IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

In re:	**§**	**Chapter 11**
	§	
HII TECHNOLOGIES, INC., *et al.*[1]	**§**	**15-60070 (DRJ)**
Debtors	**§**	**(Jointly Administered)**

OBJECTION TO MOTION TO APPOINT CHAPTER 11 TRUSTEE FOR DEBTOR APACHE ENERGY SERVICES LLC

The Honorable David R. Jones, United States Bankruptcy Judge:

HII Technologies, Inc. ("HII") and its above-captioned affiliated debtors (collectively, the "Debtors"), file this Objection to the Motion to Appoint Chapter 11 Trustee for Debtor Apache Energy Services LLC (the "Motion," Docket No. 136) filed by the self-styled "Ad Hoc Committee of Creditors of debtor Apache Energy Services, Inc."[2] (the "Ad Hoc Group"), and respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Ad Hoc Group's Motion is procedurally improper, has no factual basis whatsoever, and fails to satisfy the "extraordinary remedy" and high legal standard for appointing a chapter 11 trustee. Therefore, the Motion should be denied.

2. Without offering any admissible evidence, the Ad Hoc Group, relying solely on statements of its counsel (which, at least in part, was replaced after the filing of the Motion), alleges conflicts of interest between (a) the Debtors and (b) the Debtors and their creditors to manufacture the requisite "cause" for seeking appointment of a chapter 11 trustee. The Ad Hoc

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: (i) Apache Energy Services, LLC (4404); (ii) Aqua Handling of Texas, LLC (4480); (iii) HII Technologies, Inc. (3686); (iv) Sage Power Solutions, Inc. fka KMHVC, Inc. (1210); and (v) Hamilton Investment Group, Inc. (0150).

[2] This is the name the Ad Hoc Group has given itself in the Motion. The group is comprised of Brent Mulliniks, Billy Cox, One Flow Energy Services, LLC, Black Gold Energy LLC, and Fields Water Services, LLC. The Debtors take no position on the authenticity or authority of this "ad hoc" group.

Group's unsupported allegations, however, are not enough to displace the debtors-in-possession from managing the estates or to usurp the authority and proper role of the Debtors' Chief Restructuring Officer, whose retention was approved by this Court after notice and a hearing. A chapter 11 trustee would neither know anything about the Debtors' operations nor have any experience in running the Debtors' businesses. Further, any assertion that an independent trustee is required to investigate and prosecute claims of these Debtors' estates is completely undermined by the fact that an Official Committee of Unsecured Creditors was appointed in these Debtors' chapter 11 cases and is authorized to conduct any investigation under this Court's Final DIP Order (defined below).

3. Appointment of a chapter 11 trustee would result in an immediate default under the DIP Loan (defined below) and will not change the economic realities of these Debtors' cases (i.e., the Debtors have no access to cash or alternative financing, except for the funds provided to the Debtors by their secured lenders, and the Debtors' unsecured creditors will likely receive little or no recovery if a chapter 11 trustee were appointed). Without the DIP Loan, the Debtors will be forced to halt their sales efforts, which will result in loss of the value of their business and a reduction in the value of the Debtors' assets to the detriment of the Debtors' creditors.

4. Aside from the catastrophic results to the Debtors and their economic constituents if a chapter 11 trustee were appointed, there is simply no "cause" to grant the relief requested in the Motion. The Debtors' operations and assets are being thoroughly analyzed and investigated by two independent estate fiduciaries – the Debtors' CRO and their counsel, on the one hand, and the Official Committee of Unsecured Creditors and its counsel, on the other hand. The subjective and personalized agenda of the Ad Hoc Group is evidenced by the fact that the group cannot show any specific acts committed by the Debtors' post-petition management team and its

counsel that have undermined the value of the Debtors' estates. For these reasons, and as further explained below, the Motion should be denied.

BACKGROUND

5. These cases were each filed on September 18, 2015 (the "Petition Date") and joint administration was requested by the Debtors.

6. On September 21, the Court entered an Order for Joint Administration of Cases (Docket No. 18).

7. The Court held first day hearings on September 22, 2015 and entered an Order in aid of case administration (Docket No. 33), requiring that persons in control of property of the estates return them to the Debtors immediately. The Debtors thereafter had multiple conversations with the Ad Hoc Group's members, Mr. Cox and Mr. Mulliniks, and Mr. Baucom, asking them to turn over assets of these estates in their possession. These persons, and others, did not agree to undertake the expense to collect and return the Debtors' equipment and books.

