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.	**A-1 PAVEMENT MARKING, LLC'S REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR MANDATORY INJUNCTION**

A-1 respectfully submits this reply brief in response to Defendants' brief in opposition to Plaintiff's Motion for Mandatory Injunction.

INTRODUCTION

APMI's brief attempts to obscure and complicate the simple issue before the Court—whether A-1 has the right to the title and proceeds from the sale of Truck 107— a truck it purchased for fair market value ("FMV") from Priority Leasing and sold to a bona fide third party purchaser ("BFP"). A-1's motion does not require the Court to resolve the ultimate issues in the case regarding the assumption of long term liabilities in the Asset Purchase Agreement ("APA"). Rather, A-1 must prove only that: (1) APMI did not have an ownership interest in Truck 107 at the time the APA was executed and does not have any interest in Truck 107 at the present time; and (2) A-1 is likely to succeed in proving either that APMI has no interest in Truck 107, or that APMI breached the APA by failing to use commercially reasonable means to obtain Priority Leasing's consent to permit A-1 to assume the lease.

It is undisputed based on documentary and competent affidavit evidence that in 2002 APMI entered into a basic commercial lease with Priority Leasing for the use and possession of

Truck 107. Despite APMI's contrary claim, that lease was not a financing instrument. In fact, unlike what one expects to see in a conditional sales agreement, the Truck 107 lease agreement was terminable in one of three ways at the option of A-1. A-1 could have unilaterally chosen to: (1) return the truck to Priority Leasing; (2) renew the lease; or (3) purchase the truck for the FMV. A-1 was not obligated to purchase the vehicle or to undertake any action upon the satisfaction of a pre-condition by the lessee.

APMI's wrongful refusal to relinquish A-1's title to Truck 107 is causing increasing, irreparable harm to A-1. The BFP of Truck 107 needs to transport the truck to Alabama for extensive repairs so that it can be used for the particular purpose for which it was purchased. Before the BFP can drive the truck, he must register it, and for that he needs the title. If the BFP cannot get Truck 107 in service quickly enough for his business purposes, he will suffer damage to *his* business and reputation and could have claims against A-1 for such harm. The longer APMI refuses to turn over the title, the greater the likelihood and amount of harm to A-1.

REBUTTAL FACTS

Many of the statements made in APMI's brief and Ms. Blount's supporting affidavit contradict the tone and tenor of Defendants' deposition testimony and conflict with record documents.[1] Moreover, Defendants' conduct in gathering information to respond to A-1's Motion is consistent with the type of dishonest and clandestine behavior that has defined this litigation from its midnight "repossession" beginnings to the present. (Pl. 2d. Am. Comp. 2/4/09)

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[1] Plaintiff has summarized the more egregious exaggerations and omissions in Ms. Blount's affidavit at Tab 1 to Plaintiff's Materials Submitted in Support of A-1 Pavement Marking, LLC's Reply to Defendants' Brief in Opposition to Plaintiff's Motion for Mandatory Injunction ("Pls. Matls. in Supp.").

I. **The Truck 107 Lease was a basic commercial lease.**

A. The documents conveyed a simple leasehold interest in Truck 107.

APMI entered into a simple commercial lease of Truck 107. The lease states that the lessee had the following "END OF LEASE OPTIONS…: (1) Purchase the equipment for fair market value. (2) Renew the lease per Paragraph 1. (3) Return the equipment as provided in Paragraph 5 of this lease." (L. Blount Aff.; Ex. A.) The document titled "End of Lease Purchase Option," which APMI claims entitled it to purchase Truck 107 for $1, was not signed by anyone from Priority Leasing. The document states that it "will be ***null and void unless executed by an officer of Priority Leasing***." (Id.) (emphasis added.) Thus, the alleged End of Lease Purchase Option relied upon by APMI is not operational on its face. (Id.)

B. A-1 LLC does not have a copy of the End of Lease Purchase Option in any of its files.

The End of Lease Purchase Option document attached to Ms. Blount's affidavit and relied upon by APMI does not appear anywhere in A-1's files. On Wednesday, March 4, 2009, A-1 received a five-page, unsolicited facsimile from Priority Leasing, sent after the close of business on March 3. (Langevin Aff., ¶ 5, Ex. A.) This facsimile contained all five pages of the Truck 107 lease originally executed by APMI. (Id., ¶ 6.) However, the documents faxed to A-1 by Priority Leasing did not contain the "End of Lease Purchase Option."

