

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

IN RE: § Chapter 11
HII TECHNOLOGIES, INC., *et al.*, §
Debtors. § 15-60070 (DRJ)
§ (Jointly Administered)
§

**THE HAMILTONS’ SUPPLEMENTAL RESPONSE
TO DEBTORS’ OBJECTIONS TO PROOF OF CLAIM NOS. 15, 18, 19, 20, 21, 28 & 49,
AND BRIEF IN SUPPORT THEREOF**

(relates to dkt. nos. 432-438, 481, and 483-488)

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

William Mark Hamilton, Sharon K. Hamilton, William Craig Hamilton, and S&M Assets, LLC (who are collectively referred to as the “*Hamiltons*”) file their supplemental response¹ to Debtors’ objections² to proof of claim nos. 15, 18, 19, 20, 21, 28, and 49 (collectively, the “*Claims*”), and would respectfully show the Court as follows:

DEBTOR’S OBJECTIONS SHOULD BE DISMISSED WITHOUT PREJUDICE

Introduction

1. On June 20, 2016, William Mark Hamilton and Sharon K. Hamilton Mark filed a supplement³ (the “*Supplemental Response*”) to their prior response⁴ to Debtors’ objection⁵ to their proof of claim no. 16 (“*Claim 16*”). The Hamiltons incorporate by reference the argument and authorities in the Supplemental Response as a supplement to their prior responses to Debtors’ objections (“*Objections*”) to their Claims. Each of the Objections is similar in structure

¹ This response supplements the Hamiltons’ previously filed responses at docket nos. 481 & 483-488.
² Debtors’ objections are at docket nos. 432-438.
³ The Hamiltons Supplemental Response To Debtors’ Objection To Their Proof Of Claim, And Brief In Support Of Their Response” (docket no. 515).
⁴ Docket no. 482.
⁵ Docket no. 431.

and content to Debtors' objection to Claim 16. Therefore, the statutes and case law cited in the Supplemental Response are just as relevant to the Objections, and the application of this law to the Objections requires the dismissal, without prejudice, of the Objections.

2. Specifically, as was true of Debtors' objection to Claim 16, ***Debtors' do not dispute the amount of the Claims.***⁶ Instead, Debtors' assert that, for various reasons, the Claims are unenforceable against Debtors, and therefore objectionable under 11 U.S.C. § 502(b)(1). However, these section 502(b) objections, which, depending on the specific Objection, include claims of fraud, fraudulent transfer, breach of fiduciary duty, conversion, and/or breach of contract, are based on causes of action that must be tried in an adversary proceeding under Bankruptcy Rule 7001, as explained below. Therefore, the Objections violate Bankruptcy Rule 3007(b), which prohibits a "demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim...." Consequently, the section 502(b) objections should be dismissed without prejudice.

3. Further, the Objections also assert an objection based on 11 U.S.C. § 502(d) to each of the individual Claims. However, a section 502(d) objection can only be asserted *after* the alleged transfer has been avoided in an adversary proceeding, and then only *after* the transferee has refused to turn over the property transferred and *after* the transferee has been given a reasonable time to do so. *See In re Davis*, 889 F.2d 658, 661 (5th Cir. 1989). Here, Debtors have not even requested in their Objections that the alleged transfers, let alone filed and prevailed on fraudulent transfer or other avoidance claims in an adversary proceeding.

⁶ Debtors did object to claim no 21 filed by Sharon Hamilton on the basis that the claim is not sufficiently explained. Sharon Hamilton amended claim no. 21 on June 20, 2016, to include her affidavit in support of claim no. 21 clarifying the genesis and basis of the claim.

Debtors' 502(b) Objections Must be Brought as an Adversary Proceeding

4. Federal Rule of Bankruptcy Procedure 3007(b) provides that a “party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.” By their section 502(b) Objections, Debtors assert that the individual Claims are “unenforceable”⁷ under a variety of state-law theories. Under Bankruptcy Rule 7001(1), “a proceeding to recover money or property” is defined, and must be brought, as an adversary proceeding. *See In re Soporex*, 446 B.R. 750, 790 (Bankr. N.D. Tex. 2011). Further, under Bankruptcy Rule 7001(2), “a proceeding to determine the validity ... of an interest in property...” is also defined as an adversary proceeding. Therefore, claim objections constituting “direct attacks against an asserted interest” must be filed as an adversary proceeding. *In re Food Management Group, LLC*, 484 B.R. 574, 582 (S.D.N.Y. 2012); *In re Citrus Tower Boulevard Imaging Center, LLC*, 524 B.R. 895, 897 (Bankr. N.D. Georgia 2014).

