

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

Gainey Corporation, et al.,¹

Case No. GG08-09092
Chapter 11
Honorable James D. Gregg
Chief Judge

Debtors./

**UNITED STATES TRUSTEE'S MOTION
REQUESTING AUTHORITY TO APPOINT AN EXAMINER**

Daniel M. McDermott, United States Trustee for Region 9 (the "Trustee"), respectfully requests, pursuant to his authority under 11 U.S.C. §307 and 28 U.S.C. § 586(a)(3), that this Court, pursuant to 11 U.S.C. § 1104(c), issue an order directing the Trustee to appoint an examiner to investigate: (1) the extent and existence of claims and transfers of funds involving insiders or affiliates of Debtors; (2) related company claims and liabilities; and (3) the erosion of Debtors' asset base leading up to the onset of these jointly administered Chapter 11 cases. Further, the Trustee requests that the examiner identify causes of actions that the above-captioned Debtors may possess as a result of the investigation. The Trustee states the following in support of his motion:

I. Jurisdiction, Venue and Statutory Predicates

1. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).
2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and LBR 83.2(a) and (b).
3. Venue is proper in this Court pursuant to 11 U.S.C. §§ 1408 and 1409.

¹The debtors in this case are: 1) Gainey Corporation (Bankr. No. 08-09092); Gainey Transportation Services, Inc. (Bankr. No. 08-09094); Super Service, Inc. (Bankr. No. 08-09096); Freight Brokers of America, Inc. (Bankr. No. 08-09109); Lester Coggins Trucking, Inc. (Bankr. No. 08-09095); and Gainey Insurance Services, Inc. (Bankr. No. 08-09097).

4. The statutory predicate for the relief requested herein is 11 U.S.C. § 1104(c)(1).

5. The Trustee has standing pursuant to 11 U.S.C. §§ 307 & 1104(c); and 28 U.S.C. § 586(a)(3).

II. Background

6. On October 14, 2008 (the “Petition Date”), Gainey Corporation, Gainey Transportation Services, Inc., Super Service, Inc., Lester Coggins Trucking, Inc., Freight Brokers of America, Inc., and Gainey Transportation Services, Inc., (collectively “Debtors”), filed separate Petitions for Relief pursuant to Chapter 11 of Title 11 of the United States Code with this Court.

7. Harvey Gainey (“Mr. Gainey”) owns Gainey Corporation. Gainey Corporation and/or its subsidiaries own, in whole or in part, the other five Debtors in the above-captioned matter.

8. The Court is jointly administering the above-captioned proceedings pursuant to its Order entered October 16, 2008. However, the Court has not ordered, and no party has requested, the substantive consolidation of the above-captioned Debtors pursuant to 11 U.S.C. § 105(a).

9. The Debtors are operating their businesses as debtors-in-possession under 11 U.S.C. §§1107(a) and 1108. There have been no prior requests for the appointment of a trustee or an examiner under 11 U.S.C. § 1104 for any of the Debtors.

10. On November 7, 2008, the Trustee appointed an Official Committee of Unsecured creditors (the “Committee”).

III. Legal Basis For Appointment of an Examiner

11. “[A]t any time before the confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation

of any allegations of fraud, dishonesty, incompetence, misconduct, [or] mismanagement of the affairs of the debtor ... if—(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate....” See 11 U.S.C. § 1104(c)(1).

12. Appointing an examiner is a “cautious intermediate procedure” that is more economical than appointing a trustee. See In re: Gilman Services, Inc., 46 B.R. 322, 328 (Bankr. D. Mass. 1985).

13. As this Court has previously noted in broadly discussing 11 U.S.C. § 1104, and its application to appointing a *trustee*, Section 1104 attempts to balance protecting the interests of creditors, enforcing the fiduciary duties of a debtor in possession, and the benefits that a bankruptcy estate may obtain from retention of the experience of the debtor’s management. See In re: Holly’s, Inc., 140 B.R. 643, 685 (Bankr. W.D. Mich. 1992) (“the twin goals of the standard for appointment of a trustee should be *protection of ... the interests of creditors ...* and facilitation of a reorganization that will benefit both the creditors and the debtors....”) (internal citations omitted) (emphasis in original).

