

Edward J. Sebold (TX 24062339)  
Tom A. Howley (TX 24010115)  
JONES DAY  
717 Texas Avenue, Suite 3300  
Houston, Texas 77002  
Telephone: (832) 239-3939  
Facsimile: (832) 239-6000

Paul M. Green (TX 24059854)  
JONES DAY  
2727 North Harwood Street  
Dallas, Texas 75201  
Telephone: (214) 220-3939  
Facsimile: (214) 969-5100

Attorneys for SR Acquisition I, LLC

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>In re:</b>	:	<b>Chapter 11</b>	<b>RECEIVED</b>
	:		
<b>TRIDIMENSION ENERGY, et al.,</b>	:	<b>Case No. 10-33565 (SGJ)</b>	<b>JUN 13 2011</b>
	:		
<b>Debtors.</b>	:	<b>(Jointly Administered)</b>	<b>BMC GROUP</b>
	:		

**MOTION OF SR ACQUISITION I, LLC FOR AN ORDER  
GRANTING PAYMENT ON AN ADMINISTRATIVE PRIORITY CLAIM**

SR Acquisition I, LLC ("SR Acquisition") hereby moves the Court for the entry of an order pursuant to section 503 of title 11 of the United States Code (the "Bankruptcy Code") authorizing payment on account of certain administrative priority claims held by SR Acquisition.<sup>1</sup> In support of this Motion, SR Acquisition respectfully represents as follows:

<sup>1</sup> SR Acquisition is currently the defendant in the Environmental Action (as defined below) and anticipates (a) filing the claims described herein in the Environmental Action at the appropriate time and (b) having such claims heard in the Environmental Action at the appropriate time. In the event the Environmental Action is dismissed, SR Acquisition will file a separate notice of objection deadline and hearing date regarding this Motion.



## Background<sup>2</sup>

### Procedural Background

1. On May 21, 2010, the above-captioned debtors (the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
2. On October 18, 2010, the Debtors and SR Acquisition entered into that certain Asset Purchase Agreement (as amended, the "APA") pursuant to which SR Acquisition agreed to act as a stalking horse bidder in connection with a sale of substantially all of the Debtors' assets.
3. On November 16, 2010, the Debtors conducted an auction (the "Auction") for the sale of substantially all of their assets, ultimately selecting SR Acquisition's bid as the highest and best offer.
4. On November 19, 2010, the Court entered an Order Authorizing (A) the Sale of the Debtors' Right, Title and Interest In, To and Under Substantially All of the Debtors' Assets Free and Clear of Claims, Encumbrances, Liens, and Interests, (B) the Assumption and Assignment of Executory Contracts and Unexpired Leases, and (C) Related Relief (D.I. 481) (the "Sale Order"), where the Court, among other things, authorized the sale of substantially all of the Debtors' assets to SR Acquisition.
5. The Sale Order is currently the subject of a pending appeal filed by Vada Group L.P. (the "Appeal"). The record of the Appeal was transferred to the District Court and docketed on March 18, 2011. Pursuant to the APA, the Debtors agreed to diligently oppose such Appeal and to use all commercially reasonable efforts to obtain an expedited resolution of the same. See APA § 7.02(d) ("If the entry of . . . any [order] of the Bankruptcy Court relating to the

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<sup>2</sup> This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue for this matter is proper in this district pursuant to 28 U.S.C. § 1409.

Transaction shall be appealed . . . , the Debtors agree to diligently oppose such appeal . . . and to use all commercially reasonable efforts to obtain an expedited resolution of any such appeal."); id. § 7.01 (requiring the Debtors to "take such other actions as may be necessary or desirable in order to consummate or implement expeditiously the Transactions in accordance with the terms and conditions of [the APA]").

6. Pursuant to the Confirmation Order (as defined below) the Appeal was to be dismissed with prejudice within five business days after the Confirmation Order became a final, non-appealable order. As of the date hereof, the Appeal remains pending in the District Court.

7. On December 8, 2010, SR Acquisition and the Debtors closed on the sale of substantially all of the Debtors' assets to SR Acquisition (D.I. 570).

8. On January 4, 2011, the Debtors filed their Motion to Enforce and Implement Asset Purchase Agreement and for Disallowance of Any Alleged Defect Discovered Through Breach of the Asset Purchase Agreement Filed by Debtor (D.I. 584) (the "Breach of Contract Motion"), where the Debtors sought to improperly commence an adversary proceeding against SR Acquisition in the form of a motion. The Breach of Contract Motion was later withdrawn due to the procedural deficiencies.