Finding it odd that A-1 was faxed a copy of the Truck 107 lease over a year after it ended, Ms. Langevin contacted Brian Gallucci at Priority Leasing to find out why the lease had been sent. (Id., ¶ 8.) Mr. Gallucci told her that he sent the lease because Linda Blount had called him approximately fifteen times the day before requesting the lease documents immediately. (Id., ¶ 9.) Mr. Gallucci asked Ms. Blount why she needed the lease so urgently, and she

responded that she needed it for "tax purposes." (Id.) She apparently did not mention this lawsuit or the pending motion.

After the incident with Priority Leasing, A-1 reviewed its files and located its own copy of the Truck 107 lease. (Id., ¶ 10, Ex. B.) Like the lease faxed by Priority Leasing, A-1's Truck 107 file does not contain the "End of Lease Purchase Option." (Id.)

C. According to Priority Leasing Management, Truck 107 did not have a nominal payoff option.

According to Ellen Lavoie, who is a Senior End of Lease Manager at Priority Leasing, there was no $1.00 End of Lease Option for Truck 107. (Lavoie Aff., ¶ 11.) Ms. Lavoie explained this fact at length to Defendant Gary Blount in 2007. (Id.)

On January 19, 2007, (after the asset sale) Ms. Lavoie received a voicemail message from a woman named Mindy, whom she understood to be affiliated with APMI,[2] stating that APMI made its final lease payment on Truck 107 and wanting to discuss vehicle purchase options. (Lavoie Aff., ¶¶ 4; 5.) Ms. Lavoie reviewed the file and called Mindy to give her the $14,884.72 price. (Lavoie Aff., ¶¶ 5; 6.)

On January 22, 2007, Defendant Gary Blount called Ms. Lavoie to dispute the price. Ms. Lavoie advised him that Truck 107 could be purchased only for its FMV of $14,884.72, and explained in detail how she had calculated that value.[3] (Id., ¶ 6.) She also told Mr. Blount that

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[2] It wasn't until counsel for A-1 contacted Ms. Lavoie regarding this litigation, that she learned that APMI had sold its assets to A-1 during the term of the Truck 107 lease. Neither Mindy or Gary Blount told her about any change in ownership with respect to APMI or the assets of that company despite APMI's obligation under §3.6 of the APA to undertake commercially reasonable steps to notify affected third parties of the sale. (Id., ¶ 12.)

[3] In Paragraph 7 of her affidavit, Ms. Blount states that the FMV of Truck 107 was approximately $100,000.00 in January 2007. Ms. Blount is neither competent nor qualified to testify as to the FMV of Truck 107. She does not have personal knowledge of either the condition or the mileage of Truck 107 at the time A-1 purchased it from

she would put the explanation for the purchase price in writing, which she did in a facsimile dated January 22, 2007. (Id., ¶ 7; Ex. B).

II. Harm to A-1 if APMI continues to refuse to surrender A-1's title to Truck 107.

As explained in its opening brief, A-1 sold Truck 107 to a BFP, who notified A-1 during the sale negotiations of his intention to use Truck 107 to complete several contracts. Like most pavement marking projects, this BFP must complete his work by a particular date or liquidated damages will be charged for every day that the job is late. (Langevin Aff., ¶ 12.)

A-1 was notified that the BFP needs to transport Truck 107 to Alabama for refurbishment and modification in order to use it for the purpose for which he purchased it. Before the BFP can drive the truck, he must have title to it so that he can register it. (Id., ¶ 13.) If the BFP cannot register the vehicle in sufficient time to have it modified according to his unique job specifications, he will not be able to perform the contracted for work and he could file a lawsuit against A-1 for any associated damages to *his* business and reputation. This potential harm is not only imminent; it grows more likely every day A-1 cannot provide the title to Truck 107 to this BFP. (Id., ¶ 14.)

Additionally, if A-1 cannot convey title to Truck 107, the BFP will likely rescind his purchase agreement, thereby exposing A-1 to another potential lawsuit. Finally, with each day that passes in which A-1 cannot provide title to Truck 107, A-1's reputation in its business community suffers. (Id., ¶ 15.)

Priority Leasing. "[I]t is a general legal principle that affidavits must be based upon personal knowledge." *Currituck Associates Residential Partnership v. Howell,* 170 N.C. App. 399, 403 (Ct. App. 2005) (quoting *Lemon v. Combs,* 164 N.C. App. 615, 622 (Ct. App. 2004)).

