

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2006-CA-836

DIVISION: CV-F

ADVANCED BUSINESS COMPUTERS
OF AMERICA, INC.,

Plaintiff,

vs.

SELECT MANAGEMENT RESOURCES, LLC,
AYCOX AND AYCOX, INC. and TITLE LOANS
OF AMERICA,

Defendants.

SELECT MANAGEMENT RESOURCES, LLC,
AYCOX AND AYCOX, INC.,

Defendants/Counterclaimants,

vs.

ADVANCED BUSINESS COMPUTERS
OF AMERICA, INC.,

Plaintiff/Counter Defendant

SELECT AND AYCOX'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants/Counterclaimants Select Management Resources, LLC ("Select") and Aycox and Aycox, Inc. ("Aycox") hereby move for partial summary judgment on certain of the claims asserted by Plaintiff ("ABC").

Factual Background

The Second Amended Complaint and the deposition testimony submitted herewith,¹ including the testimony of ABC's principal witnesses, establish the following undisputed facts,

¹ Defendants are filing the deposition testimony in full and will serve hereafter an appendix of the particular pages referenced herein for the ease of use by the Court and counsel.

viewed in the light most favorable to ABC:

ABC is a software vendor and IBM reseller founded by Shad Hedy. (Hedy 7-11-08 Depo, 11:6-12; 15:19-25). ABC owns a series of related computer programs that are intended for use by consumer finance companies, such as buy-here, pay here car dealers, pawn brokers, title loan companies and other consumer lenders. (Hedy 7-11-08 Depo., at 27:8; Hedy 6-21-07 Depo., 10:8-11, 12). Aycox is in the consumer finance business. (Newell Depo., at 8:13-14). Select is a management company for a number of Aycox-owned companies founded by Rod Aycox. (Newell Depo., at 6:7-14).

In 1998, when Aycox was a small start-up company, it approached ABC in order to obtain a package of software for its finance operations. (Newell Depo., at 9:7 and 10:5; Hedy 6-21-07 Depo., at 17:20). ABC's latest complaint, the Second Amended Complaint, alleges that Mr. Aycox, acting in his capacity of Aycox's president, first signed a contract with ABC on June 22, 1998. (Sec. Am. Complaint ¶ 7). This agreement was, according to ABC, amended two days later, on June 24, 1998. (*Id.*). Both the original contract and the amended contract are purportedly attached to the Second Amended Complaint as Exhibit "A." The parties disagree over whether Exhibit "A" is in fact an accurate embodiment of the initial or amended contract between them. (See Defendants' Answer, Affirmative Defenses and Counterclaim, served September 19, 2008). For purposes of this motion, however, Defendants accept as true ABC's contentions in this respect, and thus Defendants will assume that the initial contract and the amendment to it two days later are in fact embodied in Exhibit "A" to ABC's Second Amended Complaint. The terms of the initial and amended contract between ABC and Aycox ² are crucial to a determination of the issues raised in this motion.

A. The Key Terms of Exhibit "A" To the Second Am. Complaint

Consider first the portion of the contract said to have been concluded on June 22, 1998, representing the first nine pages of Exhibit "A." The key introductory page, numbered page 1 of 7, in plain and ordinary language, says that ABC "**agrees to sell** and Customer **agrees to purchase** the computer equipment, **application software** and related services below under the terms and

² Because Select is a management company for Aycox, it is assumed that both Defendants are jointly and severally liable for any amount found to be due ABC as if Select had also signed the agreement.

conditions of this agreement (see inside). . . The Equipment, Application Software and services made subject to this Agreement are summarized as follows. . .” (Emphasis added).

Immediately following the above appears the title “**ONE TIME CHARGES**,” after which appears a listing of purchased items **including ABC’s application software**, such as “STD Finance Company 9 (4 User, Schedule B)” and STD BPHH (4 User, Schedule B)” and “Other Modules.”

As this page 1 of 7 shows, Defendants were charged a “one time fee” for each of the itemized application software products, such as the one time fee of \$19,750.00 for the Finance Company package alone.