9. On March 30, 2011, the Debtors initiated an adversary proceeding (Adv. No. 11-03282) by filing a complaint against SR Acquisition where, among other things, the Debtors seek to recover certain damages in connection with an alleged breach of the APA (the "Environmental Action"). All of the facts and circumstances forming the basis of the Debtor's allegations in the Environmental Action were known prior to the Auction.

10. On May 16, 2011, SR Acquisition filed its Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (D.I.s 10, 13) (the "Motion to Dismiss"), where SR

Acquisition seeks dismissal of the Environmental Action. A hearing on the Motion to Dismiss is scheduled for June 16, 2011.

11. On May 6, 2011, the Court entered an Order Confirming Amended Joint Plan of Liquidation for the Debtors (D.I. 777) (the "Confirmation Order"), where the Court, among other things, confirmed the terms of the Amended Joint Plan of Liquidation for the Debtors (the "Plan"). Pursuant to the Plan, all applications for allowance of administrative claims must be filed before the Post-Confirmation Bar Date—i.e., the first business day that is at least thirty days after the effective date of the Plan. The Confirmation Order also limits SR Acquisition's affirmative recovery on account of any administrative claims filed in these cases to \$700,000. While the Confirmation Order sets a limit for SR Acquisition's affirmative recovery, it does not affect SR Acquisition's setoff rights in the event the Debtors prevail on any of their claims in the Environmental Action.

12. On May 13, 2011, the Debtors filed the Notice of Occurrence of Effective Date of the Amended Joint Plan of Liquidation for the Debtors (D.I. 799), where the Debtors provided notice that the effective date of the Plan was May 13, 2011.

**The Debtors' Undisclosed Non-Consent Elections**

13. When an operator desires to drill a new well or make certain expenditures in connection with a joint operating agreement, it seeks consent and payment for such expenditures from the working-interest owners. If a working-interest owner elects to forgo making the requested payments, it is considered a non-consenting working-interest owner. By going "non-consent," the working-interest owner's rights under the joint operating agreement are modified, and a substantial penalty is imposed, requiring the withholding of all revenues from the well until the penalty has been paid in full.

14. Following the closing of the sale contemplated by the APA, SR Acquisition discovered that at least nine wells that it purchased from the Debtors were in non-consent status (the "Non-Consent Wells").<sup>3</sup> Despite having elected to go non-consent on all but one of the Non-Consent Wells during the pendency of their bankruptcy cases, the Debtors never informed SR Acquisition of their elections or the existence of the significant penalties associated therewith. In fact, the Debtors never publicly informed any of their various constituents that they had elected to incur significant penalties by electing to go non-consent on the Non-Consent Wells.

15. Under the APA, the Debtors were obligated to disclose all of the material contracts, including all amendments, extensions or other modifications thereof, related to the assets being purchased by SR Acquisition. APA § 3.05(a). The Debtors' non-consent elections modified the Debtors' rights under the joint operating agreements associated with the Non-Consent Wells. By failing to properly disclose their non-consent elections and the resulting modifications to the applicable joint operating agreements, the Debtors violated section 3.05(a) of the APA.

16. The Debtors were also prohibited from "sell[ing], leas[ing] or otherwise transfer[ing] any Oil and Gas Interests, or otherwise voluntarily divest[ing] or relinquish[ing] any right or asset" pursuant to section 5.01(b)(iii) of the APA. Id. § 5.01(b)(iii). Despite this prohibition, the Debtors voluntarily relinquished their right to receive revenues in connection with at least one well, by electing to go non-consent following the execution of the APA.<sup>4</sup>

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<sup>3</sup> The Non-Consent Wells consist of the following: Ragusa #1, RPS Exxon #1, Patterson #2, Ringo #1, Touro #2, Lorio #2, Patterson #5, Patterson #6 and Patterson #8. The Debtors made the non-consent election on each of the aforementioned wells, except for Ragusa #1, during their bankruptcy cases.

<sup>4</sup> The Debtors received an authorization for expenditures in connection with Patterson #8 after the execution of the APA but prior to the closing.

17. Absent a disclosure from the Debtors, there was no way that SR Acquisition, or any other party, could have discovered the Debtors' non-consent elections and the associated penalties. Non-consent elections are not part of the title record, and the Debtors never informed SR Acquisition that a portion of the assets it was purchasing was subject to significant non-consent penalties. Instead, the Debtors presented all wells to be sold pursuant to the APA as wells in pay status—i.e., wells not subject to any non-consent penalties. As a result of the Debtors' misrepresentation and/or nondisclosure of the status of the Non-Consent Wells, SR Acquisition has incurred, or in the future will incur, \$4,640,358.90 in fees and penalties,<sup>5</sup> the payment of which is necessary to return the wells to pay status.

#### **Relief Requested**

18. SR Acquisition requests that the Court allow payment of the claims described herein on an administrative priority basis.

