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

Case No. 15-60070
Chapter 11

IN RE:

HII TECHNOLOGIES, INC., *et al.*

Debtors.

THE HAMILTON CREDITORS' COMBINED OBJECTIONS TO DEBTORS' THIRD AMENDED JOINT PLAN OF REORGANIZATION

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William Mark Hamilton ("Mark Hamilton"), Sharon K. Hamilton ("Sharon Hamilton"), S & M Assets, LLC ("S & M Assets"), William Craig Hamilton ("Craig Hamilton"), and H2 Services, LLC ("H2 Services") (collectively, the "Hamilton Creditors") submit the following objections to the Debtors' Third Amended Joint Plan of Reorganization. In support thereof, the Hamilton Creditors show the Court as follows:

INTRODUCTION

Debtors Apache Energy Services, LLC, Aqua Handling of Texas, LLC, HII Technologies, Inc. ("HII"), Sage Power Solutions, Inc., and Hamilton Investment Group, Inc. ("HIG") (collectively, the "Debtors") filed voluntary, joint petitions for relief under Chapter 11 of the Bankruptcy Code on September 18, 2015 (the "Petition Date"). Since that time, each has continued to operate its business and manage its property as a debtor-in-possession pursuant to sections 1107 and 1108 of title 11 of the United States Code (the "Bankruptcy Code"). Debtors filed their Amended Joint Plan of Reorganization and First Amended Disclosure Statement in Support of Joint Amended Plan of Reorganization ("Disclosure Statement") on March 4, 2016. The Debtors have since

filed a Third Amended Joint Plan of Reorganization on April 5, 2016 ("Plan of Reorganization" or "Plan").

Through Chapter 11 reorganization, Debtors seek to transform a multi-million dollar oilfield services operation into a reorganized entity with annual gross revenues of less than $200,000, and projected operational cash flow of less than $50,000 a year. The Debtors' minimal revenue projections are almost entirely dependent on *future* equipment leases, and these speculative projections are wholly untethered to any realistic effort to stave off a future liquidation.

This proposed plan of continued viability and operation fails on its face to present a reasonable plan to address the claims of the secured and unsecured creditors, and should be denied on this basis alone. Extinguishing the many millions of dollars of claims of the secured and unsecured creditors through bankruptcy, and then allowing that company and its CEO to continue on as a low-dollar equipment rental company, yet to borrow another $500,000 to finance contingent, unsupported and completely speculative litigation, is not the foundation of what Chapter 11 was designed to promote. For that reason, and the reasons stated below, the Court should deny the proposed Plan of Reorganization, and convert this matter to a Chapter 7 liquidation proceeding.

ARGUMENT

The Court should deny confirmation of the Debtors' Plan of Reorganization because the Debtors have not and cannot satisfy the requirements of the Bankruptcy Code. Because the Hamilton Creditors object to the confirmation of the Debtors' Plan of Reorganization, the Debtors bear the burden of proving each of the requirements set forth

in § 1129 of the Bankruptcy Code by a preponderance of the evidence. *See Heartland Fed. Sav. & Loan Ass'n Enters. v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1163 (5th Cir. 1993).

As is set explained separately below, the Hamilton Creditors object to the Debtors' Plan of Reorganization because:

1. substantive consolidation of the Debtors' estates is unwarranted and prejudicial to the Hamilton Creditors;

2. the Plan is prejudicial to the Hamilton Creditors because they are mischaracterized as insiders of HII;

3. the Debtors' proposed Convenience Class is simply an attempt at gerrymandering because the same is neither reasonable nor necessary given the finite number of claims involved in these proceedings;

4. the Plan is not feasible because the Debtors' successful reorganization is predicated on a litigation recovery that is speculative at best and where the Debtors have arbitrarily and unreasonably limited their probable sources of recovery;

5. the Plan unfairly discriminates against creditors of the same priority; and

6. the Plan is not proposed in good faith.

I. Substantive Consolidation of the Debtors' Estates is Unwarranted

The Hamilton Creditors object to the Debtors' request that these jointly administered cases be substantively consolidated because the same is an extreme remedy, unwarranted by the facts of these cases, and because substantive consolidation is prejudicial to the Hamilton Creditors with respect to their plan confirmation voting rights under the Bankruptcy Code.

Substantive consolidation is a mechanism for administering the bankruptcy estates of multiple, related entities. *In re Ark–La–Tex Timber Co.*, 482 F.3d 319, 327 n. 6 (5th

Cir. 2007). "Fundamentally, substantive consolidation occurs when the assets and liabilities of separate and distinct legal entities are combined in a single pool and treated as if they belong to one entity." *Clyde Bergemann, Inc. v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.),* 250 F.3d 955, 959 (5th Cir. 2001) (quoting 1 William L. Norton Jr., Norton Bankruptcy Law and Practice § 20:3 (2d ed. 2000)). It usually results in, *inter alia*, "eliminating inter-company claims[] and combining the creditors of the [consolidated] companies for purposes of voting on reorganization plans." *In re Babcock & Wilcox Co.,* 250 F.3d at 958 n.6 (quoting *In re Augie/Restivo Baking Co.,* 860 F.2d 515, 518 (2d Cir. 1988)).

The Fifth Circuit has said that substantive consolidation is "an extreme and unusual remedy", *Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.),* 584 F.3d 229, 249 (5th Cir. 2009), and that it should be used sparingly, *In re Amco Ins.*, 444 F.3d 690, 696–97 (5th Cir. 2006); *see also Gandy v. Gandy (In re Gandy),* 299 F.3d 489, 499 (5th Cir. 2002) (Substantive consolidation in bankruptcy is "an extreme and unusual remedy."). No Code provision provides for substantive consolidation; and the authority of a court to order substantive consolidation is derived solely from the equitable powers of the bankruptcy court. *See In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 517 (W.D. Tex. 2000).

There is no presumption of substantive consolidation. Bankruptcy courts in the Fifth Circuit have determined that the parties seeking substantive consolidation bear the burden of proving that any prejudice resulting from consolidation is outweighed by the greater prejudice posed by the continued separation of the estates. *See In re AHF Dev.,*

Ltd., 462 B.R. 186, 198 (Bankr. N.D. Tex. 2011); *In re DRW Property Co. 82*, 54 B.R. 489, 495 (Bankr. N.D. Tex. 1985). A necessary corollary, according to the Court in *DRW*, is for the party seeking consolidation to also show prejudice to the estates if they were to remain separate. *See DRW Property*, 54 B.R. at 495 (citing *In re Donut Queen*, 41 B.R. 706 (Bankr. E.D.N.Y. 1984)). Allowing substantive consolidation "without pleading, proof, or adequate findings under law to support substantive consolidation is prohibited." *In re Texas Extrusion Corp.*, 68 B.R. 712, 722 (N.D. Tex. 1986). The burden on the moving party should be "exacting" and substantive consolidation should be used sparingly "if the request is met with opposition from either a creditor or a debtor." *In re Bippert*, 311 B.R. 456, 464 (W.D. Tex. 2004). The proponent of substantive consolidation must carry its burden by a preponderance of the evidence. *See, e.g.*, *In re AHF Dev., Ltd.*, 462 B.R. at 198; *Introgen Therapeutics, Inc.*, 429 B.R. 570, 582 (Bankr. N.D. Tex. 2010).

By contrast, joint administration is merely a procedural device which enables a court to efficiently oversee multiple cases. *In re Babcock & Wilcox Co.*, 250 F.3d at 958 n.6. Bankruptcy Rule 1015(b) provides:

> If a joint petition or two or more petitions are pending in the same court by or against ... a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest.

FED. R. BANKR.P. 1015(b). "Joint administration is designed in large part to promote procedural convenience and cost efficiencies which do not affect the substantive rights of

claimants or the respective debtor estates." *In re McKenzie Energy Corp.*, 228 B.R. 854, 874 (Bankr. S.D. Tex. 1998).

Here, the Debtors request this Court to substantively consolidate their jointly administered cases "solely for the purposes of voting and making distributions," but fail to provide any justification to the Court for why such extreme relief is warranted. As the parties requesting substantive consolidation, the Debtors bear the burden of proving by a preponderance of the evidence that any prejudice resulting from consolidation is outweighed by the greater prejudice of continued separation of the estates. **Debtors fail to articulate – much less prove – any such rationale and make no showing of prejudice to the respective estates if they were to remain separate.** *See DRW Property*, 54 B.R. at 495. Absent pleading, proof, or adequate findings under law to support substantive consolidation, the Debtors' request must be denied. *In re Texas Extrusion Corp.*, 68 B.R. at 722.

Moreover, the Debtors request for substantive consolidation is nothing more than an attempt to circumvent the Hamilton Creditors' right to vote on the confirmation of the Debtors' Plan under § 1129 of the Bankruptcy Code. As discussed in Part II below, the Hamilton Creditors are statutory insiders of HIG, but they are not insiders of HII: **this distinction is critical to the Hamilton Creditors with respect to their voting rights under § 1129 of the Bankruptcy Code.** Pursuant to § 1129, the Court shall confirm a plan only if, *inter alia*, ". . . at least one class of claims that is impaired under the plan has accepted the plan, **determined without including any acceptance of the plan by any insider."** 11 U.S.C. § 1129(a)(10) (emphasis added). Debtors state that they seek

substantive consolidation for purposes of voting on plan confirmation, but leave uncertain the issue of whether consolidation transforms the insiders of one debtor into insiders of all debtors with respect to voting rights. *See e.g. In re AHF Dev., Ltd.*, 462 B.R. at 198 (noting that the substantive rights of insiders may be affected by a consolidation order). Given that there are fewer than sixty (60) total unsecured creditors in the Debtors' combined estates, the Hamilton Creditors submit that the Debtors are merely requesting consolidation as an attempt to disenfranchise the Hamilton Creditors from voting on the proposed Plan. As such, this Court should deny confirmation of the Debtors' Plan.

II. The Debtors' Plan of Reorganization Mischaracterizes the Hamilton Creditors as Insiders.

The Hamilton Creditors are not insiders of HII. Mark Hamilton and his family meet the statutory definition of an "insider" only with respect to HIG, and the Debtors have mischaracterized this fact throughout their Plan of Reorganization and Disclosure Statement. Insider status is highly relevant in Chapter 11 proceedings with respect to preferences under § 547 and plan confirmation under § 1129 – the relationship between a debtor and an insider is more closely scrutinized in bankruptcy proceedings and a bankruptcy trustee's right to avoid transfers to an insider is greatly enhanced. As such, the Debtors' mischaracterization of the Hamilton Creditors as insiders of HII is detrimental to the Hamilton Creditors' interests and has important implications to all creditors voting on the Debtors' Plan of Reorganization or otherwise concerned with the feasibility of the Debtors' proposed reorganization.

Where the debtor is a corporation, § 101(30) of the Bankruptcy Code defines an "insider," as a: "(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor. . . ." 11 U.S.C. § 101(30)(B). As an officer of HIG, Mark Hamilton is an insider of that entity. *See* § 101(30)(B)(ii). His wife and son are also insiders of HIG, *see* § 101(30)(B)(vi), as are the business entities that they wholly own. Collectively, then, the Hamilton Creditors are statutory insiders of HIG. This much is undisputed.

The Hamilton Creditors, however, do not meet any of the § 101(30)(B) definitions of a statutory insider with respect to HII, nor was their relationship with HII close enough to otherwise confer upon the Hamilton Creditors insider status. In addition to § 101(30)(B) insider status, an insider is also one who has "a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." *In re Premiere Network Servs., Inc.*, 333 B.R. 126, 128 (Bankr. N.D. Tex. 2005) (citing *Missionary Baptist Foundation of America, Inc. v. Huffman*, 712 F.2d 206, 210 (5th Cir. 1983)). Courts look to the relationship to determine whether dealings are at arms length, and "[k]ey factors to consider are the closeness of the relationship and whether the alleged insider has control over the debtor." See Matter of Holloway, 955 F.2d 1008, 1011 (5th Cir. 1992). "The determination of an extra-statutory insider turns on whether the closeness of the relationship is so great that the advantage gained by the creditor is attributable to affinity rather than course of business dealings." *In re Premiere Network Servs., Inc.*, 333 B.R. at 129.

Here, there is no evidence of anything more than a history of arms-length transactions between the Hamilton Creditors and HII. The Debtors have not and cannot adduce any evidence that the Hamilton Creditors controlled HII: a finding that is underscored by the fact that the Debtors are suing the Hamilton Creditors for millions of dollars. Nevertheless, the Debtors have classified the Hamilton Creditors as "insiders" throughout their Plan of Reorganization and Disclosure Statement – a classification that is wholly unwarranted by the Bankruptcy Code and extant case-law.

III. The Debtors' Proposed Convenience Class is Unnecessary and Constitutes Improper Gerrymandering

Pursuant to § 1129(a)(1) of the Bankruptcy Code, a plan of reorganization must "compl[y] with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). The Debtors' Plan of Reorganization invokes § 1122 of the Bankruptcy Code to propose dividing unsecured creditors' claims into two classes for purposes of voting on acceptance of the plan: a general unsecured creditor class as well as a convenience class. This division is neither reasonable nor necessary given the finite number of unsecured claims filed against the Debtors' respective estates. Instead, the Debtors' proposal is nothing more than impermissible gerrymandering that runs afoul of § 1122 of the Bankruptcy Code. Consequently, the Debtors' Plan does not comply with all applicable provisions of the Bankruptcy Code, and this Court should deny its confirmation. *See* 11 U.S.C. § 1129(a)(1).