III. **A-1 has requested repeatedly that APMI transfer title in the trucks to A-1.**

Since June 2008, counsel for the parties have been engaged in discussions regarding transferring the titles and registrations for the vehicles that A-1 purchased in the APA. A compilation of correspondence between counsel about these issues is attached to Pls. Matls. in Supp. at Tab 2.[4] Defendants' brief correctly notes that APMI offered to allow A-1 to put the titles in A-1's own name, with APMI's liens properly recorded, if A-1 would pay the re-registration and title fees (an obligation that belongs to APMI under the §6.2(a) of the APA). Defendants incorrectly claim that A-1 did not follow up on Defendants' offer. (Def. Br. pg. 4-5.) To the contrary, counsel for A-1 followed up with APMI's counsel by e-mail, and counsel discussed the issue in person and on the telephone.

Ultimately, however, negotiations regarding the titles broke down at or near the time of Defendant Linda Blount's somewhat emotional deposition on December 18, 2008. *See* Pls. Matls. in Supp. at Tab 4. (L. Blount Dep. 36-37:14; 183:1-184:11) For example, in one colloquy with counsel, Ms. Blount stated that, at the time of the lawsuit, "[the titles] ***belong [sic] to APMI Corporation***." *See* Pls. Matls. in Supp. at Tab 4. (L. Blount Dep. 125:1-127:6.) Additionally, it was at or near this time that A-1 learned that rather than transfer the vehicle titles to A-1, APMI actually went to the trouble to transfer the truck titles out of the name of old A-1 into the name of APMI. (Id.)

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[4] Defendants' counsel notes a gap in the discussion of the truck titles issue. The court will note that undersigned counsel took Family and Medical Leave from July 30, 2008 until October 31, 2008 for the adoption of her newborn son, which accounts for much of the gap in correspondence about the issue. Copies of counsel's consent motion and the Court's August 4, 2008 Order pertaining to the same are attached to Pls. Matls. at Tab 3.

LEGAL ARGUMENT

A-1 is not estopped from denying it owned Truck 107 at the time the APA was executed because APMI had no legal interest to pass to A-1 at that time. Also, as set forth in detail below, A-1 is substantially likely to succeed on the merits of these two different legal theories.

I. APMI's estoppel argument fails as a matter of law.

APMI claims that A-1 should be estopped from asserting it did not have an ownership interest in Truck 107 at the time of the asset sale because it executed the Security Agreement with APMI. This argument is meritless. Rather, it is APMI that could not legally take a security interest in an asset that it could not sell to A-1 because ***it had no ownership interest to transfer to A-1 in the first place***. Indeed, N.C. Gen .Stat. § 20-4.01(26) only classifies a holder of a lease as an "owner" of a vehicle where there is "an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement." There was no agreement for a conditional sale here.

As set forth above, the lease agreement for Truck 107 was not a lease-purchase agreement, but was a straightforward lease for a term of 60 months. The Truck 107 lease did not provide for purchase upon performance of certain conditions and was only purchased at the end of the lease term after A-1 paid FMV of $14,884.72 to Priority Leasing. A-1 could also have returned or chosen to re-lease the vehicle.

Defendants also argue that the $14,884.72 consideration that A-1 paid to Priority Leasing is nominal, thus creating a lease-purchase agreement. However, this argument fails because courts have held that amount less than the amount A-1 paid have represented FMV.

The North Carolina Court of Appeals has held that a purchase option for FMV is not nominal value. *Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc.*, 97 N.C. App. 610, 613 (Ct. App. 1990) (finding that a lease with an option to purchase a leased vehicle at FMV was not nominal consideration). *See also Beau Rivage Plantation, Inc. v. MeTex USA, Inc.*, 112 N.C. App. 446, 450 (Ct. App. 1993) (finding that an agreement for a fixed term of 48 months with an option to purchase for FMV, or ***ten percent of the original sales price***, whichever was less, created a true lease).

Despite Defendants' assertion that $14,884.72 is nominal consideration, the lease agreement clearly states that the purchase price is for FMV. The Court in *Beau Rivage* held that an option to purchase for FMV or 10% of an original sales price on a 48 month lease was a true lease. Here, A-1 paid 20% of the purchase price on a 60 month lease. (Lavoie Aff., Ex. B.) This is sufficient consideration to create a true lease under North Carolina law.

Thus, because APMI did not own Truck 107 at the time of the asset sale but merely leased it, it could not sell Truck 107 to A-1. And because A-1 could not and did not buy Truck 107 from APMI, it did not grant a security interest in the truck to APMI. Accordingly, regardless of whether Truck 107 was erroneously included on a list of collateral for the Security Agreement, A-1 did not and could not grant a security interest in something it did not own.

