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 FOR RECONSIDERATION
AND REQUEST FOR ADDITIONAL FINDINGS
(Relates to dkt #201)

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 Ad Hoc Committee's Motion to Reconsider (the "Motion," dkt #201), and respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Motion is a ham-handed attempt to extend appellate deadlines, is substantively defective, and equitably moot. If the Court desires to take up the Motion despite its myriad defects, the Court should deny the Motion because it is not based in fact. The Ad Hoc Committee has not satisfied the legal requirements for relief.

2. The Motion seeks relief under Fed. R. Bankr. P. 7052 though there was no clearly erroneous finding. Because the Motion is a pretextual waste of resources before the inevitable appeal, the Debtors request that the Court make additional findings of fact and conclusions of law permitted by Rule 7052.

[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).

BACKGROUND

3. These cases were each filed on September 18, 2015 (the "Petition Date") and joint administration was requested by the Debtors. Also on the Petition Date, the Debtors sought to obtain post-petition financing ("DIP Motion," dkt #7) and they served notice. As shown by the Certificate of Service of First Day Motions (dkt #19) service was made on, *inter alia*, insiders who would later appear as the members of the Ad Hoc Committee.

4. On September 21, 2015, the Court entered an Order for Joint Administration of Cases (dkt #18). That relief was never opposed and no person has sought to end joint administration. The Ad Hoc Committee does not seek such relief in the Motion. The United States Trustee appointed an Official Committee of Unsecured Creditors for all of the Debtors (the "Committee") on September 29, 2015 (dkt #69).

5. On September 22, after a well-attended first day hearing, the Court approved the DIP Motion on an interim basis (dkt #42). No appeal was filed to that order.

6. The Ad Hoc Committee filed a pleading (dkt #80) on October 1, 2015, objecting to the DIP Motion. On October 5, the Court entered a second interim order approving the DIP Motion (dkt #104). No appeal was filed to that order.

7. The United States Trustee reconstituted the Committee on October 7, 2015 (dkt #115) because one of the Committee's members chose to remain in the Ad Hoc Committee. Members of the Ad Hoc Committee are current or former insiders of the Debtors or entities in which the Debtors' current or former insiders hold positions of authority.

8. The Ad Hoc Committee filed a supplemental objection to the DIP Motion (dkt #141) on October 13, 2015.

9. On October 13, 2015, the Ad Hoc Committee filed a motion to appoint a chapter 11 trustee over AES ("Trustee Motion," dkt #136). The Debtors and others objected (dkt ##208-210).

10. The Court held a final hearing on October 14, 2015 on the Debtors' DIP Motion and the Court entered an order granting the relief sought (the "Final DIP Order," dkt #149).

11. The Ad Hoc Committee filed the instant Motion (dkt #201) on October 28, 2015, seeking reconsideration of the Final DIP Order.

OBJECTIONS TO THE MOTION

The Motion Seeks Relief Beyond the Rules or Statute.

12. The Ad Hoc Committee has styled its Motion as a Fed. R. Civ. P. 52 and 59(e) pleading (incorporated into Bankruptcy Rules 9014 and 9023). Most aspects of the relief sought fall outside the authority of the Rules because the Ad Hoc Committee is not seeking denial of the DIP Motion, but rather modification of a contract the DIP Motion approved.

13. The Ad Hoc Committee asks that the Court "vacate the $12 million roll-up of prepetition debt as to debtor Apache Energy Services ('AES') only." (Motion ¶ 1). This goes far beyond asking the Court to reconsider its legal ruling on cross-collateralization (made in connection with the Court's approval of the Final DIP Order).

14. In the Motion, the Ad Hoc Committee asks the Court to leave the Final DIP Order in place. They would have the Court retain the allegedly improper cross-collateralization provisions intact against all Debtors except AES. The Ad Hoc Committee asks the Court to amend the terms of the contract between the Debtors and its DIP Lenders—in a manner that will benefit AES—over the objections of the Debtors and the DIP Lenders. Thus the Ad Hoc

Committee is not seeking reconsideration of the Court's approval of the DIP Motion, but rather the modification of a contract between the Debtor and DIP Lenders.

15. Similarly, the Ad Hoc Committee asks that the Court "clarify, by technical amendment or otherwise, that the Order allows any official committee of creditors of debtor AES to initiate claims against the pre-petition lenders if after investigation it believes such suit is warranted." (Motion ¶ 1). The Ad Hoc Committee appears to be requesting that the Court amend the Final DIP Order to assign rights in property of the Debtors' estate (an alleged § 548 fraudulent-transfer cause of action) to creditors of one of the Debtors (AES) for no consideration. This is likewise improper relief for a motion for reconsideration. The Ad Hoc Committee is seeking to amend a contract, and for transfer of the Debtors' property to it—not reconsideration of the Court's decision to approve the DIP Motion.

