U. S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 30 2003
TAWANA C. MARSHALL, CLERK
By brj
Deputy

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
TEXASOIL ENTERPRISES, INC.	§	CASE NO. 02-45470-DML-7
	§	
Debtor.	§	
	§	

MEMORANDUM OPINION AND ORDER

Before the court is the United States Trustee's ("UST") Motion to Examine Debtor's Transactions with Attorney (the "Motion"). Arthur Ungerman ("Ungerman") has filed a response to the Motion (the "Response"). The court heard testimony on the Motion on June 17, 2003, and July 1, 2003. By agreement of Ungerman and the UST, the court will also consider the award of compensation and expenses in this case to Ungerman.[1] The court exercises core jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(1) and (b)(2)(A). This memorandum opinion constitutes the court's findings of fact and conclusions of law. *See* FED. R. BANKR. P. 7052 and 9014.

I. Background

This case was voluntarily commenced as a chapter 11 case on July 30, 2002. Debtor retained Ungerman to represent it in the chapter 11 case, and the court approved Ungerman's employment on September 27, 2002. Debtor paid to Ungerman a retainer of $15,000 prepetition, which Ungerman still holds.

1 Among the exhibits offered by Ungerman are his time records.

Debtor owned and operated three retail gas station/convenience stores in North Texas. Debtor had pledged all of its assets, both real and personal, to two lenders, Zions First National Bank ("Zions"), the holder of a first lien securing approximately $3,300,000 of debt, and Citizens National Bank ("CNB"), holder of a second lien securing approximately $500,000 of debt. Debtor had also accumulated substantial unsecured debt, including about $377,000 to Carter Petroleum, its principal gasoline supplier.

On motion of Carter following the adjourned first meeting of creditors,[2] the court held a status conference on October 7, 2002. Carter, the UST and other parties advised the court at the status conference that they were concerned by actions of Debtor that were inconsistent with the authority and duties of a debtor in possession, including (1) payment of prepetition debt without court authority; (2) retention of an accountant without court authority; and (3) use of cash collateral of Zions and CNB and the grant therefor by Debtor of adequate protection without court authority. After considering available options, the court determined that an order should be entered pursuant to 11 U.S.C. §§ 1107 and 1108 limiting Debtor's operating authority.[3] A copy of the resulting order (the "1107 Order") is appended hereto. The 1107 Order, *inter alia*, imposed on Ungerman certain oversight responsibilities to ensure Debtor's compliance.[4]

Following the status conference, Debtor continued to operate as a debtor-in-possession

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2 Creditors were not sent notice of the original date set for the meeting of creditors pursuant to 11 U.S.C. § 341.

3 The court also encouraged formation of a creditors' committee, and a committee was formed by the UST. The committee retained Josephine Garrett ("Garrett") as counsel.

4 "Ordered that Southern District of Texas Local Bankruptcy Rule 4002 shall be applicable to Debtor, and Debtor and its counsel shall be responsible to ensure compliance with such rule." *1107 Order* at 7.

subject to the 1107 Order. Although Debtor operated at a loss at all times, several parties expressed an interest in acquiring Debtor's assets either pursuant to a plan of reorganization or through a sale under 11 U.S.C. § 363. The ultimate result of efforts to sell Debtor's assets was a plan filed by Carter.

In the meantime, Debtor apparently suffered a defalcation by one of its employees. As a result on January 6, 2003, the court directed appointment of a trustee for Debtor,[5] and Shawn Brown ("Brown") was appointed as chapter 11 trustee by the UST.

Carter's plan proved impracticable. On February 4, 2003, the stay was lifted on Debtor's property to allow Zions to foreclose. On March 20, 2003, Debtor's case was converted to chapter 7, and Brown was appointed as chapter 7 trustee.

On April 4, 2003, the UST filed the Motion. The Response was filed on June 12. During the hearings on the Motion, the court heard testimony from John Mitchell, counsel for Carter, Brown, Garrett and Ungerman. The parties also produced various exhibits.[6]

II. The UST's Position

The UST asks in the Motion that the court "determine what portion of the fees paid or promised to Mr. Ungerman from any source are excessive, that it find all such fees excessive, and that it disallow Mr. Ungerman any fees for this case." The basis for this relief, the UST

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5 The court order for appointment of a trustee followed Zions' undertaking to compensate the trustee.