None of the other language on this first page, entitled “page 1 of 7,” states that the transaction is anything other than an agreement for the purchase and sale of particular copies of ABC’s software. Indeed the form does have language for the lease of the software, but this language is blank, clearly indicating that the transaction was not a lease. (See Monthly Charges, Lease Monthly Payment Total).

This same page 1 of 7 is also the only page signed by both the the contracting parties. Mr. Rod Aycox, signed for Aycox. (Mr. Aycox also signed page 7 of 7 of the June 22, 1998 agreement, and also page 6 of 7 of the June 24, 1998 agreement.).

The next page of the agreement (page 2 of 7) is blank.

The third page of the agreement (page 3 of 7) reinforces that the software is in fact purchased, for it lists the “standard finance company package” and other software and then reflects a one time charge for that software, for example the \$19,750.00 fee for “4 user pricing.” This same page 3 of 7 does mention a monthly fee but only for “**monthly support**” and is consistent with the monthly fee on the first page (page 1 of 7) for monthly support, which is, as the name implies, for support of the software being purchased.

The fourth page of Exhibit “A” likewise indicates that the transaction is a sale, not a lease or a mere monthly license. Each of the unit prices listed on this page is consistent with a **ONE TIME CHARGE** and each of the “usage” fees is consistent with the added charge on page 3 for “additional users.” Indeed page 3 of 7 expressly states “for each additional 4 users, \$125 will be

deducted.” Since page 4 is a continuation of page 3, the only possible meaning of “usage” on page 4 is that it is the additional fee for monthly support of the purchased software at \$125 per additional 4 users.³

Page 5 of 7 also reinforces the inference that Exhibit “A” is for the purchase of a copy of ABC’s software. For it addresses the charges for “support of hardware and software” and the hourly charge for “on site visits” to resolve problems with the software, and additional charges for changes in the forms that the “F&I” software generates, as well as additional charges for “customization.” A reasonable person reading this language could only conclude that it addresses the additional charges that might prove necessary for the continued support of the already-purchased software – the software for which there had already been a **“ONE TIME CHARGE.”**

Page 6 of 7 likewise addresses only additional charges, all of which represent a one-time fee, not a monthly obligation.

Page 7 of 7 is entitled **RECAP OF CONTRACT** and expressly states: “Please initial by each item as discussed indicating that you understand fully and accept the following items **included in the contract you have signed.**” (Emphasis added). The items that are then filled out include “cost of software (Fin. Co.), Cost of Software Other and Cost of Software Users,” representing total one-time charges of \$47,375.00 for the software component of this transaction. This amount is exactly the same as the “one time” fees shown on page 1 of 7 of the contract for ABC’s application software.

The other items for which charges are shown are, in contrast, insignificant: \$2,500 for “training,” \$5,000 for “Software Paper Packs” and \$1,985.00 for “monthly support charges.”

This **RECAP OF CONTRACT** (7 of 7) is also the last page bearing Mr. Aycox’s signature. There is no indication that there was an eighth or other page to this contract.

ABC’s president, Mr. Hedy, has testified under oath that the **RECAP OF CONTRACT** page was placed in the contract so that the customer would know exactly what it is paying for. (Hedy 7-11-08 Depo., Vol. One, 14:19 to 15:15).

³ The term “usage” is not defined in the agreement. But page 3 of 7 states that “for each additional 4 users, \$125 will be deducted. And Page 4, under the column entitled usage, also shows \$125 for most categories of “usage,” which is consistent with the fee for 4 additional users.

Exhibit "A" also includes, however, two "fine print" pages entitled "Agreement Terms and Conditions." Neither of these pages bear either the name of the "customer" or any signature or other information that links this pre-printed, "fine print" language to the first seven pages of the contract that bear Aycox's signature.

Paragraph 2 (a) of the "fine print" portion says that ABC's application software "consisting of copies of each of the computer software programs licensed hereunder in machine readable form and user documentation relating thereto will be delivered to **Purchaser and/or Customer** herein as soon as practicable after the arrival of the Equipment at the installation location." Neither of these terms is defined in the "fine print" portion nor are these terms used consistently elsewhere in the document, but if the "fine print" is part of the rest of Exhibit "A", it is consistent with Defendants as a purchaser of a copy of the software (and thus a perpetual licensee of the copyright in it). Furthermore ¶ 7 (c), which applies to the rental of ABC's application software, provides that a rental customer may "accrue 50% of rental payments toward the **paid up license price shown above.**" (Emphasis added). This language indicates that even a rental customer would have the opportunity to buy (for the one time fee) a copy of ABC's software. In addition, ¶ 13 (a) refers to **Purchaser**, which would certainly include Defendants in the context of the overall agreement.