8. The United States Trustee appointed an Official Committee of Unsecured Creditors for all of the Debtors (the "Committee") on September 29, 2015 (Docket No. 69). The Committee included a member of the so-called "ad hoc" committee.

9. The Debtors filed a motion for order to show cause against, *inter alia*, Brent Mulliniks, Billy Cox, and Calen Baucom seeking to have them appear and show cause why they should not be held in contempt for violations of the automatic stay because they refused to return to the Debtors equipment and papers that belonged to these Debtors' estates. The Court entered an order on September 25, 2015, requiring them to appear and show cause on October 5, 2015 (Docket No. 56).

10. The Ad Hoc Group filed a pleading (Docket No. 80) on October 1, 2015, objecting to the Debtors' motion for approval of post-petition secured financing (the "DIP Loan"). It did not file a Rule 2019 statement at that time. Afterwards, counsel for the Ad Hoc Group negotiated with counsel for the debtors for a prompt return of inventory and assets from Mr. Mulliniks, Mr. Baucom, and Mr. Cox.

11. The Court commenced an evidentiary hearing on October 5, 2015 and at the commencement of the hearing, in the presence of counsel for the Ad Hoc Group, the Debtors' counsel announced the agreement with Mr. Mulliniks, Mr. Baucom, and Mr. Cox.

12. The United States Trustee reconstituted the Committee on October 7, 2015 (Docket No. 115) because one of the Committee's members chose to remain in the Ad Hoc Group. With one potential exception, all members of the Ad Hoc Group are current or former insiders[3] of the Debtors or entities in which former insiders hold positions of authority.

13. On October 13, 2015, the Ad Hoc Group filed its Motion seeking to sever the Debtor Apache Energy Services, Inc. ("AES") from these jointly administered bankruptcy cases and appoint a chapter 11 trustee over AES (Docket No. 136).

OBJECTION TO MOTION

Significant Procedural Deficiencies Justify Striking the Motion

14. The Movants have not complied with BLR 9013-1. The Motion does not contain the 21-day notice language required under BLR 9013-1. Though styled as an expedited motion, it does not contain a declaration or other required information explaining the need for emergency consideration under BLR 9013-1(j).

15. The Motion also incorrectly states "The Ad Hoc Committee has filed a separate motion requesting expedited relief with respect to appointment of a chapter 11 trustee for debtor

[3] The term "insider" is defined in 11 U.S.C. § 101(31).

AES." (Docket No. 136, p. 7). A review of the Court's Docket shows no such motion seeking expedited relief was filed.

16. The Motion does not contain a certificate of service. No certificate of service has been filed. Under BLR 9013(f), one must file proof of service stating who was served and how.[4] Proper service and compliance with due process is a prerequisite for consideration of the Motion.

17. The Motion does not attach a proposed form of order, as required by BLR 9013(h), which requires that each motion, application, objection, and response filed with the Court must be accompanied by a proposed order.

18. These procedural deficiencies require denial of the Motion.

Estoppel and Factual Deficiencies Also Justify Denial of the Motion

19. Without any factual basis, the Motion alleges that the Debtors' Chief Restructuring Officer ("CRO") and the Debtors' counsel have a conflict of interest, but (with no objection by any party) the Debtors' CRO and counsel were properly retained for all of the Debtors, as approved, after notice and a hearing, by this Court. This argument by the Ad Hoc Group is therefore barred by estoppel. *See Order Approving Application to Employ and Retain Loretta Cross as the Debtors' Chief Restructuring Officer* (Docket No. 32); *Order Authorizing Employment of McKool Smith P.C. as Debtors' Counsel* (Docket No. 192). If the Ad Hoc Group had any objections to the retention of the Debtors' CRO or their counsel, it could have raised them at the hearing when the Court considered and approved such retentions. The Ad Hoc Group cannot collaterally attack this Court's orders approving retentions of the Debtors' CRO and counsel by the Motion.

[4] Whenever service of a pleading, notice, or other document is required under these rules or the Fed. R. Bankr. P, the serving party must serve it no later than the next day after the pleading is filed. The serving party must file a certificate of service including the name and address of those served.

