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Leonard H. Simon  
Board Certified in Business Bankruptcy Law  
Texas Board of Legal Specialization

December 9, 2015

**VIA ELECTRONIC MAIL**

Elizabeth Guffy  
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Steven Bryant  
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Locke Lorde LLP  
600 Travis Street  
Suite 2800  
Houston, Texas 77002

Re: Request that Official Committee of Unsecured Creditors of  
*Apache Energy Services, Inc.*, Case No. 15-60069 (Bank. S.D. Tex.)  
Bring or Preserve Claims Against Heartland Bank

Dear Ms. Guffy and Mr. Bryant:

As you know, I represent a group of creditors who hold unsecured claims in the Apache Energy Services, Inc. chapter 11 bankruptcy case (hereinafter "AES"). The total unsecured claims held by the creditors in our group exceeds \$650,000. The purpose of this letter is to formally request that the Official Committee of Unsecured Creditors ("UCC") of debtor Apache Energy Services LLC and its court appointed counsel, Locke Lorde LLP, assert claims against Heartland Bank for the benefit of AES' unsecured creditors before the expiration of the deadline set forth in the Final Order Approving DIP Financing which is December 17, 2015. The nature and factual bases of the legal claims against Heartland Bank are set forth below.

**I. Avoidance of \$12 million Term Loan as to Debtor AES Pursuant to 11 U.S.C. § 548(a)(1)**

On August 12, 2014, debtor HII Technologies borrowed \$12 million from Heartland Bank to acquire the stock of Hamilton Investment Group, Inc. (the "Term Loan"). The Term Loan and its associated liens are senior in priority to the debts of unsecured creditors of debtor

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AES. If the Term Loan is avoided, however, unsecured creditors of debtor AES will have a realistic opportunity to receive a distribution in this bankruptcy case. A basic application of the elements of Section 548(a) of the Bankruptcy Code demonstrates that the \$12 million the Term Loan may be avoided as to debtor AES.

**A. No reasonably equivalent value to debtor AES from Term Loan to parent debtor HII Technologies**

The Term Loan did not provide reasonably equivalent value to subsidiary debtor, AES. The Debtors' chief restructuring officer, Loretta Cross, confirmed under oath on October 14, 2015 that debtor AES did not receive any proceeds of the Term Loan. The former president and vice president of debtor AES, Brent Mulliniks and Billy Cox, also confirm that debtor AES did not receive any proceeds of the Term Loan. Loan documents submitted at the final hearing on cash collateral confirm that the purpose of the Term Loan was to pay the acquisition price for the purchase of HIG stock. [Debtor Exhibit 3 at p. 3, p. 11].

**B. Transfer within 2 Years of Petition Date**

The Term Loan obligation to Heartland Bank falls squarely within the 2-year look back period under 11 U.S.C. § 548. The Term Loan was originated on August 14, 2014. Debtor AES filed for chapter 11 bankruptcy on September 18, 2015.

**C. \$12 Million Debt Owed by AES = Insolvency or Lack of Adequate Capital**

The Term Loan made debtor AES insolvent. When the \$12 million obligation to Heartland Bank is added to debtor AES' balance sheet on August 14, 2014, the aggregate liabilities of debtor AES exceed its assets at fair market value by a significant margin. Alternatively, after the debtor AES became obligated on the Term Loan, its remaining capital assets were unreasonably small such that AES could not service the Term Loan, continue to grow the business, and pay vendor debt. *See* 11 U.S.C. § 548(a)(1)(B)(ii). These financial metrics are confirmed by the former president of Apache Energy Services Brent Mulliniks and also confirmed by the Debtor's schedules and statements of financial affairs.

**D. Reasons Why Avoidance of the Term Loan Benefits Unsecured Creditors**

The Term Loan primes the claims of unsecured creditors of debtor AES. If the Term Loan is avoided, unsecured creditors of debtor AES will have a realistic opportunity to receive distributions on their unsecured claims because the remaining debt of Heartland Bank against

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AES is small relative to the fair market value of AES assets.