Section 1122(b) of the Bankruptcy Code provides that a debtor may separate unsecured claims into different classes when it is "reasonable and necessary for

administrative convenience." 11 U.S.C. § 1122(b). The creation of an administrative convenience class is not merely a matter of showing that there are a group of small claims that could be nicely segregated; rather, the debtor must show that is reasonable and necessary to create a separate class and that it is about something more than just tending to ease the administrative burden." *In re Northwest Timberline Enterprises, Inc.*, 348 B.R. 412, 440 (Bankr. N.D. Tex. 2006) ("*e.g.*, such as eliminating hundreds or thousands of small claims from the ledger and avoiding the nuisance of having to pay those out over time."). The debtor must "show that the administrative benefits the debtor will derive from the classification at issue outweigh the adverse effects that the classification may render upon other entities and the Bankruptcy Code policies." *In re Way Apartments, D.T.*, 201 B.R. 444, 451 (N.D. Tex. 1996).

Chief among those adverse effects is the likelihood that an artificial delineation of unsecured claims is merely an attempt by the debtor to gerrymander the confirmation process. *See, e.g.*, *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991), *cert denied*, 506 U.S. 821 (1992) ("thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."); *see also In re Northwest Timberline Enterprises, Inc.*, 348 B.R. 412, 440 (Bankr. N.D. Tex. 2006) (finding no credible argument that a proposed convenience class comprised of only 14 creditors passed muster under *Greystone*). In *Greystone*, the Fifth Circuit opined that "if claims could be arbitrarily placed in separate classes, it would almost always be possible for the debtor to manipulate 'acceptance' by artful classification." 995 F.2d at 1277.

Here, the Debtors have classified unsecured claims into two categories: general unsecured claims and a convenience class comprised of unsecured claims less than $1,000.00. *See* Plan of Reorganization, at 14. In these jointly administered cases, however, **there are only fifty-eight (58) unsecured creditor claims in total, and only three (3) of those claims are for less than $1,000.00.**[1] *See generally*, Proof of Claim Register. However, the proper purpose of a convenience class is to eliminate hundreds or thousands of small claims from the ledger and avoiding the nuisance of having to pay those out over time – a purpose that is in no way fulfilled by arbitrarily segregating three out of 58 claims into a separate class. Moreover, even if the Debtors could muster a credible argument that disposing of these *three claims* somehow conveniences the estates, the same must be weighed against the adverse effects of this "artful classification" with respect to plan confirmation under the cramdown requirements of § 1129(b) of the Bankruptcy Code. The Hamilton Creditors submit that the fact that three creditors holding claims worth less than $3,000.00 in the aggregate could potentially affirm the Debtors' Plan of Reorganization over the objection of the only other class permitted to vote on confirmation is evidence that the Debtors' proposal to artificially delineate the unsecured creditors into two classes is neither reasonable nor necessary. It is class gerrymandering, plain and simple.

Because the Debtors have failed to establish by a preponderance of the evidence that their proposed convenience class is reasonable and necessary under § 1122(b), and

[1] There are an additional nine (9) unsecured claims under $5,000.00.

that the same is not merely a ruse for impermissible gerrymandering, the Court should deny confirmation of the Plan under § 1129(a)(1).

IV. The Debtors' Plan of Reorganization is not Feasible Because Successful Reorganization is Conditioned on a Speculative Litigation Recovery

The Hamilton Creditors object to the Debtors' Plan of Reorganization because its success is predicated on a $5 million litigation recovery that is speculative at best. The feasibility test set forth in § 1129(a)(11) requires the Bankruptcy Court to determine whether the Plan is "workable and has a reasonable likelihood of success." *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd., P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 801 (5th Cir. 1997). The Fifth Circuit has determined that while the bankruptcy court need not require a guarantee of success, ". . . a reasonable assurance of commercial viability is required." *Id*. at 801. To establish the feasibility of a plan, the debtor must present proof through reasonable projections that there will be sufficient cash flow to fund the plan. Such projections cannot be speculative, conjectural or unrealistic. *See In re M & S Assocs., Ltd.*, 138 B.R. 84, 849 (Bankr. W.D. Tex. 1992).

Where a plan's feasibility is based on future litigation, moreover, courts must assess the likely success of the proposed litigation in determining whether the proposed plan satisfies the feasibility requirement of § 1129(a)(11). *See In re WR Grace & Co.*, 729 F.3d 332, 348-49 (3d Cir. 2013); *see also In re DCNC N.C. I, LLC*, 407 B.R. 651, 667 (Bankr. E.D. Pa. 2009); *In re Thompson*, No. 92–7461, 1995 WL 358135, at *3–4 (Bankr. E.D. Pa. 1995); *In re Cherry*, 84 B.R. 134, 139 (Bankr. N.D. Ill. 1988); *In re Rey*, Nos. 04–B–35040, 04–B–22548, 06–B–4487, 2006 WL 2457435, at *7 (Bankr. N.D. Ill.

Aug. 21, 2006). A plan is "not feasible is it hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely." *In re WR Grace & Co.*, 729 F.3d at 348-49; *see also Am. Capital Equip., LLC*, 688 F.3d 145, 156 (3d. Cir. 2012) (finding plan not feasible where its only source of funding was proceeds from highly speculative litigation winnings).

Here, Debtors' Plan and Disclosure Statement are fundamentally deficient and misleading because of the vague representations by Debtors that they "assume[] that recoveries from causes of actions is $5 million." *See* Exhibit D to Second Amended Disclosure Statement, Liquidation Analysis, at 3. This is a conclusory representation, with no detail or supporting facts or statements as to how the purported $5 million was calculated, from which person or entity the parts of the $5 million are targeted to come, and some semblance of factual detail supporting that claim against that person or entity. Not only have the Debtors failed to show any basis for their estimated recovery from any of the litigation targets (plausible claims, plausible defense, and a legal basis on which they will win), but they have not demonstrated if and how they will collect from any such targets. It is critical for the unsecured creditors to have this information in order to decide whether to vote for the proposed Plan of Reorganization, or to vote against it and put the Debtors into liquidation. Simply listing a very large figure that appears to have been just pulled out of the air, and providing no supporting information about how that figure was derived, runs afoul of § 1129(a)(11) and appears to be an effort to entice the unsecured creditors to vote in favor of the proposed Plan of Reorganization without having adequate information as is required by law.

Moreover, feasibility is not satisfied because **the Debtors' Plan inexplicably releases all litigation claims against the HII Directors and unreasonably limits possible litigation recovery from Brent Mulliniks ("Mulliniks") and Billy Cox, Jr. ("Cox")**. Although the Debtors' Plan proposes to reserve causes of action against any of the HII Directors, section 21.12(i) of the Debtors' Disclosure Statement preserves only those claims where notice was sent by April 1, 2016: because Debtors have failed to provide notice of any such claims, and the deadline has now passed, confirmation of the Debtors' Plan forecloses any possible recovery against any of the HII Directors. Additionally, the Debtors have proposed a settlement agreement with Mulliniks and Cox whereby the Debtors have agreed to arbitrarily create a priority claim in favor of Mulliniks and Cox in the aggregate amount of $150,000.00 and then to limit any litigation recovery against Mulliniks and Cox up to the value of this claim plus the amount of insurance proceeds that may be available to pay such recovery. In other words, the Debtors have foreclosed the possibility of the Litigation Trust recovering anything other than available insurance proceeds from Mulliniks and Cox despite setting forth probable causes of action against the same for embezzlement, disclosure of proprietary financial information, diversion of corporate assets and opportunities, as well as willful and gross misconduct.

Paradoxically, the feasibility of the Debtors' Plan of Reorganization depends entirely on a speculative litigation recovery that the Debtors simultaneously propose to **arbitrarily limit to just a handful of the claims** originally contemplated by their initial disclosures. Because the Debtors have fallen far short of their burden of proving by a

preponderance of the evidence that the Plan is feasible under § 1129(11), the Court should sustain the Hamilton Creditors' objection and deny confirmation of the Plan.

V. The Debtors' Plan of Reorganization Unfairly Discriminates Against Creditors Within the Same Class.

The Debtors' Plan unfairly discriminates against the Hamilton Creditors by prioritizing the claims of Mulliniks and Cox *vis-à-vis* all other general unsecured creditors in violation of § 1129(b) of the Bankruptcy Code. "[A] Chapter 11 plan is presumptively subject to denial of confirmation on the basis of unfair discrimination, even though it provides fair and equitable treatment for all classes, when there is (1) a dissenting class; (2) another class of the same priority; and (3) a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution." *In re Sentry Operating Co. of Texas, Inc.*, 264 B.R. 850, 863-64 (Bankr. S.D. Tex. 2001) (*quoting* Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 AM. BANKR. L.J. 227 (1998)).

Here, the Debtors' Plan unfairly discriminates as between unsecured creditor claims of the same priority by according preferential treatment to all of Mulliniks' and Cox's claims, including general unsecured claims. Specifically, the Debtors have proposed a settlement agreement whereby Mulliniks and Cox will receive a higher percentage recovery than other unsecured creditors as well as a lower allocation of risk

than other unsecured creditors given that their claims will be accorded priority status under the Debtors' Plan. Debtors have agreed to pay $100,000.00 to Mulliniks and Cox within ten business days of the Court's approval of the Motion to Comprise, while all other unsecured creditors must wait to recover from proceeds, if any, from a speculative Litigation Trust. *See* Part IV, *supra*.

Additionally, the Debtors have agreed to **arbitrarily manufacture a priority claim** in favor of Mulliniks and Cox in the aggregate amount of $150,000.00 payable from the Litigation Trust, and further permit Mulliniks and Cox to recover proceeds, if any, from the Litigation Trust before any other unsecured creditor. No other unsecured creditor is treated as such. To the contrary, all other unsecured creditors, including the Hamilton Creditors, will only be paid on their claims **IF** (1) there is a litigation recovery at all (which is doubtful); and (2) only after the $150,000.00 priority claim reserved for Mulliniks and Cox is fully extinguished (which itself is subordinate and subject to the payment in full of the Postpetition Obligations as well as up to a $500,000.00 repayment to the DIP Lenders of the Initial Litigation Trust Administrative Cash).

Because the Debtors' Plan unfairly discriminates against unsecured creditors by according preference to the claims asserted by Millinik and Cox, this Court should deny confirmation of the plan.

VI. The Debtors' Plan of Reorganization is not Proposed in Good Faith.

Finally, the Hamilton Creditors object to the Debtors' Plan because it is not proposed in good faith. Section 1129(3) requires that a debtor's plan be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). The requirement

of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start. *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir.1985). "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of § 1129 (a)(3) is satisfied." *Id.*

In light of the totality of the circumstances surrounding Debtors' Plan of Reorganization, the Court should find that the same is not proposed in good faith. These circumstances include the facts that:

1. the Debtors purposely misclassify the Hamilton Creditors as "insiders" when they are not (explained above);

2. the Debtors seek substantive consolidation of their respective estates and to artificially impair a convenience class when the same is unwarranted given the finite number of total creditors and where the result would effectively disenfranchise the Hamilton Creditors from voting on the Debtors' Plan of Reorganization (explained above);

3. the Debtors grossly overstate the viability of their highly speculative litigation recovery from the Hamilton Creditors and base the feasibility of their entire reorganization on collecting a $5 million recovery while at the same time limiting any such litigation recovery from other probable sources (explained above);

4. the Debtors have prioritized the repayment of claims to Mulliniks and Cox to the detriment of all other unsecured creditors (explained above);

5. the Debtors have consistently targeted the Hamilton Creditors throughout these proceedings, as illustrated by the fact that they have filed objections to each and every proof of claim filed by the Hamilton Creditors, including claims of properly documented trade debt, yet **the Debtors have not filed objections to any other proof of claim filed by any other creditor (referenced above);** and

6. the Debtors have blatantly misrepresented to this Court from the outset the nature and effect of one of the largest claims against the Debtors' estate; the $2.4 million loan made to HII by the Hamiltons in September 2014, and this probably gives rise to some fiduciary duty breach by Flemming or Loretta Cross, or both of them that should not be released as proposed in the Plan of Reorganization (explained next).

Addressing this final issue, Debtors now try to recast the $2.4 million loan made by the Hamiltons to HII in September 2014 as not being a loan. Debtors have known since a lawsuit was filed in June 2014 by the Hamiltons against HII that the Hamilton's position is that this agreement between them and HII was a loan. This was months before this the bankruptcy Petition was even filed. Yet, Debtors ignored including this as one of the unsecured creditor claims, and negated the opportunity for the Hamiltons to be present and represented in the Unsecured Creditors Committee process.

Moreover, the Hamiltons filed the Proof of Claim as to this claim on December 10, 2015. *See* Proof of Claims Register, Claim No. 16 Filed by William Mark Hamilton and Sharon K. Hamilton ("Hamilton Claim No. 16"). Yet, the Debtors waited until March 28, 2016 (two weeks after filing the proposed Plan of Reorganization) to file an Objection to that claim. *See* Exhibit 1, Dkt. No. 431, Debtors' Objection to HII Claim No. 16 Filed by William Mark Hamilton and Sharon K. Hamilton ("Debtors' Objection to Hamilton Claim No. 16"). In that Objection, Debtors misrepresent the true facts and state: "An accounts payable was kept on the books for the working capital adjustment but no separate 'loan' obligation exists. The HII board did not approve of an undocumented 'loan'. Numerous legal restrictions applicable to HII prevent it from incurring a $2.4 million loan obligation without a board-authorized note…. To the extent

that the Hamiltons' claim relates to the SPA working capital adjustment, no demand was timely made under the SPA, and no proof of claim was timely filed to assert liability for breach of the SPA's working capital adjustment." *See* Exhibit 1, Debtors' Objection to Hamilton Claim No. 16, page 3, fn 3.

