STATE OF NORTH CAROLINA COUNTY OF UNION	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CASE NO.: 07-CVS-03186
A-1 PAVEMENT MARKING, LLC, Plaintiff, v. APMI CORPORATION, LINDA BLOUNT and GARY BLOUNT Defendants.	**BRIEF IN SUPPORT OF MOTION FOR MANDATORY INJUNCTION REGARDING MOTOR VEHICLE TITLES**

Plaintiff A-1 Pavement Marking, LLC ("A-1")[1], respectfully submits this brief in support of its Motion for Mandatory Injunction Regarding Motor Vehicle Titles.

INTRODUCTION

This lawsuit arises out of Defendant APMI Corporation ("APMI") and Defendant Linda Blount's sale of a pavement marking business to Carolyn and Lenny Langevin in April 2006. APMI financed a portion of the sale price for A-1 and, in turn, assumed a security interest in certain assets previously owned by APMI, which were conveyed to A-1 in the sale.

One of the items received by A-1 in its purchase of APMI's assets was a thermoliner truck, used to paint lines on highways, and known by the parties as Truck 107. Prior to their sale of the business, APMI had been leasing Truck 107 from Priority Leasing. A-1 took over payments on the lease after of the sale closed. At no time did APMI own Truck 107 outright.

[1] A-1 Pavement Marking, LLC is the new entity created after the asset sale. Prior to the asset sale Defendant Linda Blount owned A-1 Pavement Marking, Inc., which became APMI as a part of the asset sale.

Truck 107 was merely a vehicle APMI rented for business purposes. After making the lease payments for several months, A-1 purchased Truck 107 from the third party lessor with funds from A-1's coffers. In January 2009, A-1 re-sold Truck 107 to a bona fide third-party purchaser ("BFP").

Only after A-1 sold Truck 107 did it learn that the title to Truck 107 had been removed from A-1's premises without the company's knowledge or consent. Indeed, the Langevins learned that the title to Truck 107 was improperly in the possession of Defendant Linda Blount. The Blounts apparently contend that Defendant Linda Blount maintains possession of the title to Truck 107 in order to protect an alleged security interest in that truck.

Whatever security interest APMI may have created in assets owned by it and sold to A-1, no such security interest applies to Truck 107. At the time of the sale it was owned by a third party lessor, Priority Leasing, and was only leased by APMI. As a matter of North Carolina law, a creditor cannot perfect a security interest in a vehicle purchased by the debtor simply by taking the title to that vehicle, without the debtor's knowledge and/or permission. *See* N.C.G.S. § 20-58(a)(2),

A-1's inability to convey good title to the third-party BFP of Truck 107 has jeopardized that transaction. Likewise, A-1's failure to complete the sale of Truck 107 may imperil their ability to continue employing their workforce through the slow season. A-1 has been relying on the cash from the sale of Truck 107 to help make payroll during the cold winter months when many of A-1's products cannot be applied to pavement due to the cold. The harms facing A-1 are imminent and irreparable. Through counsel, A-1 has repeatedly requested that Defendants return the title to Truck 107 without success.

Through counsel, accordingly, A-1 now requests that this Court enter a Mandatory Injunction, directing Defendants to return the title to Truck 107 to A-1 within forty-eight hours.

FACTUAL BACKGROUND

The facts relevant to this Motion are straight-forward and undisputed. On April 21, 2006, A-1 (then known as Langevin Ventures, LLC) entered an Asset Purchase Agreement with APMI to purchase certain of its assets and equipment, with the intent that A-1 acquire the business of APMI as a going concern. (*See* Affidavit of Carolyn B. Langevin ("Langevin Aff."), at ¶ 4, attached at Exhibit D to P's Mot. for Mand. Inj.) Pursuant to the parties' agreement, the total purchase for the asset sale was $1.5 million by wire transfer. (Langevin Aff., at ¶ 5.) A-1 paid Defendants Linda Blount and APMI $500,000.00 on the date of sale. (Langevin Aff., at ¶ 5.) APMI financed the remaining $1 million of the purchase price, specifying an interest rate of 4% per annum, payable monthly by A-1 of $18,416.52 installments, through and including April 1, 2011. (Langevin Aff., at ¶ 5.) This financing is memorialized in a Security Agreement, dated April 21, 2006, pursuant to which A-1 grants APMI a security interest in the name "A-1 Pavement Marking" and certain assets of A-1 Pavement Marking, as set forth in Exhibit A to the Security Agreement. (*See* Exhibit 9 of Asset Purchase Agreement, which is attached to Verified Complaint, attached as Exhibit A to P.'s Mot. for Mand. Inj.)

