

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

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

**HAMILTON CREDITORS’ SUPPLEMENT TO MOTION TO PRESERVE
CREDITORS’ RIGHT TO SETOFF CLAIMS AGAINST DEBTORS’ ESTATES**
(Refers to Docket No. 427)

William Mark Hamilton (“Mark Hamilton”), Sharon K. Hamilton (“Sharon Hamilton”), William Craig Hamilton (“Craig Hamilton”), S & M Assets, LLC (“S & M Assets”), and H2 Services, LLC (“H2 Services”) (collectively, the “Hamilton Creditors”) hereby file this supplement to the Motion to Preserve Creditors’ Right to Setoff Claims Against Debtors’ Estates.

The following paragraph represents the supplement to the Motion to Preserve Creditors’ Rights to Setoff Claims Against Debtors’ Estates (Docket No. 427) as filed by the Hamilton Creditors on the 24th day of March 2016:

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY

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).

RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

The following is verbatim the Motion to Preserve Creditors' Rights to Setoff Claims Against Debtors' Estates (Docket No. 427) as filed by the Hamilton Creditors on the 24th day of March 2016:

William Mark Hamilton ("Mark Hamilton"), Sharon K. Hamilton ("Sharon Hamilton"), William Craig Hamilton ("Craig Hamilton"), S & M Assets, LLC ("S & M Assets"), and H2 Services, LLC ("H2 Services") (collectively, the "Hamilton Creditors") requests this Court to issue an Order preserving their contractual, common law, and statutory rights of setoff pursuant to Section 553 of title 11 of the United States Code (the "Bankruptcy Code"). In support thereof, the Hamilton Creditors show the Court as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district in accordance with 28 U.S.C. § 1408(1). The statutory and procedural predicates for the relief requested herein are Sections 553 of the Bankruptcy Code and Rule 9014 of the Federal Rules of Bankruptcy Procedure.

INTRODUCTION

2. In its Amended Plan for Reorganization, 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”) identify the Hamilton Creditors as “litigation targets” and reserve against the Hamilton Creditors any claim or cause of action of any nature, whatsoever, whether at law or in equity. *See* Debtors’ Am. Joint Plan of Reorganization (“Debtors’ Plan”), at 36 [Dkt. #392]. Specifically, the Debtors contend that they may have viable causes of action: (1) against Mark Hamilton and Sharon Hamilton related to HII’s acquisition and subsequent operation of HIG; (2) against S & M Assets related to the payment of above-market rent by HII and HIG in connection with several lease agreements for real and personal property; and (3) claims against Craig Hamilton for the alleged improper use of HIG equipment. *See* Debtors’ First Am. Disclosure Statement in Supp. of Joint Am. Plan of Reorganization (“Debtors’ Disclosure Statement”), at 57-58 [Dkt. #393]. The factual underpinnings of each of these possible causes of action against the Hamilton Creditors relate back to the August 12, 2014 sale of HIG to HII and the ensuing relationship that HII purposefully cultivated with the Hamilton Creditors as it conducted oilfield service operations in Oklahoma. Not only have the Hamilton Creditors vehemently denied any wrongdoing, they have filed multiple claims in this case predicated on these same transactions and totaling over \$2.7 million.

3. Pursuant to Section 21.14 of the Debtors Disclosure Statement, the Debtors assert that “no holder of any Claim or Equity Interest be entitled to setoff against any

Claim or Equity Interest against any claim, right, or cause of action of the Debtors or the Litigation Trust, as applicable, unless such holder has filed a motion with the Bankruptcy Court requesting the authority to perform such setoff on or before the Confirmation Date” *See* Debtors’ Disclosure Statement, at 63.

4. In accordance therewith, and to the extent that any of the Debtors’ claims against the Hamilton Creditors result in a judgment or settlement in favor of the Debtors, the Hamilton Creditors respectfully request this Court to acknowledge and approve a setoff of any such liability against that recovery which the Hamilton Creditors are entitled to with respect to the claims discussed below.

FACTUAL BACKGROUND

5. Debtors HII and HIG 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 §§ 1107 and 1108 of the Bankruptcy Code.

6. Thirteen months prior to the Petition Date, HII acquired HIG from Mark Hamilton and Sharon Hamilton, husband and wife. The terms of the sale were memorialized in a Stock Purchase Agreement (“SPA”) dated August 12, 2014.

7. Among other things, the SPA set forth certain post-closing provisions for calculating the working capital of HIG. As a result of this calculation, the parties determined that HII owed an additional \$2,428,871.39 million to Mark Hamilton and Sharon Hamilton for the working capital of HIG.

8. In lieu of paying the working capital adjustment in a lump sum as was required by the SPA, HII requested to treat that liability as a loan and pay monthly interest of ten (10%) percent on the principal. HII made these monthly interest payments to Mark Hamilton and Sharon Hamilton on the \$2.4 million from September 2014 through April 2015. However, in May 2015, HII stopped making interest payments on the loan. Mark Hamilton and Sharon Hamilton filed a proof of claim for \$2,519,371.54 against HII, which includes the principal balance of \$2,428,871.39 plus unpaid, pre-petition interest in the amount of \$90,500.15. *See* Proof of Claim Register, Claim No. 16.