20. The Motion incorrectly states that there is a conflict between the respective Debtors, who hold intercompany debts of $25 million, which requires, according to the Ad Hoc Group, independent managerial, legal and financial decisions. The underlying issues – whether the Debtors required and properly incurred the DIP Loan and whether the Debtors' CRO and counsel could ethically be engaged to represent each of the Debtors – have already been decided by this Court in favor of the Debtors. The Ad Hoc Group's arguments to the contrary are therefore barred by collateral estoppel.[5]

21. These arguments of the Ad Hoc Group in support of the Motion are also dead wrong for the following reasons:

a. The factual underpinning of the Motion that AES is allegedly profitable is incorrect. The intercompany records, however, show that AES owes HII over $11 million, not the other way around. Far from making money, AES took money from HII (who sold stock to generate cash for AES's benefit). The premise of the Ad Hoc Group's argument for a separate AES trustee is that a trustee (rather than the Debtors' CRO) will collect more money for AES's creditors, but those funds would disproportionately flow to the affiliate.

b. Contrary to the Ad Hoc Group's assertion that AES was a profitable company, AES has had negative, not positive, cash flow. It is not self-sustaining.

c. AES was a disregarded entity for tax purposes and only filed taxes as a part of the HII's tax consolidation group. It has no taxable net operating loss carryovers at the level of the disregarded entity. Thus, a plan without AES would harm both HII and AES.

d. Appointment of a trustee would cause a default under the DIP Loan and remove all assets (including name and goodwill) from the various estates.

e. The appointment of an AES trustee would cause harm to the Debtors' creditors by making a plan of reorganization and recovery for the unsecured creditors difficult, if not impossible.

[5] *See Final Order Approving the Debtors' Motion for Entry of Order Authorizing Postpetition Financing* ("Final DIP Order" Docket No. 149)[5]; *Order Approving Application to Employ and Retain Loretta Cross as the Debtors' Chief Restructuring Officer* (Docket No. 32); *Order Authorizing Employment of McKool Smith P.C. as Debtors' Counsel* (Docket No. 192).

f. AES has no funds to pay the administrative expenses associated with a separate committee and a chapter 11 trustee.

22. In short, the Motion cannot meet the high evidentiary standard for appointing a chapter 11 trustee and as such, the Ad Hoc Group cannot satisfy its burden and has failed to show "cause" for the relief requested.

LAW AND ARGUMENT

23. Appointment of a chapter 11 trustee is an extraordinary remedy and is disfavored at law. Such relief should not be granted based solely on counsel's legal argument and unsupported statements of entitlement to relief.[6]

The Strong Presumption against Appointing a Chapter 11 Trustee Can Be Rebutted Only by Clear And Convincing Evidence

24. Under the Bankruptcy Code, a chapter 11 trustee may only be appointed:

> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause . . .; or
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . . .

11 U.S.C. § 1104(a); *see In re Manda Ann Convalescent Home, Inc.*, No. 11-37950-H3-11, 2012 WL 2994422, at *4 (Bankr. S.D. Tex. July 20, 2012) (denying motion for trustee because there was "insufficient evidence of fraud, dishonesty, incompetence, [and] gross mismanagement," and it was "not in the best interests of creditors").

25. Appointing a trustee in a chapter 11 case is an "extraordinary remedy" and there is a "strong presumption" against it. *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex. rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003) (*en banc*) (internal

[6] The allegations were made by the pervious counsel for the Ad Hoc Group (attorney Kirk Kennedy and The Kennedy Firm), who has since been replaced and substituted by Ms. Kehlhof of Wist Holland & Kehlhof, as co-counsel with Leonard H. Simon, Esq. (Docket No. 200).

quotations & citation omitted). As such, "[i]t is settled that appointment of a trustee should be the exception, rather than the rule." *In re The 1031 Tax Grp., LLC*, 374 B.R. 78, 85 (Bankr. S.D.N.Y. 2007) (internal quotations & citation omitted).

26. Under section 1104, the Ad Hoc Group has the burden of showing cause or the need for a trustee by clear and convincing evidence. *See In re Tahkenitch Tree Farm P'ship*, 156 B.R. 525, 527 (Bankr. E.D. La. 1993). *See also In re G-I Holdings, Inc.*, 295 B.R. 502, 507-508 (D.N.J. 2003) ("Evidence is clear and convincing when [it] produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.") (internal quotations & citation omitted; alternations in original), *aff'd*, 385 F.3d 313, 317-18 (3d Cir. 2004).

The Ad Hoc Group Cannot Produce Evidence Required by Section 1104(a)(1)

27. Section 1104(a)(1) lists circumstances in which a trustee may be appointed for cause: "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause." 11 U.S.C. § 1104(a)(1). There is no contention that the Debtors' current management team and the Debtors' CRO engaged in fraud, behaved dishonestly, favored insiders, or engaged in self-dealing. Nor is there any claim that the Debtors' CRO is incompetent or that the Debtors are being grossly mismanaged. The Ad Hoc Group cannot point to any action or inaction by the Debtors' CRO which would support the relief requested. As such, none of the enumerated reasons for appointing a chapter 11 trustee are present here.

