The relief described hereinbelow is SO ORDERED.

SIGNED this 2nd day of July, 2020.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:
Continental Cast Stone, LLC and
Maglicon, LLC,

Debtors.

Case Nos. 19-21752 and 19-21753
Chapter 11
Jointly Administered

Order Granting Motion to Employ Bradley D. McCormack as Counsel for the Unsecured Creditors' Committee in Continental Cast Stone, LLC

I. Facts and Procedural History

The Unsecured creditors' committee for Continental Cast Stone, LLC ("Continental") has moved to employ Bradley D. McCormack of the Sader Law Firm

as counsel for the committee.[1] The Debtor has objected to this motion to employ under § 1103. For the reasons stated herein, the motion to employ will be granted.

On August 20, 2019, the debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code.[2] After the creditors' meeting was held on October 2, 2019, the U.S. trustee found in both cases that there was an insufficient number of creditors to form a creditors' committee.[3] Nevertheless, on January 30, 2020, the U.S. trustee appointed a creditors' committee composed of Sethmar Transportation ("Sethmar") and Architectural Solutions/Services.[4] On February 7, 2020, the Debtors Continental and Maglicon, LLC ("Maglicon"), which is jointly administrated with the Continental case, jointly moved to reformulate the creditors' committee in Continental and disband the committee in Maglicon.[5] In a separate order, that motion has been denied with respect to Continental and granted with respect to Maglicon for the reasons stated therein.

The creditors' committee has sought to appoint Bradley D. McCormack as attorney for the committee in the Continental case. Mr. McCormack, an attorney at Sader Law Firm, previously represented Sethmar in this bankruptcy.[6] In a hearing on March 26, 2019, he indicated to the court that his personal representation of

[1] ECF 130
[2] ECF 1
[3] ECF 91
[4] ECF 126
[5] ECF 131
[6] ECF 94.

Sethmar has been terminated and the client has given informed consent for his representation of the committee.[7]

The Debtors have objected to Mr. McCormack's employment based on his prior representation of Sethmar. Debtors argue that McCormack's representation of both Sethmar and the committee are inappropriate because of conflicts of interests between the two groups.[8] The first conflict exists between Sethmar and the body of general unsecured creditors. The Debtors' plan separately classifies Sethmar and other consignment carriers as a separate class to be paid in full because they have distinct rights to collect from Continental's customers.[9] Because the money for this payout would possibly come at the expense of other unsecured creditors, the Debtors conclude that this creates a necessary conflict of interest between the Sethmar and the unsecured creditors.[10] The Debtors' concern also stems from Sethmar's attempt to collect prepetition debts from Continental's customers during the bankruptcy.[11] This attempt to collect debts was stayed via court order in September, 2019.[12] In the March 26 hearing, Debtors argued that McCormack's representation violated Kansas and Missouri ethical rules 1.7 and 1.9 because they are representing parties with an adverse interest to one another.[13] This argument largely reiterates the prior

[7] ECF 147.
[8] ECF 140.
[9] ECF 131; ECF 147; ECF 158.
[10] ECF 131
[11] ECF 80.
[12] ECF 88.
[13] ECF 147.

argument in the context of legal ethics – namely, that Sethmar's conflicts with the unsecured creditor body will compromise the effectiveness of committee counsel.

II. The Court Will Grant the Motion to Employ Bradley D. McCormack

Conclusions of Law:

The appointment of creditors' committee counsel is governed by 11 U.S.C. § 1103. In relevant part, § 1103(b) states that:

> "An attorney or accountant employed to represent a committee…may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest."

The last sentence was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984.[14] This reflects a judgment by Congress that creditors' attorneys could play an important and valuable role as committee counsel. However, the legislative history indicates that Congress intended this to be a limited permit; the committee's counsel must cease their representation of any other entity in the case to prevent conflicts of interest.[15]

Adverse interest, the most important term in the statute, was left undefined by Congress. In subsequent case law, it has been defined more as a standard than as a clear rule. Collier on Bankruptcy provides that an adverse interest is,

> "an economic interest of the person represented by the professional that is in conflict with or that could come into conflict with the interests of the constituency represented by the professional or jeopardize the professional's

[14] Pub L. No. 98-353, §500, 98 Stat. 333, 384 (1984) (codified as amended at 11 U.S.C. § 1103(b)).
[15] H.R. Rep. No. 95-595 (1977).

