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,

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

Order Denying Motion to Reformulate Creditors' Committee in Continental Cast Stone, LLC and Granting Motion to Disband Creditors' Committee in Maglicon, LLC

I. Facts and Procedural History

Continental Cast Stone, LLC ("Continental") and its debtor affiliate, Maglicon, LLC ("Maglicon") have moved by joint motion, pursuant to 11 U.S.C. § 1102 and § 105, to disband the committee of unsecured creditors in Maglicon's

case and reformulate the committee of unsecured creditors in Continental's case.[1] For the reasons stated herein, the motion is granted in part and denied in part.

On August 20, 2019, the Debtors filed separate petitions for relief under Chapter 11 of the Bankruptcy Code.[2] On the same day, the Debtors filed a motion for joint administration of the Continental and Maglicon cases.[3] After the creditors' meeting was held in each case 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.[4] Nevertheless, on January 30, 2020, the U.S. trustee appointed a creditors' committee in both cases.[5]

The creditors' committee in both cases is composed of two unsecured creditors of Continental: Sethmar Transportation ("Sethmar") and Architectural Solutions/Services.[6] Sethmar has transported goods for Continental to its customers. In September 2019, Sethmar sought to collect fees owed on shipments it had delivered directly from Continental's customers. On September 27, 2019, this court granted Debtors' motion to stay these attempts to collect prepetition debt from Debtors' customers.[7] In Continental's plan, Sethmar and other consignment carriers are classified separately from other unsecured creditors and paid in full.[8]

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[1] ECF 131
[2] ECF 1; Case No. 19-21753, ECF 1.
[3] ECF 5.
[4] ECF 91; Case No. 19-21753, ECF 35.
[5] ECF 126; Case No. 19-21753, ECF 49.
[6] *Id.*
[7] ECF 88.
[8] ECF 158.

Architectural Solutions/Services is a sales agent for Continental. On September 9, 2019, it was approved as a critical vendor and paid the full rate of commission on any sales it generated.[9] While both Sethmar and Architectural Solutions/Services have filed claims in the Continental case, neither has filed a claim in the Maglicon case.

On February 7, 2020, the joint Debtors moved to disband the creditors' committee in the Maglicon case and reformulate the committee in the Continental case.[10] Relying on § 1102 and § 105, the Debtors argue that the Maglicon case must be disbanded because the creation of a committee containing creditors who did not hold claims in that case exceeded the bounds of the trustee's discretion.[11] As for the committee in Continental, Debtors argue that the committee fails to adequately represent the body of creditors. They allege that Sethmar is too conflicted to adequately represent the body of creditors because they attempted to collect on prepetition debt early in the case and would be unlikely to support a reorganization.[12] They also allege that the unique position of both members of the creditors' committee has divided their interests from those of the general body of creditors.

On March 5, 2020, the U.S. Trustee responded and contested each claim. With respect to the motion to disband the creditors' committee in Maglicon, the

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[9] ECF 56.
[10] ECF 131.
[11] *Id.* at 4.
[12] *Id.* at 5.

Trustee stated that such action was unreviewable by the court.[13] The trustee asserts that the court's power over creditors' committees is limited to what is laid out in § 1102 and that the court cannot take action to address the Debtors' complaints other than adding additional committees or altering committee composition to achieve adequate representation. Furthermore, the trustee alleges that the Debtors have "spoken with forked tongues" by requesting the cases be jointly administrated for the purposes of billing legal expenses but treating the cases as substantively separate.[14] Regarding the motion to reformulate the committee in Continental, the Trustee argued that the fiduciary duty owed to the committee by the creditors would prevent any of Sethmar's earlier conflicts from interfering with the committee's work.[15]

II. The Unsecured Creditors' Committee in Continental Will Not Be Reformulated

The bankruptcy court has several options to review the actions of the trustee under § 1102. This provision originated as §1102(c), under which bankruptcy courts were authorized to "change the membership or the size of a committee…if the membership of such committee is not representative of the different kinds of claims or interests to be represented."[16] This section was repealed in the Bankruptcy

