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

IN RE:	§	
	§	
HII TECHNOLOGIES, INC., *et al.,*	§	CASE NO. 15-60070
	§	(Chapter 11)
DEBTOR.	§	Jointly Administered[1]

EXPEDITED AMENDED MOTION OF THE *AD HOC* COMMITTEE OF UNSECURED CREDITORS OF APACHE ENERGY SERVICES, INC., TO APPOINT TRUSTEE

[This refers to Docket No. 136]
[Responses to Docket No. 136 have been filed at Docket Nos. 208, 209 and 210]

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response, and send a copy to the moving party. You must file and serve your response within 21 days of the date of this motion was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorney.

THE *AD HOC* COMMITTEE OF UNSECURED CREDITORS OF APACHES ENERGY SERVICES, LLC, REQUESTS EXPEDITED CONSIDERATION OF THIS MOTION

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[1] The other debtors jointly administered along with HII Technologies, Inc., under this case number are Apache Energy Services, LLC (Bkcy. Case No. 15-60069), Aqua Handling of Texas, LLC (Bkcy. Case No. 15-60071), Sage Power Solutions, Inc. f/k/a KMHVC, Inc. (Bkcy. Case No. 15-60073) and Hamilton Investment Group, Inc. (Case No. 15-60072).

The *Ad Hoc* Committee of Unsecured Creditors[2] of Apache Energy Services, LLC ("AES"), moves on an expedited basis for appointment of a chapter 11 trustee for AES pursuant to 11 USC §1104.

A. Introduction

1. The Bankruptcy Code provides that the bankruptcy court *shall* order the appointment of a trustee, after notice and a hearing,

> … 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 ……

11 U.S.C. §1104 (a)(1).

2. In the instant case, a chapter 11 trustee is needed to protect the independent decision-making power of AES and to avoid an obvious and incurable conflict of interest that exists between AES and the other jointly administered debtors.

3. At the present time, all managerial and financial decisions of AES and its other four related companies are being made by Loretta Cross, the court-appoint Chief Restructuring Officer ("CRO"). She is the sole corporate officer of AES' parent HII Technologies, Inc., but is not an officer, director or employee of AES.

4. HII owns 100% of the shares of AES. HII is using AES and its assets[3] to bolster the asset position, and, in turn, the reorganization possibilities, of the related companies *at the expense of the unsecured creditors of AES*. See Corporate Chart attached as Exhibit A.

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[2] The Ad Hoc Committee of Unsecured Creditors ("Ad Hoc Committee") of AES consists of the following trade creditors and former employees of AES who hold unsecured claims against AES: One Flow energy Services, LLC; Black Gold Energy, LLC; Fields Water Services, LLC; Brent Mulliniks and Billy Cox.

[3] As will be shown later in this Motion, in preparing AES's schedules, HII left off a considerable amount of assets from the schedules of AES.

5. For example, AES holds significant claims against its parent HII and HII's other companies that are material and could affect the outcome of AES's case. These intercompany claims, which are owned by AES, but controlled by HII, cannot at the present time be pursued by AES as a means to fund its reorganization case.

6. The goals of the unsecured creditors of AES differ from those of the creditors of HII. Unlike HII and the other related entities. AES was a viable operating company that can be reorganized and put back into business to pay creditors through continued operations. HII and the other companies are mere shells with few, if any, assets and should be liquidated in an orderly manner. AES should be carved out from HII's liquidation scheme, since it was and can be a viable entity and can stand on its own.

7. AES has fundamentally different goals than the other HII debtors. The Fifth Circuit has recognized that conflicts in interest between a debtor and management is alone a basis for appointing a Chapter 11 trustee for the dissident entity. *In re Cajun Elec. Power Co-op, Inc.,* 69 F.3d 746, 749 (5th Cir. 1995), *withdrawn in part on rehearing*, 74 F.3d. 599 (5th Cir. 1996).

B. The proposed DIP loan advocated by HII will not benefit AEs, but will impair the ability of AES to reorganize.

8. The $12 million DIP loan proposed by HII and Heartland Bank in Docket No. 7, will provide HII and the other subsidiaries of HII with much needed capital. To obtain this loan, however, AES will have to grant Heartland Bank ("Heartland") a post-petition super priority liens on all its post-petition assets, even though AES will receive little, if any, of the post-petition loan proceeds.[4] Further, at the outset of the case, on an expedited basis and with no meaningful opportunity for review, AES is being forced to waive any and all claims it might have against Heartland Bank. The Ad

[4] A separate ledger is being maintained for AES. To the extent AES receives any benefit from Heartland's $12 million post-petition financing, Heartland's post-petition super-priority lien can be extended to the assets of AES. The Ad Hoc Committee, however, objects to the waiver by AES of its claims against Heartland under any circumstances.

