

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE: NEIGHBORS LEGACY HOLDINGS, INC., et al., <i>Debtors.</i>	§ § § § §	Chapter 11 Case No. 18-33836 (MI) (Jointly Administered)
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**GERALD H. PHIPPS, INC.'S LIMITED OBJECTION TO THE FIRST AMENDED
JOINT PLAN OF LIQUIDATION OF NEIGHBORS LEGACY HOLDINGS, INC. AND
ITS DEBTOR AFFILIATES UNDER CHAPTER 11 OF THE BANKRUPTCY CODE
AND NOTICE OF RESERVATION OF RIGHTS**

[Docket #772]

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, GERALD H. PHIPPS, INC. ("Phipps"), a creditor in the above-referenced bankruptcy cases, and files this Limited Objection to the First Amended Joint Plan of Liquidation of Neighbors Legacy Holdings, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code [Doc. 772] (the "Plan"), and Notice of Reservation of Rights, and in support thereof would respectfully show the Court as follows:

PRELIMINARY STATEMENT

1. Phipps objects to the Plan to the extent that it attempts to transfer or release the officers and directors of the Debtors from any direct claim held by Phipps, or Phipps' right to recovery against any applicable insurance policy.¹

¹ Prior to filing this Limited Objection, Phipps provided the Debtors a copy of the (to be filed) Original Petition against the Officers and Directors to determine whether Debtors assert that such claims are purportedly being transferred to the Unsecured Creditors Trust. The parties continue to attempt to reach a resolution of this matter. In addition, Phipps propounded discovery upon the Debtors on or about February 18, 2019, related to issues raised herein (Doc. 765). The Debtors produced a copy of the applicable directors and officers insurance policy in response to the request for production but otherwise objected to every other request for production and interrogatory.



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2. Phipps does not consent to entry of a final order or judgments with respect to Phipps' rights and obligations related to any non-debtor, and to the extent that it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution, Phipps does not consent to jurisdiction of the Court.

BACKGROUND FACTS

3. On July 12, 2018, Neighbors Legacy Holdings, Inc. and its affiliated debtors and debtors in possession (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Petition Date") before the United States Bankruptcy Court for the Southern District of Texas, Houston Division, which are jointly administered as Case No. 18- 33836 (the "Bankruptcy Case").

4. Phipps and Neighbors Health, LLC ("NH") entered into an Agreement dated August 3, 2016 (the "NH Contract 1") for construction of a project known as "NEC Amarillo South Emergency Center, LP – Tenant Fit-Out Package" at 4121 S. Georgia Street., Amarillo, Texas 79110 (the "Amarillo Project"). To this end, Phipps furnished labor, materials, and services for construction of the Amarillo Project. Phipps provided general contracting and project supervision services, and coordinated the work of subcontractors and delivery of equipment and supplies. Phipps' superintendents, crews and subcontractors performed work on the Amarillo Project, including punch-list items on the NH Contract 1 through at least October, 2017. Phipps paid its employees and all appropriate charges due to its subcontractors and suppliers, to the extent that Phipps has been paid. However, Phipps received no payment from NH under the NH Contract 1 for retainage in the amount of \$179,697.14. After allowing for all payments, appropriate credits and offsets, Phipps is owed at-least \$179,697.14 for work that it

has performed under the NH Contract 1 for the purpose of improving the specified real property, including change orders.

5. Phipps and NH also entered into an Agreement dated November 28, 2016 (the “NH Contract 2”) for construction of a project known as “NEC Grand Prairie Emergency Center, LP – Tenant Fit-Out Package” at 725 West Pioneer Way, Grand Prairie, TX 75051 (the “GP Project”). To this end, Phipps furnished labor, materials, and services for construction of the GP Project. Phipps provided general contracting and project supervision services, and coordinated the work of subcontractors and delivery of equipment and supplies. Phipps’ superintendents, crews and subcontractors performed work from March/April, 2016 through at-least September, 2017 on the GP Project. Phipps paid its employees and all appropriate charges from its subcontractors and suppliers. However, Phipps received no payment from NH since August, 2017 and has not been paid for a portion of the work performed in July 2017 through October, 2017 in the amount of \$745,659.03, and for retainage in the amount of \$191,320.33. After allowing for all payments, appropriate credits and offsets, Phipps is owed at least \$936,979.36 for work that it has performed under the NH Contract 2 for the purpose of improving the specified real property, including change orders.

