taxes was grounds for  
6 appointment of trustee), et cetera. So, there's  
7 ample grounds for appointing a trustee under either  
8 evidentiary standard under 1104(a)(1).

9 I also find that there are grounds,  
10 and I would also appoint a trustee under 1104(a)(2).  
11 §1104(a)(2) of the Bankruptcy Code provides that a  
12 court shall order the appointment of a trustee upon  
13 the request of a party in interest, after notice and  
14 a hearing "if such appointment is in the interests of  
15 creditors, any equity security holders, and other  
16 interests of the estate." That's from 11 U.S.C.  
17 §1104(a)(2).

18 This section gives a flexible standard  
19 for determining on a fact-specific case-by-case basis  
20 whether a trustee should be imposed. I'll cite a few  
21 cases: In re Sharon Steel Corp., 871 F.2d 1217 at  
22 1226 (3d Cir. 1989); the LHC case I already cited; In  
23 re Bellevue Place Associates, 171 BR 615, 622 (Bankr.  
24 N.D. Ill. 1994.)

25 Courts look to a number of factors

1 under this provision, including (1) trustworthiness  
2 of the debtor; (2) the debtor in possession's past  
3 and present performance, and prospects for the  
4 debtor's rehabilitation; (3) the confidence, or lack  
5 thereof, of the business community and creditors in  
6 present management; and (4) the benefits derived by  
7 the appointment of a trustee, balanced against the  
8 cost of the appointment." And there are many cases  
9 that say that, but I cite *In re Ampal-American Israel*  
10 *Corp.*, No. 12-13689 at 2013 WL 1400346 at \*5 (Bankr.  
11 S.D.N.Y. April 5, 2013) quoting the *Ionosphere* case  
12 that I've already cited.

13 Appointment of a trustee is also  
14 appropriate under this provision because it's in the  
15 best interests of creditors under 1104(a)(2) in this  
16 case. All the creditors who have participated in  
17 this case by attending hearings and filing documents,  
18 including the creditors committee and the Chicago  
19 Housing Authority, CHA, which is the principal client  
20 of the debtor, support appointing a Chapter 11  
21 trustee, as does the United States Trustee.

22 The debtor has been shown to engage in  
23 dubious and illegal actions regarding employees'  
24 payroll, to permit self-dealing and otherwise be  
25 untrustworthy such that it has lost the confidence of

1 creditors. The creditors are not persuaded, nor is  
2 the court, that the debtor's present plan of  
3 reorganization has any real prospect for acceptance  
4 or success. And I have considered the costs  
5 associated with a trustee versus the benefits of a  
6 trustee.

7 I conclude that the debtor and all  
8 parties will benefit from independent management  
9 coming in to deal in a swift and straightforward way  
10 with all the issues, and institute better  
11 professional management at the top of this  
12 organization so that it can then determine the best  
13 path forward for all.

14 And I basically include all my factual  
15 findings into this -- for the previous section into  
16 this that all reflects why I think the debtor hasn't  
17 demonstrated a sufficient trustworthiness basis for  
18 creditors having confidence in it.

19 So, for all those reasons I am going  
20 to appoint a Chapter 11 trustee.

21 Now, I've obviously said some pretty  
22 negative things about people who work for this  
23 entity. I'm not suggesting that Dr. Nixon has  
24 personally engaged in anything bad here. I just want  
25 to make that clear on the record. I'm not saying he

1 was involved in whatever led up to the filing of the  
2 case personally. And I'm not making any  
3 determination of whether, you know, he should be  
4 involved, whether a trustee would want to keep him  
5 involved in some way or not. I'm going to leave that  
6 up to a trustee to figure out, what's the best  
7 situation. The same with these other employees.

8 I mean, I could certainly say what  
9 should have happened. I'm not saying that they had  
10 any personal actual real knowledge of this, but they  
11 sure should have, and done something about it.

12 So, I'm just ruling for purposes of  
13 1104(a) that there must be a trustee put into place  
14 in this case.

15 So, I'm going to enter an order that's  
16 pretty simple, grants the motion for the reasons  
17 stated on the record in open court.

18 Perhaps I should -- do I need to  
19 direct the U.S. Trustee to -- perhaps I should? You  
20 know, I'm not sure I should tell the U.S. Trustee to  
21 do anything if I don't have to, but...

22 MR. WOLFE: If the court orders the  
23 appointment of a trustee, we will do it.

24 THE COURT: You'll do your job to  
25 comply with all of that.

1                   So then that gets us to the motion  
2 about Dr. Nixon, which originally -- again, obviously  
3 last week I was thinking, okay, this guy's going to  
4 work for them, he should probably get paid. But now  
5 that I'm going to do this, I'm thinking we should  
6 continue this to see what a trustee thinks, you know,  
7 going forward. I don't want to bind a trustee to an  
8 employment agreement, basically, that he or she might  
9 not want to.

10                   MR. HERZOG: Which leads us to a cash  
11 collateral order, I've uploaded, which does have a  
12 payment to Dr. Nixon going forward.