14. Therefore, an examiner is appropriate when the debtor’s financial records reveal various matters that warrant a further investigation that the conflicting interests of the debtor in possession prevent it from conducting independently. An examiner is particularly appropriate when management, although important to the ongoing operations of a reorganizing debtor, has conflicts of interest that hamper them from engaging in the necessary investigation and examination of the debtor’s transactions. See e.g., In re: Gilman Services, Inc., 46 B.R. 322, 328 (Bankr. D. Mass. 1985) (examiner appropriate where debtor’s management was important to maintaining the value of the estate, and there was no finding of improper post-petition conduct, but debtor’s records revealed curious transactions with insiders that appeared to constitute avoidable transfers); In re:

Mako, Inc., 102 B.R. 809, 813-14 (Bankr. E.D. Okla. 1988) (absent evidence of post-petition misconduct, examiner was appropriate when insiders were important to the continued operation of a complex business, but debtor had engaged in various pre-petition transactions of questionable merit involving insiders).

15. “The benefit of appointing an independent examiner is that he or she will act as an objective non-adversarial party who will review the pertinent transactions and documents, thereby allowing the parties to make an informed determination as to their substantive rights. Often the information that an examiner provides in his or her report serves as a road map for parties in interest as they evaluate and pursue their substantive rights.” See In re: Fibermark, inc., 339 B.R. 321, 325 (Bankr. D. Vt. 2006).

IV. Facts

16. Debtors’ Schedules, and testimony, reveal several matters involving affiliates or insiders that require further investigation. However, Debtors cannot investigate and evaluate these matters consistently with their fiduciary duties as debtors in possession due to their conflicting interests. The matters that warrant further investigation include, without limitation, the matters set forth below.

17. Related Company Transactions. Each of Debtors’ Schedules contain a disclaimer that acknowledges that intercompany transactions, including accounts receivable and accounts payable, were routine before the Petition Date. Indeed, Debtors’ Schedules contain multiple intercompany payments within ninety (90) days of the Petition Date. The Schedules also reveal multiple, and significant intercompany accounts receivable, including without limitation an obligation in excess of \$10,000,000.00 from Gainey Insurance Services, Inc. to Gainey Corporation. As debtors in possession, each Debtor has a fiduciary duty to evaluate, and pursue recovery of, any account

receivable or transaction that may be recoverable or avoidable pursuant to, *inter alia*, 11 U.S.C. §§ 547 or 548. Due to their conflicted interests, Debtors cannot conduct this investigation and evaluation.

18. Pre-Petition Payments to Mr. Gainey. Debtors' Schedules reveal significant payments from Debtors to Mr. Gainey prior to the Petition Date, which include, without limitation, the following:

a. Payments From Gainey Corporation. Gainey Corporation made payments to Mr. Gainey within one (1) year of the Petition Date of \$1,222,000.00 as "salary," \$28,816.79 as an apparent "expense reimbursement," \$25,000.00 as a "directors fee," \$7,388.67 for a "car allowance," and another \$2,168.02 as another apparent "expense reimbursement." Given the apparent financial condition of Gainey Corporation at the time of these payments, an independent investigation of whether these payments were consistent with the fiduciary obligations of Mr. Gainey, and whether they are avoidable under either the Bankruptcy Code, or applicable non-bankruptcy law is appropriate.

b. Payments From Gainey Insurance Services, Inc. Gainey Insurance Services, Inc. made payments over an unspecified period of time to Mr. Gainey in the total amount of approximately \$2,817,000.00. Debtors' Schedules disclose these payments as a loan from Gainey Insurance Service, Inc. to Mr. Gainey. Gainey Insurance Services, Inc. as debtor in possession has a fiduciary duty to evaluate, and pursue vigorous collection of, this loan. However, Gainey Insurance Services, Inc. is unable to fulfill this fiduciary duty due to its conflicted interests.

19. Payments to Mr. Oosterhouse.

a. Payments From Gainey Corporation. Debtors' Schedules reveal that Gainey

Corporation made the following payments to Carl Oosterhouse within ninety (90) days of the Petition Date:

- A total of \$106,400.00, through two payments, on August 28, 2008 (47 days before the Petition Date).
- \$55,175.00 on September 23, 2008 (21 days before the Petition Date).

b. Payments From Freight Brokers of America, Inc. In addition, Debtors' Schedules reveal that Freight Brokers of America, Inc. paid Carl Oosterhouse \$55,000.00 on October 13, 2008 (1 day before the Petition Date).

