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)**

DEBTORS' OBJECTION TO EXPEDITED AMENDED MOTION TO APPOINT TRUSTEE FOR DEBTOR APACHE ENERGY SERVICES LLC
(Refers to Dkt. No. 222)

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 Expedited Amended Motion of the Ad Hoc Committee[2] of Unsecured Creditors of Apache Energy Services, Inc., to Appoint Trustee (the "Amended Motion," Docket No. 222),[3] and would respectfully show the Court as follows:

PRELIMINARY STATEMENT

1. With one potential exception, all members of the Ad Hoc Committee are current or former insiders[4] of the Debtors or entities in which former insiders hold positions of authority. They have been the subject of show cause relief. The estates have claims against many of them. Except for the Ad Hoc Committee, the major players in this case are in agreement to effectuate a

[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] The Ad Hoc Committee consists of the following trade creditors and former employees of Apache Energy Services, Inc. who hold unsecured claims against debtor AES: One Flow Energy Services, LLC, Black Gold Energy LLC, Fields Water Services, LLC, Brent Mulliniks, and Billy Cox.

[3] The Ad Hoc Committee previously filed a Motion to Appoint Chapter 11 Trustee for Debtor Apache Energy Services, LLC (the "Original Motion," Docket No. 136). The Debtors, Heartland Bank, McClarty Capital, and the Unsecured Creditors' Committee all filed objections (Docket Nos. 208-210).

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

Plan. The relief sought perverts the bankruptcy system to shelter alleged wrongdoers and frustrate the rights of legitimate creditors.

2. The Amended Motion has no factual basis and fails to satisfy the high legal standard for appointing a chapter 11 trustee. The Amended Motion should be denied.

3. Without offering any admissible evidence and relying solely on statements of its counsel, the Ad Hoc Committee 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 Committee's unsupported allegations, however, are not enough to displace the Debtors-in-possession from managing their 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).

4. 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 would be forced to halt their sales efforts, which will result in loss of the value of their

businesses and a reduction in the value of the Debtors' assets to the detriment of the Debtors' creditors.

5. 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 Amended 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 Committee 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 Amended Motion should be denied.

BACKGROUND

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

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

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 originally included a member of the Ad Hoc Committee.

9. 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 Committee's members, Mr. Cox and Mr. Mulliniks, and Mr.

Baucom, asking them to turn over assets of the estates in their possession. 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 Committee 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"). Afterwards, counsel for the Ad Hoc Committee 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 Committee, 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 Committee.

13. On October 13, 2015, the Ad Hoc Committee filed an original motion seeking appointment of a chapter 11 trustee over the Debtor Apache Energy Services, Inc. ("AES") (Docket No. 136). The Debtors, the Lenders,[5] and the Committee all filed objections (Docket Nos. 208-210).

14. On October 14, 2015, after a hearing, the Court entered the Final Order Approving the Debtors' Emergency Motion for Entry of Interim and Final Orders

[5] Heartland Bank and McLarty Capital Partners SBIC, L.P.

(A) Authorizing Postpetition Financing; (B) Authorizing Use of Cash Collateral; and (C) Granting Adequate Protection to the DIP Lenders (the "Final DIP Order", Docket No. 149).

15. On November 13, 2015 the Ad Hoc Committee filed this Amended Motion as well as an Expedited Motion to Terminate Exclusivity (Docket Nos. 222 and 223).

OBJECTION TO AMENDED MOTION

Estoppel and Factual Deficiencies Justify Denial of the Amended Motion

16. Without any factual basis, the Amended Motion alleges that the Debtors' Chief Restructuring Officer ("CRO") and the Debtors' counsel have a conflict of interest. Despite adequate notice and opportunity, the Ad Hoc Committee permitted retention of the Debtors' CRO and counsel on behalf of all of the Debtors. The Ad Hoc Committee is estopped.[6] If the Ad Hoc Committee 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 Committee cannot collaterally attack this Court's orders approving retentions of the Debtors' CRO and counsel by the Amended Motion.

17. The Amended 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 Committee, 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

[6] *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).

already been decided by this Court in favor of the Debtors. The Ad Hoc Committee's arguments to the contrary are therefore barred by collateral estoppel.[7]

18. The arguments of the Ad Hoc Committee in support of the Amended Motion are also dead wrong for the following reasons:

a. The factual underpinning of the Amended 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 (which sold stock to generate cash for AES's benefit). The premise of the Ad Hoc Committee'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 Committee'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 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 a trustee for AES would cause harm to the Debtors' creditors by making a plan of reorganization and recovery for the unsecured creditors difficult, if not impossible.

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

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

[7] *See* Final DIP Order (Docket No. 149); 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).

LAW AND ARGUMENT

20. 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.[8]

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

21. 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").

22. 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 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).

23. Under section 1104, the Ad Hoc Committee 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*,

[8] The allegations were made by counsel for the Ad Hoc Committee (attorney Kirk Kennedy and The Kennedy Firm).

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 Committee Cannot Produce Evidence Required by Section 1104(a)(1)

24. 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). None of the enumerated reasons for appointing a chapter 11 trustee are present here. The Ad Hoc Committee cannot point to any action or inaction by the Debtors' CRO which would support the relief requested.