6. NH was fully paid for all labor, materials, and services provided at the Amarillo and GP Projects through a construction loan, which necessarily included compensation for the labor, materials, and services provided by Phipps on the Amarillo and GP Projects. However, NH misappropriated the construction loan proceeds it received from its lender and failed to deliver such funds to Phipps.

a. Phipps’ Direct Causes of Action against the Officers and Directors of Neighbors Health – Breach of Trust Fund Act.

7. The Texas Trust Fund Statute provides, in pertinent part:

“[l]oan receipts are trust funds under this chapter if the funds are borrowed by a contractor, subcontractor, or owner or by an officer, director, or agent of a contractor, subcontractor, or owner for the purpose of improving specific real property in this state, and the loan is secured in whole or in part by a lien on the property.”

Tex. Prop. Code Ann. § 162.001(b) (West) (emphasis added”).

8. The Texas Trust Fund Statute further provides:

“[a] owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds.”

Tex. Prop. Code Ann. § 162.002 (West).

9. Further, “[t]rust funds paid to a creditor under this chapter are not property or an interest in property of a debtor who is a trustee described by Section 162.002.” Tex. Prop. Code Ann. § 162.001(d) (West).

10. Finally, the Texas Trust Fund Statute defines the beneficiaries of the trust as follows:

“[a]n artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or material for the construction or repair of an improvement on specific real property in this state is a beneficiary of any trust funds paid or received in connection with the improvement.”

Tex. Prop. Code Ann. § 162.003(a) (West)

11. As identified above, the Debtors are not beneficiaries of the Texas Trust Fund Statute. NH received construction loan proceeds from the Debtors’ lender that were trust funds to be used to pay for the construction of the Amarillo Project and the GP Project. A copy of

Phipps (to be filed) Original Petition against the officers and directors of the Debtors is attached hereto as Exhibit A.²

OBJECTIONS TO THE FIRST AMENDED PLAN

12. In order to obtain confirmation, a plan proponent has the burden to establish compliance with all the requirements of section 1129(a) of the Bankruptcy Code (the “Code”). See 11 U.S.C. § 1129(a). The plan proponent bears the burden of proof with respect to each and every element of section 1129(a). *See, e.g. In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001); *In re Wash Mut.*, 442 B.R. 314, 328 (Bankr. D. Del. 2011).

13. In this case, the Plan does not comply with section of 1129(a)(1),(2) and (3) of the Bankruptcy Code because (i) it attempts to transfer non-estate property to the Unsecured Creditors Trust in violation of applicable law; (ii) violates §524(e) by containing third party releases; and (iii) contains discharge and injunctive language for benefit of the Debtors in violation of §1141(d)(3) .

14. First, on page 25, the Plan improperly purports to transfer Phipps direct claims against the Debtors’ officers and directors arising under the Trust Fund Statute to the Unsecured Creditor Trust by providing as follows:

“On or before the Effective Date, the Unsecured Creditor Trustee shall execute the Unsecured Creditor Trust Agreement and cause the Unsecured Creditor Trust to accept, on behalf of the beneficiaries thereof, (i) the GUC Settlement Cash, (ii) Retained Causes of Action and (iii) claims under and proceeds of D&O Policies. As of the Effective Date, all assets vested in the Unsecured Creditor Trust and all assets dealt with in the Plan shall be transferred and conveyed free and clear of all Liens, Claims, and Interests except as otherwise specifically provided in the Plan or in the Confirmation Order.”³ (emphasis added).

² As specifically allowed by Article XI, ¶E of the Plan, Debtor Neighbors Health LLC is a named defendant in its nominal capacity.

³ See Plan, pg., 25, ¶D. “Retained Causes of Action” is defined to include “D&O Claims”. See Plan, pg. 13. “D&O Claims” is defined to include “all rights and claims against the Debtors’

15. Property interests are created and defined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). It is well settled that in Texas, causes of action constitute a property right. A debtor's interest in a cause of action is determined according to state law. *In re Segerstrom*, 247 F.3d 218, 224 (5th Cir. 2001) citing *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979).