28. The Ad Hoc Group cites two cases to suggest that a trustee should be appointed in the Debtors' chapter 11 cases because of an alleged conflict of interest and acrimony between the Debtors and their creditors, without any analysis or specific examples. Specifically, the Ad Hoc

Group asserted that appointment of a chapter 11 trustee over the Debtor AES "is supported by controlling Fifth Circuit precedent" citing *In re Cajun Electric Power Cooperative, Inc.*, 69 F.3d 746, 749 (5th Cir. 1995), *withdrawn in part on rehearing*, 74 F.3d 599, 600 (5th Cir. 1996) (withdrawing all of section IV of the prior opinion and adopting reasoning of the dissent in 69 F.3d at 751), *cert. denied*, 519 U.S. 808 (1996) and *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 472 (3d Cir. 1998) (adopting reasoning of the Fifth Circuit's decision in *Cajun Electric*). *See* Motion at 2, 5.

29. However, a review of the Fifth Circuit's decision in *Cajun Electric*, 69 F.3d at 751 (concluding that appointment of a trustee may be the only effective way to pursue reorganization in the "large and messy" bankruptcy where board members had conflicts of interest "beyond the 'inherent' conflicts under which all healthy cooperatives operate" and were "working at cross-purposes" considering strategies which seem designed to break-up and scavenge the assets of the debtor), reveals that that case is factually distinguishable and inapplicable under the circumstances of these Debtors' chapter 11 cases.

30. Deciding whether to appoint a trustee is "fact intensive and the determination must be made on a case by case basis." *In re Sundale, Ltd*., 400 B.R. 890, 900 (Bankr. S.D. Fla. 2009). The Court "must determine whether the totality of the circumstances warrant appointment of a trustee." *Id*. Here, the Debtors' CRO, Loretta Cross, has been responsible for the day-to-day management of the Debtors and has managed, among other things, to locate and collect misappropriated and concealed assets of these estates (including assets taken and withheld by the members of the Ad Hoc Group that only recently have been returned to these Debtors' estates, following the Debtors' request for intervention by this Court) and to find funds to manage these Debtors' chapter 11 cases where few others would be successful. The record of

the Debtors' CRO and her management team in these Debtors' chapter 11 cases is not just acceptable, it is extraordinary.

31. The Ad Hoc Group's reliance on *Cajun Electric* is thus misplaced and its unsupported allegations have no merit. The requirement of providing "clear and convincing" evidence in support of the Motion cannot be disregarded in this case, particularly where the allegations are based solely on unsupported allegations of counsel for the Ad Hoc Group. There is no evidence, let alone "clear and convincing" evidence, of any conflict of interest, acrimony, mismanagement, or distrust in the Debtors' current management that would justify the "extraordinary remedy" of appointing a chapter 11 trustee.

32. In any event, the Bankruptcy Court approved the appointment of Loretta Cross, as the Debtors' CRO, for managing the affairs of the Debtors. Further, the Committee was appointed by the Office of the United States Trustee and could conduct any investigation of the Debtors' prepetition transactions, including claims, liens and security interests of the Debtors' prepetition secured lenders. The existence of these two independent fiduciaries (represented by competent legal counsel) undermines the Ad Hoc Committee's arguments that a chapter 11 trustee is necessary to make independent managerial and legal decisions in these cases. The Ad Hoc Group's attempt to manufacture a need for independent management based on alleged conflict between the Debtors and their creditors lacks merit. Thus, the Motion should be denied.

The Ad Hoc Group Cannot Show that Appointment of a Chapter 11 Trustee Serves the Best Interests of the Creditors and Equity Holders Under Section 1104(a)(2)

33. For the same reasons, appointment of a chapter 11 trustee would not be in the best interests of creditors and equity holders, as required under section 1104(a)(2).

34. The relief requested by the Ad Hoc Group, if granted, would cause an immediate default under the DIP Loan and damage these Debtors' estates and their creditors, would

minimize or eliminate any chance for recovery by these Debtors' creditors under a chapter 11 plan, and would cause the Debtor AES and its estate to owe $11 million (or more) to the Debtor HII and its estate (which it could not repay) and would still leave the Debtor AES a shell because its assets are fully encumbered and secured.

35. Further, appointing a chapter 11 trustee in Debtor AES's chapter 11 case would cause additional administrative expenses (above and beyond the DIP Lenders' superpriority administrative expense claim) with no resources to pay them. As a result, the granting of the Motion would severely injure, not help, Debtor AES's creditors.

