IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
CYPRUS MINES CORPORATION,	Case No. 21-10398 (LSS)
Debtors.	Re: Docket No. 155

BENCH RULING ON MOTION OF THE KAZAN MCCLAIN FIRM PERSONAL INJURY PLAINTIFFS FOR MODIFICATION OF THE TORT CLAIMANTS COMMITTEE OR FOR APPOINTMENT OF TORT CLAIMANTS CONFLICTS COMMITTEE[1]

On March 22, 2021, seven personal injury plaintiffs ("Movants") with claims against Cyprus Mines Corporation and represented, individually, by the law firm of Kazan, McClain Satterley & Greenwood, PLC ("Kazan McClain") filed a motion to modify the composition of the Official Tort Claimants Committee ("Cyprus Committee") or to appoint a separate tort claimants' conflict committee in this bankruptcy case.[2]

Movants assert that the Cyprus Committee, as currently constituted, does not adequately represent the Cyprus general unsecured creditors because five (the "Five") of the seven committee members are represented by law firms which also represent members of the Tort Claimants Committee ("Imerys TCC") in the Imerys bankruptcy cases.[3] Movants argue that these five law firms "serve by proxy" on the Imerys TCC. These five law firms also sat on a "prepetition Ad Hoc Committee" consulted by Cyprus Mines Corporation with respect to its plan of reorganization.

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[1] This Bench Ruling was read in court on May 17, 2021. Minimal minor, non-substantive corrections were made and citations have been added.
[2] Motion of the Kazan McClain Firm Personal Injury Plaintiffs for Modification of the Tort Claimants Committee or for Appointment of Tort Claimants Conflicts Committee, D.I. 155.
[3] *In re Imerys American, Inc., et al.*, Case No. 19-10289 (LSS) (Bankr. D. Del.).

Movants seek the creation of a separate committee comprised of claimants whose law firms do not "serve on the Imerys Tort Claimants Committee by proxy" and who did not sit on the Cyprus prepetition Ad Hoc Committee. Movants argue that the settlement between Cyprus Mines Corporation and Imerys ("Cyprus/Imerys Settlement"), which is embodied in both the Cyprus and Imerys plans of reorganization, makes the Five conflicted as their respective counsel have already considered and approved the Cyprus/Imerys Settlement as members of the Imerys TCC. Continuing with the "service by proxy" theme, Movants tout that Kazan McClain has advised the Office of the United States Trustee ("UST") of its willingness to participate on the Cyprus Committee, or a separate "unconflicted" committee and to bring its valuable experience to committee deliberations. Kazan McClain does not have a client on the Imerys TCC and thus asserts it is unconflicted.

Movants did not present any evidence that members of the Cyprus Committee were breaching their fiduciary duties. While Movants sought to introduce evidence, the evidence they would have adduced, if permitted, was related to how committees appointed in mass tort cases function, generally, not how the Cyprus Committee is functioning. The only other evidence Movants sought to introduce related to the Kazan McClain firm's extensive experience in mass tort bankruptcy cases.

For the reasons discussed below, I am denying the Motion. Movants have identified a concern, but adding members to the Cyprus Committee or appointing a separate committee of members who do not have counsel who sit on the Imerys TCC does not necessarily provide a solution. And, I find that Movants' viewpoint is adequately

represented on the Cyprus Committee by the two members who currently sit on the Cyprus Committee who are not hampered by the alleged conflict Movants' posit.

The case law

At argument, counsel primarily relied on two cases – *Enron*[4] and *ShoreBank.*[5] Neither fact scenario is close to the one before me, but they both set out the relevant general principles.

The *Enron* case addresses the situation where one debtor in a corporate structure is cash flow positive or solvent and other entities in the structure are not. The question is whether creditors of the solvent debtor should have their own committee or a greater voice on a combined creditors committee. In *Enron*, the court declined to appoint a separate committee and found that the committee as constituted adequately represented the constituency as a whole. In so finding, the court looked at multiple factors, including (i) the ability of the committee to function, (ii) the nature of the case, (iii) the standing and desires of the various constituencies, (iv) the cost associated with the appointment, (v) the potential for added complexity, and (vi) the presence of other avenues for creditor participation and conflicts of interest. The court also held that before a conflict of interest requires reconstituting a committee or appointing an additional committee, there must be specific evidence that the committee members, or one of them, is breaching or likely to breach their fiduciary duties. The court further noted that ordering the appointment of additional committees is an extraordinary remedy. Important to the *Enron* decision, the court noted that no committee member complained about conflicts of others on the committee or that

[4] *In re Enron Corp.*, 279 B.R. 671 (Bankr. S.D.N.Y. 2002).
[5] *In re The Shorebank Corp.*, 467 B.R. 156 (Bankr. N.D. Ill. 2012).

their individual voice was not being heard. The *Enron* court noted that no evidence of the committee's inability to function had been presented. Further, the Court also frequently referenced the existence of an independent examiner appointed for the solvent entity.

