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 BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff A-1 Pavement Marking, LLC ("A-1"), respectfully submits this brief in support of its Motion for Partial Summary Judgment.

I. INTRODUCTION

A-1 respectfully requests the Court grant it partial summary judgment and dismiss Defendant Gary Blount's claim for alleged unpaid wages based upon a profitability bonus, pursuant to the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1, *et seq*. ("NCWHA"). Mr. Blount has not forecast any evidence supporting his claim he was wrongfully denied bonus pay. In fact, it is undisputed that A-1 paid Mr. Blount's bonus according to the express terms of the Bonus Plan. The NCWHA requires that an employee is paid what he is entitled pursuant to the terms of a written bonus plan, and it is undisputed, based upon the facts in the record, that Mr. Blount was paid according to A-1's written bonus plan. Therefore, Defendants' sixth counterclaim fails as a matter of law.

II. UNDISPUTED FACTS

A. Mr. Blount Accepted Employment as A-1's General Manager Upon Execution of the Asset Purchase Agreement, which Contained His Employment Agreement and Bonus Plan.

This lawsuit arises out of an Asset Purchase Agreement ("APA") executed between A-1 and Defendant APMI Corporation ("APMI" or "Old A-1") on or about April 21, 2006, in which A-1 purchased substantially all of the assets and trade name of APMI. (G. Blount Dep. 21:1-5; Pl. Mat. in Supp. Ex. 1.) APMI was formerly known as A-1 Pavement Marking, Inc. Old A-1 was wholly owned by Defendant Linda Blount and managed by her husband Defendant Gary Blount. (G. Blount Dep. 30:23-24.)

Among the reasons A-1's owners, the Langevins, were interested in purchasing Old A-1 was to acquire the services of Mr. Blount, who had successfully served as the General Manager of Old A-1, and whom the Langevins believed would help run and grow the new business. (L. Langevin Dep. 46:14-21; 52:6-14; G. Blount Dep. 53: 15-23.) Accordingly, Mr. Blount and A-1 entered into an employment agreement naming Mr. Blount General Manager of A-1. (Defs.' Answer and Countercl. to Pl.'s 2nd. Am. Compl., pg. 16, ¶ 27-28; G. Blount Dep. 58:18-59:15.)

Mr. Blount was extremely well compensated in his position with the new company. He received a base salary of $100,000 per year. (Pl. Mat. In Supp. Ex. 1, Tab A.) In addition to standard health benefits, Mr. Blount was also given an automobile allowance. *Id*. Mr. Blount also had an opportunity to earn a bonus, if certain defined company-wide goals were met. *Id*. The employment agreement preserved A-1's right to modify or eliminate any of Mr. Blount's benefits. (Id. ¶ 13.)

Mr. Blount was eligible for a Bonus Measurement plan (the "Bonus Plan"), the terms of which were attached to his employment agreement as Exhibit A. *Id*.; (Pl. Mat. In Supp. Ex. 1,

Tab A.) The Bonus Plan stated that Mr. Blount's eligibility for determining whether and how much bonus he could potentially receive would be measured on December 31st for the next two years. *Id*.; (G. Blount Dep. 59:16-60:10.) It further stated that any bonus amounts paid would be based on an increase in total gross profits for each year, as compared to the base year – the year ending December 31, 2005. The gross profit calculation was to be determined by Cullen, Murphy & Co., P.C. ("Cullen Murphy"). *Id*. The Bonus Plan specifically set out Cullen Murphy's 2005 base year gross profit calculation, which totaled $556,900, and which was the bench mark for purposes of determining Mr. Blount's eligibility for a bonus. (Pl. Mat. in Supp. Ex. 1, Tab A; Pl. Mat. in Supp. Ex. 2, ¶ 4; G. Blount Dep. 199:11-20.)

B. Mr. Blount's 2006 Bonus was Calculated by Cullen Murphy using Generally Accepted Accounting Principles ("GAAP").

Following the 2006 fiscal year, Cullen Murphy calculated A-1's 2006 gross profits as total $579,909, an approximate 4.1% increase over the 2005 base year. (Pl. Mat. in Supp. Ex. 2, ¶¶ 5-6.) Based on this 4.1% increase, A-1 determined that Mr. Blount's 2006 bonus was $5,000, exactly as illustrated on the chart in the Bonus Plan for increases of less than 10%. (Pl. Mat. in Supp. Ex. 1, Tab A; Pl. Mat. in Supp. Ex. 2, ¶ 6.) Cullen Murphy performed its gross profit calculations using GAAP, and did not uncover any fraudulent or improper inter or intra company transfers that would have affected A-1's total gross profit figures for 2005 or 2006. (Pl. Mat. in Supp. Ex. 2, ¶¶ 3, 7-8.)