Debtors offer affidavits from the Chief Restructuring Officer, Loretta Cross, and Chief Executive Officer, Matthew Flemming. See Exhibit 1 Debtors' Objection to Hamilton Claim No. 16, attachments. **Each affidavit is glaring not only about what it says, but also about what it does not say.** Cross states that in "her capacity as the CRO, I am familiar with the daily operations and financial conditions of HII Technologies, Inc. and its affiliates. … The Debtors have no record of board authorization for a loan of approximately $2.4 million from William Mark Hamilton and Sharon K. Hamilton to HIIT, for which [the Hamiltons]… filed HII Claim No. 16." Flemming says that in his "capacity as HII's CEO, I am generally familiar with the operations and financial conditions of HII and its subsidiaries." He says nothing of any substance of about $2.4 million loan to refute it or to explain it. More blatantly omitted, neither affidavit from the two people most knowledgeable about the Debtors' financial history and accounting say anything to attest to how the $2.4 million was booked on the financial records of HII, and more so, why HII would pay monthly "interest" payments to the Hamiltons from September 2014 (when the loan was made) through May 2015 (when the payments stopped) and how those payments were booked.

Despite this wrangling of the facts to try to make the $2.4 million agreement out as being an accounts payable and not a loan, Debtors cannot escape that Flemming has

taken the position that the $2.4 million agreement was **in fact a loan** in the federal lawsuit pending in the United States District Court for the Western District of Oklahoma, entitled *S&M Assets, LLC, William Mark Hamilton and Sharon K. Hamilton v. Matthew C. Flemming*, Case No. 5:16-cv-00280-W (W.D. Okla. Mar. 23, 2016). In the Motion to Dismiss filed by Flemming **less than a week ago** on April 1, 2016. *See* Exhibit 2, Flemming's Motion to Dismiss), Flemming does not state, nor even contend, that the $2.4 million transaction between HII and the Hamiltons was an "accounts receivable" and not a loan. To the contrary, Flemming characterizes the transaction **six different times** in the Motion **as a loan**, with **principal** and **interest payments:**

1. Page 10: "Nor do Plaintiffs assert allegations that support the other recognized circumstance that would allow Plaintiffs to recover for fraud or negligent misrepresentation based on Flemming's opinion that **the loan principal would be repaid in a year**."

2. Page 12: "Plaintiffs' Amended Petition alleges (sic) also includes misrepresentations by Flemming that allegedly took place *after* **Plaintiffs agreed to loan money to HII** in support of Plaintiffs' claim for damages."

3. Page 13: "Plaintiffs could not have relied on alleged misrepresentations made by Flemming that took place *after* **they decided to enter into the loan agreement with HII**."

4. Page 13: "Because Plaintiffs seek damages only in the amount of **the loan principal plus interest**, Plaintiffs cannot plausibly recover under fraud and/or negligent misrepresentation claims for misrepresentations made after **the loan agreement had been entered**.

5. Page 13: Plaintiff's Amended Petition must be dismissed to the extent it purports to rely on such statements to recover **the loan principal and interest** from Flemming."

This position had to be taken by Flemming in that lawsuit, because Flemming's attorney was in possession of the same emails and check memos that were also attached

as exhibits to the Hamilton's Proof of Claim No. 16. These documents establish that Flemming represented the transaction as a loan by his use of the words "principal" and "interest" in an email to Mark Hamilton dated January 18, 2015, and "paying 10% per annum interest on the money" in an email from Flemming to Mark Hamilton dated April 6, 2015, and the monthly interest payment checks that HII made to the Hamiltons from September 2014 through May 2015. *See* Exhibit 3, Emails and Check Stubs from Hamilton Claim No. 16. A debtor does not pay interest only on an accounts payable; that is a loan.

These inescapable facts underscore the double-talk and inconsistency of Debtors' witnesses, and illustrate that the entire course of these proceedings has not been candid and has been in bad faith as to the Hamiltons, giving rise to these poignant conclusions:

1. Flemming never told the HII Board about the $2.4 million that had been received from the lenders to pay the working capital adjustment and tendered to the Hamiltons, or if he did, he did not tell the HII Board that he did not pay it as he was expected and obligated to do unless there was a different arrangement agreed to by the Hamiltons.

2. Flemming breached his fiduciary duties to HII to not advise the Board of the discussion with Mark Hamilton about the $2.4 million, and his agreement to treat it as a loan. And, as the Debtors' attorneys have said "Numerous legal restrictions applicable to HII prevent it from incurring a $2.4 million loan obligation without a board-authorized note."

3. Flemming breached his fiduciary duties to HII to not advise the Board of each monthly interest payment that he authorized to be paid by HII for the $2.4 million loan , and that he paid to the Hamiltons.

4. Flemming may have breached fiduciary duties to HII in the way that that $2.4 million was actually used, because there are no facts offered of where that money went.

5. Cross may have breached her fiduciary duties to the Debtors and in this proceeding by not getting adequate answers to the issues above, or if she

did, then she should present those answers to this Court and the other interested parties before a Plan of Reorganization is proposed. She is bound by the representation of the Debtors' attorney that "Numerous legal restrictions applicable to HII prevent it from incurring a $2.4 million loan obligation without a board-authorized note." So, she is bound to have investigated that issue and to provide that information to the Court and the other interested parties, and she has not done so.

6. Cross breached her fiduciary duties in this bankruptcy proceeding by not including this $2.4 million claim (whether as a loan or as just "on the books for a working capital adjustment") in the top unsecured creditors' claims when the bankruptcy was filed, thereby preventing the Hamiltons from timely notice and representation on the Unsecured Creditors' Committee.

7. Even if the $2.4 million transaction is found to not be a loan, but to be an accounts payable, the Hamiltons should be given setoff credit for the full amount because it represents money owed to them and not paid, and HII had notice that the Hamiltons were demanding payment of it well before this bankruptcy was filed.

8. Neither Flemming nor Cross are being fully candid with this Court in these proceedings, or else all of these very relevant facts would have already been provided, rather than having to be pointed out by the Hamiltons.

For all of these reasons, neither Flemming nor Cross should be protected by a Release of Liability for fiduciary breaches or other actionable claims as is proposed by the Plan of Reorganization. Moreover, because the Debtors have purposefully singled-out and explicitly targeted the Hamilton Creditors, **and only the Hamilton Creditors**, in their proposed Plan of Reorganization, the Court should find that the good faith requirement of § 1129(a)(3) has not been satisfied. Accordingly, the Court should sustain the Hamilton Creditors' objections and deny confirmation of the Debtors' Plan.

CONCLUSION

Bankruptcy Court is a court of equity. It ensures fairness to all parties when a debtor cannot pay its obligations. Chapter 11 was never meant for use by debtors like

HII and its subsidiaries in the manner they propose. They want to walk away from many millions of dollars in debt, obtain a new $500,000 to finance litigation that is not well-grounded or calculated for success, and then continue on renting a few pieces of equipment and netting less than $50,000 per year. The Debtors' Plan of Reorganization is not proposed or pursued in good faith. For the foregoing reasons, the Hamilton Creditors respectfully object to the confirmation of the Debtors' Plan of Reorganization, and request the Court to deny confirmation of the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2016, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties eligible to receive service through the Clerk's Office ECF facilities by electronic mail, and mailed to those recipients who are not eligible to receive service through such means.

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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
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 HII CLAIM NO. 16 FILED BY WILLIAM MARK HAMILTON AND SHARON K. HAMILTON

THIS IS AN OBJECTION TO YOUR CLAIM. THE OBJECTING PARTY IS ASKING THE COURT TO DISALLOW THE CLAIM THAT YOU FILED IN THIS BANKRUPTCY CASE. YOU SHOULD IMMEDIATELY CONTACT THE OBJECTING PARTY TO RESOLVE THE DISPUTE. IF YOU DO NOT REACH AN AGREEMENT, YOU MUST FILE A RESPONSE TO THIS OBJECTION AND SEND A COPY OF YOUR RESPONSE TO THE OBJECTING PARTY WITHIN 30 DAYS AFTER THE OBJECTION WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE OBJECTION IS NOT VALID. IF YOU DO NOT FILE A RESPONSE WITHIN 30 DAYS AFTER THE OBJECTION WAS SERVED ON YOU, YOUR CLAIM MAY BE DISALLOWED WITHOUT A HEARING.

A HEARING HAS BEEN SET ON THIS MATTER ON MAY 17, 2016 AT 10:00 AM IN COURTROOM 400, 4TH FLOOR, 515 RUSK, HOUSTON, TEXAS 77002.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

TO THE HONORABLE DAVID R. JONES, UNITED STATES BANKRUPTCY JUDGE:

HII Technologies, Inc. ("HII") and its subsidiaries request an order disallowing HII Claim No. 16 filed by William Mark Hamilton and Sharon K. Hamilton. In support of this objection,[2] the Debtors respectfully state as follows:

[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).

Jurisdiction and Venue

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of the Debtors' 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).

2. The statutory predicates for the relief sought are sections 502(b)(1) and 502(d) the Bankruptcy Code. The Court has authority to enter final orders granting this relief.

Relief Requested

3. The Debtors request that this Court enter an order disallowing HII Claim No. 16 in its entirety.

Background

4. On or about August 11, 2014, HII purchased Hamilton Investment Group, Inc. ("HIG"), a frac water transfer company in Guthrie, Oklahoma, from William Mark Hamilton and his wife Sharon K. Hamilton via a Stock Purchase Agreement ("SPA"). William Mark Hamilton and Sharon K. Hamilton were represented to be the sole owners of HIG.

5. After the sale of HIG to HII, HIG and William Mark Hamilton executed an employment agreement. William Mark was HIG's President, and he oversaw HIG's day-to-day operations.

6. William Craig Hamilton, son of William Mark Hamilton, was an HIG employee until the sale to HII in August 2014. After the sale, William Craig Hamilton entered into a consulting agreement with HIG where he maintained a special and confidential fiduciary relationship with both HII and HIG. Each of Mark Hamilton, Craig Hamilton and Sharon

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[2] The Debtors' facts and legal bases supporting the objections to the Hamilton claims (HII Claim Nos. 15-21, 28, and 49) are interrelated. The objections to the other claims are incorporated herein by reference.

Hamilton occupied a special relationship of confidential trust with HII and were entrusted with assets and information of the Debtors as their fiduciaries.

7. After the sale of HIG to HII, HIG entered into various leases of both real and personal property from William Mark Hamilton, Sharon K. Hamilton, William Craig Hamilton, S&M Assets, LLC (owned by William Mark Hamilton and his wife Sharon K. Hamilton) and H2 Services, LLC (owned by William Craig Hamilton). The board of directors of both HII and HIG did not approve these self-interested transactions. No third-party fairness opinion concluded that these transactions were objectively fair. These transactions were not fair to either HIG or HII and, upon information and belief, charged rates that were above market and/or contained provisions that were not fair to HII and HIG.

8. HIG terminated William Craig Hamilton, William Mark Hamilton, and Sharon K. Hamilton on June 4, 2015.

9. William Mark Hamilton, Sharon K. Hamilton, and S&M Assets filed suit against HII and HIG on June 26, 2015, seeking monies owed under three (3) of the self-interested lease agreements and an undocumented "loan" allegedly for $2.4 million.[3] In connection with their lawsuit, William Mark Hamilton, Sharon K. Hamilton, and S&M Assets moved for and obtained a temporary restraining order against HII and HIG.

10. On September 18, 2015 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

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[3] An accounts payable was kept on the books for the working capital adjustment but no separate "loan" obligation exists. The HII board did not approve of an undocumented "loan". Numerous legal restrictions applicable to HII prevent it from incurring a $2.4 Million loan obligation without a board-authorized note, a fact of which the Hamiltons were keenly aware. To the extent that the Hamiltons' claim relates to the SPA working capital adjustment, no demand was timely made under the SPA, and no proof of claim was timely filed to assert liability for breach of the SPA's working capital adjustment. Finally, the SPA (as discussed below) was induced by fraud and cannot be the basis for a claim against HII, if such a claim had been timely made and a proof of claim timely filed.

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

Basis for Relief

12. Section 502(b)(1) provides for disallowance of a claim to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unliquidated." 11 U.S.C. § 502(b)(1). William Mark Hamilton and Sharon K. Hamilton's HII Claim No. 16 is unenforceable against the Debtors under applicable law, as set forth in further detail below.

13. Section 502(d) provides for disallowance of "any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title . . ." 11 U.S.C. § 502(d). William Mark Hamilton and Sharon K. Hamilton are entities[4] from which property is recoverable under these sections as well as transferees of avoidable transfers, as set forth in further detail below.

Objections to HII Claim No. 16

14. William Mark Hamilton and Sharon K. Hamilton filed an unsecured claim against HII in the amount of $2,519,371.54. There is insufficient documentation attached to the proof of claim. From what was attached, it appears that the Hamiltons claim HII owed William Mark Hamilton and Sharon K. Hamilton a Working Capital Adjustment that was satisfied by an undocumented "loan" for which no promissory note or written memorialization has been provided. The only operative contract is the SPA, of which the Hamiltons have not timely asserted a breach. The Debtors will address the hypothetical liability under the SPA below.

