

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

**IN RE:**

**HII TECHNOLOGIES, INC., *et al.*,  
Debtors.<sup>1</sup>**

§  
§  
§  
§  
§  
§  
§

**Chapter 11**

**Case No. 15-60070**

**Jointly Administered**

---

**OBJECTION OF THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS TO EXPEDITED AMENDED MOTION TO APPOINT  
CHAPTER 11 TRUSTEE FOR DEBTOR APACHE ENERGY SERVICES LLC**

[Relates to Dkt. No. 222]

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

The Official Committee of Unsecured Creditors of HII Technologies, Inc. (the “Committee”) files this *Objection* (the “Objection”) to the *Expedited Amended Motion of the Ad Hoc Committee of Unsecured Creditors of Apache Energy Services, Inc., to Appoint Trustee* (the “Motion”) [Dkt. No. 222] filed by the “Ad Hoc Committee of Creditors of debtor Apache Energy Services, Inc.”<sup>2</sup> (the “Ad Hoc Group” or “Movant”) and respectfully represents as follows:

**OBJECTION**

1. Appointing a trustee in a chapter 11 case is an extraordinary remedy, and there is a strong presumption that the debtor should remain in possession. *Official Committee of*

---

<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Apache Energy Services, L.L.C. (4404), HII Technologies, Inc. (3686), Aqua Handling of Texas, L.L.C. (4480), Hamilton Investment Group, Inc. (0150), and Sage Power Solutions, Inc. (1210).

<sup>2</sup> 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 Committee takes no position on the authenticity or authority of this “ad hoc” group.

*Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003); *In re Texasoil Ents., Inc.*, 296 B.R. 431, 434 (Bankr. N.D. Tex. 2003). Movants have failed to identify any reason why a trustee should be appointed for Debtor Apache Energy Services, LLC (“AES”) and thus the Motion should be denied.

**A. No conflict of interest exists that would merit appointment of a trustee.**

2. In the Motion, the Movant asserts that there is a conflict of interest between AES and the remaining Debtors, seemingly on two grounds: (a) differing “goals” between AES and the remaining Debtors and (b) apparent intercompany claims.<sup>3</sup> This alleged conflict of interest is entirely predicated on the faulty assumption that AES is viable as a going concern, which has been incessantly asserted and repeatedly rejected.

3. Interdebtor claims or disputes do not create a conflict of interest necessitating the appointment of a trustee. *In re Adelphia Comms. Corp.*, 336 B.R. 610, 658 (Bankr. S.D.N.Y. 2006) (“Adelphia I”) (“[T]here is no basis for a conclusion that the mere presence of interdebtor disputes alone mandates the appointment of a trustee.”). Interdebtor claims are exceedingly common in bankruptcy, and separate estate fiduciaries are unnecessary in such situations. *Adelphia I*, 610 B.R. at 644-654 (collecting cases). In fact, appointment of a trustee would be extraordinarily destructive and unnecessarily costly. *In re Adelphia Comms. Corp.*, 342 B.R. 122, 130 (S.D.N.Y. 2006) (“Adelphia II”) (“[I]f a trustee or other fiduciary were appointed for [one of the] Debtors, other creditor groups would make similar demands, resulting in the ‘[b]alkanization of decisionmaking’ for all Debtors, causing inefficiency, costs, error and delay.”) (quoting *Adelphia I*, 610 B.R. at 640).

---

<sup>3</sup> Also the inexplicable target of the Movant’s ire is Loretta Cross, the Debtors’ court-approved CRO. To the extent that the Movant asserts that Ms. Cross is not disinterested as to AES, such an issue is *res judicata*. The Movant identifies no way in which Ms. Cross is unable to execute her fiduciary duties to all Debtors, including AES, nor do they identify any conflict of interest between Ms. Cross and AES.

4. Movant appears to further suggest that a trustee should be appointed so that he or she could litigate certain claims (*i.e.*, breach of fiduciary duty and fraudulent transfer) against various individuals and entities. A cause of action for breach of fiduciary duty owed to the prepetition debtor belongs to the debtor. *Torch Liquidating Trust ex rel. Bridge Assocs., LLC v. Stockstill*, 561 F.3d 377, 386 (5th Cir. 2009) (citing cases). Similarly, an action for a fraudulent transfer belongs to the debtor. *City Bank v. Compass Bank*, 717 F.Supp.2d 599, 608-09 (W.D. Tex. 2010); *Willis v. Borg-Warner Acceptance Corp. (In re Willis)*, 48 B.R. 295, 298 (S.D. Tex. 1985). Even assuming that the Debtors flatly refused to litigate these or other claims that it might have, that would not constitute grounds for the appointment of a trustee.<sup>4</sup> *Adelphia II*, 342 B.R. at 129. Instead, the Court would have the power to grant derivative standing to the Committee to pursue such claims. *Chinery*, 330 F.3d at 576. Appointing a trustee in lieu of granting the Committee derivative standing in that instance would “amount to replacing the scalpel of a derivative suit with a chainsaw.” *Id.* at 576 (internal citation omitted).