16. Neither of these two requested changes constitutes "reconsideration" of the DIP Motion. There is no statutory or constitutional basis to modify the lending agreement, or to summarily transfer property of the Debtors' estates to the Ad Hoc Committee for no consideration. This by itself is sufficient reason to deny the Motion.

The Motion Has the Facts Dead Wrong.

17. In addition to the improper relief sought, the Motion and related documents contain numerous factual inaccuracies and fail to address key facts.

18. The factual underpinning of the Motion that "AES is profitable" is flat wrong. AES lost money, which is why it required massive cash infusions from HII. The former president of AES is a member of the Ad Hoc Committee. He knows that AES received cash infusions from HII. He personally vouched for the accuracy of the intercompany receivables.

19. At the October 5 hearing, the Debtors' CRO discussed how intercompany records show that AES owes HII over $11 million, not the other way around. Far from making money, AES took money from HII (which sold stock to generate cash for AES's benefit).

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

21. Likewise, while the Ad Hoc Committee has made much hay over the amounts loaned to purchase the Hamilton Investment Group ("Hamilton"), it has neglected to mention that the Term Loan, a loan on which AES is a co-obligor, funded AES's losses. Uncontroverted evidence and testimony at each hearing on the DIP Motion established AES's use of cross-collateralized funds from the Term Loan (and AES's subsequent default under the Term Loan).

22. The Motion fails to address the incontrovertible fact that AES was a disregarded entity for tax purposes and only filed income taxes as a part of HII's tax consolidation group. AES 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.

It is Too Late to Change the Final DIP Order.

23. Funds authorized under the DIP Loan have been used. Some have been committed to pay debts as set forth in the Budget. The money cannot be recaptured from some vendors, especially vendors who, by cause of receipt of the funds, have waived lien claims against third parties.

24. Many people outside of the Bankruptcy Court have justifiably relied on the DIP Order in good faith. It would be inequitable to change the Final DIP Order to prejudice them.

25. Change or vacatur of the Final DIP Order would destroy the bankruptcy cases of AES and the other Debtors because it would cause an incurable default under the DIP Loan and

other agreements and cause all assets of all Debtors (including AES) to be subject to foreclosure.[2] That action would disproportionally harm the creditors of AES and the other Debtors. The Debtors submit to the Court that the doctrine of equitable mootness (although usually used in the context of substantially consummated bankruptcy plans) should apply here. *See In re Tex. Grand Prairie Hotel Realty, LLC*, 710 F.3d 324, 327 (5th Cir. 2013) ("The doctrine of equitable mootness is unique to bankruptcy proceedings, responsive to the reality that 'there is a point beyond which a court cannot order fundamental changes in reorganization actions.'")

26. In the event the Court determines that the issue is not equitably moot, the proper mechanism to challenge the Court's findings is an appeal. The Court should strike the Motion from the docket.

Judicial Estoppel and Waiver.

27. **Waiver**. When the Ad Hoc Committee filed the Motion, they did so after two hearings where their counsel represented the Ad Hoc Committee and made choices about how evidence was produced and arguments that were made. Having chosen not to make these arguments at the prior hearings, the Ad Hoc Committee now raises them as "new". The Ad Hoc Committee waived all arguments it chose not to make at the prior hearings.

28. With the exception of the testimony of Mr. Mulliniks on October 14, 2015 (which was *excluded, thus not "new" evidence*) the Ad Hoc Committee was able to present its evidence at the prior hearings. The Ad Hoc Committee cannot now bring forth evidence and arguments that it could have raised at the prior hearings but chose not to do so. The Ad Hoc Committee has waived those issues.

[2] Final DIP Order at p. 46 "Events of Default.. ..(xiv) reversal, vacatur, amendment, or modification (without the consent of the DIP Agent and the DIP Lenders), for a period in excess of five (5) days, of the Interim Order or this Order".

29. **Judicial Estoppel**. The Ad Hoc Committee took the position that the value of AES was its name and that their prior permitted liens should not be abridged. The Court accepted that position and granted relief in favor of the Ad Hoc Committee on that basis. The name AES and existence of prior permitted liens (if any) by the Ad Hoc Committee was preserved in the Roll-Up.