16. The Fifth Circuit has relied on state law to determine whether the debtor, as opposed to someone else, had a property interest in a right of action as of the date of filing bankruptcy. *Id.* The Texas "trust-fund act is a stand-alone, comprehensive statutory scheme defining whether "construction payments" and "loan receipts" constitute trust funds, determining who are "beneficiaries" of trust funds, providing for when trust funds are misapplied," and providing for penalties. *Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 542 (Tex. 2018), reh'g denied (June 1, 2018).

17. Whether a specific cause of action belongs to a bankruptcy estate is determined by reference to the factual allegations in the complaint. *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 583 (5th Cir. 2008) citing *Schertz–Cibolo–Universal City, Indep. School District v. Wright (In re Educators Group Health Trust)*, 25 F.3d 1281, 1285 (5th Cir.1994). If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate." *Id.* (quoting *In re Educators Group Health Trust*, 25 F.3d at 1284). "Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as

current and former director and officers including ...misuse of company funds... and any recovery under the D&O Policies associated therewith."

of the commencement of the case, and thus is not property of the estate.” *Id.* (quoting *In re Educators Group Health Trust*, 25 F.3d at 1284); *see also In re Schimmelpenninck*, 183 F.3d 347, 359 (5th Cir.1999) (“A trustee can assert the general claims of creditors, but is precluded from asserting those creditor claims that are personal.”)

18. In this case, Phipps’ claims against the Debtors’ officers and directors only affects Phipps. Phipps is the only designated beneficiary under the Trust Fund Act and the trust fund claims are not a general harm to the Debtors (or their estate). The Texas legislature could have provided that the Debtors were a beneficiary of the Trust Fund Act, but it did not. In fact, the violation of the trust fund act may have benefitted other creditors (as the trust funds were misappropriated away from their intended beneficiary (Phipps). Importantly, the Debtors could not have asserted the trust fund claims against the officers and directors at the commencement of these cases. Accordingly, trust fund claims belong solely to Phipps and cannot be transferred to the Unsecured Creditors Trust. As a result, confirmation of the Plan should be denied, or the Order confirming the Plan should specifically provide that Phipps’ trust fund claims are not transferred to the Unsecured Creditors Trust.

19. Second, the Plan improperly provides for a release of certain non-debtor third parties in violation of 11 U.S.C. § 524(e). The Plan, on page 43, impermissibly “permanently enjoins” parties from pursuing claims against non-debtor third parties. Phipps does not consent to the Court’s jurisdiction of Phipps’ rights and obligations related to any non-debtor, specifically, Phipps’ claims against the Debtors’ officers and directors. Phipps “opts-out” of any purported third party releases contained in the Plan.⁴ Accordingly, to the extent the Plan is confirmed, Phipps requests that the Confirmation Order provide that the Plan is denied as to any provision

⁴ For the avoidance of doubt, Phipps timely cast its ballots, voted against the Plan and opted out of the third party releases.

purporting to release Debtors' officers and directors (or any other non-debtor third party) from any claims that could be asserted by Phipps. *See In re Washington Mut., Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases).

20. Finally, the liquidating Plan violates 11 U.S.C. §1141(d)(3) as it contains a permanent injunction (or de-facto discharge) for the benefit of the Debtors. By its own terms, the Plan is a liquidating plan, the Debtors will not engage in future business, and the Debtors would otherwise be denied a discharge under §727(a). Article XIII, ¶21 of the Plan provides that the Bankruptcy Court hear and determine all disputes "involving the ... the Debtors' discharge." However, the Debtors are not entitled to a discharge under §1141(d)(3). Accordingly, the Plan does not comply with 11 U.S.C. 1129(a)(1) and confirmation should be denied.

WHEREFORE, PREMISES CONSIDERED, Creditor, GERALD H. PHIPPS, INC., respectfully requests that the Court sustain this Objection and deny approval of the Plan, and further requests that it be granted such other and further relief, general and special, at law or in equity, to which Phipps may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, a true and correct copy of the foregoing Objection to the First Amended Plan of Liquidation was served via the method described below:

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/s/ T. Josh Judd
T. JOSH JUDD

EXHIBIT A

4. NEIGHBORS HEALTH, LLC (“NH”) is a Texas limited liability company with a principal place of business located at 10800 Richmond Avenue, Houston, TX 77042.¹

5. Upon information and belief, Defendant BRUCE MCVEY is an individual who at all times relevant to this action was an officer, director, or agent of NH who had control over trust funds, and who is believed to reside at _____.

