IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
SCRIPSAMERICA,	:	Case No. 16-11991 (LSS)
	:	
Debtor.	:	**Hearing Date: December 6, 2016, at 11:30 a.m.**
	:	**Objections Due: November 21, 2016 at 4:00 p.m.**

UNITED STATES TRUSTEE'S OBJECTION TO AND RESERVATION OF RIGHTS WITH RESPECT TO THE DEBTOR'S MOTION FOR AN ORDER PURSUANT TO 11 U.S.C §§ 105 (a) AND 1102 DIRECTING THE DISBANDMENTOF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OR, ALTERNATIVELY, THE REMOVAL OF IRONRIDGE GLOBAL PARTNERS, LLC AND ROBERT SCHNEIDERMAN FROM THE COMMITTEE (D.I. 75)

In support of his Objection to and Reservation of Rights with Respect to the Debtor's Motion for an Order Pursuant to 11 U.S.C. §§ 105(a) and 1102 Directing the Disbandment of the Official Committee Of Unsecured Creditors or, Alternatively, the Removal of Ironridge Global Partners, LLC and Robert Schneiderman (D.I. 75) (the "Motion"),[1] Andrew R. Vara, the Acting United States Trustee for Region 3, by and through counsel, respectfully states as follows:

I. INTRODUCTION

The Debtor's motion to disband or remove the members from the Official Committee of Unsecured Creditors is without basis. Bankruptcy courts do not have statutory authority to disband or dispense with mandatory committees except in one instance, small business cases. Beyond that, section 1102(a) does not authorize a bankruptcy court to disband a committee appointed under section 1102(a)(1), and section 105(d) is no authority to contravene the specific and carefully crafted Code provisions governing the formation, modification, and oversight of official committees. Although bankruptcy courts do have authority to rule on "adequate

[1] Unless otherwise defined herein, capitalized terms shall have the same meaning and context as those capitalized terms included in the Motion or other referenced pleading or document.

representation" challenges and order modification of committee membership, Debtor provides no evidence here of inadequate representation which would require modification. There has been no evidence presented that either Committee member breached any fiduciary duty that they owe to the unsecured creditors as a whole. Rather, there has only been speculation that they may do so in the future. Given the body of unsecured creditors in this case and under the facts and circumstances here, both creditors are qualified and adequately representative Committee members. Accordingly, the Committee should stand as constituted, and the Motion should be denied.

II. JURISDICTION AND PROCEDURAL HISTORY

1. This Court has jurisdiction to hear this Objection.

2. Pursuant to Section 586 of title 28, U.S. Code, the U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this District. 11 U.S.C. § 586. Under Section 586 and Section 307 of the Bankruptcy Code, Congress charged the U.S. Trustee with broad responsibilities in Chapter 11 cases and the standing to raise and be heard on any issue in any case or proceeding. 11 U.S.C. § 307; *see also United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

3. Under Section 1102 of the Bankruptcy Code, the U.S. Trustee is authorized to appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity holders as the U.S. Trustee deems appropriate. 11 U.S.C. § 1102(a)(1). Section 586(a)(1)(E) of title 28 requires that the U.S. Trustee monitor creditors' committees once appointed. 28 U.S.C. § 586(a)(1)(E).

III. FACTS

A. Background.

4. On September 7, 2016, the Debtor or "Scrips" commenced this Chapter 11 case.

5. According to Brian Ettinger, the Debtor's Board Chairman since May 17, 2011, and the Chief Executive Officer since June 30, 2015,[2] the Debtor is a Delaware corporation since May 12, 2008, in the business of distributing prescription and over-the-counter pharmaceuticals. *See* Declaration of Brian Ettinger, Chief Executive Officer and Chairman of the Board of Directors of the Debtor in Support of Chapter 11 Petition and Initial Filings dated September 7, 2016 ("Ettinger Declaration") at ¶ 6. (D.I. 3).