5. Ironically, however, were the Motion to be granted and the Movant’s scheme to be effectuated, *then* a conflict would arise. The “Ad Hoc Group” is hardly representative of the creditors of AES. In fact, at least four of the five members of the Ad Hoc Group are insiders, as defined in 11 U.S.C. § 101(31). By their own admission, Movant’s aim is to “restor[e] Billy Cox and [Brent Mulliniks] as managers of AES business operations.” *Notice of Filing of Proffer of Brent Mulliniks* [sic], at § G [Dkt. No. 202]. Mr. Cox and Mr. Mulliniks are likely targets of lawsuits by the Debtors, including AES, and their planned re-ascension to control of their former company while it is in bankruptcy is inherently improper.

---

<sup>4</sup> The Movant baselessly alleges that “it is neither reasonable nor realistic to expect that HII is likely to spend the time and energy to develop a suit” against certain former officers of the Debtor. *Motion* at ¶ 22. The Committee’s counsel understands that these causes of actions are presently under investigation by the Debtors, directly contradicting Movant’s allegation.

**B. Despite Movant's assertions, the DIP has been decided and its arguments continue to be unfounded**

6. Movant repeatedly refers to the DIP Loan proposed at Docket No. 7, debated at Docket Nos. 42, 80, 81, 82, 86, 104, 141, and 143, and approved by the Court at Docket No. 149 as "proposed." Not only is the DIP loan approved, but it is substantially consummated, with funds being advanced pursuant to its terms on a regular basis.

7. The Movant's obsession with the DIP loan is telling. The fact that the Debtors entered into, and the Court approved, a debtor-in-possession loan facility to which the Movant still objects is not grounds for the appointment of a trustee. Clearly, the Movant's real goal is to circumvent the Court's prior order approving the DIP loan. Movant once again argues, as it did at the hearing on the DIP loan and has done repeatedly in pleadings since then, that AES has a viable chance to reorganize without providing any evidence for such an assertion besides blanket assertions from counsel. *See* Dkt. Nos. 80, 136, 201, and 223. The Movant had every opportunity to present evidence to support its objection to the DIP loan and should not be allowed revisit those issues now.

**C. Movant's remaining arguments are utterly meritless.**

8. The schedules filed in these cases are not atypical. The Debtors have the duty to file their schedules in good faith, but the very fact that, under the Bankruptcy Code, a debtor has a *continuing* duty to amend its schedules recognizes the fact that assets and liabilities known on the date of filing might (and commonly do) vary from those known on the date of confirmation. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384-85 (5th Cir. 2008). To the extent that the Debtors may have untangled or will untangle the complicated intercorporate web of assets and liabilities, the Committee expects that the Debtors will amend their schedules accordingly.

Absent a lack of good faith, which the Movant is unable to show, there is no reason to upend these cases by appointing a trustee merely because this case is evolving as most cases do.<sup>5</sup>

**FORMAL RESPONSE TO MOTION**

9. Paragraph 1 of the Motion states a conclusion of law and does not require a response.

10. The allegations in Paragraph 2 of the Motion are denied.

11. The allegations in Paragraph 3 of the Motion are admitted

12. The Committee admits that debtor HII is the sole owner of AES, as stated in paragraph 4 of the Motion. The remainder of the allegations in Paragraph 4 of the Motion are denied.

13. The Committee lacks sufficient information to determine the nature and extent of intercompany claims among the Debtors. To the extent a further response is necessary, the Committee denies the allegations Paragraph 5 of the Motion.

14. The allegations contained in Paragraph 6 of the Motion are denied.

15. The allegations contained in Paragraph 7 of the Motion are denied.

16. The Committee takes issue with the implications in Paragraph 8 of the Motion that the DIP loan has not yet been approved by the Court or that the Debtors—including AES—have not yet waived their prepetition claims against the DIP lenders. The Committee further points out that the DIP loan was made by more than one lender. To the extent a further response is necessary, the Committee denies the allegations Paragraph 8 of the Motion.

---

<sup>5</sup> For avoidance of doubt, the Committee does not adopt the allegations made by the Movant in paragraphs 17 and 18 of the Motion as factually correct, and in fact believes that many of the statements made are false.