When A-1 purchased the assets, APMI did not own Truck 107, but rather was leasing Truck 107 from Priority Leasing. (Langevin Aff., at ¶ 7.) Upon consummation of the Asset Purchase Agreement, A-1 assumed all the monthly lease payments on Truck 107. (Langevin Aff., at ¶ 8, Ex. 1 attached to Langevin Aff.) In January 2007, while

Defendant Gary Blount was still serving as the General Manager of A-1, the company purchased Truck 107 from the leasing company, paying the entire purchase amount set by Priority Leasing of $14,884.72. (Langevin Aff., at ¶ 9.) Upon payment of the purchase price for Truck 107, A-1 became the outright owner of that vehicle. (Langevin Aff., at ¶ 10.)

Unbeknownst to anyone at A-1, some time after A-1 bought Truck 107 from the leasing company, the title for Truck 107 ended up in Defendant Linda Blount's possession. No one at A-1 authorized anyone to relinquish possession of the title to Truck 107 to Ms. Blount. (Langevin Aff., at ¶ 12.)

On January 22, 2009, A-1 sold Truck 107 to a bona fide third-party purchaser ("BFP") for approximately $90,000.00. (Langevin Aff., at ¶ 13.) As a precondition to the sale, A-1 must deliver marketable title to Truck 107 to the BFP. This purchaser has appropriately demanded that A-1 provide title to Truck 107 immediately, and A-1 fears the BFP may rescind the sale and demand a refund of the $90,000.00 purchase price if it fails to produce clear title. (Langevin Aff., at ¶ 14.) If A-1 cannot convey title to the BFP, it will violate its sale agreement with the BFP, potentially subjecting itself to additional liabilities to that third-party. (Langevin Aff., at ¶ 15.)

Additionally, A-1 had been trying to sell Truck 107 since July 11, 2007 when it purchased a new thermoliner for approximately $300,000.00. (Langevin Aff., at ¶ 16.) A-1's inability to convey title to Truck 107, caused by Defendants' refusal to surrender title to this vehicle consistent with their contractual obligations, may jeopardize A-1's ability to continue employing its workforce through the slow season. (Langevin Aff., at ¶ 17.) A-1 is using the cash from the sale of Truck 107 to help make payroll until the

weather warms enough for the crews to start laying more paint on the roads. (Langevin Aff., at ¶ 17.)

LEGAL ARGUMENT

Mandatory injunctions are affirmative in character, requiring a change in existing conditions. *Roberts v. Madison County Realtors Ass'n, Inc*., 344 N.C. 394, 399-400 (1996). While mandatory injunctions are not typically favored as an interlocutory remedy, the court may properly issue a mandatory injunction when the petitioner will suffer "serious irreparable injury [and] … if the injunction is not granted, [there will be] no substantial injury to the respondent if the injunction is granted, and predictably good chances of success on the final decree by the petitioner." *Id.* at 788. Further, a court acting in equity has discretion to shape the relief in accord with its view of the equities or hardships of the case. *Id.*

As discussed below, A-1 will suffer serious, irreparable injury if Defendants wrongfully continue to hold A-1's title to Truck 107. Accordingly, A-1 respectfully requests that this Court enter an injunction mandating that Defendants relinquish title to Truck 107 within forty-eight hours of entry of this Order.

I. PLAINTIFF WILL SUFFER SERIOUS, IRREPARBLE HARM IF THIS COURT DOES NOT ISSUE AN INJUNCTION.

Truck 107 is the legal property of A-1. The North Carolina Supreme Court has stated that "[t]he word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the [property]; the right to possess, use, enjoy and *dispose of it*…" *Hildebrand v. S. Bell Tel. & Tel*., 219 N.C. 402, 14 S.E.2d 252, 256 (1941) (emphasis

added). Further, "[e]very person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined…" *Cumulus Broadcasting, LLC v. Hoke County Bd. of Comm'rs*, 180 N.C. App. 424, 427 (Ct. App. 2006) (quoting *Harrington & Co. v. Renner*, 236 N.C. 321, 324 (1952).

In this case, it is undisputed that A-1 owns Truck 107. A-1 purchased the Truck outright from Priority Leasing, with $14,884.72 of A-1's money, after assuming the lease payments from APMI. (Langevin Aff., at ¶ 9.) The fact that someone appears to have unilaterally removed the title to Truck 107 from A-1's office without A-1's authority and given it to Defendant Linda Blount does not create within APMI any legal rights in Truck 107. *See* N.C.G.S. § 20-58(a)(2) (2008) (stating that the only valid way to perfect a security interest in a motor vehicle is through an application to the Division of Motor Vehicles); *N.C. Nat'l Bank v. Robinson*, 78 N.C. App. 1, 5 (Ct. App. 1985) (finding finance company had no valid lien on a vehicle merely through possession of title).[2] Defendants' legally unjustifiable refusal to relinquish title for Truck 107 to A-1 completely hamstrings A-1's well-established legal right to "possess, use, enjoy and dispose of" its property as it sees fit. As explained above, A-1 has sold this truck to a BFP and Defendants' refusal to turn over its title may prompt this BFP to threaten to undo that transaction. (Langevin Aff., at ¶ 14.)