[4] The Bankruptcy Code defines the term "entity" to include persons. *See* 11 U.S.C. § 101(15).

Section 502(b)(1) Objections

15. The Debtors object under section 502(b)(1) because Texas law provides that fraud is a defense to liability under a contract.[5] The Debtors further object under 502(b)(1) because such claim is unenforceable as a result of William Mark Hamilton's and Sharon K. Hamilton's breaches of fiduciary duty, breaches of bailment, conversion, breaches of contract, and conspiracy. As a result, William Mark Hamilton and Sharon K. Hamilton's HII Claim No. 16 should be disallowed in its entirety pursuant to section 502(b)(1).

Fraud as a Defense to Contractual Liability

16. Texas law provides that fraud is a defense to liability under a contract. *See Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex. 1999). William Mark Hamilton and Sharon K. Hamilton committed fraud in connection with inducing HII to enter into the SPA.

17. William Mark Hamilton and Sharon K. Hamilton misrepresented to HII that "[t]he books of account and other financial records of [HIG] (i) are accurate and complete in all material respects and have been maintained on a basis consistent with prior years; and, (ii) are stated in reasonable detail and accurately and fairly reflect the material transactions and material dispositions of the respective and properties of [HIG]." This representation was false for at least the following reasons: (i) the goodwill was overstated; (ii) the reserves for bad debt were understated; (iii) the asset values (including values of current accounts) were inflated; and (iv) the method of accounting did not accurately present the financial condition of the company. William Mark Hamilton and Sharon K. Hamilton knew the representation was false at the time it was made.

[5] Texas law governs the SPA.

18. Further, William Mark Hamilton and Sharon K. Hamilton knowingly submitted to HII an accounts-receivable aging schedule containing material misrepresentations.

19. Further, William Mark Hamilton and Sharon K. Hamilton misrepresented to HII that "[a]ll of the Accounts Receivable arose in the Ordinary Course of Business and are collectible . . . and represent or will represent valid obligations arising from sales actually made or services actually performed in the ordinary course of business." This representation was false because many of the accounts receivable did not arise from sales in the ordinary course of business, but instead constituted extraordinary and non-routine events. William Mark Hamilton and Sharon K. Hamilton knew the representation was false at the time it was made.

20. Further, William Mark Hamilton and Sharon K. Hamilton misrepresented that "Schedule 3.20(c) sets forth a complete and correct list of all clients of [HIG] and its Affiliates and any Business Contracts such client is party to, including without limitation any representation agreements, and marketing agreements." This representation was false because Schedule 3.20(c) listed entities which were not bona fide clients of HIG. William Mark Hamilton and Sharon K. Hamilton knew the representation was false at the time it was made.

21. William Mark Hamilton and Sharon K. Hamilton committed many instances of fraud in connection with inducing HII to enter into the SPA as discussed in detail above, any of which remove any liability of HII for an alleged breach of the "loan" or the SPA.

Breach of Bailment/Conversion

22. William Mark Hamilton and Sharon K. Hamilton obtained a temporary restraining order ("TRO") and were in custody of the Debtors' property, but while the property was in their exclusive possession, the property went missing. William Mark Hamilton, Sharon K. Hamilton, and S&M Assets filed suit against HII and HIG on June 26, 2015. To obtain that

order, William Mark Hamilton, Sharon K. Hamilton, and S&M Assets filed a document under penalty of perjury stating which assets were in their possession. After the TRO was lifted, the Debtors sought to recover possession of the property but William Mark Hamilton, Sharon K. Hamilton, and S&M Assets did not return the Debtors' property. The Hamiltons were under a duty to maintain the property safely entrusted to their custody and, having breached that duty, are liable for damages.

23. Without the Debtors' consent, William Mark Hamilton and Sharon K. Hamilton intentionally exercised dominion or control over property of which the Debtors had the right to immediate possession. The Debtors suffered injury as a result of William Mark Hamilton and Sharon K. Hamilton's conversion which, in equity, also excuses any failure to perform on the undocumented loan.

Breach of Fiduciary Duties

24. William Mark Hamilton breached fiduciary duties owed to HIG. After the sale of HIG to HII, William Mark Hamilton entered into an employment agreement with HIG. William Mark Hamilton served as President of HIG (an Oklahoma corporation) and as such owed fiduciary duties to HIG. *See Badger Oil & Gas Co. v. Preston*, 152 P. 383, 385 (Okla. 1915). William Mark Hamilton breached his fiduciary duties by, among other things: (i) using HIG's assets for his personal benefit; (ii) helping his son William Craig Hamilton perform work for HIG's competitors; and, (iii) entering into self-interested agreements with HIG. The Debtors were injured as a result of William Mark Hamilton's breaches of fiduciary duty, to wit, they lost the value of the assets and the benefits of a fair contract.

25. One who holds the property of another in trust is their fiduciary. Here, as a result of the TRO, both William Mark Hamilton and Sharon K. Hamilton owed a fiduciary duty to HII

and HIG to return the property safely in their custody. They either deliberately dispossessed HII and HIG of those assets or they failed to act prudently with utmost diligence to preserve them. Accordingly, HII and HIG are entitled to recover for the loss of those assets and any such recovery offsets the alleged "loan" or contractual claim of the Hamiltons.

Breach of Contract

26. William Mark Hamilton and Sharon K. Hamilton are liable to the Debtors for breach of contract. William Mark Hamilton and Sharon K. Hamilton breached various representations and warranties of the SPA as set forth above. The Debtors were injured as a result of William Mark Hamilton and Sharon K. Hamilton's breaches of contract.

Conspiracy

27. Under Oklahoma law, "a civil conspiracy consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means." *See Schovanec v. Archdiocese of Okla. City*, 188 P.3d 158, 175 (Okla. 2008). The elements are: (i) two or more persons; (ii) an object to be accomplished; (iii) a meeting of minds on the object or course of action; (iv) one or more unlawful, overt acts; and, (v) damages as the proximate result. *See id.* William Craig Hamilton, along with his parents William Mark Hamilton and Sharon K. Hamilton, conspired to prevent the Debtors from retrieving property the Debtors were rightfully entitled to possess, in the hopes that this would cause the Debtors to pay amounts allegedly owed. The conspirators engaged in unlawful acts such as conversion to accomplish their goals. The Debtors suffered damages as a proximate result of the conspirators' actions.

Section 502(d) Objections

28. The Debtors object under section 502(d) because William Mark Hamilton and Sharon K. Hamilton are transferees of transfers avoidable under sections 544 and 548, and are

also entities from which property is recoverable under 542 and 550. As a result, William Mark Hamilton and Sharon K. Hamilton's Claim No. 16 should be disallowed under section 502(d).

Transferee of a Transfer Avoidable under section 548

29. William Mark Hamilton and Sharon K. Hamilton are transferees of a transfer that is avoidable under section 548 (who have not paid the amount, or returned the property, for which they are liable). On or around August 11, 2014, HII purchased HIG from William Mark Hamilton and Sharon K. Hamilton (who were HIG's sole shareholders prior to the sale). HII paid or incurred obligations totaling approximately $13.7MM for HIG and received less than reasonably equivalent value in exchange.

30. HII did not receive reasonably equivalent value in exchange for the reasons set forth above, including: (i) HIG's books and financial records (on which the purchase price was based) contained material misrepresentations; (ii) the accounts-receivable aging schedule (which also factored into the pricing determination) contained material misrepresentations; (iii) many of the accounts receivable on HIG's books (and which factored into the purchase price) did not arise in the ordinary course of business; and, (iv) HIG's alleged client base listed entities which were not bona fide clients of HIG.

31. HII made this transfer at a time when HII was undercapitalized and/or insolvent. As a result, the SPA is avoidable as a constructively fraudulent transfer under section 548(a)(1)(B) and William Mark Hamilton and Sharon K. Hamilton are transferees of a transfer avoidable under section 548.

Transferee of a Transfer Avoidable under section 544

32. William Mark Hamilton and Sharon K. Hamilton are also the transferees of transfers avoidable under sections 544. The SPA is also avoidable under section 544 (which imports state fraudulent-transfer law).[6]

33. Section 544(b) allows the avoidance of "any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . ." 11 U.S.C. § 544(b). In other words, section 544(b) is a conduit to assert state-law-based fraudulent-transfer claims in bankruptcy. *See De La Pena v. Smith (In re IFS Fin. Corp.)*, 669 F.3d 255, 261 (5th Cir. 2012) (quoting *Asarco LLC v. Americas Mining Corp.*, 404 B.R. 150, 156 (S.D. Tex. 2009)). Under either Oklahoma or Texas law, the SPA is avoidable as a fraudulent transfer.

34. The Texas Uniform Fraudulent Transfer Act ("TUFTA")[7] provides for the avoidance of transfers in which an undercapitalized debtor received less than reasonably equivalent value in exchange. *See* TEX. BUS. & COMMERCE CODE §§ 24.005(a)(2)(A), 24.008(a)(1). TUFTA further provides for the avoidance of transfers in which an insolvent debtor received less than reasonably equivalent value in exchange. *See* TEX. BUS. & COMMERCE CODE §§ 24.006(a), 24.008(a)(1). As explained above, HII received less than reasonably equivalent value under the SPA. HII made these transfers while undercapitalized and/or insolvent. As a result, these transfers are avoidable under TUFTA.

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[6] Texas law governs the SPA and HII was headquartered in Houston. HIG is an Oklahoma corporation and William Mark Hamilton and Sharon K. Hamilton are domiciled in Oklahoma. The SPA is avoidable under either Oklahoma or Texas law.

[7] TEX. BUS. & COMMERCE CODE §§ 24.001-.013.

35. The Oklahoma Uniform Fraudulent Transfer Act ("OUFTA")[8] provides for the avoidance of transfers in which an undercapitalized debtor received less than reasonably equivalent value in exchange. *See* OKLA. STAT. tit. 24, §§ 116(A)(2)(a), 119(A)(1). OUFTA further provides for the avoidance of transfers in which an insolvent debtor received less than reasonably equivalent value in exchange. *See* OKLA. STAT. tit. 24, §§ 117(A), 119(A)(1). As explained above, HII received less than reasonably equivalent value under the SPA. HII made these transfers while undercapitalized and/or insolvent. As a result, these transfers are avoidable under OUFTA.

36. As these transfers are avoidable under relevant state law (i.e., either TUFTA or OUFTA), the transfers are avoidable under section 544. As a result, William Mark Hamilton and Sharon K. Hamilton are the transferees of transfers avoidable under section 544.

Entities from which Property is Recoverable under Section 550

37. To the extent transfers are avoidable under sections 544 or 548, section 550 provides for recovery from initial, immediate, and mediate transferees of such avoidable transfers. 11 U.S.C. § 550. William Mark Hamilton and Sharon K. Hamilton are initial, immediate, and/or mediate transferees under the SPA (which, as discussed above, is avoidable under either section 544 or section 548). As a result, William Mark Hamilton and Sharon K. Hamilton are entities from which property is recoverable under section 550.

Entities from which Property is Recoverable under Section 542

38. William Mark Hamilton and Sharon K. Hamilton are entities from which property is recoverable under section 542 of the Bankruptcy Code (providing for turnover of estate property). Specifically, William Mark Hamilton, Sharon K. Hamilton, and S&M Assets,

[8] OKLA. STAT. tit. 24, §§ 112-123.

obtained a temporary restraining order ("TRO") that prohibited the Debtors from accessing their assets. To obtain the TRO, William Mark Hamilton, Sharon K. Hamilton, and S&M Assets filed a document under penalty of perjury stating which assets were in their possession. William Mark Hamilton, Sharon K. Hamilton, and S&M Assets were in sole control and fiduciary custody of the assets after entry of the TRO. Upon lifting of the TRO, the Debtors discovered that the assets were no longer present and William Mark Hamilton, Sharon K. Hamilton, and S&M Assets have not explained the loss of the assets.

Conclusion

The Debtors respectfully request that the Court enter an order disallowing HII Claim No. 16 in its entirety.

Dated: March 28, 2016.

McKool Smith, P.C.

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

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Counsel for the Debtors-in-Possession

CERTIFICATE OF SERVICE

The undersigned certifies that on March 28, 2016, a true and correct copy of this document was served via the ECF system to the parties on the ECF service list, and a copy was served upon the claimant (at the address on the proof of claim), claimant's counsel, and United States Trustee by First Class Mail.

/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.	§	**CASE NO. 15-60070**
	§	
	§	**Jointly Administered**
Debtors	§	
	§	

AFFIDAVIT OF LORETTA R. CROSS IN SUPPORT OF THE DEBTORS' OBJECTIONS TO HII CLAIM NOS. 15–16, 18–21, 28, 49

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before the undersigned notary public appeared Loretta R. Cross who, after being sworn, testified as follows:

1. My name is Loretta Cross. I am over the age of twenty-one (21), am competent to make this Affidavit, and have never been convicted of a crime. I have personal knowledge of the facts as stated in this Affidavit. I am authorized to execute this Affidavit.

2. I currently serve as the Chief Restructuring Officer (the "CRO") of HII Technologies, Inc.; Apache Energy Services LLC, dba AES Water Solutions, and its division AES Safety Services; Sage Power Solutions, Inc.; Aqua Handling of Texas LLC, dba AquaTex; and Hamilton Investment Group, Inc. (collectively, "the Debtors"). HII Technologies (herein "HIIT", "we" or the "Company") is a publicly-traded company traded on the OTC marketplace under the symbol HIIT.