6 Though not all of the exhibits were formally offered or, thus, admitted, the court concludes that all are admissible and will consider them accordingly.

asserts, is Ungerman's unsatisfactory performance as counsel to the Debtor, at least until Brown's appointment as chapter 11 trustee. Specifically, the UST points to Ungerman's failure to give notice of the initially scheduled (September 4) meeting of creditors;[7] the employment by Debtor of an accountant without court approval;[8] a number of errors or omissions in Debtor's schedules;[9] and the failures regarding payment of prepetition debt and use of cash collateral that led to the 1107 Order. The UST also argues that Debtor's case failed to produce a good result and that the failure was attributable in significant part to Ungerman's inadequacy. Finally, the UST takes the position that Debtor (and, therefore, Ungerman) did not properly comply with the 1107 Order.

III. Discussion

A. General

The case at bar raises the issue of the duties that must be performed by counsel for a debtor in possession. Because of the way chapter 11 of the Bankruptcy Code works, counsel for a debtor has an unusual role. In chapter 11, the norm is for a debtor to remain in control of its

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7 Ungerman was made aware of the creditors' meeting at the debtor interview on August 12, 2002. Ungerman failed to send the notice of the meeting to the creditors, despite receiving notices of appearance from several creditors. A few days before the scheduled meeting, Ungerman realized that the notice was not sent out and informed the UST of this problem. Following this, Ungerman did not inform the creditors who filed notices of appearance of this oversight, and as a result some creditors showed up for the meeting that did not occur and were inconvenienced. Ungerman claims his office made an honest mistake that was related to the clerk's office not sending his office the notice of the meeting, a practice he had grown accustomed to in past cases.

8 Ungerman claimed at first that he was not aware that an accountant had been hired, and then that he thought the accountant was being paid for by a third party. Ungerman claimed that upon learning of the accountant's employment, he did apply to have the court approve the hiring of the accountant, which application was granted on November 14, 2002.

9 The UST alleged several oversights by Ungerman including a failure to verify any of the numbers provided to him by Debtor and the general lack of detail provided by the schedules.

business and in possession of the bankruptcy estate. *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003); *In re Clinton Centrifuge*, 85 B.R. 980, 984 (Bankr. E.D. Pa. 1988). However, a debtor, as debtor in possession, is also charged with the duties of a fiduciary, holding the estate and operating the business for the benefit of that debtor's creditors and equity owners. *Dodson v. Huff (In re Smyth, III)*, 207 F.3d 758, 761 (5th Cir. 2000); *Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1977); *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002).

Counsel to a debtor in possession thus serves as attorney for an accidental fiduciary: unlike a person selected to be a trustee who has a clear understanding of his fiduciary role, management of a debtor in possession is burdened with a trustee's responsibilities. It is not uncommon – especially in cases like that before the court, where management and ownership are the same – for those controlling the debtor to have interests potentially at odds with those of general creditors. For example, guaranteed corporate debt, insider loans and compensation are areas where management of a debtor and its creditors may have incompatible interests.

Counsel's job is to guide the debtor's management to ensure that it performs its fiduciary duties in dealing with the debtor's business and its control of the estate. While counsel to a debtor in possession may not owe a duty directly to creditors,[10] counsel does have an obligation to ensure the debtor properly maintains the estate.[11]

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10 "A finding that debtor's counsel owes a particular duty to an individual creditor in a chapter 11 bankruptcy proceeding would prevent counsel from representing his client in accordance with the provisions of the Bankruptcy Code." *ICM Notes, Ltd. v. Andrews & Kurth, L.L.P.*, 278 B.R. 117, 216 (S.D. Tex. 2002), *affd.* 324 F.3d 768 (5th Cir. Tex. 2003).

11 *Id.* at 124; *In re Keene Corp.*, 205 B.R. 690, 691 (Bankr. S.D. N.Y. 1997).

Debtors in possession are subject to supervision by the United States trustee. *See* 28 U.S.C §586(a)(3); *In re Darmstadt Corp.*, 164 B.R. 465, 467 (Bankr. D. Del. 1994). Creditors' committees and even individual creditors may also police the actions of a debtor in possession. *See Advisory Comm. of Major Funding Corp. v. Sommers*, 109 F.3d 219 (5th Cir. Tex. 1997). The U.S. trustee and creditor representatives, having full access to the courts (11 U.S.C. § 1109), serve as checks and balances on a chapter 11 debtor in possession.