In *Shorebank*, the concern was that the committee was dominated by subordinated creditors who might be willing to take risky positions. Under a filed plan, these subordinated creditors would not receive a recovery until a senior class was paid in full. It was asserted that the payment in full of the senior class would likely reduce the recovery to general unsecured creditors. The *Shorebank* Court looked at the same factors the *Enron* Court considered. It found that the movants had identified a conflict, but noted the lack of evidence that any committee member breached or was likely to breach its fiduciary duty. The court declined to appoint an additional committee.

Analysis

Here, the conflict that has been identified is not a conflict of the Cyprus Committee members themselves. None of the Cyprus Committee members are members of the Imerys TCC. Rather, the identified conflict is that the Five's respective law firms each represent a member of the Imerys TCC and were on the prepetition Ad Hoc Committee. From that, Movants conclude that these firms "no longer have an interest in achieving any result for its constituency other than approval of the plan embodying the prepetition Cyprus Settlement"[6] and "any effort they might make to formulate an alternative plan would be a breach of the Imerys settlement agreement."[7] This conflict most closely resembles a positional conflict (as

[6] Motion ¶ 17.
[7] *Id.*

discussed in commentary to Professional Rule of Conduct 1.7).[8] But, Movants do not argue that the law firms have a conflict because of their representation of multiple clients in a single case or in more than one case. Rather, the conflict is only because of the representation of a client on both the Imerys TCC and the Cyprus Committee.

Debtor, the Cyprus Committee and the UST took the straight forward path that no appointed Cyprus Committee member has a conflict; they did not directly take on the law firms' alleged positional conflicts. Both the Cyprus Committee and the UST argued that the Cyprus Committee has already shown that it is looking at all issues anew because the Cyprus Committee retained professionals who are not involved in the Imerys bankruptcy case. Committee counsel also suggested that, to the extent necessary, a sub-committee of the two members whose counsel do not hold any alleged positional conflict, could be utilized as necessary to address issues. And, the UST argued that Movants' position assumes that the law firms advising members of the Imerys TCC advised them to approve the Cyprus Settlement. When I raised from the Bench concerns about the sanctity of committee deliberations given the overlap in counsel representing members of the Cyprus Committee and the Imerys TCC, neither Cyprus Committee Counsel nor Movants' counsel seemed particularly concerned.

Applying the *Enron/Shorebank* factors here, I conclude that the Cyprus Committee adequately represents the Cyprus creditors as a whole such that the appointment of an additional committee or additional members on the current committee is not appropriate. The Cyprus Committee members, themselves, have no conflict. And, I have no evidence

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[8] *See* Model Rules of Professional Conduct of the American Bar Association, Rule 1.7, Comment ¶¶ 23-25 (Conflicts in Litigation).

that any Cyprus Committee member has breached his or her fiduciary duty. Moreover, neither the Cyprus Committee itself nor any member thereof has complained that the committee cannot function or that his or her voice is not being heard. Two members of the Cyprus Committee are not represented by counsel who hold the alleged positional conflict and can serve as an appropriate sub-committee to the extent one is needed. These members provide a meaningful voice on behalf of similarly situated claimants; no additional committee members are needed. I also note that it is my intention to appoint an FCR that has no connection with the *Imerys* bankruptcy case, and so, much like in *Enron*, I will have an additional fiduciary performing all required functions, including a review of the Cyprus/Imerys Settlement.

Moreover, there is no argument that the Cyprus Committee as constituted does not hold claims of the types held by creditors of Cyprus, generally. Nor do Movants ask for a committee to be formed of creditors who only hold claims against Cyprus, and not Imerys. I note that Movants' alleged positional conflict can be held by any law firm that has clients with claims against both Imerys and Cyprus. So, I am not sure if a true "unconflicted" committee can be formed given the reality of law firm participation. In any event, Movants have not asked for this relief. And, given that certain creditors with claims against Cyprus also have claims against Imerys, I am not sure such a committee would adequately represent Cyprus' creditor body.

Finally, Kazan McClain's clients have been ably represented by counsel in both this case and the Imerys case showing that they have an available avenue for participation in the Cyprus bankruptcy case.

