

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION**

In re:	§	Chapter 11
	§	
HII TECHNOLOGIES, INC., <i>et al.</i>¹	§	15-60070 (DRJ)
Debtors	§	(Jointly Administered)

**DEBTORS' MOTION TO APPROVE COMPROMISE WITH
THE TEXAS COMPTROLLER AND THE LENDERS**

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 THIS 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.

HII Technologies, Inc. ("HII") and its subsidiaries, as debtors and debtors-in-possession in these chapter 11 cases (collectively, the "Debtors"), files this motion (the "Motion") to approve a compromise and settlement with the Texas Comptroller of Public Accounts (the

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).

“Comptroller”), Heartland Bank (“Heartland”) and McLarty Capital Partners SBIC, L.P. (“MCP,” and collectively with Heartland, the “Lenders”), and respectfully states as follows:

Summary

1. In the months leading up the commencement of these cases, the Debtors’ finances were in disarray. Their CFO was removed for cause, and they were in default with their Lenders. The Debtors had limited cash to operate. As a result, they did not timely pay their sales tax. Compounding the problem, the Debtors’ major customer provided tax exempt status documentation leading to confusion over the amount of sales tax due the Comptroller. In an effort to resolve the Debtors’ pre-petition sales tax liability, the Debtors, the Lenders and the Comptroller have engaged in extensive negotiations. Those negotiations have resulted in the settlement described in this motion – the payment by the Debtors to Comptroller of \$143,261.26 for pre-petition sales taxes for the periods of May 2015 through August 2015, \$19,035.37 for sales tax for the pre-petition and post-petition period of September 2015, and the mutual releases of the claims between the Comptroller, on the one hand and the Debtors and the Lenders, on the other hand, that such parties may have against each other related to the Debtors’ pre-petition sales tax liability.

Jurisdiction and Venue

2. This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue of the Debtors’ chapter 11 cases (the “Chapter 11 Cases”) in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

3. The statutory predicate for the relief sought is Rule 9019 of the Bankruptcy Rules.

Background

4. On September 18, 2015 (the “Petition Date”), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, with the United States Bankruptcy Court for the Southern District of Texas, Victoria Division (the “Bankruptcy Court”).

5. This court approved the Debtors’ motion requesting joint administration of these chapter 11 cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) on September 21, 2015 [Dkt. No. 18].

6. On September 29, 2015, the United States Trustee for the Southern District of Texas filed the Notice of the Appointment of Committee of Unsecured Creditors (the “Committee”) in these bankruptcy cases [Dkt. No. 69].

7. The Debtors continue to administer their assets as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

Summary of the Sales Tax Dispute

8. Prior to June 2015, the Debtors were current in their sale tax obligations to the Comptroller. In June, the Debtors filed their May sales tax return. The Debtors did not remit the full amount of sales taxes owed in anticipation of receiving the tax exempt documentation from their largest customer.

9. The Debtors failed to timely file their June, July and August 2015 sales tax returns. After Loretta Cross was appointed chief restructuring officer on July 30, 2015, the Debtors filed initial sales tax returns for those months. These initial returns showed the Debtors owed approximately \$347,000 in sales taxes. The Debtors subsequently filed amended sales tax returns showing a principal amount of \$143,261.26 due to the Comptroller.

10. The Debtors also failed to timely file their September 2015 sales tax return due on October 20, 2015. On or about November 23, 2015, the Debtors filed the September 2015 return showing principal, penalty and interest liability in the amount of \$19,035.37. This amount remains outstanding.

11. The Comptroller asserts that, with penalties and interest, the total sales tax liability due for the periods of May 2015 through September 2015 is approximately \$220,000. The Comptroller has made demand on both the Debtors and Heartland.

12. The Comptroller asserts that the Debtors and/or Heartland owe the Comptroller between \$143,261.26 and \$200,000 for pre-petition sales taxes for the periods of May 2015 through August 2015 and \$19,035.37 for sales tax for the period of September 2015.

Terms of the Compromise

13. The Debtors, the Lenders and the Comptroller have reached an agreement, subject to this court's approval, to resolve all disputes related to the Debtors' pre-petition sales tax liability. A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit A** and incorporated herein by reference.

14. The terms of the compromise are as follows:²

- a. Within 10 days of the entry of an order approving this Motion, the Debtors shall pay \$143,261.26 to the Comptroller for the pre-petition sales taxes owed for the periods of May 2015 through August 2015 (the "Pre-petition Tax Payment");
- b. Additionally, within 10 days of the entry of an order approving this Motion, the Debtors shall pay \$19,035.37 to the Comptroller for the sales taxes owed for September 2015 (the "September Payment" collectively with the Pre-petition Tax Payment, the "Settlement Payment");

² To the extent the terms of the Motion and the Settlement Agreement are inconsistent, the terms of the Settlement Agreement control.