In some cases, however, this typical scheme is inadequate and the debtor strays beyond the bounds set by the Bankruptcy Code and fails to meet its obligations to other parties in interest. In such cases, the Bankruptcy Code provides a range of remedies. The case may be converted to chapter 7 (11 U.S.C. § 1112), but at the cost of any going concern value that might otherwise be derived from operation of the debtor's business. The court may direct appointment of a trustee. This remedy, however, is draconian and correspondingly rare. *See* 11 U.S.C. § 1104(a); *Southmark Corp. v. Southmark Personal Storage, Inc.*,113 B.R. 280, 282 (Bankr. N.D. Tex. 1990); 7 COLLIER ON BANKRUPTCY, 1104.02[2][b], 1104-7 (15th ed. rev. 2003). Moreover, a trustee is expensive and likely to retain costly professionals. In the instant case Brown was paid $24,147.50 (by Zions by agreement) for the few weeks he operated Debtor's business.

Section 1104(c) of the Bankruptcy Code also allows for appointment of an examiner. While an examiner is most often an independent investigator (*see* 11 U.S.C. § 1104(c); *Southmark Corp.*, 113 B.R. at 280), the court may expand the duties of an examiner to suit the needs of the case. 11 U.S.C. § 1106(b) of the Bankruptcy Code; *Official Comm. of Unsecured Creditors of Cybergenics Corp.*, 330 F.3d at 577. An examiner, too, can be expensive, though the cost is perhaps more easily controlled by the court than in the case of a trustee.

In the case at bar, the problems brought to the court's attention at the October 7, 2002 status conference did not appear so serious as to require the intervention of a neutral examiner, and the court was concerned about incurring expenses that would prove unmanageable. Instead, therefore, the court chose to exercise its authority under section 1107. By limiting Debtor's power and authority, establishing a rigorous reporting regime and giving Ungerman a more precise role in supervising his client, the court hoped to protect the estate from future errors. As a committee was also organized, the court believed future administration of the case would be consistent with the requirements of the Bankruptcy Code.

B. Evaluation of Ungerman's Services

Obviously, for the 1107 Order to serve its intended purpose, it was essential that Ungerman supervise the Debtor. The UST contends Ungerman failed to do so and has raised additional concerns about Ungerman's work prior to entry of the 1107 Order. The court must also consider Ungerman's part in the failure of Debtor's reorganization effort. The court will address these subjects in reverse order.

1. Failure of the Case

The court cannot find fault with Ungerman in Debtor's failure to reorganize. From the outset, Debtor's operations were not profitable. That meant that a successful reorganization depended upon a sale of Debtor's convenience stores. Carter became the stalking-horse buyer for those stores.

While Ungerman did not negotiate extensively with Carter, he was hardly operating in a seller's market. Nevertheless, he helped to produce two other potential buyers, and their competition caused Carter to increase its bid by almost $1,000,000. Though Carter's offers were

not binding on Carter, Ungerman cannot be blamed for that. First, given Debtor's deficit operations and threatened action by secured creditors, Carter was in a very strong position. Second, Carter's good faith was evident from the time and money it expended in its effort to confirm a plan

As to not finding a better offer than Carter's, an attorney can only work with the facts and situation presented to him. In the instant case, the court is satisfied the value[12] of Debtor's assets was as fully explored as circumstances permitted. Success or failure of a reorganization case is only a fair measure of the value and competence of counsel if counsel can be charged with responsibility for the cause of the case's outcome. Here, no action of Ungerman caused Debtor to lose money, nor did Ungerman create the debt structure that left Zions (and, therefore, CNB) with inadequate collateral to cover its debt.

2. Administrative Deficiencies

Administrative deficiencies in the case at bar are more troubling. Ungerman has been practicing bankruptcy law for more than 40 years. Although his hourly rate is relatively modest, the length and breadth of his experience would suggest a performance as Debtor's counsel displaying a higher degree of ability and knowledge than he exhibited here. Though this case was not large, every chapter 11 debtor merits the full benefit of its counsel's experience and skill.

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12 The UST complains that Debtor's schedules reflected its assets at $5,500,000, though the true value was much less. The UST argues that Ungerman should have done more to ascertain Debtor's true value. As discussed below, Debtor and Ungerman could have been more diligent and careful in preparation of Debtor's schedules and statement of affairs. The court does not find any basis, however, for concluding that Ungerman's reliance in establishing values on an old appraisal and the opinion of Debtor's principal was particularly unreasonable.