3. In my capacity as the CRO, I am familiar with the daily operations and financial conditions of HII Technologies, Inc. and its affiliates. I hereby submit this affidavit in support of the Debtors' objections to HII Claim Nos. 15–16, 18–21, 28 and 49. Except as otherwise

indicated, all facts set forth in this Affidavit are based upon my personal knowledge, my review of relevant documents, or my opinion based upon my experience, knowledge and information concerning the Debtors' operations, financial condition, and the industry as a whole. If called to testify, I would testify competently to the facts set forth herein. I am authorized by the Debtors to submit this Affidavit.

4. The Debtors have no record of board authorization for a loan of approximately $2.4 million from William Mark Hamilton and Sharon K. Hamilton to HIIT, for which William Mark Hamilton and Sharon K. Hamilton filed HII Claim No. 16.

5. The Debtors have no evidence that Sharon K. Hamilton was a guarantor, co-obligor, or in any way obligated to pay the amounts set forth in Sharon K. Hamilton's HII Claim No. 21. The Debtors also have no evidence that the expenses set forth in Sharon K. Hamilton's HII Claim No. 21 were for the benefit of the Debtors.

6. The payments to various vendors allegedly made by William Mark Hamilton and that form the basis of his HII Claim No. 28 were payments voluntarily made by William Mark Hamilton. The Debtors have no records indicating that William Mark Hamilton was a guarantor, co-obligor, or in any way liable for the amounts owed to these vendors.

7. In order to obtain the temporary restraining order ("TRO"), William Mark Hamilton, Sharon K. Hamilton, and S&M Assets filed a document under penalty of perjury stating which assets were in their possession. *See* Ex. ____, Okla. TRO. After the TRO was lifted, the Debtor hired a professional equipment asset specialist, TMG Services Company, to inventory the Debtors' equipment held by William Mark Hamilton, Sharon K. Hamilton, and S&M Assets. TMS Services Company was not able to locate all of the Debtors' property of which William Mark Hamilton, Sharon K. Hamilton, and S&M Assets swore they had possession.

Further, affiant saith naught."

Loretta R. Cross

SUBSCRIBED AND SWORN TO BEFORE ME, on March 28, 2016.

DONNA LANE
Notary Public, State of Texas
My Commission Expires
June 25, 2016

NOTARY PUBLIC, STATE OF TEXAS

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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.	§	**CASE NO. 15-60070**
	§	
	§	**Jointly Administered**
Debtors	§	
	§	

DECLARATION UNDER 28 U.S.C. § 1746 OF MATTHEW FLEMMING IN SUPPORT OF THE DEBTORS' OBJECTIONS TO HII CLAIM NOS. 15–16, 18–21, 28, 49

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

1. My name is Matthew Flemming. I currently serve as the Chief Executive Officer ("CEO") of HII Technologies, Inc. ("HII") and I have served in that capacity at all times relevant to this declaration and the claims referenced herein. HII is a publicly-traded company that reports to the Securities and Exchange Commission.

2. In my capacity as HII's CEO, I am generally familiar with the operations and financial conditions of HII and its subsidiaries Apache Energy Services LLC, dba AES Water Solutions, and its division AES Safety Services; Sage Power Solutions, Inc.; Aqua Handling of Texas LLC, dba AquaTex; and Hamilton Investment Group, Inc. (collectively, "the Debtors"). I submit this declaration in support of the Debtors' objections to HII Claim Nos. 15–16, 18–21, 28 and 49. Except as otherwise indicated, all facts set forth in this declaration are based upon my personal knowledge, my review of relevant documents, or my opinion based upon my experience, knowledge and information concerning the Debtors' operations, financial condition, and the industry as a whole. I am authorized by the Debtors to submit this document and I am doing so in my capacity as the CEO.

3. On or about August 11, 2014, HII purchased Hamilton Investment Group, Inc. ("HIG"), a frac water transfer company in Guthrie, Oklahoma, from William Mark Hamilton and his wife Sharon K. Hamilton via a Stock Purchase Agreement ("SPA").

4. William Mark Hamilton and Sharon K. Hamilton (and/or entities they control) sold the stock of HIG to HII. The Hamiltons represented themselves as knowledgeable about the books of HIG, its customer base, its financials, the general business of HIG, and of HIG's assets and operations. HII relied on their representations described herein. As a result of this reliance upon the Hamiltons' representations described below, all of the Debtors were injured and HII overpaid for the HIG stock, assets acquired in connection with the SPA, and transactions associated with the SPA, and the self-interested transactions described herein.

5. In connection with the SPA, William Mark Hamilton and Sharon K. Hamilton made representations to HII that "[t]he books of account and other financial records of [HIG] (i) are accurate and complete in all material respects and have been maintained on a basis consistent with prior years; and, (ii) are stated in reasonable detail and accurately and fairly reflect the material transactions and material dispositions of the respective and properties of [HIG]." Based on HII's experience after the sale, I have concluded that the books and records did not accurately present HIG's financial condition. As a result the Debtors were injured and HII overpaid for the stock.

6. In connection with the SPA, William Mark Hamilton and Sharon K. Hamilton represented that "Schedule 3.20(c) sets forth a complete and correct list of all clients of [HIG] and its Affiliates and any Business Contracts such client is party to, including without limitation any representation agreements, and marketing agreements." After the sale, I concluded that this representation was false because Schedule 3.20(c) appears to list entities that were not bona fide

clients of HIG, and after HIG's sale to HII, HIG never did any further business with most of these customers and their MSAs.

7. After the closing of the SPA Mark Hamilton was HIG's President overseeing HIG's day-to-day operations and acting in a close relationship of trust with HII. After the SPA closing, William Craig Hamilton entered into a consulting agreement with HIG where he maintained a special and confidential fiduciary relationship with both HII and HIG. Each of Mark Hamilton, Craig Hamilton and Sharon Hamilton occupied a special relationship of confidential trust with HII and were entrusted with assets and information of the Debtors as their fiduciaries.

8. Based on my experience after he ceased to be president of HIG, it appears that while President of HIG and in a relationship of trust with HII, William Mark Hamilton: (i) used HIG's assets personally; and, (ii) helped his son William Craig Hamilton perform work for son's benefit (and/or failed to report that fact to HII). No independent third party opined on the objective fairness of the self-interested Hamilton transactions. The self-interested transactions do not appear to be fair to HII, HIG or the Debtors.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: March 28, 2016

Matthew Flemming

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) S & M ASSETS, LLC, an Oklahoma limited liability company, (2) WILLIAM MARK HAMILTON, an individual, (3) SHARON K. HAMILTON, an individual, Plaintiffs, v. (1) MATTHEW C. FLEMMING, an individual; Defendants.	)	Case No. 16-cv-00280-W

DEFENDANT MATTHEW C. FLEMMING'S
MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendant Matthew C. Flemming ("Flemming"), pursuant to Fed. R. Civ. P. 12(b)(6), respectfully requests this Court dismiss Plaintiffs' claims asserted against him. In support of this motion, Flemming offers the following brief.

INTRODUCTION

Plaintiffs S & M Assets, LLC, William Mark Hamilton, and Sharon K. Hamilton ("Plaintiffs") allege that on August 12, 2014, the Hamiltons entered into a Stock Purchase Agreement ("SPA") with HII Technologies, Inc. ("HII"), wherein the Hamiltons agreed to sell Hamilton Investment Group, Inc. ("HIG"), an oilfield service company, to HII. *See* Doc. 1 (Notice of Removal), Ex. 4, Amended Petition, ¶8. Plaintiffs contend that the purchase price HII agreed to pay included a Working Capital Adjustment ("WCA"), which was to be calculated and payable subsequent to closing. *Id.* at ¶10. Plaintiffs

assert that Flemming, the CEO of HII, asked if the Hamiltons would be agreeable to loan the WCA payment back to HII, or $2,428,871.39. Flemming allegedly represented to the Hamiltons that HII was in possession of the money for the WCA payment but HII preferred to borrow back the same amount. Plaintiffs contend Flemming further represented to the Hamiltons that the money would be paid to them within the first year the loan was made with interest. *Id.* at ¶11. Plaintiffs allege that they specifically relied on Flemming's representation that HII would be able to repay the outstanding principal balance within one year in making their determination to loan the money to HII. *Id.* at ¶13. Plaintiffs claim fraud and negligent misrepresentation by Flemming, and Plaintiffs seek damages of in the amount of the loan, $2,428,871.39, plus interest and fees. *Id.* at ¶¶ 16, 19.

In their Amended Petition, Plaintiffs allege that Flemming was at all material times the CEO of HII, and as CEO, Flemming negotiated and executed the SPA on behalf of HII. *Id.* at ¶11. Despite these allegations, Plaintiffs attempt to disregard the corporate veil of HII and hold Flemming personally liable for the obligations of HII, presumably to avoid having this claim decided as part of HII's bankruptcy.

Plaintiffs' claims against Flemming cannot survive under Oklahoma law. A legal fiction exists which protects shareholders and officers of a corporation from personal liability for the obligations of that corporate entity. *Warner v. Hillcrest Med. Ctr*, 1995 OK CIV APP 123, ¶ 23 n.5, 914 P.2d 1060, 1067 n.5. In addition, Plaintiffs' Amended Petition fails to assert allegations that state a claim that is plausible on its face. Thus, Flemming is entitled to a dismissal of Plaintiffs' Amended Petition.

STANDARDS

Taking all of the factual allegations as true, Plaintiffs' Amended Petition[1] should be dismissed pursuant to FED. R. CIV. P. 12(b)(6). Plaintiffs do not allege facts sufficient to support a claim that is plausible on its face. In considering a motion to dismiss under Rule 12(b)(6), the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. Thus, "the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Ridge at Red Hawk L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). The complaint must "provide enough factual allegations for a court to infer potential victory." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

Plaintiffs' Amended Petition also must comply with Rule 9(b) and the heightened pleading standard for fraud and negligent misrepresentation. Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). The primary purpose of Rule 9(b) is to afford a defendant fair notice of the plaintiff's claim and of the factual ground upon which it is based. *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir.

[1] After removal, the federal pleading standards govern the sufficiency of the allegations. FED. R. CIV. P. 81(c)(1).

1992). "At a minimum, Plaintiffs must set forth the 'who, what, when, where and how' of the alleged fraud, and must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 726-27 (10th Cir. 2006).

Plaintiffs' Amended Petition does not meet these required standards. Flemming therefore asks this Court to dismiss this lawsuit in its entirety.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE THAT THEY HAVE OBTAINED AN UNSATISFIED JUDGMENT AGAINST HII.

Plaintiffs are affirmatively barred from seeking liability against Flemming in this Court based on "any nature" under OKLA. STAT. tit. 12, § 682(B) (effective as of November 1, 2013). Section 682(B) states:

> **B.** No suit or claim of any nature shall be brought against any officer, director or shareholder for the debt or liability of a corporation of which he or she is an officer, director or shareholder, until judgment is obtained therefor against the corporation and execution thereon returned unsatisfied. This provision includes, but is not limited to, claims based on vicarious liability and alter ego. Provided, nothing herein prohibits a suit or claim against an officer, director or shareholder for their own conduct, act or contractual obligation arising out of or in connection with their direct involvement in the same or related transaction or occurrence.

OKLA. STAT. tit. 12, § 682(B). Two conditions must be met before Plaintiffs can bring a claim for alter ego or vicarious liability: (1) Plaintiffs must first obtain a judgment against the corporation, HII, and (2) Plaintiffs must attempt to execute the judgment and the judgment must be returned unsatisfied. *See Racher v. Westlake Nursing Home Ltd.*

P'ship, 2014 U.S. Dist. LEXIS 65940 (W.D. Okla. May 14, 2014). Plaintiffs' Amended Petition does not satisfy either condition. Plaintiffs neither allege that a judgment was obtained against HII related to this matter nor do they allege that any judgment related to this matter has been returned unsatisfied.

Plaintiffs will undoubtedly argue that they are seeking damages from Flemming based on his own "conduct, act or contractual obligation arising out of or in connection with their direct involvement in the same or related transaction or occurrence." OKLA. STAT. tit. 12, § 682(B). However, this Court is free to look behind the allegations in the Amended Petition to determine whether Plaintiffs' claims are truly against Flemming or whether they merely mirror the claims against HII. If so, this Court may disregard the claims. *ZHN v. Randy Miller, LLC*, et al., 2015 U.S. Dist. Lexis 28300 (W.D. Okla. March 9, 2015).

This Court dealt with an almost identical issue in *ZHN*. Plaintiff ZHN, LLC ("ZHN") filed an action against defendants Lippard Auctioneers, Troy Lippard, Angie Lippard, Brady Lippard, and Jerry Whitney (collectively, the "Lippard Defendants"). Lippard Auctioneers then filed a Third Party Complaint against Alexander Magid ("Magid"). *Id.* at *3. Magid moved to dismiss Lippard Auctioneers' Third Party Complaint for failure to state a claim asserting that, pursuant to Okla. Stat. tit. 12, § 682(B), Lippard Auctioneers' claim was premature because no judgment was obtained against ZHN. *Id.* at *5. Lippard Auctioneers responded that it was not just bringing an alter-ego claim against Magid but was bringing an individual claim against Magid for his conduct during the auction, which was the subject of the lawsuit. *Id.* at *7.

