

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

**IN RE:** § **Chapter 11**  
§  
**HII TECHNOLOGIES, INC., et al.<sup>1</sup>** § **CASE NO. 15-60070**  
§  
**Debtors** § **Joint Administration Pending**  
§  
§

**DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER  
AUTHORIZING PAYMENT OF CERTAIN PREPETITION (A) WAGES,  
SALARIES AND OTHER COMPENSATION; (B) REIMBURSABLE EMPLOYEE  
EXPENSES; (C) EMPLOYEE BENEFITS; AND (D) RELATED COSTS**

**NOTICE UNDER BLR 9013(B) AND 9013(I)**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED; YOU SHOULD FILE AN IMMEDIATE RESPONSE.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

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<sup>1</sup> 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).

THE DEBTORS HAVE REQUESTED THAT THIS MOTION BE CONSIDERED AT THE DEBTORS' FIRST DAY HEARINGS.

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

HII Technologies, Inc. (“HII”) and its above-captioned affiliated debtors (collectively, the “Debtors”), hereby file this motion (the “Motion”) seeking entry of an order (the “Order”) authorizing the Debtors to pay certain prepetition: (a) wages, salaries, and other compensation; (b) reimbursable employee expenses; (c) employee benefits; and (d) related costs; and granting the Debtors such other and further relief as the Court deems just and proper. In support of this Motion, the Debtors respectfully represent as follows:

#### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and the Court may enter a final order consistent with Article III of the United States Constitution.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a), 363(b), 507, 541(b) and 1129(a)(9)(B) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

#### **BACKGROUND**

4. The Debtors have only one employee, Matt Flemming, who is the CEO of HII and President or Manager of each subsidiary. Mr. Flemming is owed an amount as prepetition salary. Payment to him of \$6,232.77 will not significantly harm the Debtors. However, without his salary, the Debtors would not have his institutional and historical knowledge which is

necessary to market and sell the company and its technology. In addition, Mr. Flemming's institutional knowledge will be critical to pursuing certain causes of action.

### **RELIEF REQUESTED**

5. By this Motion, the Debtors seek entry of an Order authorizing them, in their sole discretion, to honor obligations and continue programs, as applicable, in the ordinary course of business relating to Mr. Flemming's salary and other compensation, expenses. This will be less than the \$11,725 priority amount<sup>2</sup> on account of prepetition wages or other employee benefits.

### **FACTS RELEVANT TO THIS MOTION**

6. Mr. Flemming is owed an amount as prepetition salary. Payment to him of \$6,232.77 will not significantly harm the Debtors. However, without his salary, the Debtors would not have his institutional and historical knowledge which is necessary to market and sell the company.

7. The Debtors need to reimburse Mr. Flemming for \$843.55 in reimbursable expenses as required by the Debtors' organizational documents and their agreement with Mr. Flemming. The Debtors also seek authority to continue health insurance for Mr. Flemming.

### **BASIS FOR RELIEF**

#### **A. Payment of the Obligations Is Warranted Under Section 363(b)(1) of the Bankruptcy Code.**

8. Section 363 of the Bankruptcy Code provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under section 363(b), courts require only that the debtor has "some articulated business justification for using, selling, or leasing

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<sup>2</sup> Bankruptcy Code section 507(a)(4) & (5) provide administrative expense treatment for employee wage and other benefit claims up to \$11,725 per individual.

property outside the ordinary course of business.” *In re ASARCO, LLC*, 650 F.3d 593, 601 (5th Cir. 2011) (quoting *Institutional Creditors of Cont’l Airlines, Inc. v. Cont’l Airlines, Inc. (In re Cont’l Airlines, Inc.)*, 780 F.2d 223, 1226 (5th Cir. 1986)); see also *In re Terrace Gardens Park P’ship*, 96 B.R. 707, 714 (Bankr. W.D. Tex. 1989); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (internal citations omitted).

9. Moreover, “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (citation omitted); see also *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”).