At the October 7th status conference and during the hearing on the Motion, Ungerman was unclear about how Debtor came to employ an accountant. It does not matter, though, whether he was unaware of employment of the accountant or thought the accountant would be paid by a third party. In either case, he should have advised his client of the need for court approval of professionals. Certainly, if he knew the accountant was to be employed, he should have recognized that, even if payment would not come from the estate, court approval was required. 11 U.S.C. § 327(a); *In re Quality Beverage Co., Inc.*, 216 B.R. 592, 594 (Bankr. S.D. Tex. 1995); *In re Bicoastal Corp.*, 149 B.R. 216, 218 (Bankr. M.D. Fla. 1993).

Payment of prepetition debt falls into the same category. Counsel to a debtor in possession must ensure the client is aware of what may be paid in the ordinary course of business and what may not be. There is no more fundamental duty of a debtor in possession to the estate than to ensure prepetition creditors are not paid absent court authority. *In re Coserv. L.L.C.*, 273 B.R. 487, 494 (Bankr. N.D. Tex. 2002); *Chiason v. J. Louis Matherne & Assoc. (In re Oxford Mgmt.)*, 4 F.3d 1329, 1335 (5th Cir. 1993). That Debtor was not so advised raises questions about Ungerman's preparation of his client to perform its fiduciary duties.

The same is true of Debtor's unauthorized use of case collateral.[13] A debtor should not commence a chapter 11 case – its counsel should not sign the initiating petition – without having been advised regarding the restrictions on use of cash collateral, payment of prepetition debt and employment of professionals. Even if time is so short that this advice must wait until after case

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13 At the October 7th status conference, Ungerman stated that he had believed a debtor and secured creditor could agree to use of cash collateral, based on an extension of adequate protection, without court approval. The court finds this explanation simply not credible.

commencement, in this case, Debtor spent over two months in chapter 11 without receiving this essential, rudimentary counsel.

On the other hand, the harm caused was minimal. Ultimately (with the immaterial exception of Debtor's small payments to its lenders), Ungerman obtained court approval of his client's improper conduct. Moreover, these issues were addressed at the October 7th status conference. Nevertheless, the court gives some weight to these gaps in Ungerman's services in reaching the result below.

As to problems with the schedules, certainly more time and effort could have been put into them. This is especially true given that these documents are executed under penalty of perjury. The UST points to a number of specific deficiencies,[14] but the court does not consider that any of these rises to the level of misfeasance on Ungerman's part.

Despite a number of court decisions in individual discharge cases emphasizing the importance of accurate schedules,[15] debtors and their counsel often pay no more than pro forma attention to completion of the schedules and statement of affairs. The court is not prepared to call Ungerman to task for engaging in so prevalent a practice. The court would hope, however, that its decision in this case, like the discharge cases cited above, will encourage practitioners

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14 During his examination of Ungerman, the UST alleged that (1) the schedules provided by Debtor and its counsel failed to identify when the claims were incurred with respect to the encumbered property, (2) Ungerman failed to verify values provided to him by the debtor with a third party and (3) Ungerman failed to include the liquor license as property of the estate in the schedules.

15 *See, e.g,. In re Beauboeuf*, 966 F.2d 174, 178 (5th Cir. 1992); *In re Schmitz*, 224 B.R. 149, 151-52 (Bankr. Mont. 1998); *In re Walters*, 219 B.R. 520, 526 n. 10 (Bankr. E.D. Ark. 1988).

generally to take more seriously these important records of assets, liabilities and the debtor's past conduct.

3. The 1107 Order

Ungerman testified that he spent considerable time reviewing the 1107 Order with his client and discussing how to comply with it.[16] He also testified that he recognized the importance of the 1107 Order and was aware of the responsibility it imposed on him.

Nevertheless, the 1107 Order was not complied with in all respects. Weekly reports were not filed with the court as required (though Ungerman testified his client said they were). Though a tax escrow account was established, it was not used (and Debtor's monthly reports reflected that it was not used). Approval was never obtained for post petition payment of prepetition debt to Zions and CNB. Several provisions of the 1107 Order – *e.g.*, payment of costs on a current basis – were not complied with because of the Debtor's inability to turn a profit or simply break even; Ungerman, however, took no action regarding these matters.