The President of ABC further corroborates that the software was purchased by SMR and that the monthly fees were for support:

- Q. All right. Did you discuss with Mr. Aycox anything about how the prices might increase over time?
- A. Absolutely.
- Q. All Right. And what did – what did you tell him?
- A. Well, I mean, it's on the contract. We told him that the – that there is a fee for every company that they open up, as far as the **purchase price**. There is a monthly fee for that directory. There is going to be a usage fee for the additional users that they would **purchase** in order to run the new company. And all of those are spelled out on Page 3 of 7.
- Q. Okay.
- A. Both in terms of monthly support per user as well as the additional licensing, what it would cost them.

(Hedy 6-21-07 Depo., 21:24 to 22:15) (emphasis added)

Both parties recognized that the original transaction was for a purchase of software before and after the transaction was completed. ABC has even attached a document to the Second Amended Complaint dated April 13, 2001 that includes several "Customer Summarization" attachments. (Exhibit B, p. 5 - 12). The Customer Summarization documents are an overview of Defendants' account prepared by ABC to keep track of the "**Software Purchased**" by Defendants for their various store locations, in order to assist in providing monthly support services. Here ABC itself lists the various Aycox entities and store locations and links them to the different software packages they had **purchased** for each location or group of locations. Every single page of this document lists the "**Software Purchased**" notation. The software packages listed under this notation are the very same packages listed in the **ONE TIME CHARGE** section of the original contract: The Standard Buy Here Pay Here Package, Title Loan Package, Standard Finance Company Package, and various other additional software modules. These documents amount to a specific admission by ABC that SMR purchased the software at issue in this litigation.

B. The "Modification" To The Contract of Exhibit A

This brings us to the modification to the contract between the parties two days after the initial contract was signed, also part of Exhibit "A.". The first such page is a form identical to the earlier page 1 of 7 discussed above, only it adds to the **ONE TIME CHARGES** a \$38,645.00 charge for a new IBM server and a \$4,255 charge for an IBM operating system to run it.

Page 6 of 7 of the June 24 amendment bears Mr. Aycox's signature and is fully consistent with the purchase of software. Note that no monthly charges are shown; all of the charges on this page are for one-time costs.

The next page of the June 24 document is page 7 of 7, which is substantively identical to page 7 of 7 discussed above, and which also bears Mr. Aycox's signature. This page, like the previous page 7, is entitled **RECAP OF CONTRACT**. Note that the "cost of software" for the finance company module and other modules is shown as a one-time cost: not as a monthly expense.

If there are other pages to the June 24 amended version of the contract, they are not attached

to the Second Amended Complaint, including any “fine print” portion.

C. The Disputed Exhibit “B” To The Second Am. Complaint

ABC claims that the unsigned letter, discussed above as listing the various “**Software Purchased**” by Defendants, attached as Exhibit “B” to the Second Amended Complaint, contains a contract modification of the “fine print” of Exhibit “A.” Defendants dispute that Exhibit “B” is a contract, and further dispute that the “fine print” is binding on the parties in the absence of their mutual assent to these terms.

The first page of Exhibit “B” is a form letter, entitled “Dear Valued Customer.” There is no indication on the letter that it was even addressed to Defendants, and ABC’s Shad Hedy has admitted that the purported agreement of Exhibit “B,” presumably enclosed with this letter, or intended to be enclosed, was never executed by Defendants. (Hedy 6-21-07 Depo., 34:8 to 35:3).

Consider now the second paragraph of this unaddressed form letter. In part, it says that it is enclosing the “agreement for terms and conditions of your contract for you to reference.” It does not ask for a signature; it does not purport to confirm any new agreement; it does not ask for assent to any new terms and conditions that are different from the former terms and conditions. Yet a close study of Exhibit “B” will reveal differences in the terms and conditions, in the “fine print.” (See Attached Comparison of the fine print portions of Exhibits A and B).

The Second Am. Complaint alleges that Defendants “agreed to” this purported 2001 amendment increasing the price “by paying ABC the 15% increase effective June 1, 2001.” (Id., ¶ 8). But the only evidence produced by ABC concerning an “agreement” to a price increase is set forth in the Executed “ABC Contract Amendment” dated March 16, 2001, and attached hereto, in which the parties explicitly agreed to an increase in the fees for new directories. Thus Defendants dispute this portion of the Second Am. Complaint but contend that ABC’s own evidence and testimony belies the allegation. In his first deposition in this action ABC’s Hedy testified as to this issue:

Q. . . . is there any document anywhere that has a signature from someone at – from Mr. Aycox or someone at his companies agreeing to the modification that is the 2001 contract?

A. No.

...

Q. . . . Is there anything anywhere where – signed by someone at Aycox & Aycox or Select . . . agreeing to the terms and conditions that are found in the 2001 contract, as we're calling it?

A. No.

...

A. Even though we don't have anything in writing on the 2001, but they agreed to the increase. On the letter, they agreed to that 15 per cent increase.

Q. How did they agree?

A. Well, the monthly fees went up on **an amendment**. So when they signed the amendment, that means they agreed with the letter and the agreement that went with it.

Q. They signed the amendment, I'm understanding.

A. Yeah. So what happens is when they – when we increased it by 15 percent, they signed an amendment agreeing that 15 percent is ok.

...

Q. All right. And does that amendment reflect anything about the terms – the changes on the terms and conditions on – that are attached to the letter?

A. I don't know. I've got to locate that.

(Hedy Depo. of 6-21-07, at 34:8 to 36:7).

The amendment of March 16, 2001, Attachment 1 to this motion, produced by ABC, proves that the terms and conditions of the purported 2001 amendment in fact were not incorporated in this document, only the price increase. Thus Exhibit "B" to the Second Amended Complaint is not a contract at all, for ABC has no proof that Defendants signed it or assented to it. Defendants merely agreed to a price increase as reflected in a different contract than the one attached as Exhibit "B."

D. The Subsequent Executed Amendments to the Original Contract

This leads us to the other executed amendments to the 1998 contract, of which Exhibit "C" to the Second Amended Complaint is said to be both an example and the last such amendment in time. (Sec. Am. Complaint ¶ 11). Both parties agree that amendments were executed by them, during the life of the contract, for the purpose of (a) adding to the number of Aycox authorized

“directories” as Aycox gradually expanded its business throughout the nation, and (b) increasing the number of authorized “users.” (Hedy,7-11-08 Depo., 17: 4-12). Attachment 1 to this motion, the Amendment produced by ABC, is further evidence of this practice, but in this one, as just noted, Defendants also agreed to a price increase for the charges for adding new directories.

Each such amendment refers back to the original 1998 contract. You can see this in the top right corner of Exhibit “C”: it is labeled as an amendment to the contract of “6/22/98,” which is therefore a reference back to the original Exhibit “A” agreement. Moreover, the amendment form provides that the parties “agree that the above referenced agreement is hereby amended as follows” and that “except as provided below all terms and conditions of the referenced agreement shall remain in force and effect.” (Sec. Am. Complaint, Exhibit “C”).

Though Exhibit “C”, the amendment form, uses the term “monthly usage fee,” the term is not defined. In context, as ABC’s Hedy has admitted, the term “usage” refers to the monthly support fee for an increase in the number of *users* authorized to use the software, not to a monthly fee for the software license itself. (Hedy 7-11-08 Depo., 124:15; 125:23; 17:13; 18:7; 19:16; 20:4). This is also supported by the “one time charge” in Exhibit C, which, as the name suggests, is a one-time fee to *purchase* ABC software for additional Aycox stores or directories. (Id. at 53:18; 54:24; 116:3-14).

E. The Termination of the Contract Relationship

In October 2005, according to the Second Amended Complaint, Defendants “abruptly and without cause severed their relationship with ABC without notice.” (Sec. Am. Complaint ¶ 24). Defendants do not agree that the relationship was severed “without cause” but do agree that it was abruptly severed in October 2005, and that neither can find an actual written termination notice. (Hedy Depo. of 7-11-08 at 92:2-10). Defendants made their last monthly support payment around October 12, 2005 for the September invoice. (Hedy 6-21-07 Depo., at 62:3 - 9; Newell Depo., Exhibit 3). ABC invoiced prospectively for their services so this payment would have covered service to the end of October. (See ABC’s monthly support invoice for October, Attachment 2 to this motion). Payment for November services would have been due on or around November 15, 2005.

As a result after October 2005 Defendants ceased requesting or receiving support services and ABC ceased providing any services to Defendants. (Hedy 7-11-08 Depo. at 92:11-25).

Defendants permanently locked out ABC from their system on or about November 1, 2005. (Hedy 7-11-08 Depo., 94:4) Indeed on November 23, 2005 ABC sent a notice of breach declaring that they would interrupt service if they did not receive full payment. (Hedy 6-21-07 Depo., Exhibit 4; 80:6-15). In fact, at some point after ABC received payment in October, ABC accessed Defendants' server remotely and entered a date code in Defendant's copy of the software. This entry triggered an automatic shut down feature that rendered the software – the very software which Defendants had purchased for each of the “one time fees” assessed – inoperative for anything but record archival purposes. (Hedy 7-29-08 Depo. 375:20; 376:14).

Thus since October 30, 2005 Defendants received no software support of any kind from ABC and since at least January 15, 2006 Defendants were blocked from using the software for its ordinary commercial purposes, such as generating loan documents for new finance deals. (Hedy 7-11-08 Depo., 92:11 to 94:7; 250:14 to 251:5; Hedy 7-29-08 Depo., 376:5-14). ABC then commenced this suit on January 27, 2006.

Legal Argument

I. Exhibit “B” to the Sec. Am. Complaint Is Not A Contract As A Matter of Law

As noted above, ABC claims that the contract between the parties (assumed to be Exhibit “A”) was amended on April 13, 2001, via Exhibit B. This purported “amendment” consists of an unexecuted form letter addressed to “Valued Customer” with an empty address box and an accompanying but unexecuted “fine print” form. As a matter of law, this Exhibit is not an enforceable agreement.

The original Fine Print pages of Exhibit “A,” upon which ABC relies, unequivocally provides that the agreement between the parties “**shall not be modified** in any way except by **writing executed by both parties.**” Exhibit A, p. 9, ¶ 13 (a). Such a restriction upon unexecuted “modifications” is enforceable under the UCC. *E.g.*, Fla. Stat. § 672.209 (2). Moreover, it is “hornbook law’ requiring no citations of authority, except common sense, that a contract once entered into may not thereafter be unilaterally modified; subsequent modifications require consent and ‘a meeting of the minds’ . . .” *Binninger v. Hutchinson*, 355 So. 2d 863, 865 (Fla. 1st DCA 1978)

quoting *Tropicana Pools, Inc. v. Boysen*, 296 So.2d 104, 108 (Fla. 1st DCA 1974). The requisite meeting of the minds does not exist as to Exhibit “B,” even by ABC’s admission.

Consider the letter, which is the first page of Exhibit “B.” There is no indication – if the letter was even sent at all – that the letter could even reach the proper person at Aycox with authority to bind either of the Defendants, for it has no routing information and is simply addressed to “Valued Customer.” Although the letter does enclose a terms and conditions document different from the original fine print document, the letter does not refer to the enclosure as a modification of the original agreement. It states instead: “[e]nclosed is the agreement for terms and conditions of your contract for you to **reference.**” ABC cannot claim to bind a party to new terms and conditions by simply representing it as the original terms and conditions for Defendants to “reference.” Neither can it rely on a document that does not meet the requisite formality of a contractual amendment, and that does not purport to modify anything. *Eclipse Med. v. Am. Hydro-Surgical Instruments*, 262 F. Supp. 2d 1334, 1360 (S.D. Fla. 1999). And as Mr. Hedy’s testimony shows, the price increase alluded to in the letter was in fact approved by a separate modification agreement that explicitly did *not* include the new terms and conditions of Exhibit “B.” (Hedy 6-21-07 Depo., 35:9 to 36:7).

Exhibit “B” is not a contract modification as a matter of law.

II. Defendants Own The Particular Copy of the Software They Purchased

The essential premise of ABC’s claim against Defendants is that the software for which Defendants paid a “one time” fee both at the inception of the contract and each time thereafter that they enlarged their operations, by adding new store “directories,” was merely licensed to Defendants rather than owned by them. If this is so, ABC reasons, it could lawfully require that the software be “purged,” as it provides in the unexecuted fine print portions of Exhibit “A,” and it could lawfully insist on monthly license fees for each month of “use,” assuming that the contract is capable of being so interpreted – an issue Defendants will disprove hereafter. It is Defendants’ position, on the other hand, that the software was *purchased*, not licensed on a monthly or other basis, and not rented, and that title to it was acquired when the software was delivered. If this is so, then title to the software cannot be divested or forfeited later, simply because Defendants no longer wished to purchase

software support services from ABC. The Court can resolve this issue, if the underlying facts of the agreement are sufficiently undisputed, by summary judgment. *See, e.g., Bradley v. Sanchez*, 943 So. 2d 218, 221 (Fla. 3d DCA 2006). The construction of a contract is a matter of law and when there is “no facial ambiguity in the portion of the agreement at issue, the provision must be afforded its plain meaning.” *Broward County v. LaPointe*, 685 So. 2d 889, 892 (Fla. 4th DCA 1996). “[W]here the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment.” *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999) (*Quoting Angell v. Don Jones Ins. Agency, Inc.*, 620 So. 2d 1012, 1014 (Fla. 2d DCA 1993)).

The starting point for the analysis is the contract between the parties. ABC contends that the contract, at least in its original form, is set forth in Exhibit “A,” consisting of seven numbered pages and two “fine print” pages said to have been part of the agreement. If one accepts this as true, there is *no* ambiguity in the language of the contract, and thus no need to take evidence as to the contract’s intent. *E.g., Id.* at 221-22. What Exhibit “A” unquestionably spells out, even if one includes the “fine print” portions of the agreement, is a contract for the *purchase of software and related hardware*, and thus the purchase of goods under the Uniform Commercial Code.

The first page of the contract (in the June 22 and June 24 versions) in plain and ordinary terms expressly states that ABC “**agrees to sell** and Customer **agrees to purchase** the computer equipment, **application software** and related services below under the terms and conditions of this agreement (see inside). . . The Equipment, Application Software and services made subject to this Agreement are summarized as follows. . . .” (Emphasis added). Exhibit A, p. 1.

Immediately following the above section is the title “**ONE TIME CHARGES**,” after which appears a listing of purchased items including ABC’s application software, such as “STD Finance Company 9 (4 User, Schedule B)” and “STD BHPH (4 User, Schedule B)” and “Other Modules.”

None of the other language on this first page, entitled “page 1 of 7,” states that the transaction is anything other than an agreement for the purchase and sale of particular copies of ABC’s software.

Indeed the form does have language for the lease of the software, but this language is blank, clearly indicating that the transaction was not a lease.

In the **Recap of Contract** (pg. 7 of 7 in both the June 22 and June 24 versions of the agreement) the listing is similarly only for one-time fees, not monthly licensing fees. The Cost of Software is \$19,750.00, the Cost of Software Other is \$13,000.00, and the Cost of Software Users is \$14,625.00. There is no itemization for any monthly charges relating to the software. The only amounts itemized relating to the software are labeled costs and add up to the \$47,350.00. SMR was required to pay ABC this charge in full upon delivery of the software, when the title passed from ABC to Defendants. This is the same amount stated on page 1 of the Agreement as “one time charges.” The only monthly charge itemized in the Recap of Contract is for Monthly Support Charges of \$1,985.00 per month. The entire Agreement between ABC and Defendants establishes that Defendants purchased the software from ABC, paying a one-time charge for the software in exchange for title upon delivery.

The transaction was accordingly a purchase under the Uniform Commercial Code. The “pervasive view is that computer software programs are ‘goods’ under the UCC.” *First Nationwide Bank v. Fla. Software Servs., Inc.*, 77 F. Supp. 1537, 1543 (M.D. Fla. 1991) *Tingley Sys. v. Healthlink, Inc.*, 509 F. Supp. 2d 1209, 1214 (M.D. Fla. 2007). Because software is considered a ‘good’ under the UCC, the UCC governs contracts involving its sale. *See e.g., Winterbotham v. Computer Corps., Inc.*, 490 So. 2d 1282, 1282 (Fla. 5th DCA 1986)(applying the UCC to a contract for the purchase of computer hardware and software); *Koplowitz v. Girard*, 658 So. 2d 1183, 1184 (Fla. 4th DCA 1995)(applying the UCC to contract for purchase of computer equipment and services).

The UCC therefore applies to the entire ABC agreement, including the monthly support services, for the sale of the software and computer equipment predominates over the entire initial transaction. The value of the original purchase was 20 times larger than the payments for monthly support. Mixed agreements of this sort, involving the sale of goods as well as services, are governed by the UCC if the sale of the goods predominates over the services. *See, RRX Indus. v. Lab-Con,*

Inc., 772 F.2d 543, 546 (9th Cir. 1985)(finding when a sale predominates, incidental services produced do not alter the basic transaction); *Systems Design & Management Information, Inc. v. Kansas City Post Office Employees Credit Union*, 14 Kan. App. 2d 266 (Kan. Ct. App. 1990)(finding “the test when dealing with a mixed contract is ‘not whether the goods or services are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the sale, with labor incidentally involved’”). Like the agreement in RRX, the Agreement between ABC and Defendants was predominated by the sale of the software and computer equipment. The maintenance and services licensed by Defendants were merely incidental to and would have been completely useless if not for their purchase of the software and computer equipment from ABC. Because the license of the maintenance and software updating was merely incidental to the purchase of the software and computer equipment, the Agreement between ABC and Defendants is governed by the UCC. *See, Koplowitz v. Girbard*, 658 So. 2d 1183, 1184 (Fla. 4th DCA 1995)(applying the Florida UCC to a mixed agreement for computer equipment and computer services); *Systems Design*, 14 Kan. App. 2d at 272 (finding “these services are incidental to the sale of the software because, without [the purchaser] buying the [software,] the services would not be necessary”). As a matter of law therefore Defendants purchased and now own the particular copies of ABC’s software which ABC delivered to them. Title to this software passed to Defendants upon delivery. Fla. Stat. § 672.401.

ABC will of course urge that the agreement between the parties was really one for the monthly license of the software, something akin to rent, and thus that Defendants’ rights ceased upon the cessation of payments. But this is impossible in the context of ABC’s own testimony. First, Mr. Hedy could not point to any language in the original contract between the parties that specifically provided for monthly *license* fees; to the extent it refers to monthly fees of any kind (other than rent for rental agreements) it only provides for monthly *support services*. (Hedy 7-11-08 Depo., 173:13 to 174:13). These support services are explicitly defined in Exhibit “A” to include what is normally thought of as “support” services; telephone support, updates, fixes, new releases, and the other sort of “support” one can typically purchase to keep software up to date. (Exhibit “A” terms and conditions, Section 6(a); Hedy 7-11-08 Depo., 48:15).

Hence ABC has resorted in its pleading to incorrectly attempting to transmute the monthly software support payments provided for in Exhibit A into “monthly software usage” payments. (See Second Am. Complaint, ¶ 12). Yet if you simply read the actual agreement, it is clear that it does not contemplate a “software usage fee,” but only a software purchase, as described above. Indeed the only reference to a “software usage fee” in any attachment to the Second Amended Complaint is ABC’s self-serving and unaddressed letter to “Valued Customer.” ABC is thus seeking a windfall in alleged damages by transforming the “monthly support” fee (listed in the Recap as such) into an illusory software usage fee that conveniently continues, in ABC’s assessment, until the date of trial. There is no support in the alleged contract, even as defined in the Second Amended Complaint, for this theory of liability.