B. The Debtors' Businesses.

6. Scrips has two (2) wholly-owned subsidiaries, namely Main Avenue Pharmacy, Inc. ("Main Avenue") and Pharmacy Administration, and it owns 90% of PIMD International, LLC ("PIMD"). Ettinger Declaration at ¶ 7. Scrips also directly holds a 14% interest in Wholesale Rx, Inc., a Tennessee corporation. Ettinger Declaration at ¶ 17.

7. During calendar year 2015, Main Avenue generated gross revenue of $38,326,000.00 and net revenue of $27,526,000.00. During the first six (6) months of calendar year 2016, Main Avenue generated gross revenue of $13,361,000.00 and net revenue of $9,761,000.00. Ettinger Declaration at ¶ 14. Upon information and belief, Main Avenue has ceased operations.

8. Pharmacy Administration provides billing and administrative services to

[2] Ettinger was appointed Interim CEO on June 30, 2015, and was formally appointed CEO by the Board of Directors on November 13, 2015. Ettinger Declaration at ¶ 1 (D.I. 3).

independent pharmacies and holds an interest in a retail pharmacy. During calendar year 2015, Pharmacy Administration generated gross revenue of $0 and net revenue of $0. During the first six (6) months of calendar year 2016, Pharmacy Administration generated gross revenue of $0 and net revenue of $0. Ettinger Declaration at ¶ 15.

9. PIMD is a wholesaler to independent pharmacies and other medical providers. PIMD is currently licensed in 19 states, and during calendar year 2015, PIMD generated gross revenue of $1,955,000.00 and net revenue of $1,945,000.00. During the first six (6) months of calendar year 2016, PIMD generated gross revenue of $2,375,000.00 and net revenue of $2,365,000.00. Ettinger Declaration at ¶ 16.

C. The Creditors' Committee.

10. On September 8, 2016, the U.S. Trustee solicited for an Official Committee of Unsecured Creditors from the Debtor's list of top 20 largest unsecured creditors.

11. The U.S. Trustee reviewed the three questionnaires received from creditors who indicated a willingness to serve on a creditors' committee. After review and deliberation, the U.S. Trustee appointed a two-member creditors' committee (the "Creditors' Committee").

12. The members of the Creditors' Committee are:

- Ironridge Global Partners, LLC, and;
- Robert Schneiderman.

Notice of Appointment of Official Committee of Unsecured Creditors. (D.I. 73).

13. The top 20 creditor list[3] includes the following groups of creditors summarized as follows:

- BK Bank, SSB (f/k/a Triumph Community Bank, N.A.) d/b/a Triumph Healthcare Finance has an unsecured guaranty claim of $2,018,727.51 and AcquiPharm, Inc. with a note payable of $473,602.00.
- Eight professional services claims totaling $414,491.31.
- NASDAQ - $2,740.00.
- Robert Schneiderman with three claims totaling $242,000.00 and consisting of $132,000 for a "Settlement"; $80,000 for a "Note Payable" and $30,000 for a "Credit Card".

14. Not listed on the Official Form 204 was Ironridge Global Partner's claim, which, according to a filed proof of claim, is $11,640,000.00 for damages and attorney fees for malicious prosecution. This amount apparently includes approximately $300,000.00 in awarded attorney's fees as a result of a July 25, 2016, ruling by the California State Court granting Ironridge's motion for attorney's fees. Ironridge's POC and Ettinger Declaration at ¶ 37.

15. More specifically, Ironridge's claim is for damages and attorney's fees apparently related to litigation concerning the issuance of ScripsAmerica stock and the award of attorney's fees as well as claims for malicious prosecution of certain litigation against ScripsAmerica and its counsel. Ironridge's claim is listed in the Debtor's Schedules as contingent, unliqudated and disputed, and the amount is listed as "unknown."[4]

16. Robert Schneiderman's claim is listed on the Debtor's schedules as noted above.

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[3] Information was gleaned from the Official Form 204 List of Creditors who have the 20 Largest Unsecured Claims and are Not Insiders (D.I. 1).

