

**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 OF THE DIP LENDERS TO
EXPEDITED MOTION TO EXTEND 90 DAY CHALLENGE DEADLINE**

[Relates to Docket No. 280]

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

Heartland Bank and McLarty Capital Partners SBIC, L.P. (collectively, the “**DIP Lenders**”)², by and through their undersigned counsel, file their objection (the “**Objection**”) to the *Expedited Motion to Extend 90 Day Challenge Deadline* [Docket No. 280] (the “**Motion to Extend**”) filed by the self-styled “Ad Hoc Committee of Creditors of Apache Energy Services, Inc.”³ (the “**Ad Hoc Group**”) and respectfully represent as follows:

OBJECTION

1. The Motion to Extend should be denied because the Ad Hoc Group has failed to carry its heavy burden of seeking the extraordinary remedy of extending the Challenge Deadline, which was (a) negotiated at arm’s length and consensually agreed and relied upon by the DIP Lenders, the Debtors, and the Official Committee of Unsecured Creditors, and (b) approved by

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 Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to such terms in the *Final Order Approving the Debtors’ Emergency Motion for Entry of Interim and Final Orders (a) Authorizing Postpetition Financing; (b) Authorizing Use of Cash Collateral; and (C) Granting Adequate Protection to the DIP Lenders* [Docket No. 149] (the “**Final DIP Order**”).

³ This is the name the Ad Hoc Group has given itself in the Motion to Extend. The group is comprised of Brent Mulliniks, Billy Cox, One Flow Energy Services, LLC, Black Gold Energy LLC, and Fields Water Services, LLC. The DIP Lenders take no position on the authenticity or authority of the Ad Hoc Group.

this Court under the Final DIP Order. At this point, the Challenge Deadline expired on December 17, 2015, and the Ad Hoc Group (as well as all other parties in interest) is forever barred under this Court's Final DIP Order from asserting any claims against the Debtors' secured prepetition lenders arising from their prepetition relationship with the Debtors.

2. Under the Final DIP Order approving the DIP Facility, the Court set December 17, 2015 as the Challenge Deadline for the Official Committee of Unsecured Creditors, as the representative of these Debtors' estates, to investigate the Debtors' prepetition transactions and, if appropriate, to assert any claims against the Debtors' secured prepetition lenders. The Official Committee of Unsecured Creditors conducted its investigation and determined that these Debtors' estates have no colorable claims against the Debtors' secured prepetition lenders.⁴ As a result, no claims against the Debtors' secured prepetition lenders were asserted before the expiration of the Challenge Deadline, as set forth under this Court's Final DIP Order.

3. By filing its Motion to Extend, the Ad Hoc Group asks this Court to extend the Challenge Deadline and, in effect, to convey the right to investigate and assert any alleged claims of these Debtors' estates from the Official Committee of Unsecured Creditors to the unofficial Ad Hoc Group. The Motion to Extend is styled as an "expedited" motion, but the Ad Hoc Group made no attempt to obtain expedited consideration of the matter. In fact, the Ad Hoc Group unilaterally decided to forego the opportunity for an expedited hearing, made no request for an order to show cause, and did not obtain a bridge order. Rather, at the hearing held before this Court on the Debtors' motion to sell certain assets, and in response to this Court's inquiry

⁴ See Objection of United States Trustee to Motion to Appoint Official Creditors' Committee for Debtor Apache Energy Services, LLC at ¶ 32 [Docket No. 306] (stating that the Debtors' Official Committee of Unsecured Creditors considered any alleged claims against Heartland Bank (including fraudulent conveyance, equitable subordination, and preference claims under chapter 5 of the Bankruptcy Code, which had been contended by the Ad Hoc Group) and "decided not to pursue them." (citing a letter from Locke Lord LLP to the Office of the United States Trustee dated December 18, 2015, annexed thereto as Exhibit "D")).

concerning the notice and procedure related to the Motion to Extend, the Ad Hoc Group requested that its Motion to Extend be reset from an earlier setting provided by the Court to January 7, 2016.

4. Consequently, while the members of the Ad Hoc Group have known about the Challenge Deadline for months⁵ and knew, or should have known, about the Challenge Deadline since the date the Debtors filed their motion for approval of the Final DIP Order and approval of the Challenge Deadline on a final non-reversible basis under this Court's Final DIP Order on October 14, 2015, the Ad Hoc Group delayed in filing the Motion to Extend until December 11, 2015 (a mere six days before the expiration of the Challenge Deadline) and did not set the matter for a hearing until after the expiration of the Challenge Deadline. If the Ad Hoc Group were sufficiently diligent, it would have asked the Court for expedited consideration of its Motion to Extend before the expiration of the Challenge Deadline instead of acting in a dilatory manner. At this point, however, the matter has become moot and cannot be revived. *See* 11 U.S.C. Section 364(e).