The Court found that Lippard Auctioneers was not asserting an individual claim against Magid. Instead, the complaint acknowledged that Magid was the sole member of ZHN and that Magid acted on ZHN's behalf when he signed the real estate contracts that Lippard Auctioneers alleged that both ZHN and Magid breached. *Id.* As a result, the Court concluded that Lippard's Auctioneers' Third Party Complaint was barred by § 682(B) and (D), and the Court granted Magid's Motion to Dismiss. *Id.* at *8.

Here, Plaintiffs' Amended Petition against Flemming mirrors the claims by Plaintiffs against HII and HIG in a separate lawsuit. Plaintiffs filed a lawsuit to recover the same loan payment in the case styled *S & M Assets, LLC, Mark Hamilton and Sharon Hamilton v. Hamilton Investment Group, Inc. and HII Technologies, Inc*., Case No. CJ-2015-142 (Logan County) ("First Lawsuit"). In the First Lawsuit, Plaintiffs bring a claim entitled "Fourth Cause of Action" against HII and HIG for recovery of $2.4 million, plus past and future interest payments. *See* First Lawsuit Petition, ¶¶ 34-42 (Ex. 1). At first glance, it appears that Plaintiffs are making a claim for breach of the SPA. However, in their Response to HII and HIG's Motion to Dismiss, Plaintiffs clarify their allegations:

> On or about August 12, 2014, Plaintiffs sold an oilfield service company, Hamilton Investment Group, Inc. ("HIG") to HII. The terms of the sale were memorialized in a SPA, which included a forum selection clause, a Texas choice of law provision, and an arbitration agreement. Additionally, the SPA set forth certain post-closing provisions for calculating the working capital of the company. As a result of this calculation, the parties determined that the Plaintiffs were owed an additional $2.4 million for the working capital account of the transaction.
>
> In September 2014, HII secured a loan for $2.4 million to pay off what it owed to Plaintiffs under the working capital provisions of the SPA, and notified Plaintiffs of the same. HII tendered to Plaintiffs that money to pay off the obligation that it owed to Plaintiffs of the same. HII tendered to

> Plaintiffs that money to pay off the obligation that it owed to Plaintiffs for the working capital account balance. The payment of the $2.4 million to Plaintiffs would satisfy HII's outstanding obligations under the SPA in regard to the working capital account balance.
>
> In this same conversation, however, HII asked if Plaintiffs would consider loaning the $2.4 million back to HII. Plaintiffs orally agreed to loan the $2.4 million if HII agreed to pay monthly interest on the loan. In May 2015, HII stopped making payments on the loan.
>
> Plaintiffs have brought suit for the failure to repay the loan as agreed. [. . .]

Plaintiffs' Response to Defendants' Motion to Dismiss Fourth Cause of Action, First Lawsuit (Ex. 2). The First Lawsuit remains pending. [2]

Plaintiffs' claims against Flemming in this lawsuit mirror the allegations in the First Lawsuit. The primary differences are that HII and HIG, now in bankruptcy, are no longer parties and the cause of action has changed from breach of oral contract to fraud/negligent misrepresentation. Flemming, as CEO, negotiated and executed the SPA on behalf of HII. The negotiations included the payment arrangement of the WCA as required under the SPA. The conversations between Plaintiffs and Flemming in September 2014 took place on behalf of HII and HIG. As in *ZHN*, this Court should find that Flemming cannot be held personally liable for the obligations of HII and just as in *ZHN*, Plaintiffs' claims against Flemming should be dismissed.

[2] This Court may take judicial notice of Plaintiffs' allegations in their Response to the Motion to Dismiss filed in the First Lawsuit without affecting its ability to grant Flemming's Rule 12(b)(6) Motion to Dismiss. *See, e.g, Patton v. Jones*, 2006 U.S. Dist. LEXIS 54429, at *2 n. 1 (W.D. Okla. Aug. 4, 2006).

III. PLAINTIFFS' AMENDED PETITION FAILS TO SUFFICIENTLY ALLEGE A CLAIM FOR FRAUD OR NEGLIGENT MISREPRESENTATION.

Plaintiffs allege Flemming is liable for fraud and/or negligent misrepresentation based on statements made by Flemming in a telephone conversation. Plaintiffs claim that Flemming called the Plaintiffs to ask them to loan back the amount that HII was going to pay Plaintiffs as a Working Capital Adjustment payment under the SPA. *See* Doc. 1 (Notice of Removal), Ex. 4, Amended Petition, ¶¶ 8-11. Plaintiffs allege that Flemming made false representations about "HII's ability to ever pay of the loan." *Id.* at ¶ 12. "Specifically, the Hamiltons relied on Flemming's representation that HII would be able to repay the outstanding principal balance within one year in making their determination to loan the money to HII." *Id.* at ¶ 13. Flemming's opinion that HII "would be able to repay" the loan is not a statement of ***existing*** fact but an opinion or prediction as to a ***future*** event.

False representations about future events generally cannot constitute fraud or negligent misrepresentation except in certain circumstances.[3] *Citation Co. Realtors, Inc. v. Lyon*, 610 P.2d 788, 790 (Okla. 1980). The general rule is:

> An actionable representation must relate to past or existing facts and cannot consist of merely broken promises, unfulfilled predictions, or erroneous conjectures as to future events. ***Predictions as to future events are ordinarily regarded as non-actionable expressions of opinions upon which there is no right to rely, and obviously cannot constitute fraud where made in an honest belief that they will prove correct***.

[3] These rules apply to claims for negligent misrepresentation. *See, e.g., Williams Field Services Group, LLC v. GE Int'l Inc.*, 2009 U.S. Dist. LEXIS 4723, at *14 (N.D. Okla. Jan. 22, 2009).

Southwestern Bell Media, Inc. v. Spencer, 1990 Okla. Civ App. LEXIS 60 (Okla. Civ. App. Aug. 14, 1990) (Released for publication) (quoting *Farmers Union Co-Operative Royalty Co. v. Southward*, 82 P.2d 918, 822 (Okla. 1938)) (emphasis added). An exception to the general rules exists when "the promise to act in the future is accompanied by an intention not to perform and the promise is made with the intent to deceive the promisee into acting where he otherwise would have not done so." *Citation*, 610 P.2d at 790. "There is a wide distinction between the nonperformance of a promise and a promise made *mala fide*, only the latter being actionable fraud." *Id.*

Oklahoma recognizes an expression of opinion on a future event may constitute actionable fraud or a negligent misrepresentation under certain circumstances. An opinion or prediction about a future event may carry the implied assertion that the speaker knows of no facts which would preclude such an opinion and knows of facts which justify it. *Hall v. Edge*, 782 P.2s 122, 127 (Okla. 1989) (quoting PROSSER & KEETON ON THE LAW OF TORTS, § 109, at 760-61 (5th ed)). Common examples include where the speaker holds himself out or is understood as having special knowledge not available to the listener, "such as a jeweler as to the value of a diamond, an attorney on a point of law or a physician on a matter of health . . . ." *Id.*

In *Hall*, the Oklahoma Supreme Court discussed more specifically the categories of circumstances where an opinion or prediction of a future event could constitute fraud or misrepresentation: (1) where a fiduciary relationship between the parties, (2) the speaker has special knowledge on which to base a prediction that is unavailable to the listener, (3) the speaker has successfully endeavored to secure confidence of the listener,

and (4) the speaker has some other special reason to expect that the listener will rely on his opinion. *Id.* at 127 & n. 3 (quoting the RESTATEMENT (SECOND) OF TORTS § 542).

None of these recognized circumstances are alleged in Plaintiffs' Amended Petition against Flemming. Indeed, rather than claiming Flemming owed a fiduciary duty to Plaintiffs, Plaintiffs' allegations describe an adversarial, arms-length series of transactions that required sophistication from both sides. Plaintiffs contend that the "conduct which forms the basis of the Petition . . . arose out of a contractual relationship between the parties that was originated, negotiated and consummated in Oklahoma [and] involves several ongoing transactions between the parties concerning both the sale and lease of real and personal property . . . ." Doc. 1, Ex. 2, Amended Petition, ¶4. Plaintiffs aver that they previously entered into a Stock Purchase Agreement ("SPA") in which Plaintiffs had sold their shares in an oilfield services company to HII. *Id.* at ¶8. The terms of the SPA were complex, including the calculation and payment of a WCA within a certain time after closing of the business. *Id.* at ¶10. Nothing in these allegations or the remainder of the Amended Petition can be reasonably understood to mean that there was anything other than an ordinary business relationship between Plaintiffs and Flemming.

Nor do Plaintiffs assert allegations that support the other recognized circumstances that would allow Plaintiffs to recover for fraud or negligent misrepresentation based on Flemming's opinion that the loan principal would be repaid in a year. Plaintiffs do not allege that Flemming had any special knowledge unavailable to Plaintiffs. They do not contend that Flemming had successfully secured a particular confidence in Plaintiffs or

that there was any "special reason" to expect Plaintiffs would rely on Flemming's opinion.

Without such allegations, Plaintiffs' Amended Petition fails to state a claim for relief under Rule 12(b)(6), Rule 9(b) as explained in *Iqbar* and *Twombly*. Rule 9(b) requires Plaintiffs to "state with particularity the circumstances constituting fraud." As shown above, Plaintiffs' Amended Petition are devoid of the allegations required to satisfy this standard. Plaintiffs' Amended Petition therefore must be dismissed.

IV. PLAINTIFFS' AMENDED PETITION FAILS TO ALLEGE THAT FLEMMING OWED A LEGAL DUTY TO PLAINTIFFS

Plaintiffs' Amended Petition separately fails to sufficient state a claim for negligent misrepresentation. To plead a claim for negligent misrepresentation, Plaintiffs must allege the violation of a duty owed to them by Flemming. The Oklahoma Supreme Court in *Silver v. Slusher*, 770 P.2d 878, 882 (Okla. 1988), held that the plaintiffs were precluded from recovery under either claims for either negligent misrepresentation or constructive fraud because there was no breach of a legal or equitable duty. *Id.* at 882 n. 11 (citing Okla. Stat. tit. 15, § 59, F*aulkenberry v. Kansas City Southern Ry. Co.*, Okla., 602 P.2d 203, 206 (1979)). *See also Rivera v. Hartford Ins. Co*., 2014 U.S. Dist. LEXIS 175230 (W.D. Okla. Dec. 19, 2014) (dismissing a negligent misrepresentation claim for failure to plead a duty owed by the defendant).

Plaintiffs' Amended Petition does not allege any duty owed by Flemming to them. The paragraphs in the Amended Petition devoted to the claim for negligent misrepresentation merely incorporate the allegations that were made for the fraud claim.

See Amended Petition, ¶17. As shown above, Plaintiffs' allegations are reasonably understood to involve a series of arms-length transactions negotiated through equal bargaining power. The allegations show that Plaintiffs sold their ownership interest in an oil service company to HII using a SPA with a WCA payment in excess of $2.4 million. There is nothing in the Amended Petition to suggest that Flemming, by reason of his position as CEO of HII, owed Plaintiffs any legal duties. *See, e.g., Rivera*, 2014 U.S. Dist. LEXIS 175230, at * 3 (insurer owed no duty to advise an insured with respect to their insurance needs or explain the policy).

Because the allegations, when read on their face in the Amended Petition, omit any plausible interpretation of a duty owing from Flemming to Plaintiffs at the time of the allegation misrepresentation, Plaintiffs' claim for negligent misrepresentation must be dismissed.

V. PLAINTIFFS COULD NOT HAVE PLAUSIBLY RELIED ON SOME OF THE MISREPRESENTATIONS ALLEGED BY PLAINTIFFS

Plaintiffs' Amended Petition alleges also includes misrepresentations by Flemming that allegedly took place *after* Plaintiffs agreed to loan money to HII in support of Plaintiffs' claim for damages. The Amended Petition states in part:

> 14. During the following months, up to and including April 2015, Flemming repeated these false representations to the Hamiltons, assuring them that HII would be in a position to repay the money in full. Specifically, Flemming represented to Plaintiff William Mark Hamilton on January 16, 2015, that HII would be in a position to repay the loan by March 2015 or earlier. And again, on April 6, 2015, Flemming represented to the Hamiltons that HII would be in a position to repay the loan by August 2015. Given the dire state of HII's financial condition at that time of these representations, of which

> Flemming was fully aware, these representations were false and intended to deceive and mislead the Hamiltons.

Amended Petition, ¶ 14. Plaintiffs then allege they were "damaged on the basis of Flemming's misrepresentations in the amount of $2,428,871.39, exclusive of interest, attorneys' fees and costs." *Id.* at ¶¶16 & 19.

The alleged misrepresentations contained in ¶14 cannot form the basis for Plaintiffs to recover the alleged damages for HII's failure to repay the loan principal or interest. To prove either fraud or negligent misrepresentation under Oklahoma law, Plaintiffs must show that they "sustained damage as a result of [their] reliance" on Flemming's alleged misrepresentations. *See, e.g,. Ragland v. Shattuck Nat. Bank*, 36 F.3d 983, 991 (10th Cir. 1994) (discussing Oklahoma's requirements for a negligent misrepresentation claim); *Hitch Enters. v. Cimarex Energy Co*., 859 F. Supp. 2d 1249, 1259 (W.D. Okla. 2012) ("To be actionable, however, constructive fraud like actual fraud "require[s] detrimental reliance by the . . . complaining [parties]."") (citing *Howell v. Texaco Inc.,* 112 P.3d 1154, 1161 (Okla. 2004)). At this stage of the litigation, Plaintiffs must "plead sufficient facts to create a reasonable inference of reliance." *Hitch*, 859 F. Supp. 2d at 1261 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009); Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008).