C. Mr. Blount has not Forecast Evidence Supporting His Claim for Additional Bonus Payments.

Mr. Blount claims he is entitled to a "substantial bonus," estimated at $60,000 or greater, because A-1 allegedly commingled expenses or diverted income to affiliated companies, thereby

artificially lowering A-1's gross profits.[1] (Defs.' Answer and Countercl. to Pl.'s 2nd. Am. Compl., pg. 16, ¶¶ 29, 31.) Mr. Blount does not question that the Bonus Plan controls his bonus eligibility; he claims only that he was not paid correctly pursuant to its terms. (G. Blount Dep. 255:17-22.)

Mr. Blount concedes that he is unaware of any fraudulent or wrongful conduct by Cullen Murphy. (G. Blount Dep. 211:21-212:6.) Mr. Blount also testified that he has not seen a consolidated financial statement for A-1, and that he does not understand the accounting principles for intra company receivables and invoices between affiliated companies. (G. Blount Dep. 214:2-8.) He admitted that he does not understand how "cost of goods sold" ("COGS"), a deduction taken before totaling gross profits, was calculated under either A-1 or APMI's methodologies. (G. Blount Dep. 203:8-204:12.) Mr. Blount further admitted to not taking equipment depreciation into account in making his bonus calculations and was unsure if he should have done so under GAAP. (G. Blount Dep. 206:12-22.) Mr. Blount has not had any GAAP training, which again, is the guiding principle applied by Cullen Murphy. (G. Blount Dep. 48:6-7.)

Mr. Blount could not identify where materials, labor or overhead should go on the balance sheet when calculating gross profits, stating, "you have to talk to my CPA about that. It was just a number to me … . I mean, that's – to say that it was in this part of the ledger or that part of the ledger, you'd have to speak to the CPA." (G. Blount Dep. 203:19-204:12.) Finally, Mr. Blount did not know whether the allegedly improper transactions between A-1 and APMI that he complained of were remedied in the consolidated year-end financials. (G. Blount Dep. 235:25-237:19.) Mr. Blount did not identify a financial expert to testify concerning the specifics

[1] Notably, Gary Blount originally estimated this number on April 27, 2007, to be approximately $30,000. (G. Blount Dep. pg. 201:13-25, Ex. 20.) By the time of his deposition, Gary Blount claimed that the number may be well over $65,000, despite the clear $60,000 cap in the Bonus Plan. (G. Blount Dep. pg. 256:12-258:12, Ex. 20.)

of his bonus claim, and he admitted that he lacks the finance and accounting know-how to testify about the facts necessary to make out such a claim. (Pl. Mat. in Supp. Ex. 3.)

III. LEGAL ANALYSIS AND ARGUMENT

Defendants' sixth counterclaim for unpaid bonus money fails as a matter of law. (Answer and Countercl. to Pl.'s 2nd Am. Compl., pg. 16, ¶¶ 26-32.) Mr. Blount has not forecasted sufficient evidence supporting his NCWHA claim to survive summary judgment. To the contrary, record evidence establishes that A-1 paid Mr. Blount in accordance with the Bonus Plan terms as required by law. (Pl. Mat. in Supp. Ex. 1, Tab A; Pl. Mat. in Supp. Ex. 2, ¶ 6.) *See Murphy v. First Union Capital Mkts. Corp*., 152 N.C. App. 205, 209 (N.C. Ct. App. 2002) (no wage and hour violation where an employee has been notified of a bonus plan's terms prior to implementation and is paid in accordance therewith); *Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 145 (N.C. Ct. App. 2004) (no wage and hour violation where contract does not provide for the wages sought).

The NCWHA requires, *inter alia*, employers to "notify its employees, orally or in writing at the time of hiring, of the promised wages and the day and place for payment." N.C. Gen. Stat. § 95-25.13(1). Prior to his accepting the position, A-1 gave Mr. Blount written notice of how any bonus he earned would be calculated. (Pl. Mat. in Supp. Ex. 1, Tab A.) Specifically, the Bonus Plan states that Mr. Blount's bonus amount, if any, would be calculated based on A-1's gross profits "[u]sing the 12-months ended December 21, 2005, *as calculated by Cullen, Murphy & Company, P.C., and in a comparable format to the Buyer's financial statements ...* ." (Emphasis added). *Id*. Therefore, pursuant to the Bonus Plan's terms, Mr. Blount had notice of exactly what the yardstick for his bonus would be – gross profits as calculated by Cullen Murphy

based on A-1, not APMI's, format for financial statements. It was also not to be calculated based on the rough data in QuickBooks.

A. Mr. Blount's Bonus Claim Fails Because the Bonus Plan Gave Cullen Murphy Exclusive Control Over Calculating Gross Profit and A-1 Paid Mr. Blount the Bonus Amount He Earned.