[13] ECF 141, 8-10.
[14] *Id.* at 13.
[15] *Id.* at 18.
[16] 11 U.S.C. § 1102(c) (repealed)

Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.[17] Because the U.S. Trustee program was implemented nationwide, with a few exceptions, Congress limited the role the bankruptcy courts played in appointing and modifying committees, reasoning that this administrative task was better suited for an agency than the courts.[18] Section 1102(c) was replaced with, in relevant part, § 1102(a)(2), which allowed the court to, upon request of a party in interest, "order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors…." The 2005 amendments to the Bankruptcy Code added § 1102(a)(4), which provided the court authority to order the trustee to change the composition of the committee "if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders."[19]

The court reviews questions of adequate representation independently. The Bankruptcy Code explicitly permits litigants to seek judicial review of the U.S. trustee's administrative acts.[20] Because adequate representation is a purely legal question, it must be resolved judicially after the U.S. trustee's administrative task is complete. Because the U.S. trustee does not produce a record or rationale for its decision, it is inaccurate to consider the standard of review under § 1102; instead, it

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[17] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 221, 100 Stat. 3101 (1986) (codified as amended at 11 U.S.C. § 1102).
[18] H.R. Rep. No. 99-764, at 28 (1986).
[19] Bankruptcy Abuse Protection and Consumer Protection Act, Pub. L. No. 109-8, § 405, 119 Stat. 23, 105 (2005) (codified as amended at 11 U.S.C. § 1102(a)(4)).
[20] 11 U.S.C. § 1102(a)(4).

more appropriate to treat the court's inquiry as an independent review of the adequacy of representation.[21]

Adequate representation is not defined in § 1102. Courts have employed a variety of factors to determine whether representation is adequate, including:

> "the ability of the committee to function, the nature of the case, the standing and desires of the various constituencies, the ability for creditors to participate in the case without an official committee, the possibility that different classes would be treated differently under a plan and need representation, and the motivation of the movant."[22]

Additionally, a theory the debtor draws on heavily is that representation is inadequate because of conflicts of interest between members of the committee and the body of unsecured creditors.[23] The Trustee can place almost any holder of an unsecured claim on the creditors' committee regardless of the nature of their claim.[24] Additionally, the creditors appointed need not support the reorganization.[25] Because the creditors' committee is bound by fiduciary duty, there must be some overt, specific act to indicate a conflict of interest has developed to justify removing a creditor from the committee.[26]

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[21] *In re Shorebank*, 467 B.R. 156, 162-63 (Bankr. N.D. Ill. 2012); *see also In re Enron Corp.*, 279 B.R. 671, 684 (Bankr. S.D.N.Y. 2002); *In re Value Merchants*, 202 B.R. 280, 285-86 (E.D. Wis. 1996).
[22] *Id.* At 162.
[23] ECF 131, 5, Case No. 19-21752.
[24] 11 U.S.C. § 101(5); *In re Barney's*, 197 B.R. 431, 440 (Bankr. S.D.N.Y. 1996); *see also In re First RepublicBank Corp.*, 95 B.R. 58 (Bankr. N.D. Tex. 1988); *In re Altair Airlines, Inc.*, 727 F.2d 88, 90 (3d Cir. 1984) (holding that a creditor's disagreement over strategy, even if that is a preference for liquidation, does not require removal).
[25] *In re M.H. Corp.*, 30 B.R. 266, 267 (Bankr. S.D. Ohio 1983).
[26] *Shorebank*, 467 B.R. at 161.