Hoc Committee believes AES may have a considerable cause or causes of action against Heartland Bank that can be used to fund post-petition operations.[5]

9. The Ad Hoc Committee seeks to maximize the return to unsecured creditors of AES generally. If the Ad Hoc Committee believed that liquidation was in the best interest of AES or that AES were to benefit in any meaningful way from the proposed post-petition loan of Heartland Bank, the Ad Hoc Committee would welcome the proposed financing of Heartland. However, not only does it appear that AES receive little or nothing from the proposed post-petition loan, it does so at great cost, by waiving potentially valuable claims against Heartland in exchange for little or no consideration. Post-petition financing is not meant to deplete a debtor of its assets. Here the real reason for requiring AES to participate in the loan package is to enable Heartland to receive a post-petition pledge of the considerable assets of AES (most of which have are not scheduled) while forcing AES to waive an asset in which the Ad Hoc Committee has considerable belief, AES' legal claims against Heartland. These estates have not been consolidated. The unsecured creditors of AES should not have the asset pool of AES diluted to underwrite the return to creditors of the other jointly administered debtors.

10. Given the innate disagreement between the Ad Hoc Committee of AES and the management of HII, its parent, the Ad Hoc Committee believes the appointment of a trustee is warranted. The only certain way to prevent AES and its assets from being exploited for the benefit of HII and the other jointly administered debtors is to appoint independent management for AES in the form of a Chapter 11 trustee. A trustee would have the power to gather and pursue the assets and even pursue reorganization, which the Ad Hoc Committee believes is a viable goal.

1. The Claims of AES against Heartland

11. In August, 2014, HII caused AES to globally pledge its assets to Heartland to secure a $12 million term loan to HII, which was used by HII to acquire another subsidiary, Hamilton

[5] Ironically, that cause of action are among the many assets not scheduled on the AES's Schedule B.

Investment Group ("Hamilton"). The Hamilton acquisition proved to be a disaster, not only costing HII millions, but directly leading to these five jointly administered bankruptcy filings.

12. AES received no consideration for its pledge of assets. Little, if any, of Heartland's $12 million loan was received by AES.

13. The Ad Hoc Committee believes that a forensic accounting would reveal that the amount of accounting revenue transferred from AES to Heartland between August, 2014, and the date of filing greatly exceeded any consideration that AES received in exchange for those payments. Based on information and belief, Heartland received at least $1.09 million in transfers from AES during the relevant period of time.

14. In addition, the $12 million obligation and accompanying pledge of AES assets by AES to Heartland is itself a fraudulent transfer to AES since AES received no consideration in exchange for its pledge. The Ad Hoc Committee requests that a trustee be appointed to review, research and ultimately pursue this asset, rather than forcing AES to waive it without review, without research and with no consideration in exchange.

15. Finally, with respect to the claims AES has against Heartland, the Ad Hoc Committee would show that such claims are critical to the Debtor's ability to reorganize. Unless AES is extracted from the overreaching claims of Heartland, AES will never be able to reorganize. The Ad Hoc Committee is not pursuing pipedreams, but fighting for its right to a meaningful return on its claims.

C. The schedules filed in AES' case are so inadequate as to require appointment of a trustee

16. Adequate schedules are critical to operation of any Chapter 11 case, even if the debtor is not operating or seeks only to liquidate. They are so important that the preparer must sign an oath under penalty of perjury, stating that to the best of the preparer's knowledge such schedules are true and correct. The schedules in this case were signed, but their truth and veracity cannot be taken as true.

17. On October 26, 2015, a Letter of Intent was presented to counsel and management for HII. The terms of that letter are confidential, as is the response of HII's counsel, except that counsel for HII made the following admissions concerning the type and value of assets owed by AES:

i. According to Debtor's counsel, accounts receivable owed AES total $3.6 million. The Debtor's schedules reflect account receivables of s little over $2.6 million.[6] There is no listing of accounts receivables, so there is no way this figure can be challenged or verified.

ii. According to Debtor's counsel, AES has equipment valued at over $1.5 million. In response to Item 29 on AES' schedules, AES lists the value of its equipment as "Unknown" and refers the reader to Item 29 on HII's Schedule B, which in turn reads: (OLV) Combined equipment of all debtors, located in Texas and Oklahoma - $3,383,000.

Perhaps this entry more than any other demonstrates the urgent need for a separate Chapter 11 trustee for AES. In sworn schedules filed with this court, HII lumps together its equipment assets with all other assets of the jointly administered debtors. It appears that approximately half of all the equipment actually belongs to AES. According to the schedules, the amount owned by AES is unknown. According to Debtor's counsel a month later, the amount owned is $1.5 million. There is no listing at any of the equipment, so there is no way these variations can be challenged or verified.

iii. AES' name, master service agreements and other contract rights are worth at least $500,000, but are not scheduled as assets.

iv. AES alleges it has a claim or claims against some of the members of the Ad Hoc Committee for $1.5 to $2 million or even higher. There is a D&O policy for $2 million backing up those claims, yet on the schedules the value of these claims is listed as unknown,

18. Going by counsel's letter, there are approximately $5 million in assets identified by HII as assets of AES that have not been scheduled by AES, not including the potential claim against Heartland, which also is not scheduled. AES cannot reorganize until HII stops playing games with its AES and its assets or is forced to do so by the appointment of a Chapter 11 trustee.