30. Now the Ad Hoc Committee is taking the position that preserving prior liens and the AES name was wrong, because the Final DIP Order was based on clearly erroneous facts about AES, and thus the Final DIP Order must be amended to prevent the Roll Up because there is value in AES beyond the AES name. This is a reversal of a position simply because it is convenient to do so.

31. In *Reed v. City of Arlington*, the Fifth Circuit restated their threefold test for judicial estoppel:

> (1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position;
>
> (2) a court accepted the prior position; and
>
> (3) the party did not act inadvertently.

Reed v. City of Arlington, 650 F. 3d 571, 574 (5th Cir. 2011) (collecting cases).

32. Here, the Ad Hoc Committee originally stated the value of AES is entirely the name. That asset was then carved out of the DIP Loan because the Court accepted that argument. The argument was not made inadvertently. Now, somehow, carving out the AES name was not enough.

LAW AND ARGUMENT

33. Even if the Ad Hoc Committee's Motion sought proper relief for a FRCP 59(e) pleading, and even if the Motion were not based on numerous factual inaccuracies, there is no legal basis for granting the Motion.

34. The Ad Hoc Committee cites Bankruptcy Rule 9023 (incorporating Federal Rule of Civil Procedure 59) as its legal authority for altering or amending the DIP Financing Order. (Motion ¶ 6). FRCP 59(e) allows for motions to amend or alter judgments,[3] provided they are filed within 28 days of entry of the judgment.

35. FRCP 59(e) "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). As the Ad Hoc Committee noted, FRCP 59(e) "serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989)). The Ad Hoc Committee fails to satisfy either requirement.

This Court Did Not Make a Manifest Error of Law.

36. The Ad Hoc Committee argues that there was a manifest error of law because "[t]he $12 million roll-up violates Section 364 of the Bankruptcy Code." (Motion ¶ 6). A FRCP 59(e) motion "not based on newly discovered evidence must 'clearly establish' a 'manifest error of law' . . . ." *Interstate Fire & Casualty Co. v. Catholic Diocese of El Paso*, 2015 U.S. App. LEXIS 14390 at *4 (5th Cir. Aug. 14, 2015) (citing *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005)). The Ad Hoc Committee has failed to clearly establish a manifest error of law.

[3] Bankruptcy Rule 9001 defines "judgment" in this context to mean any appealable order. FED. R. BANKR. P. 9001(7).

37. In support of its argument that this Court made a manifest error in law, the Ad Hoc Committee cites an Eleventh Circuit decision, two decisions of the Bankruptcy Court for the Southern District of Texas, and a decision of the District Court for the District of New Hampshire. (Motion ¶ 4). The Ad Hoc Committee does not cite to a governing Fifth Circuit decision on the issue of cross-collateralization under Bankruptcy Code section 364, and the undersigned attorneys have found no such decision. In fact, the Fifth Circuit has refused to prohibit cross-collateralization. *See In re Tex. Research, Inc.*, 862 F.2d 1161, 1164 (5th Cir. 1989). In addition, the DIP Motion listed numerous cases to support its position that "Roll-ups are a common feature in debtor-in-possession financings"[4]

38. The Bankruptcy Code does not prohibit cross-collateralization. This fact, combined with the lack of governing Fifth Circuit law on the issue, means that the Court did not make a manifest error of law. If this issue is not equitably moot, the Ad Hoc Committee's proper

[4] Docket 7 at ¶47, *citing In re Laboratory Partners, Inc*., Case No. 13-12769 (Bankr. D. Del. Oct. 29, 2013) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Southern Air Holdings, Inc*., Case No. 12-12690 (Bankr. D. Del. Oct. 1, 2012) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Appleseed's Intermediate Holdings LLC*, et al., Case No. 11-0160 (Bankr. D. Del. Jan. 20, 2011) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Hayes Lemmerz Int'l, Inc*., Case No. 09-11655 (Bankr. D. Del. May 14, 2009) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Source Interlink Cos. Inc*., Case No. 09-11424 (Bankr. D. Del. Apr. 29, 2009) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Dayton Superior Corp*., Case No. 09-10785 (Bankr. D. Del. Apr. 19, 2009) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Aleris Int'l*, Inc., Case No. 09-10478 (Bankr. D. Del. Mar. 18, 2009) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Pacific Energy Resources, Ltd*., Case No. 09-10785 (Bankr. D. Del. Mar. 10, 2009) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Foamex International Inc*., Case No. 09- 10560 (Bankr. D. Del. Feb. 20, 2009) (authorizing debtor-in-possession financing that included full roll-up under the interim order); *In re Hilex Poly Co. LLC*, Case No. 08-10890 (Bankr. D. Del. May 7, 2008) (authorizing debtor-in-possession financing that included roll-up under the interim order); *In re Holley Performance Products Inc*., No. 08-10256 (Bankr. D. Del. Feb. 12, 2008) (authorizing debtor-in-possession financing that included roll-up under the interim order). *See also In re United Retail*, Case No. 12-10405 (Bankr. S.D.N.Y. Feb. 1, 2012) (authorizing the refinancing of $11,500,000 of existing letter of credit obligations); *In re Velo Holdings, Inc.*, Case No. 12-11384 (Bankr. S.D.N.Y. April 2, 2012) (authorizing a dollar-for-dollar refinancing of prepetition obligations up to $20,000,000); *In re Blockbuster, Inc.*, Case No. 10-14997 (Bankr. S.D.N.Y. Sept. 23, 2010) (authorizing the roll up of secured notes of up to $125 million); *In re Chemtura Corp.*, Case No. 09-11233 (Bankr. S.D.N.Y. Mar. 18, 2009) (authorizing a $86.5 million refinancing revolving credit facility under a $400 million DIP facility); *In re Lyondell Chemical Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. Mar. 1, 2009) (approving a dollar-for-dollar roll up of $3.25 billion of a prepetition secured debt facility); *In re Tronox Inc.*, Case No. 09-10156 (Bankr. S.D.N.Y. Feb. 6, 2009) (approving the payment of $79.5 million of prepetition secured indebtedness).