5. It is the DIP Lenders' position that under the Final DIP Order, no alleged claims of these Debtors' estates can be asserted against the Debtors' secured prepetition lenders after the expiration of the Challenge Deadline. Thus, the Ad Hoc Group is forever barred from asserting any alleged claims against the Debtors' secured prepetition lenders arising from their prepetition relationship with the Debtors. During the course of the Debtors' chapter 11 cases, the Challenge Deadline was negotiated in good faith by the DIP Lenders with the Debtors and the Official Committee of Unsecured Creditors and was consensually extended (from its original terms) and agreed upon by these parties and approved by this Court under the Final DIP Order entered on

⁵ *See, e.g.*, Docket No. 201.

October 14, 2015. The Official Committee of Unsecured Creditors had sufficient time to investigate the Debtors' prepetition transactions with the Debtors' secured prepetition lenders and never requested a further extension of the Challenge Deadline, which expired on December 17, 2015. Moreover, the Official Committee of Unsecured Creditors determined prior to expiration of the Challenge Deadline that there are no colorable claims against the Debtors' secured prepetition lenders to pursue. Accordingly, the Challenge Deadline expired under the Final DIP Order on December 17, 2015, thereby releasing the Debtors' secured prepetition lenders from all claims which might have ever existed against them in connection with the Debtors' prepetition transactions.

6. All parties in interest, including the Debtors' prepetition lenders, the DIP Lenders, the Official Committee of Unsecured Creditors, and the Debtors, relied upon the terms of the DIP Facility approved under the Final DIP Order. The DIP Lenders would not have agreed to provide the DIP Facility in the absence of the Challenge Deadline approved by this Court under the Final DIP Order. Indeed, the DIP Lenders respectfully submit that no secured lender would ever provide a postpetition DIP Facility to a debtor unless any and all claims of the debtor's estate against the secured lender are forever barred after the expiration of a period to investigate and assert any claims against the lender. Thus, granting the relief requested by the Ad Hoc Group under the circumstances of these Debtors' chapter 11 cases would set a terrible precedent. The importance of the permanence of DIP financing orders that lenders rely upon in lending is codified in Section 364(e) of the Bankruptcy Code for this very reason.

7. Further, the Motion to Extend should be denied because it is not supported by a single case, it is not based on any admissible evidence, and constitutes an impermissible collateral attack on this Court's Final DIP Order. The relief sought by the Ad Hoc Group under

the Motion to Extend is extraordinary. Yet, the Motion to Extend is allegedly based solely on Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, without support of a single case. The Ad Hoc Group has failed to satisfy its burden to show “good cause,” much less any cause at all, for the relief requested. *See* Fed. R. Bankr. P. 9006(b)(1) (requiring that “cause [be] shown” for extension); *see also, e.g.*, Fed. R. Civ. P. 16(d) (providing that “A schedule shall not be modified except upon a showing of good cause and by leave of the district judge.”); *Reliance Ins. Co. v. La. Land & Exploration Co.*, 110 F.3d 253, 257, 258 (5th Cir. 1997) (stating that “Fed. R. Civ. P. 16(b) allows a scheduling modification only for good cause” and that district courts maintain the “power to control their dockets by refusing to give ineffective litigants a second chance to develop their case.”); *Forge v. City of Dallas*, No. 03-CV-0256, 2004 WL 1243151, at *2 (N.D. Tex. June 4, 2004) (stating that “[t]he ‘good cause’ standard focuses on the diligence of the party seeking a modification of the scheduling order.”) (citations omitted); *Am. Tourmaline Fields v. Int’l Paper Co.*, No. 96-CV-3363, 1998 WL 874825, at *1 (N.D. Tex. Dec. 7, 1998) (stating that mere inadvertence on the part of the movant, and the absence of prejudice to the non-movant, are insufficient to establish “good cause” and that **“the movant must show that, despite his diligence, he could not have reasonably met the scheduling deadline.”** (emphasis added) (citing *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990))).