[6] Debtor's Schedule B, Item 16, which is denominated Accounts Receivables, also reflects Employee Advances of $122,207.64, a Note Receivable of $290,000 and Accrued Interest on the Account Receivable of $28,960.28. None of those is an account receivable. They belong more property under Item 18, Other liquidated debts owed to Debtor.

19. In viewing the actual assets of AES, Heartland's desire to include AES in its post-petition financing becomes immediately apparent. AES owns significant assets and Heartland wants the benefit of the equity in those assets, regardless of how this impacts AES or its unsecured creditors. If AES needed Heartland's financing, AES and its unsecured creditors might accept the need to pledge the post-petition assets of AES. But AES *does not need Heartland's post-petition financing*, even if the other jointly administered debtors do.

D. AES has claims against HII that will not be brought so long as AES continues to be controlled by HII

20. Prior to bankruptcy, AES was the only profitable subsidiary of HII.

21. In 2014 and 2015, HII and its senior corporate officers (particularly HII CEO Matt Flemming and HII chief financial officer Acie Palmer) began to insert themselves into the operations of AES, even though none had little, if any, experience in the water management systems used in oil field fracking. Their actions, particularly those of Flemming and Parker, damaged AES in a number of ways, including, but not limited to:

i. diverting money of AES to HII and/or the other subsidiaries, especially Sage Power;

ii. entering into above market equipment leases;

iii. cancelling profitable AES business operations;

iv. terminating profitable AES business operations; and

v. pledging assets of AES to secure obligations of the other jointly administered debtors; and

vi. ordering transfer of $2.2 million in Series-B investor funds to pay down debt of Heartland during the preference period when investor funds were allocated to pay down AES vendor debt.

22. It is neither reasonable nor realistic to expect that HII is likely to spend the time and energy to develop a suit. This inherent conflict is yet another reason mandating the appointment of an in independent Chapter 11 trustee for AES.

E. Expedited Consideration

23. AES requires the immediate appointment of a Chapter 11 trustee. Decisions concerning cash collateral alone require the separate representation of AES. While AES is not presently operating, some of its going concern value can be salvaged by an immediate sale to the right buyer and the filing by AES of an expedited plan.[7] Given the diversity of interests between HII's management and creditors and the creditors of AES, AES believes that if a trustee is not appointed immediately, the return unsecured creditors can expect from the reorganization of AES will be irreparably damaged.

F. Summary

24. This motion raises no novel points of law. It has long been held that conflict of interest and acrimony between a debtor and its creditors mandate the appointment of a trustee. *In re Cajun Elec. Power Co-op, Inc.,* 69 F.3d 746, 749; *In re Marvel Entertainment Group, Inc.,* 140 F.3d 463, 472 (3rd Cir. 1998)(adopting the Fifth Circuit's reasoning in *Cajun Elect. Power Co-op, Inc.).*

25. The Ad Hoc Committee does not believe that management of HII is looking out for the interests of the unsecured creditors of AES. Just as they did pre-petition, the management of AES is willing to sacrifice the equity in AES' assets to see that HII and the other jointly administered debtors are provided for. The Ad Hoc Committee believes the assets of AES are more valuable than the assets of the other companies because AES was profitable pre-petition and, based on its past performance, retains the ability to reorganize as an operating entity. There has already been one offer to purchase and that and any other bids should be seriously considered before AES is condemned to auction. The efforts of the Ad Hoc Committee to sell the assets of this company as a going concern have not been well received by HII, its management and counsel, and the other jointly administered debtors, not

[7] By separate motion filed this same date, the Ad Hoc Committee seeks the immediate termination of the exclusivity period in which AES may alone file a plan. The Ad Hoc Committee believes that speed is of the essence to obtain a meaningful return from the assets and business of AES.

because the concept was flawed, but because it did not suit the overall auction strategy. The Ad Hoc Committee requests that a Chapter 11 trustee be appointed so that AES and its unsecured creditors can meet with someone as interested in the welfare of AES as they are.

WHEREFORE, PREMISES CONSIDERED, the Ad Hoc Committee prays that a Chapter 11 trustee be appointed in the Chapter 11 case of AES on an expedited basis; and that the Ad Hoc Committee be granted any further relief, whether legal or equitable, whether general or special, to which it may show itself justly entitled.

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