- c. Upon receipt of the Settlement Payment, the Comptroller releases all claims against the Lenders, the Debtors and the Debtors' estates for sales tax obligations incurred or owed by the Debtors to the State of Texas prior to the Petition Date;
- d. Upon receipt of the Settlement Payment by the Comptroller, the Lenders release all claims against the Comptroller for claims related to Debtors' pre-petition sales tax obligations owed to the Comptroller;
- e. Upon receipt of the Settlement Payment by the Comptroller, the Debtors and the Debtors' estates release all claims against the Comptroller for claims related to Debtors' pre-petition sales tax obligations owed to the Comptroller;
- f. The Debtors shall file their 2015 franchise tax returns no later than 10 days after the entry of an order approving this Motion. The Comptroller shall apply the \$13,766.93 credit it holds in favor of the Debtors to the Debtors' 2015 franchise tax, penalty and interest obligations; and in the event the Debtors' 2015 franchise tax, penalty and interest obligations are less than \$13,766.93 the Comptroller shall return the remaining balance to the Debtors.
- g. Debtors shall continue to deposit all sales taxes collected post-petition directly into the Sales Tax Account and within 48 hours of Debtors' receipt of the monthly statement for the Sales Tax Account, Debtors will provide a copy via email to counsel for the Comptroller by email to Courtney.Hull@texasattorneygeneral.gov.
- h. Debtors shall file their sales tax and franchise tax returns and make payment of post-petition taxes owed to Comptroller on a timely basis as required by state law and by 28 U.S.C. §§ 959(b) and 960.
- i. This compromise, and the payments and releases described, is contingent upon the Bankruptcy Court entering an order, which subsequently becomes a final, non-appealable order.
- j. The Sales Tax Claims do not include future collections on Apache Energy Services' outstanding receivables. With respect to any future collections of Apache Energy Services' outstanding receivables on which sales tax is owed, the Comptroller will be entitled to 8.25% of the amount received net of the costs of collection.

Basis for Relief

15. Bankruptcy Rule 9019(a) permits a bankruptcy court to approve a compromise or settlement. The standard for the approval of a compromise under Bankruptcy Rule 9019(a) is well settled – the compromise must be “fair and equitable and in the best interest of the estate.” *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d 349, 355 (5th Cir. 1997). In analyzing a proposed settlement, a court should seek to determine whether the proposed compromise falls within the reasonable range of litigation possibilities. *In re Energy Corp. Inc.*, 886 F.2d 921, 929 (7th Cir. 1989).

16. The United States Supreme Court has established the following factors for a court to weigh in determining the reasonableness of any compromise or settlement:

- a. the probabilities of ultimate success should the dispute be litigated;
- b. an educated estimate of (i) the complexity, expense, and likely duration of the litigation, (ii) possible difficulties of collecting on any judgment that might be obtained, and (iii) all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise; and
- c. the comparison of the terms of the settlement with the likely rewards of litigation.

Protective Comm. For the Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968).

17. Based on their amended sales tax returns the Debtors believe that, even if successful, they would owe the Comptroller \$143,261.26 for the periods of May 2015 through August 2015 and \$19,035.37 for the period of September 2015. Alternatively, if the Comptroller were to successfully recover from the Lenders, the Debtors could have exposure for amounts the Lenders were forced to pay. The Debtors believe there is very little to be gained by litigating this dispute with the Comptroller.

18. This multi-party dispute of tax and contract claims would take several months, and cost the estates a significant amount, which they do not have.

19. Comparing the risks to the possible rewards, the compromise set out in this Motion is in the best interests of the estates.

NOTICE

20. The Debtors will provide notice of this Motion to all parties on the Debtors' Master Service List. The Debtors submit that no further notice of this Motion is required.

WHEREFORE, the Debtors respectfully request that the Court enter an order, (a) approving the compromise set forth in this Motion, (b) authorizing the Debtors to pay the Comptroller the Settlement Payment in exchange for a release of all pre-petition sales tax obligations, (c) approving the releases set forth in this Motion, and (d) granting such further relief as may be just and necessary under the circumstances.

Respectfully submitted this 23rd day of December 2015.

McKool Smith, P.C.