> integrity. Representation of the other entity should not: prevent the professional from vigorous representation of the committee; interfere with the professional's undivided loyalty; imperil the confidentiality of information or strategy confided by the committee to the professional; or cause the professional to act in a manner different than the professional otherwise would."[16]

Additionally, in the interest of preserving the integrity of the bankruptcy process, the court must err against even the possibility of conflicts of interest [17] and prevent even the appearance of impropriety.[18] To determine whether such an appearance exists, the court must "view the conduct [of counsel] as an informed and concerned private citizen and judge whether the reputation of the Bar would be lowered if the conduct were permitted."[19]

Creditors' committee counsel owes an undivided duty of "fidelity, undivided loyalty and impartial service" to the entire class.[20] This requires that the attorney not place himself in a position such that he has an adverse interest to the committee or the class of general unsecured creditors and should not represent an individual entity whose interest is adverse to the committee or creditors.[21] In a

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[16] 7 Collier on Bankruptcy ¶1103.04.
[17] *In re Mesta Machine Co.*, 67 B.R. 151, 157-58 (Bankr. W.D. Pa. 1986); *In re Broadcast Management Corp.*, 36 B.R. 519, 520 (Bankr. S.D. Ohio 1983) ("as the pertinent legislative history indicates, § 1103(b) was designed to prevent potential conflicts of interest")
[18] *In re Lion Capital Group*, 44 B.R. 684, 689 (Bankr. S.D.N.Y.) ("Where the representation does not entail an actual or potential conflict of interests or present an appearance of impropriety, § 1103(b) is not to be interpreted to preclude a committee from engaging counsel of its choice"); *see also In re Saxon Industries, Inc.*, 29 B.R. 320, 322 (Bankr. S.D.N.Y. 1983) ("A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of the secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries at a level higher than that trodden by the crowd.").
[19] *In re Oliver Stores, Inc.*, 79 B.R. 588, 594 (Bankr. D. N.J. 1987) (quoting *U.S. v. Miller*, 624 F.2d 1198, 1202 (3d Cir. 1980)).
[20] *Mesta Machine*, 67 B.R. at 156.
[21] *Id.*; *see also*, *Grant Broadcasting*, 71 B.R. at 664; *Oliver Stores*, 79 B.R. at 597 ("the integrity of the bankruptcy system demands that the professionals serving the committee not place themselves in a

minority of cases, courts have held that instead the attorney's only duty is to the creditors' committee.[22] This viewpoint is flawed in that it would allow the creditors' committee attorney to act against the interest of a creditor the committee supposedly represents and to which it owes a duty. If the creditors' committee owes a fiduciary duty to all creditors in the class it represents, and the attorney is acting as the agent of the creditors' committee, the scope of authority delegated to that attorney cannot include actions that would violate the fiduciary duty of the creditors' committee.[23]

Debtors further object to Mr. McCormack's representation on the grounds that it would violate Rules 1.7 and 1.9 of the Kansas Rules of Professional Conduct for attorneys.[24] Rule 1.7 concerns current clients and stipulates that attorneys cannot represent clients who are directly adverse to each other or those where "there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client…."[25] However, this can be waived subject to a four-factor test. Specifically, the lawyer must reasonably believe they can provide "competent and diligent" representation to each client, the representation must not be unlawful, the representation must not involve the lawyer asserting claims against the other client in the same forum, and

situation where their independence, loyalty and integrity can be questioned by the unsecured creditor body whom they represent.").
[22] *See* 7 Collier on Bankruptcy ¶1103.03[7].
[23] Restatement (Third) of Agency § 8.09.
[24] Kan. R. Rel. Disc. Att. 1.7; Kan. R. Rel. Disc. Att. 1.9.
[25] Kan. R. Rel. Disc. Att. 1.7(a).

informed consent must be procured.[26] Importantly, under Rule 1.10, lawyer conflicts are imputed to all other attorneys in a law firm unless the conflict is personal in nature and doesn't materially inhibit representation by other attorneys of the firm.[27]