[4] At least a portion of this litigation among the parties is the subject of an opinion in *ScripsAmerica v. Ironridge*, 119 F. Supp. 3d 1213 (C.D. Cal. 2015).

Schneiderman indicated that his claims total $305,295.51 as set forth on his questionnaire, which also includes a breach of contract claim pending in a Delaware State Court action.

17. Schneiderman was the Debtor's founder and the Debtor's CEO, President, and Secretary through June 30, 2015, when he resigned all positions and executed a severance agreement. The Debtor suspended payments under the severance agreement in August 2015, alleging Schneiderman's breach of such agreement. Ettinger Declaration at ¶ 17.

18. Specifically, the Debtor agreed to pay to Schneiderman severance of $144,000 in semi-monthly installments of $6,000, commencing in July 2015 until paid. Ettinger Declaration at ¶ 21.

19. Under the agreement, Schneiderman agreed to meet with Scrips' new management, as may be requested, at any mutually convenient time during regular business hours until the close of business on June 30, 2016, and to provide such factual background information, documents, files, e-mails, computer files, etc. as may be requested. Ettinger Declaration at ¶ 21.

20. The Debtor was also obligated to repay two loans to Schneiderman in the aggregate amount of $212,669, which mature in January 2016, each bearing simple interest at the rate of 12% per annum. Ettinger Declaration at ¶ 21. Additionally, the Debtor was also required to make monthly payments of interest and to pay the principal on the maturity date. Scrips agreed to pay a credit card balance, issued on the credit of (and in the name of) Schneiderman, which was used by Main Avenue and which had an over-limit balance of $59,614. Under the agreement, Scrips was obligated to pay $59,614 of the total outstanding balance. To date, there

remains a balance of $30,001.00. Ettinger Declaration at ¶ 21.

IV. LEGAL ANALYSIS AND ARGUMENT

A. The Statutory Framework: Section 1102 Confers Important, But Different, Authority on Bankruptcy Courts and U.S. Trustees with Respect to Official Committees.

21. Section 1102(a) of the Code governs the formation, appointment, and modification of official committees. Congress gave the United States Trustee and bankruptcy courts important, but different, authority over official committees in chapter 11, and section 1102(a) specifies under what circumstances the court and the U.S. Trustee may act and under what standards:

> (a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.
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> (4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders.

11 U.S.C. § 1102 (a)(1) and (4).

22. A bankruptcy court may, if requested:

• Order the U.S. Trustee to appoint additional committees if necessary to assure adequate representation, 11 U.S.C. § 1102(a)(2);

• Order the U.S. Trustee to change committee membership if necessary to ensure adequate representation, 11 U.S.C. 1102(a)(4);

• Order the U.S. Trustee to increase membership to include a creditor that is a small business concern, 11 U.S.C. § 1102(a)(4); and

• Order that a committee not be appointed in a small business case, 11 U.S.C. § 1102(a)(3).

23. Beyond these four powers, section 1102 is silent on the court's role in committee appointments, composition, modification, or disbandment. 7 COLLIER ON BANKRUPTCY ¶ 1102.07[1] (16th ed. 2012) (no specific authorization for court to order the disbandment of a committee appointed by the U.S. Trustee).

24. The relative and delineated roles for the courts and the U.S. Trustees in committee matters under section 1102 are no accident. The 1986 amendments, which established the U.S. Trustee system on a permanent, nationwide basis (except for North Carolina and Alabama), reflected Congress's desire to separate the judicial and administrative functions and to screen courts from administrative functions, like appointing committees, that could raise conflict of interest issues.

B. The United States Trustee's Appointment of an Official Committee is Mandatory, and The Authority to Disband a Committee Appointed Under Section 1102(a)(1) Rests Only with the United States Trustee.