Mr. Blount must establish that A-1 failed to pay him a bonus amount that accrued in accordance with the terms of the Bonus Plan, or his NCWHA claim fails as a matter of law. *Murphy*, 152 N.C. App. at 209.

The NCWHA provides, in relevant part:

> Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday … . Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance.

N.C. Gen. Stat. § 95-25.6. For purpose of the NCWHA, "wage" includes bonuses. *See* N.C. Gen. Stat. § 95-25.2(16).

Mr. Blount has not forecasted evidence sufficient to prove that A-1 failed to pay him accrued bonus amounts. The Bonus Plan's plain language states that Mr. Blount's bonus is measured on gross profits *as calculated by* Cullen Murphy in a comparable format to the Buyer, A-1's, financial statements.[2] (Pl. Mat. in Supp. Ex. 1, Tab A.); *Walton v. City of Raleigh*, 342 N.C. 879, 881 (1996) ("If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.") Cullen Murphy, applying GAAP, calculated A-1's 2006 gross profits as $579,909, a 4.1% increase from 2005, which entitled Mr. Blount to the $5,000 bonus that he was paid. (Pl. Mat. in Supp. Ex. 2, ¶¶ 3-6.) Because the Bonus Plan gave Cullen Murphy exclusive control over calculating A-1's gross profits, any evidence that

[2] In his deposition, Mr. Blount repeatedly referred to the numbers he allegedly saw on A-1s local office QuickBooks program. Again, the terms of the Bonus Plan control. It is A-1's financial statements, not QuickBooks, that controlled. (G. Blount Dep. 236-237:15.)

Defendant might proffer challenging the firm's accounting is irrelevant. (Pl. Mat. in Supp. Ex. 1, Tab A.) Moreover, Mr. Blount has not forecast evidence demonstrating any flaw in those calculations, and concedes that he is not aware of any indication of fraud or wrongful conduct by Cullen Murphy. (G. Blount Dep. 211:21-212:6.) Therefore, Mr. Blount's bonus-based counterclaim is without merit, and should be dismissed.

B. Mr. Blount Has Not Forecast Evidence Supporting His Claim That A-1 Improperly Calculated His 2006 Bonus.

Mr. Blount alleges A-1 improperly commingled expenses and diverted or diluted income between A-1 and a related company. (Defs.' Answer and Countercl. to Pl.'s 2nd Am. Compl., pg. 16, ¶ 31.) Therefore, his claim seeks to challenge the legitimacy of A-1's accounting of transactions between A-1 and Traffic Markings. However, Mr. Blount provides only speculation to support these allegations. A-1 and Traffic Markings transactions would affect “above the line” items like those discussed below.

Mr. Blount testified honestly that he does not understand how gross profits are calculated, and does not understand how A-1 came up with its gross profit numbers. First, Mr. Blount conceded that he does not know how "cost of goods sold" ("COGS"), a deduction over gross profits, is calculated. (G. Blount Dep. 203:8-204:12.) Mr. Blount testified concerning what he believed the COGS calculation would include "in [his] eyes," but admitted to having no idea how COGS was calculated under either A-1 or APMI's accounting methodology. *Id*. Second, Mr. Blount conceded that his own bonus calculations failed to account for equipment depreciation, a generally accepted gross profit adjustment. (G. Blount Dep. 206:12-22.) Third, when asked whether he knew where materials, labor and overhead should go on a balance sheet for purposes of calculating gross profit, he responded, "You have to talk to my CPA about that. It was just a

number to me … I mean, that's – to say that it was in this part of the ledger or that part of the ledger, you'd have to speak to the CPA." (G. Blount Dep. 203:19-204:12.)

Therefore, by Mr. Blount's own admissions, his bonus claim boils down to nothing more than personal opinion that he cannot substantiate without the testimony of a CPA or other expert. Defendants did not identify a testifying expert. As such, no genuine question of material fact exists regarding Defendants' sixth counterclaim, and A-1 is entitled to judgment as a matter of law.

IV. CONCLUSION

For the reasons stated above, A-1 requests the Court to enter an Order granting its Motion for Partial Summary Judgment; dismissing Defendants' sixth counterclaim for violations of the NCWHA with prejudice; awarding A-1 the costs incurred in defending this claim, including its reasonable attorneys' fees; and granting such further relief as the Court deems just and proper.

Respectfully submitted this the 8th day of April, 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 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** has a word count of less than 7,500 words which complies with North Carolina Business Court, Rule 15.8.

This the 8th day of April, 2009.

/s/ Amy R. Worley

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing **A-1 PAVEMENT MARKING, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** and **BRIEF IN SUPPORT OF A-1 PAVEMENT MARKING, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** 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 8th day of April 2009.

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