UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
GARDEN RIDGE CORPORATION, *et al.*,	)	Case No. 04-10324 (DDS)
	)	Jointly Administered
Debtors.	)	
	)	

MEMORANDUM OPINION WITH RESPECT TO MOTION TO APPOINT AN OFFICIAL COMMITTEE OF LANDLORDS[1]

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[1] For a complete list of the appearances, the reader is referred to the transcript of the hearing held on May 18, 2004 (Docket No. 592).

KORNREICH, J.

Before me are the motions of Austin-HF, Ltd. and Wal-Mart Stores, Inc. seeking the appointment of an additional official creditors committee of landlords. Upon consideration of all relevant pleadings, oral argument, the parties' stipulation of facts and evidence, and for the reasons set forth below, the motions are denied. This Memorandum Opinion constitutes my findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

BACKGROUND

On February 13, 2004, the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Official Committee"). The Official Committee's members include four vendors, one advertising company, and two landlords with rejected leases.[2]

On April 7, 2004, seven of the Debtors' landlords formed an informal landlord committee (the "Informal Committee").[3] Shortly thereafter, twelve additional landlords[4] joined this committee. The nineteen members of the Informal Committee are parties to twenty of the Debtors' forty-seven leases.

The evidence, as agreed by the parties, includes a written stipulation of facts, exhibits, and certain transcript designations from the depositions of Kirk A. Kennedy, Donald Martin, Tom Roddy, and Charles Hendricks. According to the parties' joint stipulation of facts, over

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[2] The members of the Official Committee include: American Greetings, vendor; Framecrafters, Inc., vendor; Allstate Floral & Craft, Inc., vendor; Amscan, Inc., vendor; Fogerty Klein Monroe, advertising agency; Peter Fazio, landlord; and Humbel Garden, LLC, landlord.

[3] Ocwen Federal Bank, FSB, MK GRP Associates, L.P., Austin-HF, Ltd., Nashridge, LLC, Eric W. White, Wal-Mart Stores, Inc. (a landlord with two leases), and SSC Eastgate Square GR, LLC.

[4] Greenville Industrial Park, L.P., O'Fallon Ridge, LLC, IP Atlanta-Kennesaw LLC, IP Atlanta-Norcross LLC, Carwood L.P., Weeds (OK) QRS 12-22, Inc., QRS 11-29 (TX), Inc., GR (TX) LP, Ocean Front IV, L.L.C., Fist United Leasing Corp., The Philip H. and Ruth Ann Ingber, and Catamount Virginia, LLC.

1,200 proofs of claim have been filed in this case. The Debtors' schedules indicate that there are approximately 2,100 unsecured claims.

The opposing parties[5] have jointly submitted to two preliminary summaries of general unsecured claims before the court: "Scenario A" and "Scenario B."[6] The primary difference between the two is the treatment of claims arising out of rejected leases. Under Scenario A, the rejection landlords' claims may total $30,449,492, which would be 27.5% of the anticipated unsecured claims, and the remaining landlords' claims may total $9,342,298, which would be 8.7% of the anticipated unsecured claims. Under Scenario B, the rejection landlords' claims may total $70,049,322, which would be 46.6% of the anticipated unsecured claims, and the remaining landlords' claims may total $9,342,298, which would be 6.2% of the anticipated total unsecured claims.

Under both scenarios, other sub-groupings of unsecured claims include: (1) the vendor claims of $53,637,204, which would be 48.4% of the unsecured claims under Scenario A and 35.7% under Scenario B; (2) the Allied Capital claim of $2,513,416, which would be 2.3% of the unsecured claims under Scenario A and 1.7% under Scenario B; (3) the Employment Contract Claims of $3,139,581, which would be 2.9% of the unsecured claims under Scenario A and 2.1% under Scenario B; (4) the Workers' Compensation Claims of $1,000,000, which would be 0.9% of the unsecured claims under Scenario A and 0.7% under Scenario B; and (5) the General Liability Claims of $14,794,869, which would be 13.4% of the unsecured claims under Scenario A and 9.8% under Scenario B.

The landlords assert that the Official Committee cannot adequately represent their interests under either Scenario A or Scenario B. Of the seven members of the Official

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[5] The parties opposing the current motions are Allied Capital Corporation, the Office of the United States Trustee, the Debtors and the Official Committee.

[6] See Joint Stipulated Exhibits 1 and 2, respectfully.