25. Section 1102(a)(1) of the Bankruptcy Code *requires* the United States Trustee to appoint an official unsecured creditors' committee in every case (as long as there are qualified unsecured creditors willing to serve). Indeed, the plain language of section 1102(a)(1) says the United States Trustee "shall" appoint an unsecured creditors' committee and that the United States Trustee "may" appoint other committees as he or she "deems appropriate." 11 U.S.C. §

1102(a)(1). The word "shall" in the Bankruptcy Code denotes compulsion and mandatory obligation, not discretion. *In re Revco D.S., Inc.*, 898 F.2d 498, 501 (6th Cir. 1990); *In re Columbia Gas Sys.*, 33 F. 3d 294, 299-303(3d Cir. 1994) (describing the mandatory nature of section 345(b) which instructs that "the trustee shall require from an entity with which such money is deposited or invested"). Shall means shall.

26. Although section 1102(b)(1) states that committees "ordinarily" will have seven members, the Code does not require that committees have a particular or minimum number of members. If at least two eligible creditors are willing to serve, the United States Trustee must appoint a committee; section 1102(a)(1) requires it. Three members or more may be preferable as a policy choice to avoid deadlocks and to broaden creditor participation, but three member committees are not a statutory requirement. The United States Trustee's preference for a minimum of three member committees expressed in a committee information sheet does not and cannot supersede the Code.

27. The fact that two member committees are unusual does not de-legitimize them. In fact, two member official committees have been appointed in other cases in this District, including *In re Taylor-Wharton International, LLC, et al*., Case No. 15-12075-BLS (D.I. 197); *In re SW Liquidation, LLC,* Case No. 15-10327-LSS (D.I. 386); *In re Egenix, Inc*., Case No. 14-12818-BLS (D.I. 58); *In re Vermillion, Inc., et al*, Case No. 09-11091-CSS (D.I. 210); and *In re Exaeris, Inc*., Case No. 07-10887-KG (D.I. 422). In *In re Edge Pennsylvania, LLC,* Case No. 1:15-bk-04869 (D.I. 102), a case pending in the Middle District of Pennsylvania, the U.S. Trustee appointed a two-member committee from the outset.

28. The Code does not authorize the Court to excuse the United States Trustee's duty

of appointment simply because only two creditors are willing to serve, as Debtor urges. Indeed, the Court can relieve the United States Trustee from the mandatory committee appointment in only one instance—a small business case—and only upon a showing of cause after a request by a party in interest. 11 U.S.C. § 1102(a)(3).

29. Because section 1102(a) expressly limits the cases where the Court may order that a committee not be appointed to small business cases, the absence of authority for a court to disallow committees in any other case is significant. Several canons of statutory construction are instructive here. First, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal citations omitted). Second, *expressio unius est exclusio alterius*—the express mention of one thing excludes all others. *Continental Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 677 (1935). The statute expressly grants courts specific but limited authority to order certain committee changes and to prohibit committee formation only in small business cases. Under these two principles of statutory construction, section 1102 does not authorize the court to disband an unsecured creditors' committee appointed under section 1102(a)(1). [5]

[5] Because a court may vacate its own orders, a bankruptcy court does have authority to order the disbandment of any additional committee that it ordered be appointed under section 1102(a)(2). But section 1102(a)(2) is not at issue here.

C. The Court Cannot Rely on Section 105(d) to Disband the Committee and Grant Relief That is Inconsistent with the Code.

30. Debtor relies on a single inapposite chapter 11 case from a jurisdiction where the United States Trustee Program does not operate (so the court or its Bankruptcy Administrator appoints committees) and asks for relief under 11 U.S.C. § 105(d) inconsistent with other express provisions of the Code. The court in *In re Pacific Avenue, LLC*, 467 B.R. 868, 871 (Bankr. W.D.N.C. 2012), disbanded an unsecured creditor's committee that it had appointed after the appointment of a chapter 11 trustee.