13                   THE COURT: And, obviously, we don't  
14 have the IRS here, but...

15                   MR. HERZOG: The problem I see, Your  
16 Honor, is that if the trustee wants to invest the  
17 support of Dr. Nixon, if he's not being paid, there's  
18 really no incentive for him to continue with this.

19                   THE COURT: Well, obviously. But the  
20 trustee might think, you know, okay, he doesn't  
21 really have a role here. I have no idea. You know,  
22 I'm not in the offices understanding how this place  
23 really works, so...

24                   MR. HERZOG: No, but the point would  
25 be that the trustee does not have to continue his

1 employment. I've got a provision in the cash  
2 collateral order that if he does -- well, if in fact  
3 that his employment is continued, there's salary  
4 budgeted for it.

5 THE COURT: Okay. What do you suggest  
6 we do about this, Mr. Wolfe?

7 MR. WOLFE: As a matter of fact, let  
8 me just back up briefly to answer to the court's  
9 question.

10 Our duty now is to consult with the  
11 parties about nominees for the appointment of a  
12 Chapter 11 trustee. And what I've got to do then is  
13 take those names back to Mr. Layng, and he can either  
14 choose one of them or choose someone else. Then what  
15 we have to do is file a motion asking Your Honor to  
16 approve the appointment.

17 THE COURT: Right.

18 MR. WOLFE: I'm going to try to get  
19 this done as soon as possible, but we've got to make  
20 a decision. We've got to contact the trustee. The  
21 trustee has to do a conflicts check, get an  
22 affidavit. It takes a little bit of time. So my  
23 hope, I'm hard-pressed to say we'd be back here  
24 tomorrow, but it would probably be next week.

25 THE COURT: Okay.

1 MR. WOLFE: But in these type  
2 situations, I always counsel debtor, kind of coming  
3 to the Dr. Nixon question, is that until there's a  
4 trustee in place, the debtor in possession is still  
5 operating the debtor, maintains a fiduciary duty to  
6 do what's in the best interests of the creditors and  
7 the estate.

8 I know at a previous hearing, Your  
9 Honor did indicate that Dr. Nixon, it would be fair  
10 for him to get paid for the services he's rendered,  
11 at some point. Whether that point is today or next  
12 week or some future point, I don't have a strong  
13 feeling on it. I suggest the committee might very  
14 well have a stronger feeling on that discrete issue.

15 MR. DAN: As I stated when we were in  
16 last week, Your Honor, my main issue with the motion  
17 to employ Dr. Nixon was they wanted to employ him  
18 retroactively --

19 THE COURT: Right.

20 MR. DAN: -- pay him for all that  
21 time.

22 THE COURT: Right.

23 MR. DAN: I don't disagree with what  
24 the court was saying last week, in that if Dr. Nixon  
25 is going to be working there, he should be paid to

1 work there, obviously, prospectively, instead of --

2 THE COURT: Right.

3 MR. DAN: -- for previous work.

4 And so generally I did not have an objection on the  
5 cash collateral order, in part based on those  
6 comments from Your Honor, which I don't really  
7 disagree with.

8 And so, in that sense, at least in the  
9 interim, until a trustee has made a decision, I don't  
10 have an objection to Dr. Nixon being paid going  
11 forward. Obviously, we would raise an objection to  
12 everything prior to this period.

13 THE COURT: It looks like the pay that  
14 they're -- I'm looking at a line item --

15 MR. DAN: Right.

16 MR. HERZOG: The cash collateral order  
17 only proposes payment going forward.

18 THE COURT: Right.

19 MR. HERZOG: It does not ask for  
20 retroactive.

21 MR. DAN: And I will reflect, Your  
22 Honor, that from discussions I've had with the  
23 parties, that I found out after prior cash collateral  
24 orders, I believe this is actually payment for a  
25 two-week period.



1 THE COURT: Yes.

2 MR. DAN: Not for the month.

3 THE COURT: Yes, it's 8,000 or  
4 something, or half of what they were proposing as a  
5 salary.

6 MR. DAN: That's right.

7 THE COURT: I don't know if it's twice  
8 a month or --

9 MR. DAN: Correct.

10 THE COURT: Okay. So I could go ahead  
11 and enter this order. It would let them pay him in  
12 the next pay period.

13 MR. WOLFE: I think that's fine,  
14 Judge. I know we kind of had this issue raised  
15 previously about he's not coming in under 327, so his  
16 employment doesn't have to be approved.

17 THE COURT: It's not under 327. I  
18 think it's a 363, outside the ordinary course  
19 transaction, especially in these circumstances.

20 MR. WOLFE: We would go along with the  
21 committee on this, Judge.

22 THE COURT: Okay. So then I can go  
23 ahead with this budget. And to the extent a trustee  
24 doesn't want to do any of this, it's up to, you know,  
25 this just authorizes, doesn't require.

1                   So, what date for when it shall be  
2 continued to? Obviously, the order really is the  
3 IRS, who chooses not to participate.

4                   Do you have any agreement with them on  
5 the amount --

6                   MR. HERZOG: I spoke with them. They  
7 have no objection to cash collateral so long as  
8 they're receiving their \$2500 payment.