#### **Argument**

##### **I. By Failing to Disclose Their Non-Consent Elections, the Debtors Breached the APA.**

19. SR Acquisition incorporates the precedent paragraphs as if fully set forth herein.

20. The APA is a valid and enforceable written contract, and the Court has previously found the APA to be binding in all respects. The Debtors are a party to the APA and are therefore the proper party to sue for a breach of the APA. SR Acquisition has also materially performed its contractual obligations under the APA.

21. The Debtors breached their obligations under the APA by failing to disclose their non-consent elections and associated penalties on the Non-Consent Wells. As previously discussed, the APA required the Debtors to disclose any and all modifications and alterations to

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<sup>5</sup> An accounting summary of these fees and penalties will be provided in connection with discovery in the Environmental Action.

any material contracts. APA § 3.05(a). The Debtors violated this provision by failing to disclose their non-consent elections—elections that modified and altered the applicable joint operating agreements.

22. The APA further prohibited the Debtors from relinquishing any of their rights or assets following the execution of the APA. Id. § 5.01(b). The Debtors violated this provision by ignoring an authorization for expenditures on at least one well, Patterson #8, following the execution of the APA, as the Debtors' failure to respond to the request for expenditure resulted in the Debtors' relinquishment of their rights to participate in the well and receive revenues in connection with the same.

23. The Debtors' breach caused SR Acquisition injury. SR Acquisition's economic bargain as part of the sale was based on the Debtors complying with the express terms of the parties' agreement. By misrepresenting and withholding information regarding the status of the Non-Consent Wells, SR Acquisition must either (a) pay the penalties associated with each Non-Consent Well, or (b) allow the operator to withhold revenues from each Non-Consent Well until the penalties are paid in full. As a result, SR Acquisition is entitled to the allowance of an administrative priority claim in an amount no less than \$4,640,358.90.

24. SR Acquisition is also entitled to recover reasonable attorneys' fees under Texas Civil Practice & Remedies Code Chapter 38 because its claim is for breach of a written contract.

**II. SR Acquisition Is Entitled to Damages Stemming from the Debtors' Failure to Disclose Their Non-Consent Election.**

25. SR Acquisition incorporates the precedent paragraphs as if fully set forth herein.

26. As previously discussed, the Debtors failed to disclose material facts, their election to go non-consent on the Non-Consent Wells, related to the transaction contemplated by the APA.

27. The Debtors had a duty to disclose their election to go non-consent on certain wells because the Debtors sold real property, including the Non-Consent Wells, to SR Acquisition. Moreover, the Debtors also had a duty to disclose their non-consent election because the Debtors' presentation and representation of the wells as all having revenue streams associated with them created the substantially false impression that the Non-Consent Wells were in fact paying wells.

28. The Debtors' failure to disclose their non-consent elections on the Non-Consent Wells was material and will require SR Acquisition to pay substantial penalties in order to return the wells to pay status.

29. The Debtors knew that SR Acquisition was unaware of their non-consent elections, and SR Acquisition did not have an opportunity to discover the truth. As previously discussed, a working-interest owner's election to go non-consent on a well is not a matter of public record. As a result, SR Acquisition could have only discovered the Debtors' election if the Debtors had specifically disclosed the information—something the Debtors failed to do.

30. By failing to disclose their election to go non-consent on the wells at issue and by failing to disclose the penalties associated therewith, the Debtors deliberately remained silent and did not disclose the information needed by SR Acquisition to accurately value the properties purchased pursuant to the APA. Furthermore, by failing to disclose their non-consent election, the Debtors intended that SR Acquisition bid for, and ultimately purchase, the Debtors' assets without the necessary information and at an inflated price.

31. SR Acquisition relied on the Debtors to accurately represent the true status of the Non-Consent Wells. As a result of the Debtors' failure to disclose the non-consent status of the wells at issue, the Debtors directly and proximately caused injury to SR Acquisition which



resulted in SR Acquisition's liability for penalties and fees on the Non-Consent Wells in the amount no less than \$4,640,358.90.

32. As a result of the Debtors' nondisclosure, SR Acquisition seeks unliquidated damages from the Debtors in an amount no less than \$4,640,358.90.

**III. All Claims Asserted by SR Acquisition Related to the APA Are Entitled to Administrative Priority Status Under Bankruptcy Code Section 503.**

33. Pursuant to Bankruptcy Code section 503(b), "there shall be allowed, administrative expenses . . . including, (1)(A) the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A). In determining what constitutes an "actual and necessary" cost of preserving the estate, courts have applied a two-part test. First, the claim must arise from a transaction with the bankruptcy estate. Second, it must have directly and substantially benefitted the estate. Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.), 25 F.3d 385, 387 (5th Cir. 2001)) ("In order to qualify as an [administrative priority claim], a claim against the estate must have arisen post-petition and as a result of actions taken by the trustee that benefitted the estate." (citing Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In re TransAmerican Natural Gas Corp.), 978 F.2d 1409, 1416 (5th Cir. 1992))).