Committee, only two are landlords with rejected leases (28.6%), while the other members are vendors (71.4%). The landlords therefore argue that they do not have a meaningful voice on the Official Committee, especially since they believe that the vendors' interests are adverse to the landlords' interests. For this reason, the landlords ask this court to appoint an additional official committee of creditors to represent landlord interests.

DISCUSSION

Section 1102 of the Bankruptcy Code[7] addresses the appointment of an additional committee of creditors, which provides, in relevant part:

> On request of a party in interest, the court *may* order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

11 U.S.C. § 1102(a)(2) (emphasis added).

In determining whether to appoint an additional committee, courts apply "similar sets of factors in analyzing the adequacy of the representation" such as "(1) the ability of the committee to function; (2) the nature of the case; and (3) the standing and desires of the various constituencies." *In re Enron Corp.*, 279 B.R. 671, 685 (Bankr. S.D. N.Y. 2002). Other considerations include:

> the ability of creditors to participate in the case even without an official committee; . . . the potential to recover expenses pursuant to § 503(b); whether different classes may be treated differently under a plan and need representation; the motivation of the movants; the costs incurred by the appointment of additional committees; and the tasks that a committee or separate committee is to perform.

Id. (internal citations omitted). Some courts apply a two part test: first, whether the appointment of an additional committee is necessary to assure that the movants are adequately represented;

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[7] Unless otherwise indicated, all citations to statutory sections are to the Bankruptcy Code (the "Code"), 11 U.S.C. § 101 *et seq.*

and, second, whether the court should exercise its discretion and order the appointment. *See id.* These courts consider: "(1) the cost associated with the appointment; (2) the time of the application; (3) the potential for added complexity; and (4) the presence of other avenues for creditor participation." *Id.* (citations omitted). Regardless of the factors considered, "the decision is not to be taken lightly, and involves a delicate balancing of various and sometimes diverging interests." *Id.*

Section 1102 provides guidance as to who shall ordinarily be members of an official committee of creditors:

> A committee of creditors appointed under subsection (a) . . . shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

11 U.S.C. § 1102(b)(1). Section 1103 sets forth the official committee's power and duties:

> A committee appointed under section 1102 of this title may –
> (1) consult with the trustee or debtor in possession concerning the administration of the case;
> (2) 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, and any other matter relevant to the case or to the formulation of a plan;
> (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
> (4) request the appointment of a trustee or examiner under section 1104 of the title; and
> (5) perform such other services as are in the interest of those represented.

11 U.S.C. § 1103(c). An official committee of unsecured creditors has a duty to represent all general unsecured creditors, including landlords to the extent they that have general unsecured claims. *See In re Life Service Sys. Inc.*, 279 B.R. 504, 513 (Bankr. W.D. Pa. 2002). Specifically,

the members of an official committee owe a fiduciary duty to the committee's constituents, *i.e.*, the entire class of general unsecured creditors. *See id.* The chief purpose of an official committee is to maximize distribution to this class. *See id.*

Given these considerations, the primary question for the purpose of these motions is whether the landlords are adequately represented by the Official Committee. The landlords bear the burden of proving that the Official Committee does not provide them with adequate representation. *See Enron Corp.*, 279 B.R. at 685 (citations omitted). Many courts are reluctant to appoint an additional committee of creditors because it is an extraordinary remedy. *In re Sharon Steel Corp.,* 100 B.R. 767, 777-78 (Bankr. W.D. PA. 1989). As a general rule, "adequate representation exists through a single committee so long as the diverse interests of the various creditor groups are represented on and have participated in that committee." *Id.* Further, creditor groups are adequately represented if the interests of each group "have a meaningful voice in the committee relative to their posture in the case." *In re Dow Corning Corp.*, 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (Bankr. E.D. Mich. 1997); *see also In re Hills Stores*, 137 B.R. 4, 7 (Bankr. S.D. N.Y. 1992).

There is no hard and fast rule requiring proportionate representation of distinct groups of creditors on a committee of unsecured creditors. *See Dow Corning*, 194 B.R. at 141. The Code specifically states that the committee of creditors "shall ordinarily consist of the persons . . . that hold the seven largest claims against the debtor of the kinds represented on such committee." 11 U.S.C. § 1102(b). "For a particular group of creditors to be adequately represented by an existing committee, it is not necessary for the committee to be an exact reflection of that committee's designated constituents." *Dow Corning*, 194 B.R. at 141. According to the

Debtors' consolidated list of unsecured creditors holding the twenty largest unsecured claims,[8] the four largest unsecured creditors are vendors, while the next three largest unsecured creditors are landlords. It appears that all but two Official Committee members are among the Debtors' twenty largest unsecured creditors.