10. Courts in this District and other districts within the Fifth Circuit have recognized the importance to a debtor of its employees in cases requesting relief similar to that requested here. See, e.g., *In re Autoseis, Inc.*, Case No. 14-20130, Dkt. No. 244 (Bankr. S.D. Tex. Apr. 25, 2014); *In re ATP Oil & Gas Corp.*, Case No. 12-36187, Dkt. No. 136 (Bankr. S.D. Tex. Aug. 21, 2012); *In re Seahawk Drilling, LLC*, Case No. 11-20089, Dkt. No. 47 (Bankr. S.D. Tex. Feb. 14, 2011); *In re Spectrum Jungle Labs Corp., et al.*, Case No. 09-50455, Dkt. No. 48, (Bankr. W.D. Tex. Feb. 5, 2009); *In re Pilgrim’s Pride Corp., et al.*, Case No. 08-45644, Dkt. No. 65 (Bankr. N.D. Tex. Feb. 5, 2009); *In re Scotia Dev. LLC*, Case No. 07-20027, Dkt. No. 73 (Bankr. S.D. Tex. Jan. 24, 2007). See also *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (stating that relief regarding payment of prepetition wage claims was appropriate to

“preserve and protect [the debtor’s] . . . business and ultimately reorganize, retain its currently working employees and maintain positive employee morale”).

11. Paying the employee obligations to Mr. Flemming is necessary for the Debtors to retain him, preserve his institutional knowledge, and avoid certain operating risks, and to minimize the disruption to its operations.

**B. Payment of the Obligations is Warranted Under the Doctrine of Necessity.**

12. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Specifically, this Court may use its power under Section 105(a) to authorize payment of prepetition obligations pursuant to the “doctrine of necessity” (also referred to as the “necessity of payment” doctrine).

13. The United States Court of Appeals for the Third Circuit recognized the “necessity of payment” doctrine in *In re Lehigh and New England Railway Co.*, 657 F.2d 570, 581 (3d Cir. 1981). The Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. *Id.* (stating a court may authorize payment of prepetition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); accord *In re CEI Roofing, Inc.*, 315 B.R. 50, 58 (Bankr. N.D. Tex. 2004); *In re CoServ, LLC*, 273 B.R. 487, 493 (Bankr. N.D. Tex. 2002); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that the necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid”); *see also In re Just for Feet*,

*Inc.*, 242 B.R. 821, 824-26 (D. Del. 1999) (noting that the Third Circuit permits debtors to pay prepetition claims that are essential to continued operation of business); *Official Comm. of Unsecured Creditors of Motor Coach Indus. Int'l, Inc. v. Motor Coach Indus. Int'l, Inc. (In re Motor Coach Indus. Int'l, Inc.)*, Bankr. No. 08-12136, 2009 WL 330993, at \*3 (D. Del. Feb. 10, 2009) (denying a stay pending appeal on the grounds that there is not a serious basis to challenge the doctrine of necessity in the Third Circuit).

14. Courts also have permitted post-petition payment of prepetition claims pursuant to section 105(a) of the Bankruptcy Code in other situations, such as if nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors' business reorganization plan. See *In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors' successful reorganization); *Ionosphere Clubs*, 98 B.R. at 175-77 (finding that Section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

15. This approach is particularly critical where a prepetition creditor provides vital goods or services to a debtor that would be unavailable if the Debtor did not satisfy its prepetition obligations. In *In re Structurlite Plastics Corp.*, the bankruptcy court stated it "may exercise its equity powers under § 105(a) [of the Bankruptcy Code] to authorize payment of prepetition claims where such payment is necessary to 'permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.'" 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (quoting *In re Chateaugay Corp.*, 80 B.R. 279, 287 (S.D.N.Y. 1987)). The court explained that "a *per se* rule proscribing the payment of pre-petition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code." *Id.* at

932. Indeed, as noted above, this Court and others have routinely authorized debtors to pay the prepetition claims of employees for wages, salaries, expenses and benefits on the grounds that the payment of such claims was necessary to effectuate a successful reorganization of a debtor's business.

16. Payment of the Obligations is warranted under the doctrine of necessity. Mr. Flemming provides the CRO and the Debtors with essential institutional and historical knowledge representative necessary to conduct business.

**C. Certain of the Obligations are Entitled to Priority Treatment.**

17. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code entitle the majority of the Obligations to priority treatment. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims given priority under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, for wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual, and contributions to an employee benefit plan, earned in the 180 days before filing of the petition).

**D. The Requirements of Bankruptcy Rule 6003 Are Satisfied.**

18. Under Bankruptcy Rule 6003, the Court may grant relief regarding a motion to pay all or part of a prepetition claim within 21 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001).