[2] A security agreement must contain an after-acquired property clause in order to secure after-acquired collateral. *Dowell v. D.R. Kincaid Chair Co.*, 125 N.C. App. 557, 561 (Ct. App. 1997) (holding that the security agreement, not a financing statement, establishes the scope of the security agreement). The Security Agreement was entered on April 21, 2006. A-1 did not acquire ownership of Truck 107 until January 2007. The Security Agreement does not mention after-acquired property being subject to the agreement. As such, APMI has no valid security interest in Truck 107.

Any disruption to its sale of Truck 107 to a third party will inflict substantial harm upon A-1, not only by subjecting A-1 to liability vis-à-vis the BFP, but also by jeopardizing A-1's ability to continue to employ some of its workforce for the remainder of the slow season. (Langevin Aff., at ¶ 17.) The threats facing A-1 from Defendants' inexplicable refusal to transfer title to Truck 107 – a vehicle in which APMI *never* acquired anything more than a leasehold interest – are imminent and significant. A-1 therefore respectfully requests that this Court enter an injunction mandating that Defendants provide A-1 the title to Truck 107 within forty-eight hours.

II. DEFENDANTS WILL NOT SUFFER SUBSTANTIAL INJURY IF THE INJUNCTION IS GRANTED.

APMI cannot suffer any injury with respect to any disposition of Truck 107 because, simply stated, APMI has absolutely no legal interest in the property. The undisputed facts are:

- APMI never owned Truck 107 or otherwise held valid title in the vehicle;
- APMI leased Truck 107 during the period of time that A-1 Pavement Markings, Inc., operated as an ongoing concern;
- APMI conveyed its leasehold interest in Truck 107 to A-1 as part of the Asset Purchase Agreement; and
- A-1 independently purchased Truck 107 from the vehicle leasing company several months *after* their transaction with APMI.

(Langevin Aff., at ¶¶ 7-9.) Absent a legally cognizable interest in Truck 107, APMI "could not have suffered injury or damage which was legally compensable." *Cage v. Colonial Bldg. Co., Inc. of Raleigh*, 337 N.C. 682, 685 (1994) (holding that plaintiff had no legal interest in property to support claim of negligence by builder when she did not own the property at the time of construction). Thus, before becoming the owner of property at issue, an individual or entity has "no legally protected interest which could

have been harmed[.]" *Id*. at 685. APMI does not now – nor has it ever – owned Truck 107; as such, North Carolina law recognizes no basis for APMI to be harmed by decisions relating to that vehicle.[3]

APMI may seek to manufacture a legal interest in Truck 107, and claim some sort of corresponding injury, by invoking an unperfected and legally infirm security interest purportedly attaching to certain property conveyed pursuant to the Asset Purchase Agreement. (*See* Exhibit 9 of Asset Purchase Agreement, which is attached to Verified Complaint, attached as Exhibit A to P.'s Mot. for Mand. Inj.) Unfortunately for APMI, this security interest argument lacks factual and legal merit.

As a factual matter, APMI's assertion of a security interest in Truck 107 fails because APMI held only a leasehold interest in that vehicle. (Langevin Aff., at ¶ 7, Ex. 1 attached to Langevin Aff.) The Security Agreement specifies that the collateral securing the $1,000,000.00 financing APMI provided to A-1 are those "assets of (formerly) A-1 Pavement Marking, Inc. as set out on the three pages attached and marked 'Exhibit A.'" Exhibit A, which is a tax depreciation schedule apparently used by APMI for their corporate taxes, properly should not have included Truck 107. (*See* Exhibit 9 of Asset Purchase Agreement, which is attached to Verified Complaint, attached as Exhibit A to P.'s Mot. for Mand. Inj.) How could it? Truck 107 was a leased asset to APMI and, as such, not eligible for depreciation as a taxable asset by the lessor. I.R.C**.** § Second 168.