8. The Motion to Extend should be denied in light of the prejudice to the DIP Lenders, as well as the delay and potential costs to these Debtors’ estates. The Ad Hoc Group filed its Motion to Extend almost two months after the Final DIP Order was entered by this Court, and just a mere six days before the expiration of the Challenge Deadline. As such, the prejudice to the DIP Lenders, who relied upon the Final DIP Order and provided the DIP Facility to the Debtors’ estates pursuant to the terms of the Final DIP Order, and the delay in filing the

Motion to Extend should be weighted by this Court against the relief requested. Moreover, the costs associated with the consequences of granting the relief requested under the Motion to Extend cannot be ignored or underestimated, as further explained below. In contrast, while the Ad Hoc Group stated its intention to request an official committee of creditors for AES at the final DIP hearing, it inexplicably waited for roughly two months before making a formal request for such a committee,⁶ and the Ad Hoc Group has failed to establish that the relief requested, if granted, will benefit the Debtors' estates or their unsecured creditors.

9. In addition, this Court should deny the Motion to Extend because the Ad Hoc Group is not an appropriate party in interest that should be granted authority and standing to investigate and prosecute these estates' claims – the authority and standing has been properly vested in the Official Committee of Unsecured Creditors under the Final DIP Order and should not be usurped by an unofficial ad hoc group that does not act for the benefit of all unsecured creditors of these Debtors.⁷ Moreover, granting the relief requested by the Ad Hoc Group would hamper the ability of the various constituencies, including the Debtors, DIP Lenders and the Official Committee of Unsecured Creditors, to negotiate and reach a compromise in these Debtors' chapter 11 cases. Granting the relief requested by the Ad Hoc Group would also cause an immediate default under the Debtors' DIP Facility provided by the DIP Lenders and approved by this Court's Final DIP Order. Without access to cash and funds provided by the DIP Lenders under the DIP Loan or alternative financing, these Debtors would be unable to: (a) operate their

⁶ See Docket No. 287 (filed 12/14/2015).

⁷ See Objection of United States Trustee to Motion to Appoint Official Creditors' Committee for Debtor Apache Energy Services, LLC at ¶ 15 [Docket No. 306] (stating that the Ad Hoc Group's Joint Verified Statement does not include a copy of the instruments, if any, authorizing the Ad Hoc Group to act for creditors and authorizing Pendergraft & Simon LLP and the Kennedy Firm to represent the Ad Hoc Group).

businesses; (b) complete their restructuring goals; and (c) propose a confirmable chapter 11 plan. For the foregoing reasons, the Motion to Extend should be denied.

RESERVATION OF RIGHTS

10. The DIP Lenders reserve their rights to supplement or amend this Objection to further address or object to the Motion to Extend and any related matter and to respond to any response or objection either by further submissions to this Court, at oral argument, or by testimony to be presented at any hearing.

CONCLUSION

Accordingly, and for the foregoing reasons, the DIP Lenders respectfully request that the Court deny the Ad Hoc Group's Motion to Extend.

Dated: December 30, 2015.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on December 29, 2015, the undersigned transmitted correspondence via email to Leonard Simon, counsel of record for the Ad Hoc Group, explaining that the DIP Lenders are opposed to the extension of the Challenge Deadline requested in the Motion to Extend and attempting to confer further on the matter. As of the filing of this Objection, Mr. Simon has not yet responded to such correspondence and the matter has not been resolved.

/s/ E. Lee Morris

E. Lee Morris

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of December, 2015, a true and correct copy of the foregoing pleading was served (i) electronically through the Court's ECF transmission facilities on all parties registered to receive ECF notice in this case, (ii) by electronic email transmission on all parties listed on the attached Master Service List with an email address, and (iii) by U.S. first class mail, postage prepaid, on all parties listed on the attached Master Service List without an email address.

/s/ E. Lee Morris

E. Lee Morris

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Case No. 15-60070 (DRJ)
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(as of December 16, 2015)

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**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 DENYING EXPEDITED MOTION TO
EXTEND 90 DAY CHALLENGE DEADLINE**

[Related to Docket No. 280]

CAME ON FOR CONSIDERATION the *Expedited Motion to Extend 90 Day Challenge Deadline* [Docket No. 280] (the “**Motion to Extend**”) filed by the “Ad Hoc Committee of Creditors of Apache Energy Services, Inc.” The Court, having considered the Motion, the objections and other responses of parties in interest thereto, including, without limitation, the *Objection of the DIP Lenders to Expedited Motion to Extend 90 Day Challenge Deadline* filed by Heartland Bank and McLarty Capital Partners SBIC, L.P., the evidence presented, and the arguments of counsel, finds that the Motion to Extend lacks merit and should be denied. It is therefore:

ORDERED, ADJUDGED AND DECREED that the Motion to Extend be and is hereby, and in all respects, DENIED.

SIGNED _____

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).