19. Bankruptcy Rule 6003 does not condition relief on imminent or threatened harm to the estate alone. Rather, Bankruptcy Rule 6003 speaks of “immediate and irreparable harm” generally. Cf. FED. R. BANKR. P. 4001(b)(2), (c)(2) (referring to “irreparable harm to the estate”) (emphasis added). Indeed, the “irreparable harm” standard is analogous to the traditional standards governing the issuance of preliminary injunctions and courts will routinely consider third-party interests when granting such relief. *See, e.g., Capital Ventures Int’l v. Argentina*, 443 F.3d 214, 223 n.7 (2d Cir. 2006) (stating that potential effect on the public interest is a factor in considering whether to grant preliminary injunction).

20. The relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors and all parties in interest. Mr. Flemming is vital to the Debtors’ operations. The Debtors’ sale and plan would be severely disrupted at a critical juncture in its restructuring. Additionally, Mr. Flemming relies on his compensation, benefits and reimbursement of expenses to pay their living expenses and the effect could be financially ruinous if the Debtors cannot pay them in the ordinary course of business. Accordingly, the requirements of Bankruptcy Rule 6003 are satisfied.

**E. Satisfaction of Bankruptcy Rules 6004(a) and 6004(h).**

21. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

**NOTICE**

22. Notice of this Motion will be provided by overnight delivery and/or e-mail or facsimile to: (a) the Office of the United States Trustee for the Southern District of Texas; (b) all



known or alleged secured creditors; (c) the 20 largest consolidated unsecured creditors of the Debtors; (d) the DIP Lender(s); (e) all known shareholders holding over 5% of a class of equity interests in any of the Debtors; (f) the Securities and Exchange Commission; and (g) the Internal Revenue Service. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors respectfully request that this Court (i) grant this Motion and the relief requested herein; (ii) enter the proposed order attached hereto; and (iii) grant such other and further relief as it deems just and proper.

Dated: September 18, 2015.

**McKool Smith, P.C.**

By: /s/ Christopher D. Johnson  
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***Proposed Counsel for the Debtors and  
Debtors-in-Possession***

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

**IN RE:** § **Chapter 11**  
§  
**HII TECHNOLOGIES, INC., et al.<sup>1</sup>** § **CASE NO. 15-60070**  
§  
**Debtors** § **Jointly Administered**  
§  
§

**ORDER AUTHORIZING THE DEBTORS TO PAY CERTAIN PREPETITION (A) WAGES, SALARIES AND OTHER COMPENSATION; (B) REIMBURSABLE EMPLOYEE EXPENSES; (C) EMPLOYEE BENEFITS; AND (D) RELATED COSTS**

Upon the motion dated September 16, 2015 (the “Motion”),<sup>2</sup> of HII Technologies, Inc. (“HII”) and its above-captioned affiliated debtors (collectively, the “Debtors”), for entry of an order authorizing the Debtors to pay certain prepetition (a) wages, salaries and other compensation; (b) reimbursable employee expenses; (c) employee benefits; and (d) payroll administration associated costs, and for certain related relief; and upon the Declaration of Loretta Cross, Chief Restructuring Officer of the Debtors, in Support of the First Day Motions; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that the Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties in interest;

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<sup>1</sup> 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).

<sup>2</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

and the Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion was appropriate and no other notice need be provided; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before the Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Debtors are authorized, in their sole discretion, to pay Mr. Flemming's salary/wage claims as requested in the Motion, and continue post-petition employee related programs in the ordinary course of business, in connection with the Obligations.

2. The Debtors are authorized to make payments to applicable third parties in connection with Mr. Flemming's salary/wages in accordance with the Debtors' ordinary course of business and stated policies, as set forth in the Motion.

3. All applicable banks and other financial institutions are authorized to receive, process, honor and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order, whether presented prior to or after the Petition Date, in accordance with, and with the protections granted in, any order approving the Debtors' use of their cash management system filed in these chapter 11 cases.

4. The contents of the Motion satisfy the requirements set forth in Bankruptcy Rules 6003(b) and 6004(a).

5. Notwithstanding any provision in the Federal Rules of Bankruptcy Procedure to the contrary, (i) the terms of this Order shall be immediately effective and enforceable upon its entry, (ii) the Debtors are not subject to any stay in the implementation, enforcement or

realization of the relief granted in this Order, and (iii) the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

6. The Court retains jurisdiction with respect to all matters arising from or related to the interpretation or implementation of this Order.

Signed: \_\_\_\_\_, 2015.

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UNITED STATES BANKRUPTCY JUDGE