Even if the parties' contracts had afforded APMI with a basis for claiming a security interest in Truck 107 – which they patently did not – taking title to a vehicle

[3] As noted above, APMI obtained *title* to Truck 107 through the unauthorized removal of that title from A-1's premises. Although this has created a situation in which APMI technically has possession of the title to Truck 107, APMI cannot dispute that A-1 was the bona fide purchaser of Truck 107 from the vehicle leasing company and that APMI's interest in the truck never exceeded that of lessor. (Langevin Aff., at ¶ 7, Ex. 1 attached to Langevin Aff.)

purchased by the debtor, unbeknownst to the debtor and without the debtor's permission, is not a legally viable perfection of that security interest. *See* N.C.G.S. § 20-58(a)(2); *N.C. Nat'l Bank*, 78 N.C. App. at 5.

APMI cannot demonstrate a substantial injury sufficient to preclude the Court's entry of an injunction mandating return of the title to Truck 107 to Plaintiff. At no point in time has APMI held an ownership interest in Truck 107, nor does APMI have a factual or legal basis for claiming Truck 107 as collateral on APMI's loan to Plaintiff. As such, APMI cannot identify any injury – let alone any substantial injury – that may result from the entry of an Order compelling APMI to provide Plaintiffs with title to Truck 107. A-1 therefore respectfully requests that this Court enter an injunction mandating that Defendants provide A-1 the title to Truck 107 within forty-eight hours.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Plaintiff will likely succeed on the merits of its claim to recover the title to Truck 107 in the event that the parties must present this claim to the ultimate finder of fact. See *North Carolina Electric Membership Corp. v. North Carolina Dept. of Econ. and Comm. Dev.*, 108 N.C. App. 711, 717 (1993) (a court must look at the law governing the claim the Plaintiff is asserting). As set forth in detail in sections I and II above, A-1 was, prior to the sale to the BFP, the rightful and unrestricted owner of Truck 107. Contrary to what we expect Defendants to argue in defense of this motion, APMI does not have a valid security interest in Truck 107 because at the time of the asset sale, A-1 did not own Truck 107 and could not grant a security interest in it. Accordingly, pursuant to basic North Carolina property law, APMI is wrongfully in possession of the title to property that belongs to A-1 Pavement Marking, LLC.

The facts and the law in this matter are clear and largely undisputed. APMI had a simple leasehold interest in Truck 107 at the time of the asset sale. A-1 took over that leasehold interest after the asset sale closed. A party cannot grant a security interest in an item that it does not own. Accordingly, APMI does not hold a security in Truck 107.

A third-party BFP rightfully purchased Truck 107 from A-1 in accordance with A-1's right to dispose of its property as it sees fit. *See Hildebrand*, 219 N.C. at 402, 14 S.E.2d at 256. That sale is in imminent jeopardy due to APMI's wrongful conduct in this case. If APMI does not have to return the title, A-1 could have to return the BFP's $90,000.00, which could substantially affect its cashflow and ability to maintain employees on the payroll during the cold weather off-season.

For these reasons, and the reasons set forth above, Plaintiff has demonstrated substantial likelihood of success on the merits of the claim for wrongful possession of the title of Truck 107. Accordingly, A-1 respectfully requests that this Court enter an injunction mandating that APMI provide A-1 with the title to Truck 107 and all remaining Purchased Assets within forty-eight hours.

CONCLUSION

Defendants have attempted to circumvent the clear requirements of equity and North Carolina law by taking possession of the title to Truck 107 and using it, in effect, to prevent A-1 from conducting business in the ordinary course. A-1 procured Truck 107 independently from its transactions with APMI, remitted payment from Truck 107 from its corporate coffers and now made arrangements to sell this property. APMI has absolutely no legal interest – security or otherwise – in Truck 107. Accordingly,

Defendants should be required to return the title to Truck 107 to A-1 within forty-eight hours.

Respectfully submitted this the 24th day of February, 2009.

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CERTIFICATE OF COMPLIANCE WITH N.C. BUS. CT. RULE 15.8

The undersigned hereby certifies that the foregoing document **A-1 PAVEMENT MARKING, LLC'S BRIEF IN SUPPORT OF MOTION FOR MANDATORY INJUNCTION REGARDING MOTOR VEHICLE TITLES** has a word count of less than 7,500 words which complies with North Carolina Business Court, Rule 15.8.

This the 24th day of February 2009.

_/s/ Amy R. Worley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing **A-1 PAVEMENT MARKING, LLC'S MOTION FOR MANDATORY INJUNCTION REGARDING MOTOR VEHICLE TITLES** and **BRIEF IN SUPPORT OF A-1 PAVEMENT MARKING, LLC'S MOTION FOR MANDATORY INJUNCTION REGARDING MOTOR VEHICLE TITLES** were served upon each of the parties or, when represented, upon their attorney of record, electronically and by mailing a copy thereof, postage prepaid, addressed as follows:

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This the 24th day of February 2009.

_/s/ Amy R. Worley