

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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IN RE:)
 SWEETWATER, ET AL,) Bankruptcy No. 83A-02582
 Debtor.)

MEMORANDUM DECISION

An official Purchaser's Committee was appointed in the above-captioned case pursuant to 11 U.S.C. §1102. This committee has filed an application with the court seeking authority to employ Mr. Victor Borchers as an investigator for the committee. Previously, the committee had sought authority to employ Mr. Borchers as accountant, consultant and agent. The Court declined to approve the first application and it was subsequently withdrawn.

A good functioning committee such as the Purchaser's Committee can be of significant assistance to the debtor and great protection to creditors. The powers and duties of committees appointed under 11 U.S.C. §1102 as set forth in 11 U.S.C. §1103 commences with the selection of assistants in the form of attorneys, accountants, "other agents". A majority of the members of the committee must be in attendance at a meeting at which these professionals are selected. This requirement is to assure there is protection against closely held control of committees. Nothing in the text of the code provision states

whether the attendance of that majority need be in person or whether attendance by proxy will do. It may be well argued that appearance by proxy defeats the intent of the rule in the first place. At such meeting not only must selection, but authorization of employment occur.

The Court must approve these acts of the committee in selecting and authorizing professional persons. The motion to the court, pursuant to Bankruptcy Rule 2014, must explain the reason why this employment is regarded as necessary, the anticipated basis of the charge, the function anticipated to be performed, and other information to show the desirability of employment. The person employed must be "disinterested" as that term is defined in 11 U.S.C. §101(13). Mr. Borchers was instrumental in forming and obtaining the necessary approval for the Purchaser's Committee. He was originally a member of the committee. It would appear that he is therefore a creditor of the debtor and cannot meet the disinterested test.

The legislative history of §1103 suggests that while there is no absolute bar, it is anticipated that one attorney would suffice. A similar view is expressed as to other agents if the need for any at all is demonstrated. House Report No. 95-595, 95th Cong., 1st Sess. 402(1977); Senate Report No. 95-989 9th Cong., 2d Sess. 114 (1978).

The participation in the case by a committee is described in rather clear statutory language, 11 U.S.C. §1103 provides that a committee:

"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 recommendations as to any plan formulated, and collect and file with the court acceptances of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title, if a trustee or examiner, as the case may be, had not previously been appointed under this chapter in the case; and

(5) perform such other services as are in the interest of those represented.

It is noted that some of the committee's functions are the same as some of the duties of the trustee. 11 U.S.C. §1107 places a debtor-in-possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a Chapter 11 Trustee, and is required to perform the function and duties of a Chapter 11 Trustee except investigative duties. Bankruptcy Rule 9001(10) provides that as used in the Bankruptcy Rules, the word "trustee" includes a debtor-in-possession in a Chapter 11 case. The committee is to investigate the acts, conducts, assets,

liabilities and financial condition of the debtor, the operation of the business, and the desirability of its continuance, and any other matter relevant to the case or formulation of the plan.

Section 1103(d) calls for a meeting between the debtor and the committee as soon as practicable after the appointment of the committee. Such a meeting will avoid duplication of effort and waste of resources. It may be noted that the code's statement is that the trustee shall perform stated duties while the provision for the creditor's committee recites that the committee may do what is set forth. The committee may also seek appointment of a trustee or examiner if there is evidence that such a need to investigate the acts, conducts, etc, of a debtor-in-possession is present in the case.

The Court believes that coordination between the committee and the debtor is in order, as the Court will be reluctant to approve compensation for duplicate efforts. Two persons working on the same problem are not necessarily duplicating efforts, but care seems to be in order. The code, in the provisions setting forth the powers and duties, mandates committees consulting with the debtor-in-possession concerning the administration of the case.

There has been no indication that the debtor is unwilling to cooperate with the committee in pursuing of its duties. The information desired by the committee, as outlined in the application, could very well be supplied by the debtor, thereby obviating the need for an investigator.

THEREFORE, the application to employ investigator is denied.

DATED: November 16, 1983.



JOHN H. ALLEN
United States Bankruptcy Judge