Plaintiffs could not have relied on alleged misrepresentations made by Flemming that took place ***after*** they decided to enter into the loan agreement with HII.

Because Plaintiffs seek damages only in the amount of the loan principal plus interest, Plaintiffs cannot plausibly recover under fraud and/or negligent

misrepresentation claims for misrepresentations made after the loan agreement had been entered. Plaintiffs' Amended Petition must be dismissed to the extent it purports to rely on such statements to recover the loan principal and interest from Flemming. *See* Amended Petition, ¶¶14, 16 & 19.

CONCLUSION

Plaintiffs' Amended Petition should be dismissed. Plaintiffs cannot recover from Flemming personally until they first obtain a judgment against HII Technologies, Inc. and the judgment is not satisfied. In addition, the Amended Petition fails to sufficiently state allegations that would plausibly support claims for fraud or negligent misrepresentation.

WHEREFORE, Defendant Matthew S. Flemming respectfully requests this Court to enter judgment in his favor on all claims against him and to award its costs to the extent recoverable by law and such other relief as the interests of justice may require.

Dated: April 1, 2016

Respectfully submitted,

By: /s/ Kerry R. Lewis_____
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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2016, I electronically transmitted the foregoing document to the Clerk of the Court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Victor F. Albert
Matthew L. Warren
Conner & Winters, LLP
211 N. Robinson, #1700
Oklahoma City, OK 73102

/s/ Kerry R. Lewis

1030029730

DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

S & M ASSETS, LLC,)
MARK HAMILTON, individually, and)
SHARON HAMILTON, individually,)
)
Plaintiffs,)
)
v.)
)
HAMILTON INVESTMENT GROUP,)
INC., and HII TECHNOLOGIES, INC.,)
)
Defendants.)

Case No. CJ-2015-147

PETITION

Plaintiffs, S & M Assets, LLC ("S & M Assets"), Mark Hamilton and Sharon Hamilton (collectively, "Plaintiffs"), for their Petition against Defendants allege and state as follows:

PARTIES AND JURISDICTION

1. Plaintiff, S & M Assets is an Oklahoma limited liability corporation with its principal place of business in Guthrie, Logan County, Oklahoma.

2. Plaintiffs, Mark Hamilton and Sharon Hamilton, are husband and wife and reside in Logan County, Oklahoma.

3. Defendant, Hamilton Investment Group, Inc., is an Oklahoma corporation with its principal place of business in Guthrie, Logan County, Oklahoma.

4. Defendant, HII Technologies, Inc., is a corporation organized under the laws of a state other than Oklahoma, with its principal place of business in Houston, Texas.

Exhibit 1

5. The contracts for which this Petition alleges were entered into in Logan County, Oklahoma, and were to be performed in Logan County Oklahoma.

6. This Court has jurisdiction over the parties and the subject matter of this action.

7. Venue is proper in Logan County, Oklahoma pursuant to, but not limited to, 12 O.S. §§ 134, 137, 142 and 143.

FIRST CAUSE OF ACTION

For their first cause of action against Defendants, Plaintiffs state:

8. On or about August 12, 2014, Defendants entered into a contract with S & M Assets for the lease of property that is located in Logan County.

9. The contract term is three years, through and including August 2017.

10. The contract provides that monthly rent is to be paid by Defendants to S & M Assets in the amount of $4,500.00.

11. Defendant HII Technologies, Inc. paid the monthly rent under the contract through May 2015.

12. Defendants have not made the payment owing and due for June or to be due on July 1, 2015.

13. As of July 2, 2015, Defendants will owe $9,000.00 in rents that are unpaid under this contract. Furthermore, Defendants will owe $4,500.00 for the balance of the contract through August 2017, for a total of $108,000.00.

14. Defendants have breached the contract, and that breach has proximately caused and will continue to cause damages to S & M Assets.

15. As a result of the breach by Defendants, S & M Assets is directly damaged in an amount of $9,000.00 in past damages, plus $108,000.00 as future damages, exclusive of interest, attorneys' fees and costs.

SECOND CAUSE OF ACTION

For their second cause of action against Defendants, Plaintiffs state:

16. The allegations of paragraphs 1 through 15 are incorporated herein.

17. On or about August 12, 2014, Defendants entered into a contract with S & M Assets for the lease of oilfield pipe owned by S & M Assets and located in Logan County.

18. The contract term is indefinite until the pipe has been purchased by Defendants.

19. The contract provides that monthly rent is to be paid by Defendants to S & M Assets in the amount of $10,000.00.

20. Defendant HII Technologies, Inc. paid the monthly rent under the contract through May 2015.

21. Defendants have not made the payment owing and due for June or to be due on July 1, 2015.

22. As of July 2, 2015, Defendants will owe $20,000.00 in rents that are unpaid under this contract. Furthermore, Defendants will owe $10,00.00 for the balance of the contract through the time the pipe is purchased by Defendants, for additional damages of $10,000.00 per month.

23. Defendants have breached the contract, and that breach has proximately caused and will continue to cause damages to S & M Assets.

24. As a result of the breach by Defendants, S & M Assets is directly damaged in an amount of $10,000.00 in past damages, plus $10,000.00 per month as future damages, exclusive of interest, attorneys' fees and costs.

THIRD CAUSE OF ACTION

For their third cause of action against Defendants, Plaintiffs state:

25. The allegations of paragraphs 1 through 24 are incorporated herein.

26. On or about August 12, 2014, Defendants entered into a contract with S & M Assets for the lease of property that is located in Coal County, Oklahoma.

27. The contract term is three years, through and including August 2017.

28. The contract provides that monthly rent is to be paid by Defendants to S & M Assets in the amount of $1,500.00.

29. Defendant HII Technologies, Inc. paid the monthly rent under the contract through May 2015.

30. Defendants have not made the payment owing and due for June or to be due on July 1, 2015.

31. As of July 2, 2015, Defendants will owe $3,000.00 in rents that are unpaid under this contract. Furthermore, Defendants will owe $1,500.00 for the balance of the contract through August 2017, for a total of $36,000.00.

32. Defendants have breached the contract, and that breach has proximately caused and will continue to cause damages to S & M Assets.

33. As a result of the breach by Defendants, S & M Assets is directly damaged in an amount of $3,000.00 in past damages, plus $36,000.00 as future damages, exclusive of interest, attorneys' fees and costs.

FOURTH CAUSE OF ACTION

For their fourth cause of action against Defendants, Plaintiffs state:

34. The allegations of paragraphs 1 through 33 are incorporated herein.

35. On or about August 12, 2014, Defendants entered into a contract with Mark Hamilton and Sharon Hamilton for a loan with a principal balance of $2.4 million. The agreement was that the loan could be repaid at any time by Defendants, including within the one year after the loan was contracted. Defendants agreed to pay interest on the loan to Mark and Sharon Hamilton each month.

36. The monthly interest payments were and are $20,039.32 for months with 31 days, and $19,392.89 for months with 30 days.

37. Defendant HII Technologies, Inc. paid the monthly interest under the contract through April 2015.

38. Defendants have not made the payment owing and due for May or June 2015.

39. Defendants owe $39,432.21 in interest payments that are unpaid under this contract. Furthermore, Defendants will owe monthly interest payments for the balance of the contract until it is paid off.

40. Defendants are in breach of the contract and the entire principal balance of $2.4 million is due and owing to Mark Hamilton and Sharon Hamilton.

41. Defendants have breached the contract, and that breach has proximately caused and will continue to cause damages to Mark Hamilton and Sharon Hamilton.

42. As a result of the breach by Defendants, Plaintiffs Mark Hamilton and Sharon Hamilton are directly damaged in an amount of $39,432.21 in past damages, plus

monthly interest payments as future damages, and in the principal amount that is now due and owing in the amount of $2.4 million, exclusive of interest, attorneys' fees and costs.

FIFTH CAUSE OF ACTION
(Unjust Enrichment)

For their fifth cause of action against Defendants, Plaintiffs state:

43. The allegations of paragraphs 1 through 42 are incorporated herein.

44. Defendants wrongly and unjustly received leased property and money from Plaintiffs, all as alleged above.

45. Defendants received a benefit from their unjust conduct at the expense of Plaintiffs.

46. The actions of Defendants constitute an unjust enrichment to Defendants at the sole detriment of Plaintiffs.

47. The Court should order restitution to Plaintiffs for all amounts wrongfully taken and kept by Defendants, in the particulars and amounts alleged above, which are $71,432.21 in past damages, plus future damages and the principal amount due, exclusive of interest, attorneys' fees and costs.

PRAYER

WHEREFORE, PREMISES CONSIDERED, S & M Assets, LLC, Mark Hamilton and Sharon Hamilton, respectfully pray for:

A. Judgment in their favor and against Defendants on all claims for relief;

B. Actual damages for past damages in the amount of $32,000.00 under the lease contracts, against all Defendants;

C. Actual damages for future damages in the amount of $16,000.00 in monthly rents under the lease contracts, against all Defendants;

D. Actual damages for past damages in the amount of $39,432.21 for interest payments that are unpaid under the loan contract;

E. Actual damages for future damages for the monthly interest payments that will be due and owing under the loan contract until paid in full, against all Defendants;

F. Actual damages in the amount of $2.4 million for the principal due and owing under the loan contract, against all Defendants;

G. Recovery of all damages as a result of the unjust enrichment of the Defendants by virtue of their acts and omissions set forth herein;

H. Prejudgment and post-judgment interest, attorneys' fees and costs as provided by law; and

I. Such other relief as may be deemed just and proper.

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1030109581

DISTRICT COURT OF LOGAN COUNTY
STATE OF OKLAHOMA

S & M ASSETS, LLC,
MARK HAMILTON, individually, and
SHARON HAMILTON, individually,

Plaintiffs,

v.

HAMILTON INVESTMENT GROUP, INC., and HII TECHNOLOGIES, INC.,

Defendants.

Case No. CJ-2015-142

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOURTH CAUSE OF ACTION

Plaintiffs, S & M Assets, LLC ("S & M Assets"), Mark Hamilton and Sharon Hamilton (collectively, "Plaintiffs"), respond to Defendants', Hamilton Investment Group, Inc. and HII Technologies, Inc. (collectively, "Defendants"), Motion to Dismiss Fourth Cause of Action. Defendants' move for dismissal of Count IV of Plaintiffs' Petition based on a forum-selection clause contained in a previous agreement between the parties and related to the sale of an oilfield services company. However, *this* dispute does not concern *that* contract. As set forth herein, dismissal of Count IV is not warranted because Plaintiffs have stated a claim for breach of oral contract that is facially valid under 12 O.S.2011, § 2012(B)(6) and because the validity of the forum-selection clause is in dispute as it relates to the oral agreement at issue. Defendants' Motion to Dismiss should be denied.

BACKGROUND

Defendants allege that Count IV of the Petition concerns money owing and due to Plaintiffs under a Stock Purchase Agreement ("SPA") entered into on or about August 12, 2014. The SPA relates to the sale of Plaintiffs' oilfield services company to Defendant HII Technologies, Inc. ("HII"). Defendants seek dismissal and request enforcement of a forum-

Exhibit 2

selection clause contained in that agreement. However, Plaintiffs dispute the validity of the SPA's forum-selection clause as it relates to the instant dispute. Because Defendants have attached the SPA as an exhibit to their Motion and rely on it as a basis for relief, Plaintiffs offer the following, additional facts to the Court:

On or about August 12, 2014, Plaintiffs sold an oilfield service company, Hamilton Investment Group, Inc. ("HIG") to HII. The terms of the sale were memorialized in a SPA, which included a forum-selection clause, a Texas choice of law provision, and an arbitration agreement. Additionally, the SPA set forth certain post-closing provisions for calculating the working capital of the company. As a result of this calculation, the parties determined that the Plaintiffs were owed an additional $2.4 million for the working capital account of the transaction.

In September 2014, HII secured a loan for $2.4 million to pay off what it owed to Plaintiffs under the working capital provisions of the SPA, and notified Plaintiffs of the same. HII tendered to Plaintiffs that money to pay off the obligation that it owed to Plaintiffs for the working capital account balance. The payment of the $2.4 million to Plaintiffs would satisfy HII's outstanding obligations under the SPA in regard to the working capital account balance.

In this same conversation, however, HII asked if Plaintiffs would consider loaning the $2.4 million back to HII. Plaintiffs orally agreed to loan the $2.4 million if HII agreed to pay monthly interest on the loan. HII accepted these terms. Over the next six months, HII made monthly interest payments to the Plaintiffs on the $2.4 million principal balance, as required by the terms of the loan. In May 2015, HII stopped making payments on loan.

Plaintiffs have brought suit against Defendants for the failure to repay the loan as agreed. That is one of the claims in this lawsuit. The other claims are for breaches of written leases of

premises and oilfield pipe, which, too, are separate from the SPA and contain different choice of law provisions from the SPA, electing Oklahoma as the choice of law to control the contracts. In this lawsuit, Plaintiffs do not allege breach of the SPA or nonperformance with respect to any of HII's obligations in connection with the purchase of HIG. This action does not concern that transaction, and the terms of that agreement do not govern this one.