By: /s/ Benjamin W. Hugon

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Christopher D. Johnson
State Bar No. 24012913
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Counsel for the Debtors-in-Possession

CERTIFICATE OF SERVICE

The undersigned certifies that on December 23, 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/ Benjamin W. Hugon

Benjamin W. Hugon

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into by and between HII Technologies, Inc., Apache Energy Services, LLC, Aqua Handling of Texas, LLC, Sage Power Solutions, Inc. f/k/a KMHVC, Inc., and Hamilton Investment Group, Inc. (collectively, the "Debtors"), Heartland Bank and McLarty Capital Partners SBIC, L.P. (collectively, the "Lenders") and the Texas Comptroller of Public Accounts (the "Comptroller") who, by so executing this Agreement, respectively agree to be bound by each of its terms, conditions and obligations.

RECITALS

WHEREAS, on September 18, 2015 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code with the U.S. Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court"), thereby commencing Case No. 15-60070-DRJ-11 (jointly administered) with the Bankruptcy Court (the "Bankruptcy Case"); and

WHEREAS, the Comptroller has made demand on the Debtors and the Lenders for the payment of certain alleged sales tax liability plus penalties and interest for the periods of May, June, July, August and September 2015 (the "Sales Tax Claims"); and

WHEREAS, the Debtors and the Lenders have asserted certain defenses to the Sales Tax Claims; and

WHEREAS, the Debtors, the Lenders and the Comptroller (collectively, the "Parties") wish to resolve the disputes between them in order to avoid the costs and uncertainties of litigation; and

WHEREAS, the Debtors are filing their Motion to Approve Compromise with the Texas Comptroller and the Lenders (the "Settlement Motion").

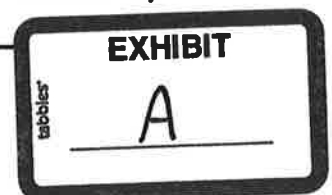
NOW, THEREFORE, in consideration of the promises, covenants and representations set forth herein, the sufficiency of which is hereby acknowledged and confessed, the Parties hereby expressly agree as follows:

TERMS OF SETTLEMENT

A. Payment Terms and Releases

1. Settlement Payment.

- a. Within ten (10) days of the entry of an order approving the Settlement Motion, the Debtors shall pay \$143,261.26 to the Comptroller for the pre-petition sales taxes owed for the periods of May 2015 through August 2015 (the "Pre-petition Tax Payment");
- b. Within ten (10) days of the entry of an order approving the Settlement Motion, the Debtors shall pay \$19,035.37 to the Comptroller for the sales taxes owed for September 2015 (the "September Payment") collectively



with the Pre-petition Tax Payment, the "Settlement Payment").

2. Release of the Lenders. Upon the receipt of the Settlement Payment, the Comptroller hereby releases the Lenders and each of their predecessors, successors, parents, subsidiaries, affiliates, assigns, partners, officers, employees, representatives, and agents (collectively, the "Lender Parties") from any and all actions, omissions, duties, obligations, liabilities, losses, causes of action, debts, accounts, covenants, agreements, promises, damages, claims, demands, fees and costs of any nature whatsoever, in law or in equity, whether direct or contingent, asserted or unasserted, known or unknown, suspected or unsuspected, choate or inchoate, which the Comptroller ever had, now has, or can, shall or may have or hold against the Lender Parties, that arise out of, are based upon, could have been asserted, involve, relate to, or concern in any way, the Sales Tax Claims and any pre-petition sales taxes owed to the Comptroller by the Debtors; *provided, however*, that said release shall not constitute nor be deemed to constitute a release or waiver of any of the rights obtained by, or any of the obligations imposed upon, the Parties pursuant to this Agreement.

3. Release of the Debtors. Upon receipt of the Settlement Payment, the Comptroller hereby releases the Debtors, their Estates and each of their predecessors, successors, parents, subsidiaries, affiliates, assigns, partners, officers, employees, representatives, and agents from any and all actions, omissions, duties, obligations, liabilities, losses, causes of action, debts, accounts, covenants, agreements, promises, damages, claims, demands, fees and costs of any nature whatsoever, in law or in equity, whether direct or contingent, asserted or unasserted, known or unknown, suspected or unsuspected, choate or inchoate, which the Comptroller ever had, now has, or can, shall or may have or hold against the Debtor Parties that arise out of, are based upon, could have been asserted, involve, relate to, or concern in any way, the Sales Tax Claims and any pre-petition sales taxes owed to the Comptroller by the Debtors; *provided, however*, that said release shall not constitute nor be deemed to constitute a release or waiver of any of the rights obtained by, or any of the obligations imposed upon, the Parties pursuant to this Agreement.