Indeed, while Ungerman testified that he instructed Debtor to comply with the 1107 Order, there is virtually no evidence that he thereafter monitored his client's conduct. Yet that was the very purpose of the court in naming Ungerman in the 1107 Order. The court expects any attorney representing any chapter 11 debtor to explain orders entered by the court to his client. That is no more than the attorney's job.

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16 Ungerman's time sheets disclose that approximately four hours were spent discussing the 1107 Order with Debtor. No time is reflected after October 16, 2002, dealing with the 1107 Order.

In a case such as the instant matter, the court found there was a need for more than what an attorney ordinarily does. The court entered the 1107 Order, having modified it to make the centrality of Ungerman's role crystal clear, in the expectation that this would cause Ungerman to supervise this Debtor with extraordinary care. The 1107 Order was meant to ensure that Debtor performed properly as a fiduciary.

It is Ungerman's failure to monitor Debtor that causes the court the greatest concern. Orders like the 1107 Order can provide the court with an attractive, inexpensive alternative to appointment of an independent fiduciary. The monitoring role of counsel involves only a little more effort than that expended in the ordinary chapter 11 case: perhaps more thorough review of reports; regular, pointed, possibly more frequent, consultation with the client. This did not occur in the instant case, despite the obvious need for it.

That said, had Ungerman made more of an effort to ensure Debtor's adherence to all requirements of the 1107 Order, it probably would not have affected the end result in this case. Thus, though the court must consider Ungerman's performance under the 1107 Order together with his missteps in the first two months of the case in determining the award of fees and expenses to which Ungerman is entitled, no independent sanction is warranted for Ungerman's inaction with regard to the 1107 Order.

C. Compensation

Ungerman testified that he and his colleague, Joyce Lindauer, had expended substantial time in this case, and the time records presented by him at the hearing bear this out.[17] Ungerman indicated at the hearing that he had also incurred expenses in this case.

Were Ungerman seeking the approximately $25,000 that his time facially justifies, the court would never consider awarding such an amount on this record. It would not be justified under 11 U.S.C. § 330 and applicable precedent. However, only Ungerman's retainer of $15,000 is available. Even on the record before it, the court might be prepared to allow Ungerman fees in that amount but for one other factor.

In large part because of errors made by Debtor while represented by Ungerman prior to the October 7th status conference, the court and the UST went to extra lengths to obtain a creditors' committee in this case. Members of that committee may have incurred expenses, and the committee retained Garrett as counsel. Though Garrett testified at the hearing on the Motion that she accepted employment as committee counsel fully aware that she risked not being paid, it does not seem to the court equitable that Ungerman should have the full benefit (albeit not great) of the retainer, especially considering Ungerman's conduct of this case.

IV. Conclusion

For the foregoing reasons, the court will award Ungerman $8,500 of his retainer as compensation and reimbursement of expenses. The balance of the retainer, $6,500, shall be

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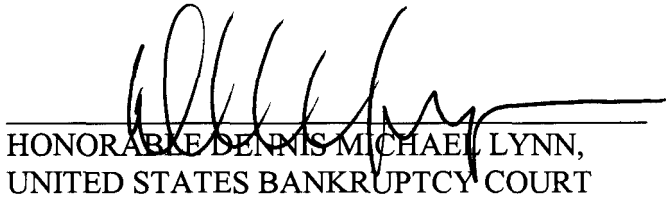
17 The time records show 99.5 hours. Using Ungerman's hourly rate of $250, total fees billed are $24,875.00.

turned over to Brown for use in payment, first, of expenses reimbursable pursuant to 11 U.S.C. § 503(b)(3)(F), and, second to be used for compensation of Garrett and any other persons allowed compensation pursuant to 11 U.S.C. § 330 by order of this court.

It is so ORDERED.

Signed this the 30th day of July 2003.