17. The Committee lacks sufficient information to determine what the so-called Ad Hoc Committee believes. To the extent a further response is necessary, the Committee denies the allegations Paragraph 9 of the Motion.

18. Paragraph 10 of the Motion is a statement of the Movant's position and does not require a specific response. To the extent a further response is necessary, the Committee denies the allegations Paragraph 10 of the Motion.

19. The Committee lacks sufficient information to determine the validity of the Movant's characterization of the Hamilton acquisition. To the extent a further response is necessary, the Committee denies the allegations Paragraph 11 of the Motion.

20. The Committee lacks sufficient information to determine whether AES received consideration for the pledge of its assets. To the extent a further response is necessary, the Committee denies the allegations Paragraph 12 of the Motion.

21. The Committee lacks sufficient information to determine what the so-called Ad Hoc Committee believes or the value AES received from or gave to the other Debtors during the time in question. To the extent a further response is necessary, the Committee denies the allegations Paragraph 13 of the Motion.

22. Paragraph 14 of the Motion is a statement of the Movant's position and does not require a specific response. To the extent a further response is necessary, the Committee denies the allegations Paragraph 14 of the Motion.

23. Paragraph 15 of the Motion is a statement of the Movant's position and does not require a specific response. To the extent a further response is necessary, the Committee denies the allegations Paragraph 15 of the Motion.

24. The first two sentences of Paragraph 16 of the Motion state conclusions of law and do not require a response. To the extent that a response is required, the first two sentences of Paragraph 16 are denied. The third sentence of Paragraph 16 is denied.

25. The Committee has not been furnished with a copy of the Letter of Intent referenced in Paragraph 17 of the Motion and therefore cannot provide a specific response to the allegations contained in Paragraph 17. To the extent a further response is necessary, the Committee denies the allegations contained in Paragraph 17.

26. The Committee has not been furnished with a copy of the Letter of Intent referenced in Paragraph 17 of the Motion and therefore cannot provide a specific response to the allegations contained in the first sentence of Paragraph 18 of the Motion. To the extent a further response is necessary, the Committee denies the allegations contained in Paragraph 18.

27. Paragraph 19 of the Motion is little more than argument from counsel. To the extent a specific response is necessary, the Committee denies the allegations contained in Paragraph 19.

28. The allegations in Paragraph 20 of the Motion are denied.

29. The Committee is without knowledge or information to admit or deny the allegations made in Paragraph 21 of the Motion.

30. Paragraph 22 of the Motion is merely speculation and argument from counsel. To the extent a specific response is necessary, the Committee denies the allegations contained in Paragraph 22.

31. Paragraph 23 of the Motion contains a request for relief and argument of counsel and does not require a specific response. To the extent a further response is necessary, the Committee denies the allegations contained in Paragraph 23.

32. Paragraph 24 of the Motion states conclusions of law and does not require a response. To the extent that a response is required, the allegations in Paragraph 24 are denied.

33. Paragraph 25 of the Motion is a summary of the Movant's argument and does not require a specific response. To the extent a further response is necessary, the Committee denies the allegations contained in Paragraph 25.

WHEREFORE the Official Committee of Unsecured Creditors of HII Technologies, Inc., *et al.* respectfully requests that the Court deny the Motion and grant such other and further relief to which the Committee may be entitled.

Date: December 4, 2015

Respectfully submitted,

LOCKE LORD LLP

By: /s/ W. Steven Bryant

W. Steven Bryant

State Bar No. 24027413

Federal I.D. No. 32913

Elizabeth M. Guffy

State Bar No. 08592525

Steven W. Golden

Federal Bar No. 2650080

600 Travis Street, Suite 2800

Houston, Texas 77002

Phone: (713) 226-1489

Fax: (713) 229-2536

sbryant@lockelord.com

eguffy@lockelord.com

steven.golden@lockelord.com

ATTORNEYS FOR THE OFFICIAL  
COMMITTEE OF UNSECURED  
CREDITORS OF HII TECHNOLOGIES,  
INC., *ET AL.*



**CERTIFICATE OF SERVICE**

I certify that, on December 4, 2015, a true and correct copy of the foregoing *Objection to the Expedited Amended Motion of the Ad Hoc Committee of Unsecured Creditors of Apache Energy Services, Inc., to Appoint Trustee* was served via ECF on all parties who receive service in these Bankruptcy Cases via electronic case filing.

/s/ Elizabeth M. Guffy  
Elizabeth M. Guffy

**CERTIFICATE OF CONFERENCE**

I certify that, on December 2, 2015, the Committee and the Movant's counsel met and discussed the relief requested in the Motion and could not reach an agreement.

/s/ Elizabeth M. Guffy  
Elizabeth M. Guffy