9. Along with its acquisition of HIG, HII offered to retain Mark Hamilton as President of HIG for two years at a salary of \$125,000.00 per annum plus certain benefits as described in an Employment Contract dated August 12, 2014 (the "Agreement"). Mark Hamilton has filed a proof of claim against HIG for any and all amounts owing under the Agreement, including any unpaid and owing compensation, reimbursement, benefits, and other amounts due as of the Petition Date or thereafter, to the extent permitted by law. *See* Proof of Claim Register, Claim No. 49.

10. Mark Hamilton personally paid and was not reimbursed for two trade debts accrued by HIG after its acquisition by HII, but prior to the Petition Date. These invoices totaled \$6,836.70. *See* Proof of Claim Register, Claim No. 28.

11. After the sale of HIG to HII, Sharon Hamilton permitted HIG to use her personal credit card for its business purchases, as long as HIG reimbursed her for all business expenses charged to her account. HIG accrued \$39,876.26 in pre-petition

charges for which Sharon Hamilton was never reimbursed. *See* Proof of Claim Register, Claim No. 21.

12. On August 12, 2014, S & M Assets, an entity owned by Mark Hamilton and Sharon Hamilton, entered into a written agreement with HII and its newly acquired subsidiary, HIG, to lease certain oilfield pipe owned by S & M Assets and located in Logan County, Oklahoma.

13. The lease agreement provided that the Lessee would make monthly rental payments to S & M Assets in the amount of \$10,000.00. The lease agreement further provided that title to the pipe would remain with S & M Assets and that the pipe would be immediately returned to S & M Assets at the termination of the agreement.

14. HII and HIG made the monthly rental payments through May 2015, but failed to make any payments thereafter. On the Petition Date, HII and HIG formally rejected the lease agreement as permitted by the Bankruptcy Code. *See* Debtor's Motion Pursuant to 11 U.S.C. § 365 to Reject Certain Executory Contracts, No 15-60070 (filed Sept. 18, 2015) [Dkt. # 14].

15. Upon rejection of the lease agreement, S & M Assets inspected the pipe and discovered that 13,260 feet of 10" Aluminum Water Transfer Pipe was missing. S & M Assets filed a proof of claim for \$83,040.00, which includes \$53,040.00 for the value of the missing pipe and \$30,000.00 in unpaid, pre-petition rent due under the lease agreement. *See* Proof of Claim Register, Claim No. 20

16. On August 12, 2014, S & M Assets entered into a three-year lease agreement with HII's newly acquired subsidiary, HIG, for real property located in Coal County, Oklahoma.

17. The lease agreement provided that HIG would make monthly rental payments to S & M Assets in the amount of \$1,500.00. HIG paid the monthly rent under the contract through May 2015, but failed to make any payments thereafter. HIG rejected the lease agreement on the Petition Date, and S & M Assets filed a proof of claim for \$22,500.00, which includes \$6,000.00 in unpaid, pre-petition rent due. *See* Proof of Claim Register, Claim No. 18.

18. On August 12, 2014, S & M Assets entered into a three-year lease agreement with HII's newly acquired subsidiary, HIG, for real property located in Logan County, Oklahoma.

19. The lease agreement provided that HIG would make monthly rental payments to S & M Assets in the amount of \$4,500.00. HIG paid the monthly rent under the contract through May 2015, but failed to make any payments thereafter. HIG rejected the lease agreement on the Petition Date, and S & M Assets filed a proof of claim for \$67,500.00, which includes \$18,000.00 in unpaid, pre-petition rent due. *See* Proof of Claim Register, Claim No. 19.

20. On August 12, 2014, Craig Hamilton entered into a six month lease with HIG for real and personal property located in Logan County, Oklahoma. The lease agreement provided that HIG would make monthly rental payments to Craig Hamilton in the amount of \$850.00. The lease agreement further contained a holdover provision

creating a monthly tenancy terminable on thirty (30) days notice by either party. HIG paid monthly rent under this agreement through June 2015, but failed to make any payment thereafter or to provide notice of its intent to terminate the lease agreement. HIG rejected the lease agreement on the Petition Date, and Craig Hamilton filed a proof of claim for \$2,550.00, which comprises the unpaid, pre-petition rent due under the lease. *See* Proof of Claim Register, Claim No. 15.

21. Between March 18, 2015 and April 26, 2015, H2 Services, an entity owned by Craig Hamilton, performed oilfield services for HIG for which it has not been paid. H2 Services filed a proof of claim for \$10,200.00, which comprises the unpaid balance of its pre-petition invoices. *See* Proof of Claim Register, Claim No. 17.

22. Each of the foregoing claims of Mark Hamilton and / or Sharon Hamilton, S & M Assets, Craig Hamilton, or H2 Services, shall be referred to collectively as the “Hamilton Creditors’ Claims”.

ARGUMENT

23. Section 553 of the Bankruptcy Code provides that subject to certain limitations, “this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case. . . .” 11 U.S.C. § 553(a).