method of recourse is not a FRCP 59(e) motion, but to file an appeal in order to place the cross-collateralization issue squarely before an appellate court.

The Ad Hoc Committee has Failed to Present Newly Discovered Evidence.

39. The Ad Hoc Committee argues that it has newly discovered evidence in the form of a proffer by Brent Mulliniks that allegedly "establishes that debtor AES could be reorganized in the absence of the $12 million roll up and that debtor AES has legal claims unique to it that the other debtors do not have." (Motion ¶ 6). This is not newly discovered evidence. The proffer is evidence that was known at the time of the October 14 hearing, and in fact offered up for admission, but ultimately excluded by the Court. Again, the Motion is pretextual and merely a prelude to appeal. This is an attempt to put the proffer into the record for appellate purposes—not to remedy an inequitable result based on evidence that, if it had been discovered, would have changed the outcome.

40. Fifth Circuit law is very clear that a FRCP 59(e) motion must present *newly discovered* evidence. FRCP 59(e) "motions cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005). Even ignoring all of its misstatements and inaccuracies, nothing in Brent Mulliniks's proffer constitutes newly discovered evidence. This is grounds for denying the Ad Hoc Committee's FRCP 59(e) motion. *See Templet v. Hydrochem Inc.*, 367 F.3d 473, 480 (5th Cir. 2004) (noting that an unexcused failure to present evidence available at the time of the initial judgment provides a valid basis for denying a FRCP 59(e) motion).

The Ad Hoc Committee's Request for Rule 52 Relief Should be Denied.

41. The Fifth Circuit has stated the purpose of Rule 52(b) motions to amend judgments, similar to Rule 59(e) motions, "is to correct manifest errors of law or fact or, in some

limited situations, to present newly discovered evidence." *Fontenot v. Mesa Petrol. Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986).

42. The Ad Hoc Committee has not identified a manifest error of law or fact. As discussed above in connection with the Rule 59(e) relief, the Court did not make a manifest error of law. Specifically, under Rule 52(a)(6), the Court may set aside findings if they were *clearly erroneous*. That stratospherically high legal standard has not been properly pled, much less met.

43. Further, the Court made no erroneous factual findings, much less clearly erroneous ones. "A finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony." *French v. Allstate Indem. Co.*, 637 F.3d 571, 577 (5th Cir. 2011). There is no need to change or modify the findings in the Final DIP Order.

CONCLUSION

44. The Court should go beyond denying the Ad Hoc Committee's baseless Motion. Even the Ad Hoc Committee expects the Motion to be denied, as it is clearly a pretext. Taken for what it is, the Motion should be stricken. The Debtors respectfully request that, if not stricken, the Court deny the Motion.

WHEREFORE, the Debtors respectfully request that the Court deny the 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 18, 2015.

MCKOOL SMITH, P.C.

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

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 18, 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
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

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

ORDER ON MOTION TO ALTER OR AMEND JUDGMENT
(Refers to Docket No. 201)

On consideration of the Motion Pursuant to Bankruptcy Rules 9023 and 7052(b) to Alter or Amend Judgment or to Amend Findings of Fact and Conclusions of Law in Connection with Final Order Authorizing Post-Petition Financing ("Motion," dkt #201) 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).