

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 BALLENTINE BROS., INC.,) CASE NO. BK83-182
)
 DEBTOR) CH. 11

MEMORANDUM

Hearing was held on Equitable Life Assurance Society of the United States (Equitable) motion for appointment of trustee in this Chapter 11 case on April 13, 1988. John Pierce of Rembolt, Ludtke, Parker & Berger, Lincoln, Nebraska, appeared on behalf of Equitable; David Hahn of Lincoln, Nebraska, appeared on behalf of the debtor; Douglas Semisch, Assistant United States Attorney appeared on behalf of the Farmers Home Administration; Vince Powers, Lincoln, Nebraska, appeared on behalf of Keith County, Nebraska; C.G. Wallace, III, of Thompson, Crouse, Pieper, Wallace & Eggers, P.C., Omaha, Nebraska, appeared on behalf of the firm.

This is a long-running and very unsuccessful Chapter 11 bankruptcy proceeding. It was filed in 1983 and has continued in existence until this date subject to significant litigation both in the form of contested matters and in the form of adversary proceedings.

Equitable has filed a motion for the appointment of a trustee alleging improper activities on the part of the debtor with regard to assets of the estate. At the hearing, the debtor resisted the motion, as did Keith County. However, since the hearing, Keith County has withdrawn its resistance and has joined with Equitable in requesting a trustee to be appointed. All other parties present at the hearing joined in support of the motion for the appointment of a trustee.

Absent from the hearing was a representative of Adams Bank & Trust Company, a creditor in the case. Some of the allegations by Equitable concern activities between the debtor-in-possession and Adams Bank & Trust. The Court has been made aware of the Bank's resistance to the motion by virtue of argument heard at a later hearing on Keith County's motion to dismiss. That motion has now been withdrawn and, for the purposes of this Memorandum, the Court assumes that the only parties objecting to the appointment of a trustee are the debtor and Adams Bank & Trust Company.

The evidence in favor of the appointment of a trustee can be summarized as follows:

1. Approximately two years after the bankruptcy petition was filed, the debtor made a payment to Adams Bank & Trust Company (Adams Bank) which was applied partly to the post-petition operating loan which had been authorized by the Court and partially, in the amount of \$53,438.50 was applied to a prepetition indebtedness owed by the debtor to the Adams Bank.

2. On or about March 28, 1985, Ballentine also paid the Bank the sum of \$53,438.50 for application to the prepetition indebtedness.

3. The funds available for the above-listed payments came from operating income of the debtor, that is, the sale of crops and calves, both of which became property of the estate after the bankruptcy petition was filed.

4. The debtor transferred, at some point in time, substantially all of its real property to R & T Custom Machine, an entity under which one of the debtor's principals operates a business. Such transfer was purportedly by lease without approval of this Court and was for a sum substantially less than the fair rental value of the property based upon the opinion of an employee of Equitable Agri-Business, Inc., a wholly owned subsidiary of the Equitable Life Assurance Society of the United States.

5. The debtor refused, until this Court made a specific order within the last forty-five days, to account for all rents and profits and to identify their form and location, all in violation of the Court rules.

6. The debtor has transferred to insiders various personal property without receiving compensation in the form of purchase or rental payments.

7. The debtor has continued to fail and neglect to take any action for recovery of transfers to the Adams Bank or insiders.

8. Transferees of the debtor, either by lease or otherwise, have participated in the Federal Government farm programs to the exclusion of the interest of the debtor and for the benefit of insiders as well as for the benefit of independent transferees.

All of the above activities or inactivities by the management of the debtor-in-possession lead this Court to believe that it is in the best interests of all parties to this case that a trustee be appointed.

The Bankruptcy Code at 11 U.S.C. § 1104 provides that after notice and hearing the Court shall order the appointment of a trustee for cause including ... gross mismanagement of the affairs

of the debtor by current management. This Court is satisfied that the statutory requirement of 11 U.S.C. § 1104 has been met and that a trustee should be appointed to take possession of the assets and perform the appropriate investigations, reporting requirements and administration of this debtor.

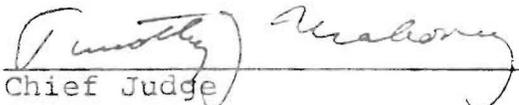
The motion for appointment of the trustee was joined by the official creditors' committee and by the United States of America, acting through the Farmers Home Administration. The motion requests that an independent person, Eugene L. Chamberlain, be appointed as trustee and that as trustee he be compensated at the rate of \$60 per hour for time expended and out-of-pocket expenses as are approved by the Court, such fees to be paid out of any recovery made by the trustee. This Court will appoint Mr. Chamberlain subject to his acceptance and qualification. However, if he, based upon his previous experience in other cases, believes the compensation provisions are not appropriate, he may immediately, preappointment or postappointment, request the Court to order a different compensation arrangement, perhaps by surcharge against the interest of the secured creditors, if no other funds are available or recovered.

It is, therefore, ordered that Eugene L. Chamberlain is appointed as trustee in this case, subject only to his qualification and appointment and approval of the appropriate bond in an initial amount not to exceed \$50,000.

Separate Journal Entry shall be filed.

DATED: May 11, 1988.

BY THE COURT:



Chief Judge