c. According to pleadings that Mr. Gainey has filed with this Court, "the Debtors have given Carl Oosterhouse, formerly Special Assistant to the President, the new title of Chief Operating Officer.... Mr. Oosterhouse has been given the duties of coordinating the Debtors' compliance with their obligations under the Bankruptcy Code and strategic planning with regard to the reorganization process."²

d. At the time of the above-described payments, Mr. Oosterhouse was an officer of one or more of Debtors.

e. Mr. Oosterhouse is a former attorney for the Debtors. Specifically, Mr. Oosterhouse represented Debtors while he was associated with Varnum Riddering until mid-July, 2006, and also represented Debtors while he was associated with Dickinson Wright, from mid-July 2006, to July 30, 2008. Prior to July 30, 2008, the Grievance Administrator of the State of Michigan Attorney Grievance Commission filed a complaint against Mr. Oosterhouse with the Commission,

²"Motion for Authorization for Debtors to Make Chief Executive Officer's Pre-Petition Priority Wage Payment and to Pay Post-Petition Compensation", paragraph 12, page 5; Bankruptcy Court Docket No. 116.

alleging various violations of MCR 9.104(A) and Michigan Rules of Professional Conduct 1.0(b). Mr. Oosterhouse admitted to forging Mr. Gainey's signature and to diverting funds from, *inter alia*, Gainey Corporation and Mr. Gainey. As a result, the Michigan Attorney Discipline Board disbarred Mr. Oosterhouse. In its decision, the board noted the "sophisticated manipulations of client invoices, credits on client fees that were diverted ..., and other devices which hid [Mr. Oosterhouse's] activities."³ Within days after Mr. Oosterhouse lost his license to practice law in the State of Michigan, he entered a "business consulting agreement," with Gainey Corporation, which mimicked (down to the letterhead style) the prior legal services agreement he had with Gainey Corporation, but essentially just replaced the words "legal" with "business" services throughout the agreement. Debtors, as debtors in possession, have a fiduciary duty to evaluate: 1) whether the above-described payments to Mr. Oosterhouse can and should be recovered under the Bankruptcy Code or under applicable non-bankruptcy law; 2) whether Mr. Oosterhouse should continue to serve as the Chief Operating Officer of Debtors; and 3) if Mr. Oosterhouse should continue to serve as Chief Operating Officer of Debtors, what his salary should be, and whether Debtors should comply with 11 U.S.C. § 327.

20. Transfers to Mr. Gainey's Son. Debtors' Schedules reveal the following transfers to Harvey N. Gainey, III, Mr. Gainey's son:

a. Payments within one (1) year of the Petition Date from Gainey Corporation in the amount of \$2,168.02 for "expense reimbursement."

b. Payments within one (1) year of the Petition Date from Gainey Insurance Services, Inc. in the following amounts: \$123,448.00 for "salary"; \$13,599.96 for "auto-car allowance"; and

³Grievance Administrator v. Oosterhouse, Panel Decision, page 5, July 8, 2008, case No. 07-93-GA.

\$24,693.52 for a “commission.”

c. In addition, public records disclose that Harvey N. Gainey, III registered a Lamborghini in the State of Michigan in 2008.

Debtors should evaluate these issues consistently with their fiduciary duties to determine whether one or more of them would give rise to a cause of action under the Bankruptcy Code or under applicable non-bankruptcy law. However, Debtors are not able to independently evaluate these issues due to their conflicting interests.

21. Non-Debtor Related Entities. Debtors’ Schedules reveal a number of transactions within ninety (90) days of the Petition Date with affiliates that have not sought relief from this Court. These transfers include, without limitation, payments totaling \$345,000.00 to Gainey Aircraft Corporation, which owns an airplane that Debtors, and their affiliates and insiders have used, and may still use. Debtors, as debtors in possession, have a fiduciary duty to analyze these payments for purposes of determining whether they may constitute avoidable transactions, or whether the officers and directors of Debtors acted in accordance with their fiduciary duties in authorizing the payments given the financial affairs of Debtors. Moreover, Debtors have a fiduciary duty to evaluate the underlying contractual relationship to determine whether it is an executory contract that the appropriate Debtor should reject pursuant to 11 U.S.C. § 365. However, Debtors are not able to conduct an appropriate analysis of these transactions, or of the contractual relationship with these non-debtor entities, due to their conflicting interests.