Courts generally will not authorize an additional committee of unsecured creditors unless the current committee is "hopelessly divided, unable to take a position on important matters and ineffective. . . ." *Enron Corp.*, 279 B.R. at 686 (citation omitted). A committee of unsecured creditors often consists of creditors with a variety of viewpoints, and thus conflicts are not uncommon, especially when creditors are acting individually to protect their separate business interests. *See Hills Stores*, 137 B.R. at 6. Adequate representation is lacking only when these conflicts prevent an official committee from upholding its fiduciary obligations to all general unsecured creditors. *See Sharon Steel*, 100 B.R. at 778.

Here the landlords argue that the Official Committee is not representing their interests, as evidenced by member voting record on certain issues. Yet as mentioned above, the chief purpose of the Official Committee is to represent all general unsecured creditors. See *Life Service Sys.*, 279 B.R. at 510. If an Official Committee member advances its own interests through its position on the committee, that member is in breach of its fiduciary duty to committee constituents. *See id.* The Official Committee is simply not intended to represent individual creditor interests. Mere conflict between members of the Official Committee is no basis for the appointment of an additional committee of creditors. Based on the forgoing, the landlords have made no showing that the Official Committee has failed to fulfill its duty to maximize recovery to all general unsecured creditors.

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[8] Attached to the Debtors' chapter 11 petitions.

It is important to keep in mind that each member of the Official Committee is free to represent its own interests in an individual capacity apart from membership in the Official Committee. *In re American Federation of Television and Radio Artists*, 30 B.R. 772, 776 (Bankr. S.D. N.Y. 1983). Each landlord has a distinct relationship with the Debtors governed by the requirements of section 365. Under section 365, the final determination of whether a lease is assumed or rejected is subject to notice and a hearing. This decision to assume or reject is subject to the business judgment rule. *See In re Vencor, Inc.*, 2003 WL 21026737, at *3 (Bankr. D. Del. 2003) (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1992)). A landlord may challenge this determination by taking the position that the Debtors are not acting in the best interest of the estate and present related evidence with respect to each proposed lease assumption or rejection. If a lease is ultimately assumed, the particular landlord continues to have a distinct relationship with the debtor. If the lease is ultimately rejected, the concerns of the rejected landlord become, for the most part, the concerns of a general unsecured creditor represented by the Official Committee.

In an effort to represent its individual interests, a landlord may act in concert with those landlords who are members of the Informal Committee, as some of the landlords did here when they formed the Informal Committee. Those landlords who are members of the Informal Committee may continue to work collectively with that designation, and, should it choose to do so, the Informal Committee will continue to be heard as a party of interest in this case. Pursuant to section 503(b), the Informal Committee may later seek reimbursement for reasonable professional services and expenses, and nothing in this decision will prevent the Informal Committee from making such application or determine the outcome of such request. Section 503(b) provides, in relevant part:

> After notice and a hearing, there shall be allowed administrative expenses . . ., including –
> (3) the actual, necessary expenses, . . . incurred by –
> (D) . . . a committee representing creditors . . . other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
> (4) reasonable compensation for professional services rendered by . . . an entity whose expense is allowable under paragraph (3) of this subsection, based on time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

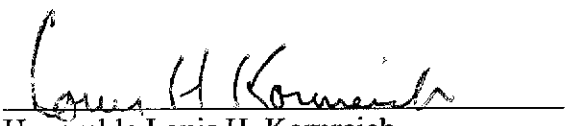
11 U.S.C. 503(b).

It is noteworthy that the Code provides that "the court shall *not* allow compensation for – (i) unnecessary duplication of services; or (ii) services that were not – (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A) (emphasis added). With these considerations in mind, if this court finds that the efforts of the Informal Committee have provided substantial contribution to the interests of the estate, then the Informal Committee may be entitled to reasonable compensation at the conclusion of the case.

CONCLUSION

For the reasons set forth above, the motions to appoint an additional official committee of landlords are DENIED. A separate order denying the motions shall enter.

Dated: March 2, 2005



Honorable Louis H. Kornreich
United States Bankruptcy Judge