36. Bankruptcy courts have refused to appoint a trustee under section 1104(a) where, as here, the trustee would serve no legitimate purpose. *See In re Swann Land LLC*, No. 07-33181, 2007 WL 4146680, at *3 (E.D. Tenn. 2007) (denying application for appointment of trustee where "replacement of the Debtors' management in favor of a chapter 11 trustee . . . would not remedy the problem [] that Debtors are not represented by [legal] counsel"); *In re Rutenberg*, 158 B.R. 230, 231 (Bankr. M.D. Fla. 1993) (refusing to appoint an examiner under § 1104(b) because it would serve no valid purpose); *In re Manda Ann Convalescent Home, Inc*., 2012 WL 2994422, at *4 (chapter 11 trustee request denied where "trustee would be constrained . . . and would have no option but to immediately seek conversion [to chapter 7] or dismissal [of the action]").

37. Thus, the Ad Hoc Group has failed to bear the burden of establishing, by clear and convincing evidence, that the appointment of a chapter 11 trustee to manage the affairs of the Debtor AES (the task that is now handled by the Debtors' CRO) and to investigate its prepetition transactions and, if necessary, to prosecute the claims of the estate (the task that is

now handled by the Official Committee of Unsecured Creditors) is justified under the circumstances. The Motion based on mere unsupported allegations is not sufficient.

38. Even where a movant makes a proper evidentiary showing to support an appointment of a chapter 11 trustee, this Court retains broad discretion to deny such appointment based on a variety of factors, including (a) whether the Debtors' cases are properly managed by the Debtors' CRO; (b) whether the Committee and its counsel may conduct an appropriate investigation of the Debtors' prepetition transactions; (c) whether the appointment of a chapter 11 trustee would case a default under the DIP Loan; (d) whether the appointment of a chapter 11 trustee would increase administrative costs and prevent, or cause a delay in, the Debtors' sale or restructuring efforts; and (e) whether the timing of the Motion suggests it is merely a litigation tactic by the Ad Hoc Group.

39. The Ad Hoc Group has failed to establish that the appointment of a chapter 11 trustee in these Debtors' cases and therefore, the Motion to should denied.

CONCLUSION

40. The Motion fails to meet the procedural requirements under the Local Rules and should be stricken. The alleged facts stated in the Motion lack evidentiary support, are wrong or misunderstood. The issues raised as concerns have since been adjudicated by this Court against the Ad Hoc Group, and the Ad Hoc Group should therefore be estopped. There is no factual basis to appoint a chapter 11 trustee over the Debtor AES, or to give the Ad Hoc Group (comprised of insiders) a standing and authority to cause a default under the DIP Loan and to burden the Debtors' estates with unnecessary administrative expenses in this small case.

WHEREFORE, the Debtors respectfully request that the Court deny the Ad Hoc Group's Motion and grant the Debtors such other and further relief, both at law and in equity, to which they may be justly entitled.

Dated: November 2, 2015.

MCKOOL SMITH, P.C.

By: */s/ Hugh M. Ray, III*

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 2, 2015, a true and correct copy of this document was served via the ECF system to the parties on the ECF service list, including the United States Trustee, and the pleading is being delivered to the Noticing Agent for service upon the parties on the Master Service List.

/s/ Hugh M. Ray, III
Hugh M. Ray, III

IN THE UNITED STATES BANKRUPTCY COURT
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In re:	**§**	**Chapter 11**
	§	
HII TECHNOLOGIES, INC., *et al.*[1]	**§**	**15-60070 (DRJ)**
Debtors	**§**	**(Jointly Administered)**

ORDER ON MOTION TO APPOINT CHAPTER 11 TRUSTEE
FOR DEBTOR APACHE ENERGY SERVICES LLC
(Refers to Docket No. 136)

On consideration of the Motion to Appoint Chapter 11 Trustee for Debtor Apache Energy Services LLC ("Motion") filed by the Ad Hoc Committee of Creditors of Debtor Apache Energy Services, Inc., any objections filed thereto and the argument of counsel, if any, the Court finds as follows:

The Motion is denied.

SIGNED THIS ___day of _____, 2015.

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: (i) Apache Energy Services, LLC (4404); (ii) Aqua Handling of Texas, LLC (4480); (iii) HII Technologies, Inc. (3686); (iv) Sage Power Solutions, Inc. fka KMHVC, Inc. (1210); and (v) Hamilton Investment Group, Inc. (0150).