22. Payments to Professionals. Debtors’ Schedules reveal several payments to current or former professionals. The timing, size, and amount of these transfers indicate that the appropriate Debtor, as debtor in possession, should evaluate those payments to determine whether they would

give rise to a cause of action pursuant to the Bankruptcy Code (including without limitation 11 U.S.C. §§ 329, 541, 547, and 548) and applicable non-bankruptcy law. However, the applicable Debtors cannot independently evaluate these payments due to their conflicting interests. The Debtors' Schedules indicate that an independent examiner should evaluate the following non-exclusive list of transactions:

a. The Schedules of Gainey Corporation reveal that it had professional retainers with third parties on the Petition Date in the total amount of \$666,610.79.

b. The Schedules of Gainey Corporation reveal that it paid Capstone Financial more than \$292,000.00 within ninety (90) days of the Petition Date.

c. The Schedules of Gainey Corporation reveal that it paid Dickinson Wright (its current counsel) \$390,000.00 within ninety (90) days of the Petition Date.

d. The Schedules of Gainey Corporation reveal that it paid DW Associates more than \$160,000.00 within ninety (90) days of the Petition Date.

e. The Schedules of Gainey Corporation reveal that it paid Varnum Riddering (its counsel prior to the Petition Date) substantial sums within ninety (90) days of the Petition Date, including without limitation, a payment of \$364,441.20 on September 29, 2008 (15 days before the Petition Date).

23. Diminution of Assets. Debtors' Schedules, and testimony, disclose that they incurred approximately \$260,000,000.00 of secured debt in a single transaction in 2006. Presumably, there was or appeared to be sufficient collateral to secure this obligation when the lenders extended the loan facility to the Debtors. However, according to Mr. Gainey's testimony on November 24, 2008, the total value of the assets that serve as collateral for this loan is currently \$190,000,000.00. The

Court should appoint an examiner to review how the collateral position eroded to such an extreme extent, including without limitation whether the shareholder(s) of one or more of the Debtors removed significant funds from one or more Debtors as a distribution contemporaneously with (or shortly after) the closing of this loan facility.

24. There is a significant deficiency claim in the above-captioned cases that could qualify them for mandatory appointment of an examiner pursuant to 11 U.S.C. § 1104(c)(2) and Morgenstern v. Revco D.S., Inc. (In re: Revco D.S., Inc.), 898 F.2d 498 (6th Cir. 1990). Although the Trustee does not seek relief pursuant to 11 U.S.C. § 1104(c)(2) in this motion, the size and complexity of these cases, as this large claim indicates, nonetheless argue in favor of appointing an examiner to provide an unbiased report to serve as a guide to interested parties as they evaluate upcoming matters in these large and complex cases.

25. Appointing an examiner to evaluate these issues is more efficient than the piecemeal, and likely overlapping, investigations that individual parties would otherwise conduct. An analysis of the above-described issues will be crucial to many issues that will, or may, arise in this case, including without limitation: 1) the proposal of a plan of reorganization, 2) the determination of whether any proposed plan of reorganization is confirmable, 3) the determination of whether a class of creditors will vote in favor of any proposed plan of reorganization, 4) the determination of whether it is appropriate for the Court to substantively consolidate two or more of Debtors, 5) the prosecution of potential causes of action, and 6) perhaps issues such as whether a trustee should be appointed or whether one or more of the above-captioned cases should be dismissed or converted to a proceeding under Chapter 7 of the Bankruptcy Code. An examiner's report would serve as a single, independent road map of these issues for the appropriate parties to use at the appropriate time.

26. Appointing an expert to investigate the these issues, and to identify related causes of action that might benefit the above-captioned bankruptcy estates is in the best interests of creditors, any equity security holders, and other interests of the estates.

WHEREFORE, the Trustee, pursuant to 11 U.S.C. § 1104(c)(1) asks that this Court enter an Order authorizing the Trustee to appoint an examiner to serve in each of the above-captioned cases, to identify causes of action that one or more of the above-captioned Debtors may hold; and to investigate:(1) the extent and existence of claims and transfers of funds involving insiders or affiliates of the Debtors; (2) related company claims and liabilities; and (3) the erosion of Debtors' asset base leading up to the onset of these jointly administered chapter 11 cases; and that this Court grant such other and further relief as it deems just and appropriate under the circumstances.

Respectfully submitted,
DANIEL M. McDERMOTT
United States Trustee
Region 9

Date: _____

By: _____

By: /s/ Michael V. Maggio
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