The Debtors cannot show that representation on the creditors' committee is inadequate. Debtors allege that Sethmar is an inadequate representative because its efforts to collect prepetition debts at the beginning of the case demonstrate it has too great a conflict of interest to remain on the committee.[27] No conflict of interest has been demonstrated here. Sethmar's attempt to collect prepetition debt existed when it was simply an unsecured creditor with no duty to other creditors or the Debtors. While that attempt was stayed, that does not demonstrate that Sethmar would then be unfit for future inclusion on a creditors' committee because the creditor did not violate any duty to any other entity. Members of the creditors' committee are now subject to a fiduciary duty to other creditors, and Sethmar has taken no actions while on the committee that would demonstrate it intends to violate that duty. Allegations by the Debtors that Sethmar would seek relief from stay to the detriment of other creditors are speculative; it has given no indication it will do so, and Debtors cannot produce any evidence to show that will be the case beyond mere conjecture.

The Debtors also contend that Sethmar and Architectural Solutions/Services hold claims so unlike the body of unsecured creditors that they cannot be adequately representative.[28] The court must consider the relevant remedy. The court is asked by Debtors to remove an unspecified set of unsecured creditors from the committee to achieve adequate representation. There are many transportation

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[27] ECF 131, 5.

[28] *Id.*, 6.

creditors in this case that likely hold similar rights to Sethmar, and there are a significant number of sales and consultancy firms that are being paid through this case.[29] These two creditors are not outliers in the creditor body. Furthermore, the process of creating a creditors' committee is not a suggestion. The trustee is bound by § 1102(b)(1), which limits the composition of the committee to those willing to serve. There are no other creditors willing to serve, so the court cannot direct the trustee to add more creditors to the committee. Given the similarity between the current creditors' committee and other members of the general creditor body, reducing the number of creditors would necessarily make the body less representative. There is no way the court could improve the representativeness of the creditors' committee by reformulating it in the way the debtor requests. Because § 1102(c) was repealed and replaced with the current iteration of § 1102, the court's permit is the review the committees created by the trustee for adequate representation. It cannot tweak each committee to achieve the perfect balance of interests. There is no indication this committee will be an inadequate representative of the body of creditors and on those grounds it stands.

III. The Unsecured Creditors' Committee in Maglicon Will Be Disbanded

The majority of courts hold that a bankruptcy court can review any action of the U.S. trustee under § 105, including the existence or composition of

[29] ECF 73.

committees.[30] This provision was added to prevent abuse and ensure judges could control the cases before them; it is a generalized power, constrained only by other sections of the bankruptcy code.[31] Review under § 105 is a means to ensure the trustee has not abused its discretion or acted in an arbitrary and capricious manner.[32] The trustee's decision is arbitrary and capricious if it "is based on an erroneous conclusion of law, a record devoid of evidence on which the decision maker could rationally have based its decision, or is otherwise patently unreasonable, arbitrary or fanciful."[33] If the trustee is found to have abused its discretion, "the bankruptcy judge may invoke § 105(a) and generally do as he sees fit."[34]

The trustee contends that this interpretation of § 105 would either confer on the Court an independent substantive authority or allow it to flatly contradict the code.[35] Neither is the case. This interpretation does not grant a new substantive power. Instead, it is a power to review the acts of the trustee insofar as they would

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[30] *Bodenstein v. Lentz (In re Mercury Fin., Corp.)*, 240 B.R. 270, 276 (N.D. Ill. 1999); *Value Merchants*, 202 B.R. at 287-288; *In re Barney's, Inc.*, 197 B.R. 431, 437-39 (Bankr. S.D.N.Y 1996) (also holding that Rule 2020 of the Federal Rules of Bankruptcy Procedure allows judicial review of the appointment of committees); *In re Plabell Rubber Prods.*, 140 B.R. 179, 181 (Bankr. N.D. Ohio 1992); *In re Columbia Gas Sys.*, 133 B.R. 174, 175-76 (Bankr. D. Del. 1991); *but see In re Caesars Entm't, Operating Co.*, 526 B.R. 265 (Bankr. N.D. Ill. 2015); *In re Shorebank Corp.*, 467 B.R. 156, 162-63 (Bankr. N.D. Ill. 2012) (holding that the addition of § 1102(a)(4) eliminates the court's review under § 105).
[31] *Value Merchants*, 202 B.R. at 287.
[32] *Mercury Fin. Corp.*, 240 B.R. 277.
[33] *Barney's*, 197 B.R. at 439.
[34] *Value Merchants*, 202 B.R. at 287.
[35] ECF 141, 10.

obstruct the ability for the court to implement other provisions of the code.[36] The court is not attempting to craft a new remedy for Debtor out of whole cloth but is instead preserving the authority of the court to conduct proceedings according to the Bankruptcy Code.