24. “The right of setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making A pay B when B owes A.’” *Citizens Bank of Maryland v. Strumpf*, 116 S. Ct. 286, 289 (1995)

(quoting *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)). Setoff “occupie[s] a favored position in our history of jurisprudence,” *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1164 (2d Cir. 1979), with which courts should interfere “only under the most compelling circumstances.” *In re Utica Floor Maint., Inc.*, 441 B.R. 941, 944 (N.D.N.Y. 1984). “The rule allowing setoff . . . is not one that courts are free to ignore when they think application would be unjust.” *In re Applied Logic Corp.*, 576 F.2d 952 (2d Cir. 1978). To the contrary, “the justification for permitting setoff is based on notions of fairness,” *In re IML Freight, Inc.*, 65 B.R. 788, 791-92 (Bankr. D. Utah 1986), and “[t]he primacy of setoffs is essential to the equitable treatment of creditors. . . . Absent a setoff, a creditor . . . is in the worst of both worlds: it must pay its debt to the debtor in full, but is only entitled to receive a tiny fraction of the money the debtor owes it. It was to avoid this unfairness that setoffs were allowed in bankruptcy in the first place.” *In re DeLaurentiis Entertainment Group, Inc.*, 963 F.2d 1269, 1277 (9th Cir. 1992).

25. Bankruptcy Code § 553 does not create a right of setoff; rather, it “preserves a party’s right to setoff if such right exists outside of bankruptcy.” *In re Shortt*, 277 B.R. 683, 688-89 (Bankr. N.D. Tex. 2002). To establish a valid right of setoff under § 553, the movant must prove: (1) a debt owed by the creditor to the debtor which arose prior to the commencement of the bankruptcy case; (2) a claim of the creditor against the debtor which arose prior to the commencement of the bankruptcy case; and (3) the debt and claim must be mutual obligations. *See* 11 U.S.C. § 553(a); *IRS v. Luongo*, 259 F.3d 323, 334 (5th Cir. 2001).

26. Debt is defined by the Bankruptcy Code as “liability on a claim.” *See* 11 U.S.C. § 101(12). Claim is defined as “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, [or] unmatured” *See id.* § 101(5)(A).

27. Contractual obligations are debts for purposes of setoff. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 59 (3d Cir. 1990). And contract claims may be setoff against tort based claims, so long as the claims otherwise possess the requisite mutuality. *In re Thurston*, 139 B.R. 14, 16 (Bankr. W.D. Mo. 1992).

28. Mutuality exists where both debts arose before the Petition Date. *See, e.g., In re Communicall Cent., Inc.*, 106 B.R. 540, 545 (Bankr. N.D. Ill. 1989).

29. Section 506(a) of the Bankruptcy Code provides that a claim “that is subject to setoff under Section 553 of this title is a secured claim to the extent . . . of the amount subject to setoff.” 11 U.S.C. § 506(a).

30. Debtors’ Plan and Disclosure Statement expressly require that creditors seeking to preserve any setoff rights file with this Court a motion seeking such relief, thus giving rise to this Motion.

31. The Hamilton Creditors request this Court to preserve their rights to setoff amounts owed by HII and HIG on account of the Hamilton Creditors’ Claims against the recovery each Debtor entity seeks from the Hamilton Creditors, should the Debtors prevail in their proposed litigation. Essentially, the Debtors have asserted a “right to payment” that has not yet been “reduced to judgment” against the Hamilton Creditors based upon certain pre-petition transactions – the very same transactions that give rise to

the Hamilton Creditors' Claims against the Debtors. Should the Debtors prevail on any claim related to pre-petition conduct of the Hamilton Creditors, then the Hamilton Creditors request the right to setoff any liability accruing therefrom against the Hamilton Creditors' Claims, to the extent permitted by the Bankruptcy Code.

CONCLUSION

WHEREFORE, the Hamilton Creditors respectfully request this Court to enter an Order preserving their contractual, common law, and statutory rights to setoff mutual pre-petition debts pursuant to Section 553 of the Bankruptcy Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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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Counsel for Flow Zone LLC

/s/ Victor F. Albert
Victor F. Albert

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

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

**ORDER GRANTING THE MOTION TO PRESERVE THE HAMILTON
CREDITORS’ RIGHT TO SETOFF CLAIMS AGAINST DEBTORS’ ESTATES**
(Refers to Docket No. 427)

Upon consideration of the Motion to Preserve the Hamilton Creditors’ Right to Setoff Claims Against Debtors’ Estates (Dkt. No. 427), and supplement thereto (Dkt. No. ___) filed by William Mark Hamilton, Sharon K. Hamilton, William Craig Hamilton, S&M Assets, LLC, and H2 Services, LLC, any objections filed thereto, and the argument of counsel, if any, the Court rules as follows:

The Motion is GRANTED.

SIGNED: _____, 2016.

UNITED STATES BANKRUPTCY JUDGE

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s tax identification number, are: (i) Apache Energy Services, LLC (4404); (ii) Aqua Handling of Texas, LLC (4480); (iii) HII Technologies, Inc. (3686); (iv) Sage Power Solutions, Inc. fka KMHVC, Inc. (1210); and (v) Hamilton Investment Group, Inc. (0150).