II. A-1 is likely to succeed on the merits of its claims against APMI.

A-1 is likely to succeed on the merits of its claims against APMI under two different, and equally sufficient theories: (1) that APMI has no legally cognizable interest in Truck 107; and (2) that APMI breached the APA by failing to use commercially reasonable means to notify Priority Leasing and obtain its consent to transfer the lease of Truck 107 to A-1.

A. A-1 is likely to succeed in proving that APMI has no cognizable interest in Truck 107 because APMI was not the owner of the vehicle at the time of the asset sale.

A-1 only needs to show a likelihood of success on the merits on the issue on which it is seeking an injunction. *See Kennedy v. Kennedy*, 160 N.C. App. 1, 9- 12 (Ct. App. 2003) (only examining likelihood of success on the merits on issue of enforceability of non-compete agreement); *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 27 (Ct. App. 1988) (upholding denial of injunction when plaintiff was unlikely to succeed on issue of whether covenant not to compete was void as against public policy).

The only issue before the Court on this motion is whether APMI had an ownership interest in Truck 107 when it attempted to convey that interest in Truck 107 to A-1 under the terms of the APA. Defendants attempt to establish that APMI was the owner of Truck 107, stating that the lease "was in reality a conditional sales contract used to finance the purchase of truck 107," and that there was an "option to purchase the vehicle for an additional $1.00." (Def. Br. pgs. 7-8). To the contrary, according to both the lease documents themselves and Ms. Lavoie from Priority Leasing, the Truck 107 lease was not a conditional sales contract and there was not an option to purchase Truck 107 for $1.00. APMI did not own Truck 107 and could not transfer ownership to A-1. As such, A-1 could not and did not grant APMI a security interest in the truck. For these reasons, A-1 has shown a substantial likelihood of succeeding on the merits of its claim to obtain possession of the title to Truck 107.

B. A-1 is likely to succeed on the merits of a breach of contract claim against APMI because APMI failed to use commercially reasonable efforts to obtain the necessary consents from Priority Leasing.

Furthermore, A-1 is likely to succeed on the breach of contract claim in Plaintiff's Complaint against APMI because APMI breached the APA with regard to Truck 107. Section

3.6 of the APA, entitled "Procedures for Assets not Transferable," states "[i]f any of the Contracts or any other property rights included in the Purchased Assets are not assignable or transferable either by ***virtue of the provisions thereof*** or under applicable Law without the Consent of a Person that is not a Party to this Agreement and that is not controlled by a party to this Agreement, Seller shall use commercially reasonable efforts to obtain such Consents prior to the Closing Date." (Mot. for Mand. Inj. Ex. A, APA, § 3.6.) The lease agreement for Truck 107 states in Paragraph 10 "Assignment: You have no right to sell, transfer, assign, or sublease the equipment or this agreement." (Lavoie Aff., Ex. A.) Thus, the lease for Truck 107 was "not assignable or transferable... by the provisions" of the lease.

According to Ms. Lavoie, APMI did not inform Priority Leasing that substantially all of the assets of APMI had been sold to A-1. (Id., ¶ 12.). If APMI did not notify Priority Leasing of the transfer of the lease to A-1, it could not have sought consent for an assignment of the lease. The terms of the APA require that APMI at least undertake reasonable measures to obtain consent from third parties for the transfer of any non-transferable contract. Because APMI failed to attempt to obtain Priority Leasing's consent to the transfer of the lease to A-1, APMI breached the terms of the APA. Thus, A-1 has demonstrated a likelihood of success on the merits of its claim for breach of contract against APMI.

III. APMI's legal interests are not harmed if the Court grants the Mandatory Injunction.

There is no legally significant harm to APMI if title to Truck 107 is returned to A-1. Defendants are correct that A-1 has refused to give Ms. Blount the $90,000 proceeds from the sale of Truck 107. This is because there is no provision in any agreement or Court order that

obligates A-1 to make such a payment. *See* Pls. Matls. in Supp. at Tab A. Without a legal right to the money, Ms. Blount has not suffered a legally cognizable harm.

CONCLUSION

For the reasons set forth above and in Plaintiff's opening brief in support of its Motion for a Mandatory Injunction, A-1 respectfully requests that the Court order APMI to convey title to Truck 107 to A-1 free and clear of all liens and encumbrances within 48 hours of the entry of the Court's Order.

Respectfully submitted this the 13th day of March, 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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR MANDATORY INJUNCTION** has a word count of less than 3,750 words which complies with North Carolina Business Court, Rule 15.8.

This the 13th day of March 2009.

/s/ Amy R. Worley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing **A-1 PAVEMENT MARKING, LLC'S RESPONSE TO DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'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 13th day of March 2009.

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