5. Moreover, the various legal theories asserted by Debtors in defense of the Claims are essentially requests for a declaratory judgment, which implicate Bankruptcy Rule 7001(9), and therefore must be pursued within the ambit of an adversary proceeding. *In re Formatech, Inc.*, 496 B.R. 26, 35 (Bankr. D. Mass. 2013). Accordingly, the Hamiltons request that all of the Debtors' Objections under § 502(b) be dismissed, without prejudice, as having been incorrectly brought as contested matters, rather than in the context of an adversary proceeding.

Debtors' 502(d) Objections Must Also be Dismissed

6. Debtors also object to the Claims under 11 U.S.C. § 502(d). Section 502(d) provides for the disallowance of a creditor's claim who is a transferee of a transfer avoided under

⁷ *E.g.* “Debtors' Objection to HII Claim No. 15 Filed By William Craig Hamilton” (dkt. 432), p. 4, paragraph 16 (“The Debtors object under 502(b)(1) because such claim is unenforceable under applicable law because of William Craig Hamilton's breaches of fiduciary duties, conversion and conspiracy.”);

a chapter 5 avoidance action, “unless [the creditor] has paid the amount, or turned over any such property, for which ... such transferee is liable....” 11 U.S.C. § 502(d); *In re Odom Antennas, Inc.*, 340 F.3d 705, 708 (8th Cir. 2003). “The purpose of section 502(d) is to ensure compliance with judicial orders.” *Odom*, 340 F.3d at 708. Consequently, a creditor must first be adjudged liable before the provision can apply, “otherwise, the court could not determine if the exception applies.” *Id.* (citing *In re Davis*, 889 F.2d 658, 661 (5th Cir. 1989)). As the Fifth Circuit explained in *Davis*, section 502(d) “is designed to be triggered after a creditor has been afforded a reasonable time in which to turn over amounts adjudicated to belong to the bankruptcy estate.” 889 F.2d at 662.

7. Although Debtors assert in their various Objections that certain transfers by certain of the Hamiltons are avoidable as fraudulent transfers or otherwise, Debtors do not actually request that the transfers be avoided or the property recovered. Certainly, there has been no adjudication of any Chapter 5 causes of action against any of the Hamiltons. And § 502(d) “does not permit affirmative relief of any kind.” *In re Parker North America Corp.*, 24 F.3d 1145, 1155 (9th Cir. 1994). A fraudulent transfer action must be brought as an adversary proceeding. *In re Indri*, 126 B.R. 443, 444 (Bankr. D. N.J. 1991); Bankruptcy Rule 7001(1). *Accord In re Eakin*, 153 B.R. 59, 60 (Bankr. D. Idaho 1993) (citing Fed. R. Bankr. P. 7001; 9 Lawrence P. King, *Collier on Bankruptcy* ¶ 7001.05[1], at 7001–13 (15th ed. 1993)) (“Exercise of the avoidance powers under 544 requires the filing of an adversary proceeding.”). Therefore, until such time, if ever, Debtors file and then prevail in an adversary proceeding on Chapter 5 avoidance claims, they will be unable satisfy even the first prerequisite for use of section 502(d) as a defense to any of the Hamiltons’ Claims.

REQUEST FOR RELIEF

WHEREFORE, the Hamiltons respectfully request that the Court dismiss the §502(b) Objections as being improperly brought as contested matters, dismiss the § 502(d) Objections as premature, and deny the Objections if properly brought, and further request that they be granted such additional and alternative relief as is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, this supplemental response was filed via the ECF system, and therefore all persons and entities entitled to notice of the filing were served electronically on that date. Additionally, claimants also served this supplemental response on the following persons and entities, by U.S. mail, postage prepaid, on June 21, 2016.

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