STANDARD OF REVIEW

Motions to dismiss are generally viewed with disfavor. *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 4, 230 P.3d 853, 856. The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim. *Zaharias v. Gammill*, 1992 OK 149, ¶ 6, 844 P.2d 137, 138. A motion to dismiss for failure to state a claim upon which relief may be granted should be denied unless it appears without doubt that the plaintiff can prove no set of facts in support of the claim for relief. *See A-Plus Janitorial & Carpet Cleaning v. The Emp'rs' Workers' Comp. Ass'n*, 1997 OK 37, ¶ 9, 936 P.2d 916, 922; *Nat'l Diversified Bus. Servs., Inc. v. Corporate Fin. Opportunities, Inc.*, 1997 OK 36, ¶ 9, 946 P.2d 662, 665; *Delbrel v. Doenges Bros. Ford, Inc.*, 1996 OK 36, ¶ 3, 913 P.2d 1318, 1320.

When considering a defendant's request for dismissal, this Court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them. *Great Plains Fed. Sav. and Loan Ass'n v. Dabney*, 1993 OK 4, ¶ 2 n.3, 846 P.2d 1088, 1090. Importantly, a plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. *Id.* at ¶ 3, at 1096. Factual disputes, moreover, should not be resolved on a motion to dismiss so long as relief is possible under any set of facts which can be established and is consistent with the challenged pleading's allegations. *Lockhart v. Loosen*, 1997 OK 103, ¶ 4, 943 P.2d 1074, 1077.

Furthermore, Defendants filed their Motion pursuant to 12 O.S.2011, § 2012(B)(6), but their request for relief is based on an exhibit not relied upon by the Plaintiffs in the Petition.[1] If matters outside the Petition are presented to and not excluded by the court on a motion to dismiss for failure to state a claim upon which relief can be granted, the motion shall be treated as one for summary judgment. *See* 12 O.S.2011, § 2012(B). If such matters are accepted by the Court, the Plaintiffs respectfully request a "reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment" as required by § 2012(B).[2]

ARGUMENT

Defendants seek enforcement of an interstate forum-selection clause allegedly applicable to the resolution of Plaintiffs' claim for breach of an oral contract. If the forum-selection clause applies, Defendants' argue that dismissal is the proper procedure. Defs.' Mot. 1, n.1. This argument, however, is misplaced. As demonstrated herein, the Defendants' request for relief should be denied because Plaintiffs have stated a claim for breach of oral contract that is facially valid under § 2012(B)(6) and because the validity of the forum-selection clause is in dispute as it relates to the oral agreement at issue.

I. Plaintiffs have Stated a Claim Upon which Relief may be Granted.

Defendants' motion to dismiss must be denied because Plaintiffs have stated a claim for breach of an oral contract that is facially valid. Under Oklahoma law, a contract may be written

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[1] Defendants' contend that because the "Hamiltons reference the SPA in their Petition but do not attach it", Defendants may rely on it in their argument without converting their request to a motion for summary judgment. Defs.' Mot. to Dismiss 3 n.5 [hereinafter "Defs.' Mot."]. However, the Petition makes no reference to the SPA, and the Plaintiffs have not alleged breach of any of it provisions. It is the Plaintiffs' position that this action concerns the breach of subsequent agreements reached between the parties, and that such agreements are unrelated to either party's obligations with respect to any prior dealings.

[2] For example, Plaintiffs possess pertinent material in support of their position that the SPA's provisions do not govern the $2.4 million loan to the Defendants, including but not limited to evidence of other agreements entered into between the parties subsequent to the SPA, which do not include a forum-selection clause and which contain Oklahoma choice of law provisions. These instruments support Plaintiffs' position that the forum-selection clause and choice of law provisions contained in the SPA were not intended to govern subsequent dealings between the parties.

or oral, except where specially required by statute to be in writing. *See* 15 O.S.2011, § 134. To state a claim for breach of contract, a plaintiff must establish: 1) the formation of a contract; 2) a breach thereof; and 3) actual damages suffered from that breach. *Digital Design Group, Inc. v. Info. Builders, Inc.*, 2001 OK 21, 33, 24 P.3d 834, 843. Breach is simply the failure to do something that was promised in the contract. *See* Oklahoma Uniform Jury Instruction – Civil, No. 23.21; *see also* Restatement (Second) of Contracts § 235 (1981) ("When performance of a duty under a contract is due any non-performance is a breach.").

Here, Plaintiffs have stated a claim for breach of an oral contract that is facially valid. Taking each of the Plaintiffs' allegations as true, the Petition sets forth that on or about August 12, 2014[3], Mark and Sharon Hamilton loaned the Defendants $2.4 million. Pet. ¶ 35. The parties agreed that the loan could be repaid at any time, and the Defendants agreed to pay interest on the loan to the Hamiltons each month. *Id.* Thereafter, Defendant HII made monthly interest payments to the Hamiltons in the amount of $20,039.32 for months with 31 days, and $19,392.89 for months with 30 days. *Id.* ¶ 36. Defendant HII made these monthly interest payments through April 2015. *Id.* ¶ 37. However, Defendants failed to make the payment owing and due for May or June 2015. *Id.* ¶ 38. This non-performance constituted a breach of the express terms of the agreement, and the Hamiltons have suffered actual damages as a result thereof. Because relief for breach of contract is legally possible on these facts, the Defendants' motion to dismiss must be denied.

[3] The Petition incorrectly states August 12, 2014. However, the Plaintiffs evidence will establish that the actual date of the loan was in September 2014.

II. The Defendants have Failed to Demonstrate the Prima Facie Validity of the Forum-Selection Clause as it Relates to the Instant Dispute.

Additionally, the Defendants' request for relief must be denied because the validly of the forum-selection clause[4] is in dispute, foreclosing a judgment on the pleadings. In *Tucker v. Cochran Firm-Criminal Defense Birmingham, L.L.C.*, 2014 OK 112, 341 P.3d 673, the Oklahoma Supreme Court held that where an agreement contains a valid forum-selection clause, the proper procedure for enforcing it is either a motion to dismiss or a motion for summary judgment. *Tucker v. Cochran Firm-Criminal Defense Birmingham, L.L.C.*, 2014 OK 112, ¶ 37, 341 P.3d 673, 688. In *Tucker*, however, the Court vacated a trial court's dismissal of an action on a motion to enforce a forum-selection clause and remanded the case for further proceedings. *Id.* In so doing, the Court postulated that "[i]f the [defendant's] exhibits to its motion *served to show prima facie validity of the forum-selection clause* in support of the motion for § 2012(B)(6) relief or summary judgment, then [the plaintiff] had a burden to respond to the motion and argue the proper response to a § 2012(B)(6) motion or respond to a motion for summary judgment and present any material facts that were disputed, and argue that [the defendant's] claim concerning the venue selection should not be granted as a matter of law." *Id.*, at ¶ 36, at 688 (emphasis added). Under *Tucker*, then, a trial court cannot evaluate a party's request to enforce a forum-selection clause without first making a determination that the clause is valid with respect to the particular dispute.

Here, no such determination is possible at this early stage in the litigation[5] because the validly of the forum-selection clause is in dispute as it relates to this loan. Plaintiffs allege that the $2.4 million loan to the Defendants constituted an entirely separate contract with the

[4] Defendants additionally argue that Texas law should govern this dispute. Defs.' Mot. 5-6. This contention, however, presupposes that the SPA governs the instant dispute; a fact which Plaintiffs dispute.

[5] A motion for dismissal pursuant to § 2012(B)(6) must be determined solely with respect to the pleadings. 12 O.S. 2011, § 2012(B).

Defendants. The forum-selection clause is inapplicable to the loan because it relates back to a previous agreement between the Plaintiffs and Defendant HII. Far from demonstrating that relief is required under § 2012(B)(6), the Defendants have merely established that a factual dispute exists concerning whether or not the $2.4 million loan constituted a separate contract as between the parties. As such, this Court should deny the Defendants' motion and permit the parties to further develop the facts through discovery.

CONCLUSION

Defendants are not entitled to judgment on the pleadings because Plaintiffs have stated a claim for breach of an oral contract that is facially valid, and the validity of the forum-selection clause as it relates to the $2.4 million loan is in dispute.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Court deny the Defendants' Motion to Dismiss Fourth Cause of Action.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of August 2015, a true and correct copy of the above and foregoing instrument was mailed via U.S. Mail, first-class, postage prepaid, to:

Patrick M. Ryan
Grant M. Lucky
RYAN WHALEY COLDIRON
JANTZEN PETERS & WEBER PLLC
900 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102

Attorneys for Defendants

Matthew L. Warren

EXHIBIT 3

HII Technologies, Inc

20322

Sharon & Mark Hamilton

10/3/2014

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
10/3/2014	Bill	Interest	12,282.16	12,282.16		12,282.16
					Check Amount	12,282.16

19 Days

Chase 2981

Interest 30 days after closing of 9/12/14

12,282.16

HII Technologies, Inc

30027

Sharon & Mark Hamilton

11/3/2014

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
11/3/2014	Bill	Interest	20,039.32	20,039.32		20,039.32
					Check Amount	20,039.32

Heartland

Interest from 10-1-14 to 10-31-14

20,039.32

HII Technologies, Inc

30047

Sharon & Mark Hamilton

12/1/2014

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
11/30/2014	Bill	Interest	19,392.89	19,392.89		19,392.89
					Check Amount	19,392.89

Heartland — Interest owed for Nov 2014 — 19,392.89

HII Technologies, Inc

30082

Sharon & Mark Hamilton

1/1/2015

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
12/31/2014	Bill	Interest	20,039.32	20,039.32		20,039.32
					Check Amount	20,039.32

646.43 31 days

667.98 30 days

Heartland

Interest owed for Dec 2014

20,039.32

HII Technologies, Inc

30102

Sharon & Mark Hamilton

2/1/2015

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
1/31/2015	Bill	Interest	20,039.32	20,039.32		20,039.32
					Check Amount	20,039.32

Heartland Interest owed for Jan 2015 20,039.32

HII Technologies, Inc

30131

Sharon & Mark Hamilton

3/1/2015

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
2/28/2015	Bill	Feb '15 Interest	18,100.03	18,100.03	-	18,100.03
					Check Amount	18,100.03

Heartland Interest owed for Feb 2015 18,100.03

HII Technologies, Inc

30148

Sharon & Mark Hamilton

4/1/2015

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
3/31/2015	Bill	Mar '15 Interest	20,039.32	20,039.32		20,039.32
					Check Amount	20,039.32

Heartland

Interest owed for Mar 2015

20,039.32

HII Technologies, Inc

30172

Sharon & Mark Hamilton

5/1/2015

Date	Type	Reference	Original Amt.	Balance Due	Discount	Payment
4/30/2015	Bill	Apr '15 Interest	19,392.89	19,392.89		19,392.89
					Check Amount	19,392.89

Heartland — Interest owed for Apr 2015 — 19,392.89

From: **Matt Flemming** matt@hiltinc.com
Subject: **Fwd: Hamilton interest payments**
Date: **January 16, 2015 at 4:11 PM**
To: **Mark Ipad** markh-3385 @[redacted]

Hi Mark

per your text enclosed is the payments for interest
please let me know if you have received the last payment earlier this month.
Also, when Mark Milliner returns on Monday I will get timing for next payment.

As mentioned, with upcoming milestones I believe we will be in a position to pay the principal by March or earlier.
Thank you

Matt

--

Matt Flemming

CEO

Hil Technologies, Inc.

Oilfield Services

2:29 PM
01/16/15

Hil Technologies, Inc
All Transactions for Sharon & Mark Hamilton
All Transactions

Type	Num	Memo	Date	Amount
Bill Pmt -Check	20322	Interest 30 days after closing of 9/12/14	10/03/2014	12,282.16
Bill Pmt -Check	30027	Interest from 10-1-14 to 10-31-14	11/03/2014	20,039.32
Bill Pmt -Check	30047	Interest owed for Nov 2014	12/01/2014	19,392.89
Bill Pmt -Check	30082	Interest owed for Dec 2014	01/01/2015	20,039.32
Total				**71,753.69**

HIG and HII Technologies Important

Matt Flemming <matt@hiitinc.com> Apr 6 at 9:27 PM
To 'markh-3385[redacted]' 'Sharon'
CC Acie Palmer, Matt Flemming

Mark/Sharon

As I mentioned earlier today, that I would send you an email regarding the working capital excess payment in the HIG transaction.

I want to be your primary contact for working capital payment matters while Acie will continue on with day to day financial items that he has been working on.

In summary, we deployed the capital excess after agreeing on an amount, receiving your permission and started paying 10% per annum interest on the money --which I believe has been paid monthly so far.

I understand that now you want the money returned and since being told of this I have been working on a plan to accomplish it. I want to be clear that I understand your request.

The down turn in the industry has slowed our business and made the ability to pay the money out of our current cash flow an unacceptably long time frame.
The bank has been supportive of our company in a general sense during this time but will not advance more funds for our line of credit or term loan facilities.
The company has been working for some time now to raise equity in order to gain more working capital and ultimately be able to address the requested payment.

Currently our believe is that a good size equity raise is in order for the company to gain working capital and also perform on your request to return the excess working capital to the Hamilton sellers.
Given what has happened in the capital markets in the last months my best estimate is August to comply with the request. Because the markets seem to be improving very recently my hope and wish is that it will allow us to access this capital sooner than the August time frame plan.

I will keep you posted and if you have questions on this matter please contact me directly. Thanks.

Regards,

Matt Flemming
CEO
HII Technologies, Inc.
Oilfield Services

8588 Katy Freeway, Suite 430
Houston, Tx 77024

www.HIITinc.com<http://www.hiitinc.com/>
(Symbol: HIIT)

713-821-3157 Main
713-821-3224 Direct
832-553-1924 Fax

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EXHIBIT
tabbies
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