HONORABLE DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY COURT

U. S BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
OCT 10 2002
TAWANA C. MARSHALL, CLERK
By
Deputy

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	CASE NO. 02-45470-DML-11
TEXASOIL ENTERPRISES, INC.	§	CHAPTER 11
	§	
DEBTOR-IN-POSSESSION.	§	

ORDER DIRECTING LIMITATIONS AND CONDITIONS
ON RIGHTS, POWERS AND DUTIES OF DEBTOR IN POSSESSION

CAME ON TO BE CONSIDERED the Motion for Status Conference Pursuant to Bankruptcy Code § 105(d) (the "Motion"), filed by Carter Petroleum Products, Inc. ("Carter"). The Court:: (i) upon hearing the arguments of counsel present at such status conference (the "Status Conference"), (ii) upon notice of the record of this Bankruptcy Case (the "Case") as before this Court, and (iii) in accordance with and pursuant to Bankruptcy Code §§ 1107(a) and 105(a), hereby enters the following Order:

ORDERED, that the Debtor-in-Possession ("Debtor") shall continue to operate its business as debtor-in-possession in the best interests of the creditors of the estate. It is further

ORDERED, that within five (5) days of the date of entry of this Order, the Debtor will file a verified statement identifying the date, amount, and payee of all post-petition transfers of estate property *outside the ordinary course of business*, to include, but not limited to: (i) payments to Zions First National Bank ("Zions"); (ii) Citizens National Bank ("Citizens"); (iii) Zeus Associates, Inc. and any other professionals whose retention and payment of fees and expenses has not been otherwise approved by this Court; and (iv)

any payments made on behalf of pre-petition claims, including pre-petition payments to family members or insiders. It is further

ORDERED, that within five (5) days from the date of entry of this Order, the Debtor will file the appropriate documents and pleadings with this Court for *nunc pro tunc* approval of the post-petition transfers identified in the preceding decretal paragraph, or otherwise bring the appropriate action for return of such payments, pursuant to *inter alia* Chapter 5 of the Bankruptcy Code, unless otherwise covered by the interim order for use of cash collateral. It is further

ORDERED, that except as permitted by Court Order upon applicable notice and hearing requirements, the Debtor shall not borrow or lend money, employ professionals of any kind, sell property other than inventory held for sale, pay pre-petition obligations, or hire additional corporate officers or managers that qualify as "insiders as defined by Title 11. It is further

ORDERED, that the Debtor shall not make any advances to officers, managers, or other employees for loans, costs or expenditures over $50.00, per employee, per month. It is further

ORDERED, that the Debtor shall open and maintain a separate Debtor-in-Possession account styled as the "Debtor-in-Possession Tax Escrow Account". This account will be used exclusively as the repository for and payment of all taxes incurred that have not been paid since this case was filed. Such taxes include, but are not necessarily limited to ad valorem taxes, sales taxes, and fuel taxes, if any. The Debtor shall deposit into this account, whether by lump or amortized payments, sufficient funds to timely pay without penalty, interest, attorneys' fees, or other assessments for

delinquencies all post-petition tax liabilities as they come due. All such taxes shall be timely paid in accordance with Internal Revenue Service special procedures or other applicable state or federal law. It is further

ORDERED that the Debtor shall timely file all tax returns as become due post-petition. It is further

ORDERED that the Debtor shall timely pay all vendors with whom the Debtor purchases product or services. Timely payment shall be considered to be within the normal business terms existing between the Debtor and such vendors, or on such terms as they may agree upon post-petition. The Debtor shall not, however, incur or enter into a credit relationship whereby payment for goods purchased post-petition is more than 30 days past the Debtor's receipt of such goods and/or services. It is further

ORDERED, that all cash, checks and other non-credit card receipts from the Debtor's three (3) retail locations, save and except for $1,200.00 cash in each location, will be deposited in the Debtor-in-Possession account each day, in the applicable bank's night depository. It is further

ORDERED that within five (5) days of the date of entry of this Order, the Debtor shall serve upon counsel for the Official Committee of Unsecured Creditors, if any (the "Committee") copies of all existing cigarette contracts. It is further

ORDERED that the Debtor shall immediately direct any and all vendors making payments to the Debtor that any such payments for *inter alia* rebates, "rack payments" pay phones, ATM machines, air machines, cigarettes, etc., shall be made by either (i) check, made payable to "Texasoil Enterprises, Inc. – Debtor in Possession; or (ii) direct wire transfer to the [debtor in possession operating account]. It is further

ORDERED, that the Debtor shall use only two EPOS "Electronic Point of Sale" Systems at each retail location. "Pay at Pump" fuel purchases on credit shall only be made using the Conoco EPOS System, with all inside-the-store credit purchases being processed through a single EPOS System that deposits credit receipts in the Debtor-in-Possession. No other EPOS System, save and except Global Processing Company for inside credit card purchases, shall be acquired or utilized without prior Court approval. It is further