Having ruled, however, I will not suspend reality and ignore the role plaintiff law firms play in a mass tort bankruptcy case. Because of the relative few law firms that appear to dominate this landscape, and the hundreds or thousands of claimants each purports to represent (and thereby influence) in a given case, plaintiff law firms appear to have taken an outsized role in the representations of their individual clients on committees apparently supplanting and/or replacing them as acting committee members. Why do I say this? First, Movants tell me so. In their Motion, Movants describe a world of committee by proxy: "[i]t should be noted that the tasks to be performed by the Cyprus Tort Claimant's Committee are likely to be performed by the firms representing the Committee representatives, not the representatives themselves."[9] Neither Debtors nor the Cyprus Committee took issue with this description.

Second, in this case, the application to retain Cyprus Committee Counsel was signed by "Lisa Nathanson Busch, Esq, Co-Chair" and "Beth Gori, Esq., Co-Chair."[10] While a "Supplemental Signature Page," subsequently filed at the request (or perhaps insistence) of the UST, clarified that each attorney was signing on behalf of their clients, the filing of the original Signature Page at the very least evidences a mindset. How difficult would it be to slash (/s/) the name of the Committee member rather than to slash (/s/) the name of his or her lawyer?

Third, in the Imerys bankruptcy case, an application was filed seeking reimbursement of almost $70,000 for air travel, car rental and hotels incurred by three TCC

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[9] Motion ¶ 22.

[10] Application of the Official Committee of Tort Claimants for an Order Authorizing the Employment and Retention of Caplin & Drysdale, Chartered, as the Committee's Counsel, Effective *Nunc Pro Tunc* as of March 8, 2021, D.I. 228.

Committee members' law firms.[11] This request did not seek reimbursement for expenses incurred by their clients and to my knowledge no such reimbursement has been sought.

Fourth, two members of the Imerys TCC passed away during the course of the Imerys case – one in 2019 and one in 2020.[12] The UST did not amend the Notice of Appointment of the TCC until January 22, 2021. Experience tells us that the UST files amended appointments soon after the UST is informed of a resignation or change in committee membership status. The lag in time suggests that Imerys Committee counsel was not aware of the death of two of its members. These are only some specific examples that easily come to mind in just two of the cases before me. Others abound.

Why this "committee by proxy" universe has evolved, I can only guess. And, I won't speculate here. But, it was suggested at argument it is because these are complex cases and the claimants have to rely on their individual counsel for bankruptcy experience. Mass tort cases are certainly unique and undoubtedly present complex and complicated issues. But, from the perspective of committee member participation, mass tort cases are no more or less complex than other type of bankruptcy case. And, they are no more or less complex than patent infringement cases, medical malpractice cases or even the underlying asbestos cases in which individuals serve as jurors every day in this country and make decisions unaided by counsel in the jury room. Bottom line: I simply don't buy that argument. More importantly, individuals serving on committees bring valuable real life/non-legal perspectives (whether business or personal) to committee deliberations and how a case should proceed.

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[11] *In re Imerys Talc America, Inc., et al.*, Case No. 19-10289, D.I. 2342.
[12] *In re Imerys Talc America, Inc., et al.*, Case No. 19-10289, D.I. 155-7 n. 56.

Having made these observations and because of the apparent conflation between committee members and their individual counsel, I feel compelled to remind the Cyprus Committee members, their individual counsel and Committee counsel of what I believe are first principles.

1. Committee members owe a fiduciary duty to their constituents. They must actively participate in committee meetings and make decisions. While they may be assisted by their individual counsel, committee members cannot abdicate their role in favor of their counsel and their counsel do not sit "by proxy" or otherwise on creditor committees.
2. Committee members must be mindful of the fiduciary duty they take on when they agree to serve on a creditors committee. Some creditors prefer not to take on that responsibility. If a creditor does not want that responsibility, or cannot subsequently fulfill it, he should not ask to serve on the committee or should resign.
3. Committee counsel must communicate with and receive direction from actual committee members.
4. Plaintiff lawyers advising their clients in their capacities as committee members must remind their clients of their fiduciary duty.

In this case, I add an additional admonition. Law firms representing members of the Cyprus Committee and the Imerys TCC must be mindful of any positional conflicts they may have and act accordingly and pursuant to all appropriate ethical standards. And, those law firms should be wary that they are not unintentionally taking on fiduciary duties in these mass tort cases to clients other than their own.

Finally, I am directing Cyprus Committee counsel to provide a copy of this ruling to the Committee members and have a specific discussion with them about it. I am also directing Cyprus Committee counsel to provide a copy of this ruling to all counsel who represent individual members of their committee who participate in Cyprus Committee meetings.

This bench ruling will be placed on the docket and an order will issue.

Dated: May 18, 2021

Laurie Selber Silverstein
United States Bankruptcy Judge

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For the reasons set forth in my Bench Ruling of May 17, 2021, as placed on the docket on May 18, 2021, the Motion is **DENIED**.

Dated: May 18, 2021

Laurie Selber Silverstein
United States Bankruptcy Judge