6. Upon information and belief, Defendant TINSIE ACXTON is an individual who at all times relevant to this action was an officer, director, or agent of NH who had control over trust funds, and who is believed to reside at _____.

7. Defendants JOHN DOE INDIVIDUALS 1-10 are unknown individuals who may have acted as an officer, director, or agent of NH who had control over trust funds.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court. Venue is properly maintainable in Harris County, Texas pursuant to Texas Civil Practice & Remedies Code §§ 15.002 and 15.005. All conditions precedent to the institution of this suit and Plaintiff’s recovery have been performed, satisfied or have occurred.

GENERAL ALLEGATIONS

9. By way of a “*Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*”, AIA Document A102- 2007, GH Phipps and Neighbors Health, LLC (“NH”) entered into an Agreement dated August 3, 2016 (the “NH Contract 1”) for construction of a project known as “NEC Amarillo South Emergency Center, LP – Tenant Fit-Out Package” at 4121 S. Georgia Street., Amarillo, Texas 79110 (the “Amarillo Project”).

10. By way of a “*Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price*”, AIA Document A102- 2007, GH Phipps and NH also entered into an Agreement dated November 28, 2016 (the “NH Contract 2”) for construction of a project known as “NEC Grand Prairie Emergency Center, LP – Tenant Fit-Out Package” at 725 West Pioneer Way, Grand Prairie, TX 75051 (the “GP Project”).

¹ Neighbors Health, LLC, is a defendant in a nominal capacity only and recovery is limited to claims against the officers and directors of Neighbors Health, LLC, and any applicable insurance proceeds.

11. Pursuant to NH Contract 1, GH Phipps furnished labor, materials, and services for construction of the Amarillo Project. GH Phipps provided general contracting and project supervision services, and coordinated the work of subcontractors and delivery of equipment and supplies. GH Phipps' superintendents, crews and subcontractors performed work on the Amarillo Project, including punch-list items on the NH Contract 1 through at least October, 2017. GH Phipps paid its employees and all appropriate charges due to its subcontractors and suppliers, to the extent that GH Phipps has been paid. However, GH Phipps received no payment from NH under the NH Contract 1 for retainage in the amount of \$179,697.14. After allowing for all payments, appropriate credits and offsets, GH Phipps is owed at-least \$179,697.14 for work that it has performed under NH Contract 1 for the purpose of improving the specified real property, including Change Orders.

12. Pursuant to NH Contract 2, GH Phipps furnished labor, materials, and services for construction of the GP Project. GH Phipps provided general contracting and project supervision services, and coordinated the work of subcontractors and delivery of equipment and supplies. GH Phipps' superintendents, crews and subcontractors performed work from March/April, 2016 through at-least September, 2017 on the GP Project. GH Phipps paid its employees and all appropriate charges from its subcontractors and suppliers. However, GH Phipps received no payment from NH since August, 2017 and has not been paid for a portion of the work performed in July 2017 through October, 2017 in the amount of \$745,659.03, and for retainage in the amount of \$191,320.33. After allowing for all payments, appropriate credits and offsets, GH Phipps is owed at least \$936,979.36 for work that it has performed under the NH Contract 2 for the purpose of improving the specified real property, including Change Orders.

COUNT ONE

Breach of Texas Trust Fund Statute – Tex. Prop. Code § 162

13. The Texas Trust Fund Statute provides, in pertinent part:

“[l]oan receipts are trust funds under this chapter if the funds are borrowed by a contractor, subcontractor, or owner or by an officer, director, or agent of a contractor, subcontractor, or owner for the purpose of improving specific real property in this state, and the loan is secured in whole or in part by a lien on the property.”

Tex. Prop. Code Ann. § 162.001(b) (West) (emphasis added”).

14. The Texas Trust Fund Statute further provides:

“[a] owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds.”

Tex. Prop. Code Ann. § 162.002 (West).

15. Further, “[t]rust funds paid to a creditor under this chapter are not property or an interest in property of a debtor who is a trustee described by Section 162.002.” Tex. Prop. Code Ann. § 162.001(d) (West).

16. Finally, the Texas Trust Fund Statute defines the beneficiaries of the trust as follows:

“[a]n artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or material for the construction or repair of an improvement on specific real property in this state is a beneficiary of any trust funds paid or received in connection with the improvement.”