31. The *Pacific Avenue* court wrongly relied on 11 U.S.C. § 105(d) as authority to disband the general unsecured creditors committee. 467 B.R. at 870. Section 105(d) provides that the court may, at a status conference, issue an order "prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically. . . ." 11 U.S.C. § 105(d)(1). This seemingly broad authority, however, is limited. Such an order cannot be "inconsistent with another provision of this title[title 11] or with applicable Federal Rules of Bankruptcy Procedure . . . ." *Id.*

32. In *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014), the U.S. Supreme Court reaffirmed the limited scope of the bankruptcy courts' equitable powers under section 105. ("We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code.") (citations omitted); *see also In re Combustion Engineering, Inc.*, 391 F.3d 190, 236 (3rd Cir. 2004) ("The general grant of equitable power contained in § 105(a) cannot trump specific provisions of the Bankruptcy Code, and must be exercised within the parameters of the Code itself."). Similarly, Section 105(a) cannot be used to graft new provisions onto the statute that Congress neither enacted nor

intended. *See Southern Ry. Co. v. Johnson Bronze Co*., 758 F.2d 137, 141 (3d Cir. 1985) ("[S]ection 105(a) does not authorize the bankruptcy court to create rights not otherwise available under applicable law."). Additionally, equitable principles cannot be used to circumvent clear Congressional intent. *See, e.g., United States Trustee v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.),* 33 F.3d 294, 300 (3d Cir. 1994*); United States Trustee v. Price Waterhouse,* 19 F.3d 138, 142 (3d Cir. 1994).

33. Section 1102(a)(1) mandates the U.S. Trustee's appointment of a committee as soon as practicable after the order for relief. Section 1102(a)(3) expressly limits the cases where the court may direct that an unsecured creditors' committee not be formed to small business cases. 11 U.S.C. § 1102(a)(3). By allowing courts to dispense with committees only in a limited subset of cases, Congress implicitly barred courts from doing so in others. An order disbanding a general unsecured creditors' committee or directing that one should not be appointed, other than in a small business chapter 11 case, would be inconsistent with sections 1102(a)(1) and (a)(3) and therefore would not be a proper order under section 105(d).[6]

34. Moreover, a "'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .' " *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181–186 (rev. 6th ed. 2000)). A holding that courts may disband or preclude the appointment of committees in any reorganization case pursuant to section 105(d) would render 11 U.S.C. § 1102(a)(3) superfluous in small business cases. If Congress wanted bankruptcy courts to have the authority to preclude the appointment of all committees appointed under

[6] Mandatory committees are not authorized in Railroad Reorganization cases either because section 1161 renders section 1102(a)(1) inapplicable. 11 U.S.C. § 1161.

section 1102(a)(1), it easily could have granted them that authority as it did in small business cases. *See* 11 U.S.C. § 1102(a)(3); *see also* 11 U.S.C. § 1161. It did not.

D. As A Matter Of Law, Debtor Has, At Most, A Challenge To The Adequacy Of The Committee's Representation, But Debtor Offers No Evidence To Substantiate Its Challenge.

35. Although a bankruptcy court does not have the statutory authority to order the disbandment of a mandatory committee, it does have authority to review committee membership and order its modification upon a finding that the committee is not adequately representative. 11 U.S.C. §1102(a)(4).[7]

36. But the scope of a court's authority is not unfettered. The absolute predicate for relief is that the committee, as constituted, does not adequately represent the unsecured creditor body and, therefore, a change in composition "is necessary to ensure adequate representation . . . ." 11 U.S.C. § 1102(a)(4).[8] Without a threshold finding that the committee is not adequately representative, no relief may be afforded. "The statute clearly requires an initial determination of whether a party is adequately represented." *Mirant Americas Energy Marketing, LP, v. The Official Comm. Of Unsecured Creditors of Enron Corp.*, No. 02 Civ. 6274 (GBD),

[7] Section 1102(a)(4) was added in 2005 as part of BAPCPA and granted courts express authority for the first time since 1986 to review committee membership and order its modification.

[8] Most cases addressing the issue of "adequate representation" have arisen under section 1102(a)(2). Section 1102(a)(2) contains virtually identical language permitting the appointment of additional committees – rather than modifying committee membership — upon finding an additional committee is "necessary to assure adequate representation...." Accordingly, cases decided under section 1102(a)(2) can illuminate the analysis required in a challenge to committee membership arising under section 1102(a)(4). Indeed, case law addressing section 1102(a)(4) is virtually non-existent.