34. Here, SR Acquisition's claims unquestionably arise from a transaction with the bankruptcy estate, as all of SR Acquisition's claims all arise directly from the APA or the Debtors' post-petition conduct in connection with the APA. Moreover, case law confirms that damages for post-petition torts and damages for a breach of a post-petition contract both satisfy the requirement that the claim benefit the estate. See Vega v. Rexene Corp., 59 F.3d 1242 (5th Cir. 1995) ("[C]ase law confirms that 'damages for a post-petition tort become an administrative expense . . . .'" (quoting In re MacDonald, 128 B.R. 161, 164 (Bankr. W.D. Tex. 1991))); Ben

Cooper, Inc. v. Ins. Co. of Penn. (In re Ben Cooper, Inc.), 896 F.2d 1394, 1399 (2d Cir. 1990), *vacated*, 498 U.S. 964 (1990), *reinstated*, 924 F.2d 36 (2d Cir. 1991) (finding that obligations under a contract or lease entered into after the filing of the bankruptcy petition constitute post-petition obligations of the estate). Since SR Acquisition's claims are either a post-petition tort claim or a claim based on breach of a post-petition contract, all of SR Acquisitions' claims are entitled to administrative priority pursuant to Bankruptcy Code section 503.

**IV. SR Acquisition May Be Entitled to Additional Recovery on an Administrative Priority Basis (I) in the Event SR Acquisition Incurs Expenses in Connection with the Liquidating Trustee's Failure To Take Actions as Required by the APA, or (II) in the Event the Court Awards SR Acquisition Recovery for Expenses in Connection with the Environmental Action.**

35. Pursuant to the APA, the Debtors are required to diligently oppose the Appeal.

See APA § 7.02(d) ("If the entry of . . . any [order] of the Bankruptcy Court relating to the Transaction shall be appealed . . . , the Debtors agree to diligently oppose such appeal . . . and to use all commercially reasonable efforts to obtain an expedited resolution of any such appeal."); id. § 7.01 (requiring the Debtors to "take such other actions as may be necessary or desirable in order to consummate or implement expeditiously the Transactions in accordance with the terms and conditions of [the APA]"). As previously discussed, the Appeal remains pending in the District Court.

36. As a result, SR Acquisition expressly reserves all of its rights to amend this Motion to include additional administrative priority claims in the event the Liquidating Trustee fails to perform any of its remaining obligations, including (a) damages resulting from a failure to have the Appeal dismissed, (b) any damages resulting from the Liquidating Trustee's withholding of information or files required by SR Acquisition in connection with the APA or the assets purchased thereto or (c) any damages resulting from the Liquidating Trustee's failure to execute any lease releases as may be required under state law.

37. Finally, in the event the Court awards SR Acquisition any recovery for expenditures made in connection with the Environmental Action, including recovery of any costs, expenses or attorneys' fees, such award will also be entitled to recovery on an administrative priority basis.

**Conclusion**

38. For all of the reasons set forth herein, the Court should award SR Acquisition an administrative priority claim in the amount no less than \$4,640,358.90 and grant such other and further relief to SR Acquisition as the Court may deem proper.

Dated: June 13, 2011

Respectfully submitted,

*/s/ Paul M. Green*

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Edward J. Sebold (TX 24062339)

Tom A. Howley (TX 24010115)

JONES DAY

717 Texas Avenue, Suite 3300

Houston, Texas 77002

Telephone: (832) 239-3939

Facsimile: (832) 239-6000

edwardjsebold@jonesday.com;

tahowley@jonesday.com

Paul M. Green (TX 24059854)

JONES DAY

2727 North Harwood Street

Dallas, Texas 75201

Telephone: (214) 220-3939

Facsimile: (214) 969-5100

pmgreen@jonesday.com

Attorneys for SR Acquisition I, LLC

Certificate of Service

I hereby certify that on June 13, 2011, a true and correct copy of the foregoing document has been served upon all parties receiving ECF notification in this case, and by e-mail to the parties listed below:

William L. Wallander, bwallander@velaw.com  
Charles Kelley, ckelley@mayerbrown.com  
Andy Romay, aromay@mayerbrown.com  
Jason R. Searcy, jrspc@jrsearcylaw.com  
Peter Franklin, pfranklin@fslhlaw.com  
Richard M. Roberson, rroberson@gardere.com  
Nancy Resnick, Nancy.S.Resnick@doj.gov

/s/ C. Nicholas Bowen  
C. Nicholas Bowen, Paralegal