Tex. Prop. Code Ann. § 162.003(a) (West)

17. In this case, all labor, materials, and services for construction of the Amarillo and GP Projects were incorporated into the construction for both specified real properties in Texas.

18. Pursuant to and in compliance with NH Contracts 1 & 2, GH Phipps submitted Payment Applications to NH for all amounts owed to GH Phipps related to the labor, materials, and services provided for the Amarillo and GP Projects.

19. Upon information and belief, NH was fully paid for all labor, materials, and services provided at the Amarillo and GP Projects through a construction loan, which necessarily included compensation for the labor, materials, and services provided by GH Phipps on the Amarillo and GP Projects.

20. Pursuant Tex. Prop. Code § 162.001, the loan receipts received by NH and borrowed for the construction and for the labor, materials, and services GH Phipps provided to the Amarillo and GP Projects were to be held in trust by NH to the extent necessary to make payment for labor, materials, and services provided by and procured by GH Phipps for the Amarillo and GP Projects. Pursuant to the statute, GH Phipps is a beneficiary of those loan receipts and NH, and its officers and directors, are trustees. On information and belief NH failed to hold such funds in trust for GH Phipps as required. The applicable loan receipts were not property of NH but were the trust funds held for the benefit of GP Phipps.

21. Pursuant to Tex. Prop. Code § 162, NH’s failure to hold payments it received from its lender as compensation for labor, materials, and services provided by and procured by GH Phipps for the Amarillo and GP Projects constitutes a violation of the Texas Trust Fund Statute.

22. Despite having a statutory obligation pursuant to Tex. Prop. Code § 162 to hold funds it received from its lender as compensation for labor, materials, and services provided by and procured by GH Phipps for the Amarillo and GP Projects in trust, upon information and belief, NH failed to do so and breached the Texas Trust Fund Statute.

23. By violating the Texas Trust Fund Statute, but for the filing of bankruptcy by NH and other related debtors, NH should be liable to GH Phipps for failing to hold payments received in trust to the extent necessary to make payment for the labor, materials, and services provided by and procured by GH Phipps for the Amarillo and GP Projects.

24. Upon information and belief, Defendants McVey and Axcton acted as officers, directors, or agents of NH who, at all times relevant to this lawsuit, are believed to have had control over trust funds held by NH for the Amarillo and GP Projects.

25. Pursuant to Tex. Prop. Code § 162.031(a) and *Lively v. Carpet Services, Inc.* 904 S.W.2d 868, 871- 873 (Tex. App.--Houston [1st Dist.] 1995, writ denied), Defendants McVey and Axcton are individually liable to GH Phipps to the same extent as NH, as a result of the failure to hold funds in trust or for the misapplication of trust funds held for labor, materials, and services provided by and procured by GH Phipps for the Amarillo and GP Projects.

CONDITIONS PRECEDENT

26. Pursuant to Rule 54, Tex. R. Civ. P., all conditions precedent to the relief requested herein as against Defendants, have been performed, satisfied, waived or otherwise excused by operation of law.

PRAYER

THEREFORE, PREMISES CONSIDERED:

Plaintiff GERALD H. PHIPPS, INC. D/B/A GH PHIPPS CONSTRUCTION CO. prays that Defendants NEIGHBORS HEALTH, LLC, BRUCE MCVEY, and TINSIE ACXTON, and any applicable JOHN DOE DEFENDANTS be cited to appear and answer herein, and that on final judgment herein the Court find in favor of Plaintiff GH Phipps on all issues and that Plaintiff GH Phipps receive judgment and award against Defendants NEIGHBORS HEALTH, LLC, BRUCE MCVEY, and TINSIE ACXTON, and any applicable JOHN DOE DEFENDANTS, jointly and severally, as follows:

- (a) At least the unpaid balances of \$936,979.36 and \$179,697.14 in actual damages;
- (b) Plus pre-judgment and post-judgment interest at the maximum legal rate;

- (c) Plus all costs of court in the trial court and all appellate courts; and
- (f) all other relief to which Plaintiff GERALD H. PHIPPS, INC. D/B/A GH PHIPPS CONSTRUCTION CO. may be justly entitled.

REQUESTS FOR DISCLOSURES

Plaintiff requests the Disclosure by Defendants of the information required by Rule 194, within thirty (30) days of service of this instrument.

Respectfully submitted,
ANDREWS MYERS P.C.

By: _____

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