25. The Ad Hoc Committee argues that the section 1104(a)(1) standard is met because the Debtors' CRO allegedly filled out AES's Schedules improperly and because of intercompany conflicts of interest amongst the Debtors.

26. The Ad Hoc Committee argues that "[t]he schedules filed in AES' case are so inadequate as to require appointment of a trustee."[9] The Ad Hoc Committee alleges that the Debtors' CRO and Debtor HII have untoward motives (accusing them of "playing games" with the assets), but fails to explain how allegedly improperly completing AES's schedules accomplishes these alleged improper goals.

[9] Amended Motion at p. 5.

27. Before addressing the substantive allegations, the Debtors must object to the Ad Hoc Committee's use of confidential settlement communications. (Amended Motion, ¶ 17). As addressed below, the Ad Hoc Committee's substantive arguments are misplaced, but using excerpts of these communications as "admissions" of the Debtors is inappropriate. The Debtors request that Paragraphs 16-19 of the Amended Motion be struck.

28. In the event the Court decides not to strike these paragraphs, the Ad Hoc Committee's arguments do not justify granting the relief sought. The Ad Hoc Committee's allegations are inaccurate or misplaced.

29. First, the Ad Hoc Committee's allegation about understating receivables to improperly provide Heartland Bank with the "equity in those assets" is untrue. All of AES's accounts receivable (whether $3.6M or $2.6M worth) were already collateral securing amounts the Debtors owe Heartland Bank (an under-secured creditor).

30. Second, the Ad Hoc Committee's criticism of the CRO's decision to not schedule equipment by individual Debtor (instead referencing an appraisal of the equipment of all Debtors) is misplaced. The equipment of all of the Debtors serves as collateral for amounts owed to Heartland Bank and McClarty Capital. That the Debtors' CRO did not choose to segregate equipment is not indicative of a conspiracy against AES.

31. Third, the only people complaining are likely to be sued.

32. Finally, the Ad Hoc Committee's argument that the Debtors' CRO improperly listed claims against Ad Hoc Committee members as of "unknown" value because a $2 million D&O policy exists makes little sense. The existence of a $2 million insurance policy that might cover some or all of these claims does not mean those claims are automatically worth $2 million.

The Ad Hoc Committee's allegations regarding AES's Schedules are inaccurate or misplaced, and do not establish "cause" to appoint a trustee.

33. The Ad Hoc Committee cites two cases to suggest that a trustee should be appointed in these 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 Committee asserts 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* Amended Motion at pp. 2, 5.

34. 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.

35. 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). Courts "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 the estates (including assets taken and withheld by members of the Ad Hoc Committee that only recently have been returned to the estates, following the Debtors' request for intervention by this Court) and to locate funds to manage these bankruptcy cases where few others would be successful. Unlike *Cajun Electric*, the CRO has an effective working relationship with the Committee. The only acrimony in these cases is with the members of the Ad Hoc Committee—the potential defendants of estate claims. The fact that these potential defendants want to appoint their own trustee should come as no surprise to anyone. The record of the Debtors' CRO and her management team in these chapter 11 cases is not just acceptable, it is extraordinary.

36. The Ad Hoc Committee'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 Amended Motion cannot be disregarded in this case, particularly where the allegations are based solely on unsupported allegations of counsel for the Ad Hoc Committee. 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.

37. In any event, the 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 Committee's attempt to manufacture a need for independent management based on alleged conflict between the Debtors and their creditors lacks merit. Thus, the Amended Motion should be denied.

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

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

39. The relief requested by the Ad Hoc Committee, 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 the creditors under a chapter 11 plan, and would cause Debtor AES and its estate to owe $11 million (or more) to Debtor HII and its estate (which AES could not repay) and would still leave AES a shell because its assets are fully encumbered and secured.

40. 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 Amended Motion would severely injure, not help, Debtor AES's creditors.

41. 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]").

42. The Ad Hoc Committee 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 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 AES estate (the task that is now handled by the Committee) is justified under the circumstances. The Amended Motion based on mere unsupported allegations is insufficient.

43. 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 Amended Motion suggests it is merely a litigation tactic by the Ad Hoc Committee.

44. The Ad Hoc Committee has failed to establish that the appointment of a chapter 11 trustee in these cases is necessary and therefore the Amended Motion should be denied.

CONCLUSION

45. The alleged facts stated in the Amended Motion lack evidentiary support and are incorrect. Many of the issues raised have since been adjudicated by this Court against the Ad

Hoc Committee, and the Ad Hoc Committee 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 Committee (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 Committee's Amended Motion and grant the Debtors such other and further relief, both at law and in equity, to which they may be justly entitled.

Dated: December 3, 2015.

MCKOOL SMITH, P.C.

By: */s/ Hugh M. Ray, III*
Hugh M. Ray, III
State Bar No. 24004246
Christopher D. Johnson
State Bar No. 24012913
Benjamin W. Hugon
State Bar No. 24078702
600 Travis, Suite 7000
Houston, Texas 77002
Tel: 713-485-7300
Fax: 713-485-7344

Counsel for Debtors-in-Possession

CERTIFICATE OF SERVICE

The undersigned certifies that on December 3, 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