ORDERED, that no operating expenses shall be paid or purchases made by the Debtor with cash. All expense payments or purchases shall be made by check or wire draft from the Debtor-in-Possession account *only*. It is further

ORDERED, that within five (5) days from the date of entry of this Order, the Debtor will file its Monthly Operating Reports in strict adherence to the Guidelines by the United States Trustee for Debtors-in-Possession. It is further

ORDERED, that within five (5) days of the date of entry of this Order, the Debtor will file amended Schedules of Assets and Liabilities and an amended Statement of Financial Affairs (the "Schedules"). Such amended Schedules will reflect, *inter alia*, the various discrepancies raised at both the initial meeting of creditors pursuant to Bankruptcy Code § 341 as well as the Status Conference, to include, but not limited to:

- Correction to Schedule A to reflect the true amount of secured claims against each parcel of real property owned by the Debtor;
- Correction to Schedule B to identify exact amounts of cash on hand, balances in checking accounts, receivables, and other personal property of the estate existing on the Petition Date;
- Correction to Schedule D to fully describe the collateral pledged to Citizens and Zions;

- Correction to Schedule E to reflect the exact dollar amount of pre-petition sales taxes owed to the Texas State Comptroller;
- Correction to Schedule G to reflect contracts with Conoco Petroleum, Carter Petroleum Products, and all labor currently being employed as "contract employees", if any (with annotations concerning any person being compensated as an employee post-petition);
- Correction to Question 19, Statement of Financial Affairs, to list all financial institutions, creditors, and other parties of interest to whom the debtor has provided a financial statement; and
- Clarification to Question 20, Statement of Financial Affairs, to list the entity conducting the identified inventories.

It is further

ORDERED, that nothing contained in this Order shall be deemed to limit or otherwise waive the Debtor's responsibilities to file complete and fully accurate Monthly Operating Reports and Schedules pursuant to the applicable provisions of the Bankruptcy Code. It is further

ORDERED, that the Debtor shall file with the Court, and shall serve upon the United States Trustee, any creditors' committee as may be formed and its counsel, counsel for Zions First National Bank, Citizens National Bank, Carter Fuels, and any other party requesting it or having filed a notice of appearance in the case, weekly accountings of:

a. Per store gasoline and diesel reconciliations taken nightly at 10:00 p.m., including reconciliations of fuel inventory deliveries and retail fuel sales, which are included in the TNRCC report;

b. Detail of all accounts receivable with current age trial balance; and

c, Daily cash reconciliations showing daily cash overage /shortage.

Such accountings shall be filed and contemporaneously served not later than 4 p.m. each Monday, for the seven (7) day period ending the previous Friday: It is further

ORDERED that the Debtor shall file with the Court, and shall serve upon the United States Trustee, any creditors' committee as may be formed and its counsel, counsel for Zions First National Bank, Citizens National Bank, Carter Fuels, and any other party requesting it or having filed a notice of appearance in the case, monthly accountings of

a. Detailed end of month inventory report for each store location;

b. Copies of monthly cigarette tracking forms for each store location;

c. Month end bank statements for all debtor in possession accounts, of any nature;

d. Itemized list of all rebate checks and "rack payments" received relating to, *inter alia*, pay phones, ATM machines, air machines, cigarettes, et al.;

e. Comparison of previous week's projected cash usage with actual cash usage.

Such accountings shall be filed and contemporaneously served not later than ten (20) days following the end of each calendar month for operations for the previous calendar month. It is further

ORDERED, that unless specifically modified hereby, nothing contained herein shall limit or otherwise alter the Debtor's responsibilities and obligations established by the Bankruptcy Code, or other applicable law. It is further

ORDERED, that the relief and directives granted herein are without prejudice to any party in interest to seek additional forms of relief, of whatever nature, upon notice and a hearing before this Court, and pursuant to applicable law. It is further

ORDERED that Southern District of Texas Local Bankruptcy Rule 4002 shall be applicable to Debtor, and Debtor and its counsel shall be responsible to ensure compliance with such rule. It is further

ORDERED that failure to comply with any portion of this order, if not cured within 5 business days of the non-compliance, which notice shall be given to Arthur Ungerman or Joyce Lindauer, at 12900 Preston Rd., Ste. 1050, Dallas, Texas 75230, shall constitute grounds upon which any party may request a hearing to Show Cause why a trustee or examiner should not be appointed.

SO ORDERED THIS 9th DAY OF OCTOBER, 2002.

THE HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE