**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:	)	
	)	
EQUIPMENT ACQUISITION RESOURCES, INC.	)	Case No.: 09 B 39937
	)	
Debtor.	)	Hon. John H. Squires

EQUIPMENT ACQUISITION RESOURCES, INC.'S RESPONSE TO ICON EAR, LLC'S EMERGENCY MOTION TO MODIFY AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)

Debtor, EQUIPMENT ACQUISITION RESOURCES, INC. (the "Debtor" or "EAR"), by its attorneys, Arnstein & Lehr LLP, hereby submits this Response to the Emergency Motion to Modify Automatic Stay Pursuant to 11 U.S.C. § 362(d) (the "Lift Stay Motion") filed by ICON EAR, LLC ("ICON").

INTRODUCTION

The Lift Stay Motion should be denied because ICON will not be able to establish at the evidentiary hearing on the Motion that it has valid liens on real estate located in Wyoming (the "Real Estate"). As set forth below in more detail, ICON entered into an agreement with the Debtor in December, 2007 (the "Master Lease Agreement") whereby ICON would purchase equipment and then lease it to EAR. ICON first purchased equipment and leased it to EAR around the time of the execution of the Master Lease Agreement in December, 2007. ICON claims that it thereafter learned of a prior criminal conviction for one of EAR's principals, Sheldon Player. ICON demanded and obtained mortgages on the Real Estate (the "Mortgages"), without consideration.

FACTS

The Master Lease Agreement

ICON and EAR entered into the Master Lease Agreement on or around December 24, 2007. Though the Motion references the Master Lease Agreement as the basis for the relationship between ICON and EAR, it did not attach the document to the Motion. ICON produced the Master Lease Agreement in response to EAR's request to produce the evening of November 12, 2009, the night before this Response is due, as part of a production of over 2100 pages of documents. A copy of the Master Lease Agreement is attached as Exhibit A.

The Master Lease Agreement describes ICON as the "Master Lessor" and EAR as the "Lessee." By its terms, ICON "shall" purchase equipment

> as described in any Schedule executed by Lessor and Lessee (the 'Equipment'); provided, however, that all Equipment must be satisfactory to Lessor in its sole discretion.

(Exhibit A, at § 1(a), 1(b)). Further,

> Each Schedule delivered by Lessee to Lessor shall be non-cancelable and for an aggregate amount not less than $5,000,000, provided however, that the aggregate amount of Equipment in the last Schedule may be less than $5,000,000 as reasonably required by Lessor.

(Exhibit A, at § 1(c)). In addition,

> After the first Schedule is delivered and accepted, each subsequent delivery of a Schedule shall occur no less frequently than on a monthly basis; provided however, that the aggregate amount to be funded by Lessor with respect to all of the Schedules shall not exceed $25,000,000 (the "Financing Amount").

(Exhibit A, at § 1(d)). With regard to ICON's obligation to fund, the Master Lease Agreement says:

> Notwithstanding anything to the contrary in this Agreement or any other agreement, nothing herein shall be deemed to create any obligation on behalf of Lessor to enter into any Schedule or otherwise to lease any Equipment to Lessee. It is expressly understood that Lessor's entry into any Schedule is dependent upon its satisfactory business review of the Lessee and the equipment to be included on such Schedule, approval of Lessor's investment committee in its sole discretion, and satisfaction of the conditions precedent set forth in such Schedule.

(Exhibit A, at § 2(a)).

The Master Lease Agreement does not contain any provision which allows ICON to seek security or collateral beyond the equipment which it owns and is leasing to EAR.

At the time of the execution of the Master Lease Agreement, ICON purchased $6,935,000 of equipment pursuant to Schedule 1 to the Master Lease Agreement. A copy of Schedule 1 and associated documents is attached as Exhibit B. All of the equipment on Schedule 1 appears to have been purchased from a company called Machine Tools Direct, Inc. ("MTD"). On December 28, 2007, EAR executed a Certificate of Acceptance indicating that it had accepted the equipment. ICON has not produced any documentary evidence of the payment for the equipment on Schedule 1, but David Verlizzo of ICON sent an e-mail on December 28, 2007, a copy of which is attached as Exhibit C, to various individuals describing the transaction this way:

> Today, ICON EAR, LLC ("ICON"), owned 55% by ICON Leasing Fund Twelve, LLC and 45% by ICON Income Fund Eleven, LLC, acquired title to $6,935,000 of semiconductor manufacturing equipment which will be leased back to Equipment Acquisition Resources, Inc. ("EAR"). ICON will collect advance rent monthly in the amount of $4,332 per day (0.019 x $6,935,000) until the earlier of June 30, 2008 or such time as EAR has purchased $25,000,000 of equipment. Upon commencement of the base term, EAR will pay basic monthly rent of $131,765 (0.019 x $6,935,000) such basic rent shall be payable in advance on the first business day of each month. If by June 30, 2008, EAR has not purchased $20,000,000 of equipment basic monthly rent will be $137,313 per month (0.0198 v. $6,935,000).

> The term of the lease is for 60 months from the start of the base term. At the conclusion of the base term EAR may renew the lease for the fair market rental value, purchase the equipment for its fair market purchase price or return all but not less than all of the equipment on all schedules.

Some time on or around January 9, 2008, after the execution of the Master Lease Agreement and the purported purchase of the equipment on Schedule 1, ICON requested that EAR submit "additional collateral." An e-mail from Sean Connor of ICON to EAR dated January 9, 2008, a copy of which is attached as Exhibit D, said: "In addition, please forward some information on the real estate we discussed yesterday. I think the additional collateral is something our investment committee would look very favorably upon and I'd like to have something to show them." Later that day, Mark Anstett of EAR wrote an e-mail to Mr. Connor, a copy of which is attached as Exhibit E, in which he identified real estate valued between $19 million and $25 million.

By e-mail dated January 14, 2008, a copy of which is attached as Exhibit F, Mr. Connor wrote to Mark Anstett and Sheldon Player of EAR:

> Gentlemen:
>
> We had a chance to discuss our arrangement going forward and we've decided to continue as planned, provided the following two items happen:
>
> 1. We would like to perform a background check on the two of you and Donna Malone. Accordingly, I ask that you fill out the attached consent form and return a copy to David's attention.
>
> 2. We receive the real estate as additional collateral in an amount roughly equal to our financing amount. The amount of additional collateral we hold would decline over time as you guys make rental payments.
>
> Obviously there are a number of details that would need to be hammered out in point #2, but I wanted to make sure you guys are on board conceptually before inundating you with information requests.

Exhibits D, E and F suggest that ICON needed real estate with a value "roughly equal to our financing amount" as "additional collateral" before it obtained the results of a background check on the principals of EAR. It is not clear from the e-mails produced through discovery why ICON needed this "additional collateral."

In response to EAR's interrogatory 1, ICON stated that the reason ICON requested the additional collateral was because it learned "that Sheldon Player had a criminal conviction from approximately 13 years before." The response does not say when ICON learned of Mr. Player's earlier conviction, and is inconsistent with Exhibits D, E, and F, which say that ICON sought the real estate as additional collateral before it even asked Mr. Player to perform a background check. A copy of ICON's response to interrogatories is attached as Exhibit G.

Over the course of the next two months, from mid-January until mid-March, 2008, Mr. Player negotiated with Mr. Verlizzo and Mr. Connor of ICON to identify the precise parcels of real estate which ICON needed as "additional collateral." Ultimately, this led to the execution of mortgages on the Real Estate, which is owned not only by Mr. Player and his wife, Donna Malone, but also by Mr. Player's son Dale Player and Ms. Malone's daughter Dana Malone. By e-mail dated February 6, 2008, a copy of which is attached as Exhibit H, Sheldon Player explained that the property in "my childred's names" [sic] due to "the Wyoming family exemption rule."

The mortgages, which were on property owned by Sheldon Player, Donna Malone, Dale Player, and Dana Malone, are attached to ICON's motion as exhibits A, B, and C. The mortgages were recorded on March 31, 2008. Copies of the cover pages with the Teton County Recorder's stamp are attached as Exhibit I.

On April 24, 2008, ICON made a second purchase of equipment, again from MTD, this time in the amount of $6,347,500.02. This purchase was pursuant to Schedule 2 to the Master Lease Agreement. A copy of Schedule 2 and associated documents is attached as Exhibit J. Though ICON did not produce evidence of the payment, a May 13, 2008 e-mail from Criag Jackson of ICON, a copy of which is attached as Exhibit K, indicates that ICON funded $6,347,500.02 on April 24.

On June 6, 2008, ICON made a third purchase of equipment, once again from MTD, this time in the amount of $6,325,500.00. This purchase was pursuant to Schedule 3 to the Master Lease Agreement. A copy of Schedule 3 and associated documents is attached as Exhibit L. ICON produced a copy of wire confirmations, attached as Exhibit M, for this purchase.

Finally, it appears that on June 30, 2008, ICON made a fourth and final purchase of equipment, once again from MTD, this time in the amount of $2,469,000.00. This purchase was pursuant to Schedule 4 to the Master Lease Agreement. A copy of Schedule 4 and associated documents is attached as Exhibit N. ICON did not produce evidence of this payment.

ARGUMENT

The factual dispute before this Court goes not just to whether there is "cause" for lifting the automatic stay pursuant to 11 U.S.C. § 362(d)(1) or whether the Debtor lacks equity pursuant to 11 U.S.C. § 362(d)(2), but also to the validity of ICON's liens on the Real Property. This Court should find that because there was no consideration for ICON's mortgages, ICON does not have a valid lien in the Real Estate and its Motion should be denied.

1. ICON cannot prove that has a valid lien on the Real Estate.

The party moving for relief from stay is required to establish its *prima facie* case and failure to prove such requires a denial of the requested relief. 3-362 *Collier on Bankruptcy* ¶ 362.10 (15th rev. ed. 2009)(citing In re Sonnax Indus. Inc., 907 F.2d 1280, 1285 (2nd Cir. 1990)). This requires a showing by the Movant of "a factual and legal right to the relief that it seeks." In re Elmira Litho, Inc., 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994). Only if the moving party is able to establish its *prima facie* case, then the burden of going forward and the ultimate burden of persuasion shift to the Debtor to show that the movant not entitled to relief. See 3-362 *Collier on Bankruptcy* ¶ 362.10 (15th rev. ed. 2009).

On a motion for relief from stay, the Court must consider the issue of "whether the creditor has a colorable claim of interest in the property." In re Pelham Enter., Inc., 376 B.R. 684, 689 (Bankr. N.D.Ill. 2007) (Squires, J.). A creditor seeking to modify the stay has the burden of showing the existence, the validity, and the perfection of its secured claim against the Property. Pelham Enter., 376 B.R. at 689 (citing In re S. Ill. Railcar Co., 301 B.R. 305, 309 (Bankr. S.D. Ill. 2002)). The determination of whether a valid security interest exists is governed by state law. In re Buehne Farms, Inc., 231 B.R. 239, 242 (Bankr. S.D.Ill. 2002) (citing In re Powers, 983 F.2d 88, 90 (7th Cir. 1993)). As the Real Estate is located in Wyoming, the law of that state governs here.

Under Wyoming law, "[c]onsideration is one of the basic elements of a contract [and t]he burden of proving consideration is on the one seeking to recover on the contract." Moorcroft State Bank v. Morel, 701 P.2d 1159, 1161 (Wyo. 1985). The moving party's inability to prove consideration "goes to the validity of contract

formation. Absent some indicia of actual consideration, a contract will be held invalid by the courts." Moorcroft, 701 P.2d at 1162 (citing Miller v. Miller, 664 P.2d 39, 40-41 (Wyo. 1983)).

It is patently clear that ICON cannot establish due consideration for the execution and recording of the Mortgages on the Real Estate. Documents produced by ICON appear to establish the following facts:

(1) the Master Lease Agreement was in existence as of December, 2007;

(2) ICON purchased equipment pursuant to Schedule 1 in the amount of $6,935,000 in December, 2007;

(3) ICON did not seek any security or collateral, "additional" or otherwise, at the time of the execution of the Master Lease Agreement or prior to the funding of the purchase of the equipment on Schedule 1;

(4) some time around January, 2008, ICON sought "additional collateral" in the form of real estate held at the time by the principals of EAR and their children – not EAR itself – for reasons that are not at all clear;

(5) the Mortgages on the Real Estate were recorded on March 31, 2008;

(6) ICON purchased additional equipment pursuant to Schedules 2, 3, and 4 in the aggregate amount of approximately $15,142,000.00.

There is not a single document which the Debtor has identified in which ICON indicates to EAR, Mr. Player, or anyone else that ICON would not proceed with the purchase of additional equipment without the Mortgages. Rather, at best it appears that ICON perceived the Real Estate "as something our investment committee would look very favorably upon." (Exhibit D). What this means is not clear, and is not nearly enough for

ICON to satisfy its burden of proving the validity of its secured claim against the Real Estate.

2. Even if the Court finds that ICON has a valid lien, it should still deny the Motion.

Yet even if the Court finds that ICON has proven the existence of a valid lien in the Real Property – and it should not – it should still deny the motion at this time for two reasons: (1) ICON has not established "cause" necessary to modify the stay; and (2) the Debtor should have time to establish that it successful reorganization is a reasonable possibility.

A. ICON cannot establish sufficient cause.

As ICON points out in its brief, "cause" under 11 U.S.C. § 362(d)(1) is established on a case by case basis. ICON's brief, while stating the rule and standard for establishing cause, sets forth virtually no argument in support of its position. Under In re Wrobel, 197 B.R. 289 (Bankr. N.D. Ill. 1996), the court is to consider (1) whether any great prejudice to either the bankruptcy estate or the debtor would result if the stay is modified; (2) whether the hardship to the nonbankruptcy party by maintenance of the stay considerably outweighs the hardship to the debtor; and (3) where the creditor is seeking to continue litigation outside the bankruptcy forum, whether the creditor has a probability of prevailing on the merits of the suit. As set forth below, none of these factors weigh in ICON's favor.

First, the Debtor would suffer great prejudice if this Court lifts the stay. The Real Property is currently in the possession of the Debtor, and serves as an asset of potential value to the creditors. Second, the hardship to ICON does not considerably outweigh the hardship to the Debtor. In fact, ICON has failed to establish any hardship at all, let alone

in comparison to that which the Debtor would suffer. Finally, because there is not litigation outside the bankruptcy forum, the third prong does not apply.

B. The Debtor should be granted leeway at this early stage of the case.

With regard to the standards under 11 U.S.C. § 362(d)(2), this Court should allow the Debtor leeway to establish that a successful reorganization is a reasonable possibility. Several bankruptcy courts, including the Northern District of Illinois, have held that "in the initial stages of a Chapter 11 proceeding, the debtor should be granted significant leeway in attempting to establish that successful reorganization is a reasonable possibility." In re Cadwell's Corners Partn., 174 B.R. 744, 759 (Bankr. N.D.Ill. 1994). As such, the determination of a "reasonable possibility of a successful reorganization within a reasonable time" "should be viewed as a continuum with the scales tipping in favor of the debtor in the early stages and the burden of proof becoming greater in the later stages." Timbers, 484 U.S. at 376; Cadwell's Corners, 174 B.R. at 759.

The Real Property has substantial value to the Estate and its creditors. Given the early stage of this case, and the continuing investigation of the Debtor's affairs by its Chief Restructuring Officer, Mr. Brandt, this Court should decline to allow ICON to jump ahead of the other creditors and modify the stay at this point.

3. The hearing on this matter should be set for a time when all parties have the opportunity to prepare.

At the presentment of ICON's Motion to this Court, its counsel indicated that the next available date for the foreclosure sale in Wyoming was Thursday, November 19, 2009. For this reason, the Court set a short schedule in this matter and set the status for November 17, 2009. Since the last status, ICON's Wyoming counsel has indicated that the earliest date for the foreclosure sale is now December 1, 2009. Counsel for ICON

sent a notice the morning of November 13, 2009 indicating that the sales would now proceed on that date. See e-mail from Stephen Bobo with notices as attachments, attached as Exhibit O.

For the reasons set forth above, the Debtor requests that this Court deny ICON's Motion.

Equipment Acquisition Resources, Inc.

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