4. Release of Comptroller. Upon the Comptroller's receipt of the Settlement Payment, the Debtors and the Lenders hereby release the Comptroller and its employees, representatives, and agents (the "Comptroller Parties") from any and all actions, omissions, duties, obligations, liabilities, losses, causes of action, debts, accounts, covenants, agreements, promises, damages, claims, demands, fees and costs of any nature whatsoever, in law or in equity, whether direct or contingent, asserted or unasserted, known or unknown, suspected or unsuspected, choate or inchoate, which the Debtors and/or Lenders ever had, now have, or can, shall or may have or hold against the Comptroller Parties that arise out of, are based upon, could have been asserted, involve, relate to, or concern in any way, the Sales Tax Claims and any pre-petition sales taxes owed to the Comptroller by the Debtors, including, but not limited to, the Debtors' rights to request a sales tax refund for any pre-petition tax periods; *provided, however*, that said release shall not constitute nor be deemed to constitute a release or waiver of any of the rights obtained by, or any of the obligations imposed upon, the Parties pursuant to this Agreement.

5. The Debtors shall file their 2015 franchise tax returns no later than 10 days after the entry of an order approving this Motion. The Comptroller shall apply the \$13,766.93 credit it holds in favor of the Debtors to the Debtors' 2015 franchise tax, penalty and interest obligations;

and in the event the Debtors' 2015 franchise tax, penalty and interest obligations are less than \$13,766.93 the Comptroller shall return the remaining balance to the Debtors.

6. Debtors shall continue to deposit all sales taxes collected post-petition directly into the Sales Tax Account and within 48 hours of Debtors' receipt of the monthly statement for the Sales Tax Account, Debtors will provide a copy via email to counsel for the Comptroller by email to Courtney.Hull@texasattorneygeneral.gov.

7. Debtors shall file their sales tax and franchise tax returns and make payment of post-petition taxes owed to Comptroller on a timely basis as required by state law and by 28 U.S.C. §§ 959(b) and 960.

8. This compromise, and the payments and releases described, is contingent upon the Bankruptcy Court entering an order, which subsequently becomes a final, non-appealable order.

B. General Provisions

1. No Admissions. The Parties understand and acknowledge that this Agreement is in compromise of disputed claims and defenses. Therefore, neither this Agreement, nor any of its provisions, shall constitute, or be deemed to constitute, an admission as to liability on any of the claims referenced herein, the viability of any defenses to such claims, or otherwise.

2. Warranty of Authority. Each of the signatories hereto hereby warrants that he/she has the authority to execute this Agreement on behalf of the Party for whom he is signing.

3. Ownership of Claims. The Comptroller represents that it is the owner of all claims asserted with regard to the Sales Tax Claims and any other pre-petition claims based on sales tax owed by the Debtors.

4. Entire Agreement. This Agreement is the complete and final agreement of the Parties as to all of the matters set forth herein, and supersedes all previous and contemporaneous agreements, promises, covenants, negotiations, discussions, understandings and representations by and/or between the Parties, all of which have become merged and integrated into this Agreement. The Parties hereby acknowledge that there are no other written or oral agreements between them concerning the matters set forth in this Agreement.

5. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties' respective heirs, representatives, successors and assigns.

6. Terms Understood. Each Party represents that prior to execution of this Agreement, such Party was fully informed of its terms, contents, conditions and effects, and that such Party had the benefit and advice of counsel of its own choosing in entering into this Agreement. Each Party further represents that it relied solely and exclusively on its own judgment and the advice of its own counsel in entering into this Agreement.

7. Governing Law. This Agreement shall be governed by and interpreted pursuant to the laws of the State of Texas. The Bankruptcy Court shall retain exclusive jurisdiction, to the greatest extent permitted by law, over any and all disputes regarding this Agreement, its interpretation and its enforcement.

8. Headings. Sections, subheadings and titles used in this Agreement are for convenience only and shall not affect interpretation of this Agreement.

9. Modifications. This Agreement shall not be modified except by an instrument in writing signed by the Party against whom the enforcement of any modification is sought.

10. Counterparts. The Parties may execute this Agreement in multiple counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute but one and the same instrument. The facsimile or PDF image of an originally-signed signature page shall serve as, and constitute, an originally-executed copy of such signature page.

11. Future Collections. The Sales Tax Claims do not include future collections on Apache Energy Services' outstanding receivables. With respect to any future collections of Apache Energy Services' outstanding receivables on which sales tax is owed, the Comptroller will be entitled to 8.25% of the amount received net of the costs of collection.

SO EXECUTED as of this ____ day of December, 2015.

Heartland Bank

McLarty Capital Partners SBIC, LP

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

HII Technologies, Inc.

Apache Energy Services, LLC

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Aqua Handling of Texas, LLC

Sage Power Solutions, Inc. f/k/a KMHVC, Inc.

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Hamilton Investment Group, Inc.

Texas Comptroller of Public Accounts

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____