The trustee's interpretation of § 1102 would allow the trustee to determine committee eligibility and viability with no judicial review. If the court is unable to disband a creditors' committee once convened, the court is therefore unable to rule on a creditor or debtor's argument that a creditor wholly ineligible under the Code has been appointed to the committee or that a committee is not viable in the specific case. Given the role creditors' committees play in the bankruptcy process and the cost they incur on behalf of the debtor, the impact of such decisions can be felt throughout the course of the bankruptcy.

It is clear from the statutory record that Congress did not intend this result. For an action by an administrative agency to be excepted from judicial review, there must be clear and convincing evidence that such a result was intended by Congress.[37] The trustee states that the history of § 1102 indicates that the trustee's discretion over committee appointments is unreviewable because Congress repealed

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[36] *Value Merchants*, 202 B.R. at 287; *Mercury Fin. Corp.*, 240 B.R. at 277.
[37] *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 671 (1986); *see e.g. Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury…[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right").

§ 1102(c) and instead restricted the court's powers to those contained in § 1102(a).[38] However, the legislative history indicates that Congress merely thought the U.S. trustee a better fit for the administrative task of creating and populating committees.[39] The trustee wishes to draw an inference that the doctrine of *expressio unius est exclusio alteris* precludes the court from any further review of the trustee's actions because specific areas of review have been set out in the statute.[40] This argument proves too little; the failure to add disbandment of committees to the power of bankruptcy courts is not direct evidence Congress intended to deprive courts of the power to review these decisions. Furthermore, this court is drawing authority from § 105, which grants the bankruptcy court the power to issue orders necessary to carry out provisions of the Code, so long as other provisions of the Code are not contradicted. By arguing that no provision of the Code specifically addresses the Court's power to disband a committee, the trustee demonstrates that such a power would fall within the ambit of § 105. This Court is unaware of any agency whose actions are not in some way reviewable in court; it seems vanishingly unlikely on this evidence that the U.S. trustee was intended by Congress to be the first.

The U.S. trustee's decision to appoint Sethmar and Architectural Solutions/Services to the creditors' committee in the Maglicon case is a clear abuse of discretion. The plain language of § 1102(a) reads that "the United States trustee

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[38] ECF 141, 5-10.
[39] H.R. Rep. No. 99-764, at 28 (1986).
[40] ECF 141, 9.

shall appoint a committee of creditors holding unsecured claims." Neither Sethmar nor Architectural Solutions/Services hold unsecured claims in the Maglicon case. In appointing either creditor to the committee in Maglicon, the U.S. trustee exceeded its statutory authority. Given there are no other creditors willing to serve on this committee and neither Sethmar nor Architectural Services/Solutions are eligible members, the committee should be disbanded.

The Trustee asserts that in opposing the appointment of a joint creditors' committee in these cases, the Debtors have "spoken with forked tongues" because they have advocated for and secured an order to jointly administer the cases.[41] However, this argument confuses joint administration with substantive consolidation. Joint administration is merely an administrative convenience and does not alter the legal rights of either debtor.[42] An order of joint administration does not give the creditors of one entity a claim in the other, nor does it imply that they should be treated as such.

IV. Conclusion

For the above reasons, the Debtors' Motion to Reformulate the Committee of Unsecured Creditors Appointed in Case No. 19-21752 is denied, and the Debtors' motion to Disband the Committee of Unsecured Creditors in Case No. 19-21753 is granted.

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[41] ECF 141, 13.
[42] *In re Steury*, 94 B.R. 553, 553-554 (Bankr. N.D. Ind. 1988).