Rule 1.9 limits representation of those clients materially adverse to former clients and protects information disclosed over the former representation.[28] Lawyer cannot represent a client another entity with an adverse material interest before the same tribunal unless informed consent is obtained.[29] Additionally, the lawyer cannot use information gained during that previous representation to the material disadvantage of the client or reveal information relating to the representation except as required by other parts of the Rules.[30]

Analysis:

The Code specifically permits creditor's counsel to "step up" into the role of creditor's committee counsel, so Debtors must demonstrate that there are more specific reasons to prohibit Mr. McCormack's representation than the natural adversity groups of creditors have against each other in bankruptcy. This requires demonstrating an adverse interest between Sethmar and the general unsecured creditors.

[26] Kan. R. Rel. Disc. Att. 1.7(b).
[27] Kan. R. Rel. Disc. Att. 1.10.
[28] Kan. R. Rel. Disc. Att. 1.9.
[29] Kan. R. Rel. Disc. Att. 1.9(a).
[30] Kan. R. Rel. Disc. Att. 1.9(c).

Debtors' first argument hinges on the separate treatment of Sethmar and other consignment carriers in the plan but fails to account for the benefits that this separate treatment provides to the estate and unsecured creditors. Sethmar and other consignment carriers have separate rights of action that could be used to collect their transportation fees from Continental's customers. If these rights were exercised, it would be a major blow to Continental's business and significantly hinder the company's reorganization. Such a result would drastically reduce the recovery for unsecured creditors, as the pool of money from which they could be paid would shrink. It is unlikely that these consignment carriers would accept any treatment in which they would not be paid in full without resorting to their independent right to collect. It is difficult to imagine how Sethmar or Mr. McCormack could abuse their position on the creditor's committee to win a better deal than the Debtor was intending to give Sethmar from the inception of bankruptcy.

Debtors also draw on Sethmar's attempt to collect prepetition debts from Continental's customers as a reason why Mr. McCormack should not be employed as counsel for the creditors' committee. While these actions did require the Court to enforce the automatic stay, it is notable that Mr. McCormack was not involved in any way with these efforts to collect prepetition debt. Instead, Sethmar hired another firm for that purpose.[31] Additionally, Sethmar's actions here do not necessarily indicate that they have the kind of adverse interest that would preclude

[31] ECF 80-1.

their former attorney from serving on the committee. A much lower standard of conduct is required for unassociated creditors in bankruptcy than is required of members of a creditors' committee. All the aforementioned duties of "fidelity, loyalty, and impartial service" attach to Mr. McCormack as attorney for the committee. In the event of a breach of one of these duties in the course of Mr. McCormack's service, creditors and Debtors will have available remedies, but disallowing employment based on Debtors' speculation that there will be later inequitable conduct would be wholly inappropriate.

Debtor's ethical objections to Mr. McCormack's representation largely rehash their argument under § 1103 in ethical terms, with "conflict" replacing "adverse interest." For similar reasons, their concerns are misplaced. They argue that because Sethmar will be paid in full through the plan, this necessarily creates a conflict because there is an adversity between Sethmar and the other unsecured creditors the committee represents. However, it must be noted that Sethmar's actions in this case were not the impetus for the separate classification of all consignment carriers – instead, that decision was made by the Debtors due to their assessment of the unique rights these carriers held and their place in the reorganization. The conflict that grounds Debtors' argument is wholly of their own manufacture. There is no acceptable reading of the ethical rules that would allow a Debtor to classify a creditor separately, then turn around and use that separate classification as grounds to bar representation of the committee by that attorney's creditor. Furthermore, as the court stated earlier, there is no adverse interest

between Sethmar and other unsecured creditors, so there is no ethical conflict preventing Mr. McCormack's employment.

This court is mindful of the impact that creditors' committee attorney fees can have on the Debtors' bankruptcy estate. Because of the small size of this case, the creditors' committee legal fees are capped at $20,000.00.

III. Conclusion:

For the above reasons, Bradley D. McCormack's Application for Employment as counsel for the Committee of Unsecured Creditors appointed in Case No. 19-21752 is approved.