2003 WL 22327118, * 3 (S.D.N.Y. Oct. 10, 2003).[9]

37. The movant "bears the burden of proving that the Official Committee does not provide them with adequate representation." *In re Garden Ridge Corp.,* No. 04-10324 (DDS) 2005 WL 523129, *3 (Bankr. D. Del. Mar. 2, 2005). Accordingly, if a movant provides "no evidence" that a committee is not adequately representative, the motion for relief should be denied. *In re Dana Corp.*, 344 B.R. 35, 40 (Bankr. S.D.N.Y. 2006); *accord In re Allied Holdings, Inc.*, No. 05-12515 *et al*., 2007 WL 7138349, *3 (Bankr. N.D. Ga. Mar. 13, 2007).

38. If, however, a court does find that a committee is not adequately representative, the statute does not to authorize the court itself to appoint or remove members; it may only order the U.S. Trustee to do so:

> The court's authority to adjust committee membership is not unfettered. With the one exception noted below, the court may order a change in the composition of a committee only if the court determines that doing so is necessary to ensure adequate representation of creditors or equity security holders. It should also be noted that the court will not appoint any replacement committee members. The court will order the United States trustee to change membership on the committee but appointment of replacement members is still a decision that will be made by the United States trustee.
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> 7 COLLIER ON BANKRUPTCY ¶ 1102.07 (16th ed.).

39. Here, the Committee consists of one creditor that holds a substantial claim of approximately $11.64 million (including $300,000 for awarded attorney's fees) while the other member, the former CEO and corporate officer, holds a contractual claim, a note-payable claim, and a credit card reimbursement claim. The Committee, therefore, is composed of different

[9] The *Mirant, Garden Ridge and Allied Holdings* cases all involved a court's ruling on a request for an additional committee under section 1102(a)(2).

kinds of creditors, of those willing to serve, and who represent the types of claims present in the case. It is, therefore, adequately representative.

40. Although Debtor's Motion is not expressly styled as an adequate representation challenge, that is effectively what Debtor asserts, claiming that neither member is fit to serve on the committee and that each should be removed.

41. Debtor complains that the two committee members are unfit to serve in a fiduciary capacity because of alleged hostility toward the Debtor and because the members' interests "are not aligned with the interests of general unsecured creditors of the Debtor's estate." Motion, ¶¶ 27, 30. Ironridge is allegedly conflicted because it is both an equity holder and an unsecured creditor. Schneiderman is allegedly conflicted because he is a former insider and a potential purchaser.

42. Judicial authority to review "adequate representation" issues under section 1102(a)(4) does includes the ability to remedy problems of "improper representation." For example, actual and substantiated conflicts of interest (a form of improper representation) can support an adequate representation challenge under section 1102(a)(4). *See In re ShoreBank Corp.*, 467 B.R. 156, 161 (Bankr. N.D. Ill. 2012).

43. Debtor's first complaint, hostility toward the debtor or its efforts to reorganize, is not a legally sufficient basis for an adequate representation challenge. *In re Altair Airlines, Inc.*, 727 F.2d 88 (3d Cir. 1984). In *Altair*, the Third Circuit had to determine whether a union was a "creditor" and thus satisfied the eligibility requirement for committee service. Like the Debtor here, the debtor in *Altair* offered a policy argument that the union should not be on the

committee because the union's goals were in tension with other unsecured creditors on the best resolution of the case. *Id*. at 90. The court rebuffed debtor's argument and found that tension and conflict within the creditor body are to be expected:

> Nor are we impressed by the policy argument relied on by the debtor in support of the Bankruptcy Judge's construction of the governing statutory provisions. Undoubtedly ALPA's members may be interested in a plan of reorganization which preserves both their jobs and their collective bargaining agreement, while other creditors may be interested in liquidation, or a reorganization involving a merger with a non-union airline. Such conflicts of interest are not unusual in reorganizations. Materialman creditors, for example, may sometimes prefer to forego full payment for past sales in hopes of preserving a customer, while lenders may prefer liquidation and prompt payment. Section 1103(c)(2) contemplates that the Creditors' Committee may "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, *and the desirability of the continuance of such business* ...."