9                   THE COURT: That's all they're getting  
10 is 2500?

11                  MR. DAN: Your Honor, the order is for  
12 March and April, and I believe the contemplation  
13 would be --

14                  THE COURT: Oh, you mean a budgeted  
15 amount?

16                  MR. DAN: The budget is for March and  
17 April. I believe the contemplation would have been  
18 to come back sometime in late April. I don't have a  
19 problem with that, per se, Your Honor. I think a  
20 trustee, once they are appointed, will want to come  
21 in either to -- because of any changes with this, or  
22 because they're taking control. And so I think we'll  
23 need a status date, obviously, probably early next  
24 week about the trustee. But if you enter the cash  
25 collateral order, it at least authorizes the trustee

1 to continue operating the company.

2 THE COURT: Right. The people I'm  
3 most concerned about are just the regular, old  
4 employees getting paid, okay, and all these other --  
5 you know, obviously the costs of, you know, doing  
6 business, the property is there, so that's the kind  
7 of thing that I -- we really have to have an order in  
8 place for, to let the trustee do whatever he or she  
9 might want, you know, to get it changed or whatever.

10 MR. DAN: And, Your Honor, we don't  
11 expect that the trustee would do anything with, as  
12 you just said, the regular, old employees, which I  
13 consider really the CHA people.

14 THE COURT: Yes.

15 MR. DAN: The people on that separate  
16 list are the ones that the trustee is really going to  
17 have to make the decision about.

18 THE COURT: Right.

19 MR. DAN: If they are necessary and  
20 everything. But the CHA people, I don't think anyone  
21 questions that.

22 THE COURT: Okay. So should I make  
23 the order effective through April 30th, and then set  
24 a status for the 24th or 25th? Does that sound  
25 workable?

1 MR. DAN: That makes sense, Your  
2 Honor. And then, obviously, we'll be back here  
3 before that anyway as to have the trustee appointment  
4 approved.

5 THE COURT: So why don't we say April  
6 25th will be the continued hearing. Thursday is the  
7 latest day in that week that I do this kind of thing.

8 MR. HERZOG: So it's April 30th?

9 THE COURT: Yes, because the budget is  
10 for April, right?

11 Isn't that what you said, Mr. Dan? I  
12 didn't really follow it. I saw some things.

13 MR. HERZOG: I did motion up --  
14 re-motion up the motion on the insurance issue for  
15 the 11th.

16 THE COURT: I saw that.

17 MR. DAN: Oh, I did not --

18 THE COURT: A new insurance motion.  
19 So...

20 MR. WOLFE: Judge, I think if the  
21 trustee needed some modification for use of cash  
22 collateral, he or she could come in sooner than the  
23 end of April.

24 THE COURT: Yes. So I'm just going to  
25 put over this application to employ Dr. Nixon to some

1 point, I don't know what date.

2 Do you think you would be able to --  
3 should we shoot for a particular date for you, Mr.  
4 Wolfe?

5 MR. WOLFE: Judge, it looks like the  
6 court is not sitting on Monday. Tuesday is a 13 day,  
7 I believe.

8 THE COURT: Yes.

9 MR. WOLFE: We would shoot to be back  
10 here on March 6th.

11 THE COURT: Wednesday. You think you  
12 can do it by then. Okay.

13 MR. WOLFE: Requires shortened notice,  
14 but I think under the circumstances I think that  
15 would be appropriate.

16 MR. DAN: And, Your Honor, while I  
17 certainly don't want to hold anything up, I have a  
18 9:30 matter in state court on Wednesday the 6th. I  
19 am hopeful that that will not take too long and I can  
20 be here.

21 THE COURT: I mean, we can -- we'll  
22 set the continued hearing for the motion about Dr.  
23 Nixon to 10:30. Trustee can notice up any motion  
24 about the trustee for 10:30. I mean, we can make it  
25 11:00, but I kind of hate to have a separate set --

1 sometimes I don't have a lot at 10:30. I hate to  
2 make the court reporter sit around.

3 MR. DAN: And, Your Honor, I'll get  
4 here as quickly as I can. If I'm a few minutes late,  
5 if at all possible to hold it?

6 MR. HERZOG: So we're going to set it  
7 on the 10:30 call?

8 THE COURT: We're going to set  
9 everything at 10:30, any new motions.

10 MR. DAN: And I guess if the insurance  
11 motion, which I haven't seen, was filed for the 6th  
12 right at 10:00, you'll just hear that at 10:30 also?

13 THE COURT: Oh, actually it is set for  
14 10:30 on the 6th, so we don't have to change it.

15 MR. HERZOG: I apologize.

16 THE COURT: It all works out well.  
17 Okay.

18 All right. So, I guess that's it.

19 MR. WOLFE: Thank you very much,  
20 Judge.

21 (Which were all the proceedings had in  
22 the above-entitled cause, February 27,  
23 2019, 10:30 a.m.)

24 I, JACKLEEN DE FINI, CSR, RPR, DO HEREBY CERTIFY  
25 THAT THE FOREGOING IS A TRUE AND ACCURATE  
TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-  
ENTITLED CAUSE.

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