**E. Prosecution of Such Claims at No Legal Cost to the Committee.**

If your concern is the ability of the UCC to finance the prosecution of such claim, please let us know, as we may be willing to take the case on a contingent fee basis, or find another law firm who would be interested in doing so.

**II. Preference Payments to Heartland Bank**

Within the 90 days before the Petition Date, at least \$2,234,642.02 was transferred to Heartland Bank on account of antecedent debts owed by the debtors. [Doc. No. 97 at p. 18]. The preference payments are corroborated by the fact the Debtors' working capital loan under the Account Repurchase Agreement decreased from \$2,428,871 on May 20, 2015 to approximately \$890,680.71 as of the Petition Date. The cash sweeps to Heartland Bank constitute avoidable preferences under Section 547 of the Code. A preference action should be filed against Heartland Bank on or before December 17, 2015. The improvement in position test would dictate that Heartland Bank, although a secured creditor, improved its position when comparing the Bank's position on May 20, 2015, and the Bank's position on the date of filing. *See* 11 U.S.C. § 547(c)(5).

Again, if your concern is the ability of the UCC to finance the prosecution of such claim, please let us know, as we may be willing to take the case on a contingent fee basis, or find another law firm who would be interested in doing so.

**III. Lender Liability Claims Under Texas Law**

Heartland Bank is also liable to the debtor AES and debtor HII Technologies under facts which give rise to claims for fraudulent misrepresentation, duress, and interference with business relations. *See National Bank of El Paso v. Farah Manufacturing Company, Inc.*, 678 S.W.2d 661 (Tex. 1984)(seminal case of lender liability in Texas where borrower awarded \$19 million in damages arising from tortuous conduct of lender). In 2015, AES was contemplating the acquisition of a company called Water Transfer LLC. The Bank and its agents, working in concert with HII Technologies CFO, Acie Palmer, interfered with that corporate opportunity of AES and instead developed a secret plan to liquidate AES's water transfer business, acquire Water Transfer LLC for themselves, and then continue the AES business line under the auspices of Water Transfer LLC. The Bank also swept a significant portion of the funds raised by HII Technologies in May 2015 from Series B investors even though such funds were specifically allocated to pay-down vendor debt of AES. The acts and omissions of the Bank caused damages to HII, its shareholders, and AES which damages exceed \$10.5 million.

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Although, the debtor AES did execute releases of the Bank, we believe these releases are subject to the defense of duress and are not enforceable as to the tort claims described herein. Put another way, the scope of the releases does not include intentional torts committed by the Bank or its agents.

Again, if your concern is the ability of the UCC to finance the prosecution of such claim, please let us know, as we may be willing to take the case on a contingent fee basis, or find another law firm who would be interested in doing so.

The facts relating to these lender liability claims were provided to you on Wednesday, December 2, 2015 by Brent Mulliniks, the former president of AES and a member of the HII board of directors. At that meeting, we explained how debtor AES has viable claims to avoid a \$12 million term loan in favor of the secured lender that encumbers the unsecured creditors of debtor AES. As counsel for the UCC, you stated that the UCC did not intend to pursue this cause of action to avoid the \$12 million term loan, which if successful would result in a substantial benefit to the unsecured creditors of AES. We asked for an explanation why the claims were not being pursued and instead of giving us an explanation, you and Mr. Bryant abruptly left the conference room.

#### **IV. Claims Against Heartland Bank Must be Filed, Preserved and Prosecuted**

**Under the cash collateral order, the UCC and its counsel, Locke Lorde LLP, has until December 17, 2015 to file claims against the Bank.** In light of the **December 17, 2015 deadline for asserting claims against the secured lender**, I am requesting on behalf of my unsecured creditor clients that the substantial and valuable litigation claims described above be pursued for the benefit of creditors by UCC counsel, Locke Lorde LLP. Alternatively, if Locke Lorde LLP does not intend to file claims by the deadline, Pendergraft & Simon LLP will file the claims on behalf of the UCC so that the claims will be preserved and prosecuted for the benefit of unsecured creditors.

Please contact me this week to confirm that the litigation claims will be filed by Locke Lorde LLP so that the claims are not lost.

Sincerely,

/s/ Leonard H. Simon  
Leonard Simon

Cc: Hector Duran, Esq.