Id. at 90 (emphasis in original).

44. Debtor's second complaint—members' alleged conflicts that prohibit service as fiduciaries to the unsecured creditor body—can be a legal basis for an adequate representation challenge in some circumstances.[10] But more than mere speculation is required. "Before a conflict of interest necessitates reconstitution of a committee, then, there must be specific evidence that the committee member or members with the conflict have breached or are likely to breach their fiduciary duties." *ShoreBank*, 467 B.R. at 161.

45. "Based on motivations, the movants' argument is wholly speculative, and mere speculation that a committee member's conflict of interest might one day ripen into an outright

[10] The U.S. Trustee was not aware of certain of the allegations prior to the Committee's appointment or as a result of the Section 341 meeting conducted on October 17, 2016, but is in the process of reviewing the Debtor's submission filed on November 18, 2016 (D.I. 91). If the movants demonstrate or if the U.S. Trustee discovers facts that change this situation, the U.S. Trustee reserves any and all of his rights, duties and obligations to take any and all appropriate actions, including but not limited to removal of one or more committee members or to disband the committee entirely.

breach of fiduciary duty and a lack of adequate representation is not enough to warrant reconstituting a committee." *Id*. at 164 (collecting cases).

46. Similar to *ShoreBank*, Debtors have presented no evidence that either Committee member has engaged in any self-dealing, asserted that the pending sale process should be stopped, or breached its fiduciary duties. Any assertions to the contrary are mere speculation at this point.

47. Schneiderman's execution of the NDA on November 3, 2016, (the same day that the Committee was appointed) does not change this conclusion. Without question, Schneiderman has a fiduciary duty to the unsecured creditor body as a whole, and if he breaches that duty he would be disqualified from membership and removed. But, to date, there is no evidence that he has breached or violated his fiduciary duty or obtained inside or confidential information under the NDA that he used or plans to use to his benefit. In fact, as set forth in the accompanying Schneiderman Affidavit, Schneiderman states that he executed the NDA in regard to possible interest in participating in the proposed sale but that he has no interest in the sale and has not obtained any financial information. *See* Schneiderman Affidavit submitted herewith as Exhibit "A".

48. Moreover, some conflicts can be addressed short of removal of a member through, for example, recusal procedures with respect to particular issues on which the member may have a conflict. Admittedly, this is difficult with a smaller committee and would require careful monitoring to ensure the committee is indeed functioning effectively. But ordering the removal of the two members serving on a mandatory committee is a draconian remedy to be avoided, if possible.

49. Nevertheless, to the extent the Court determines otherwise regarding the purported conflicts and finds the Committee is not adequately representative, it is important to clarify the proper legal remedy and the basis for it. Although disbandment might be the practical result of any finding that the Committee is not adequately representative because neither member is fit to serve (if there are no other willing and eligible creditors to appoint), this is legally different than ordering disbandment of the Committee, which, as discussed above, a court may not do.

50. The U.S. Trustee discharged his statutory duty to appoint a creditors' committee of the creditors who are willing and eligible to serve on such a committee and to discharge their fiduciary duties. Accordingly, the U.S. Trustee requests that the Motion be denied.[11]

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[11] The U.S. Trustee reserves any and all rights, remedies, duties and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, to take any such other and further actions, file any other objections or motions as may be required or necessary, to conduct any and all discovery as may be deemed necessary or as may be required and to assert such other and further grounds as may become apparent upon such factual discovery and to take whatever other actions are deemed necessary and appropriate.

WHEREFORE, the U.S. Trustee respectfully requests that this Court (a) deny the Motion and (b) grant such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

By: */s/Richard L. Schepacarter*

Richard L. Schepacarter
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 N. King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491 (Tel.)
(302) 573-6497 (Fax)
Email: Richard.Schepacarter@usdoj.gov

Dated: November 21, 2016