The only fee that Defendants ever agreed to in Exhibit “A” was a monthly software support fee, referred to throughout Exhibit “A” as either a monthly support per user (p. 3) monthly support charges (p. 7) and “usage” in reference to “total support” (p. 4). Nowhere in the entire application support service section is software usage mentioned. Why would Defendants pay a monthly software usage fee on a software application that they purchased for almost \$50,000? The monthly fee was not for software usage, it was for telephone support and software/documentation updates.

What is more, the purported fine print document actually has a provision, *separate from the monthly support provision and one time payment provisions*, for rental of the software. Compare Exhibit “A,” p. 8, ¶¶’s 5 and 6 to ¶ 7. The only explanation for this contradiction is that the fine print document was used by ABC in conjunction with both software purchase as well as rental agreements. This explains the repeated dual references to “Purchasers and/or Customers” throughout the terms and conditions and specifically in the section entitled Delivery/Title and Use of the Application software. (See Exhibit “A,” p. 8, ¶ 2(a)) . ABC has conveniently ignored the rental provision and avoided any use of the term “rental.” This is because it is obvious that rental was never contemplated by the parties to this transaction and is never indicated as part of the transaction in any part of the agreement or the final “contract recap” page.

When pressed to provide support in the contract for the notion that Defendants’ monthly fees

were really for the license of the software rather than for the purchase of monthly support services, Mr. Hedy could find nothing in his contract (Exhibit "A") to support his theory. (Hedy 7-11-08 Depo., 57:6 to 58:24). Mr. Hedy then resorted to the argument that the series of post-contract amendments, such as Exhibit "C," actually provide the support for his theory. He testified:

Q. Where in the contract does it say – specifically, that it tells the customer that the application that they bought under the, quote, one-time charge, closed quote, is an application they're going to pay for every month on top of the one-time charge?

A. **As soon as they sign the first amendment to the contract.** The first amendment on every contract spells out to them, this is what you're getting for the additional user, this is what you're getting for the additional directory, this is the additional monthly, sign off on it. They sign off on it and I'm done, and I give them what they have signed for.

Q. So the notice of the extra charge on top of what they already bought is in --

A. Yes.

Q. -- in the amendment?

A. Yep, every single amendment that they signed, it tells them that.

(Hedy 7-11-08 Depo., 57:6-23) (Emphasis Added)

But this argument assumes that the post-contract amendments made substantive changes in the actual contract terms rather than merely adding new directories and enlarging the number of users for which a "usage fee" was then due. Exhibit "C" belies such a contention: it actually *affirms* that the terms and conditions of the original 1998 contract "shall remain in full force and effect." (Ex. "C"). And nothing in the specific terms of Exhibit "C" supports the view that "monthly usage fee" is anything other than the monthly support fee of the original contract. Indeed Mr. Hedy testified:

Q. Doesn't the amendment also refer to a one-time charge?

A. It does.

...

Q. The 125 per month that you say they signed off on --

A. Right.

Q. -- was for the monthly support charge?

A. **That is correct, monthly usage fee, support.**

(Hedy 7-11-08 Depo., 58:2-24) (Emphasis Added)

This testimony is binding on ABC as the plaintiff in this lawsuit. Exhibit "C" did not magically transform the support fees of the original contract into some kind of license fee for the software that had already been purchased. Defendants *purchased* the software under the plain and ordinary and unambiguous terms of Exhibit "A." There are no disputed issues of material fact concerning this issue. The Court should therefore rule as a matter of law that Defendants purchased the particular copy of ABC's software and are and always have been the lawful owners of title to it.

III. Because Defendants Own the Software They Had No Duty to Continue to Pay

If, as ABC has essentially admitted, Defendants did purchase the particular copies of ABC's software, they had no duty to *continue* to pay for that which they purchased. As Exhibit "C" to the Sec. Am. Complaint proves, even when new directories were added by amendment, the particular software added was purchased for a one time fee. And as the **Recap** section of Exhibit "A" shows, it is only the support services that were purchased on a monthly basis, nothing else. The question thus raised is whether Defendants were required to *continue* to purchase software *support* services, even if they no longer wanted it or received it. If we assume that the fine print portion of Exhibit "A" is part of the contract, the answer to this question is that there was no such obligation.

Certainly nothing in pages 1-7 of Exhibit "A" purports to require Defendants to continue for some indefinite time, or forever, to buy support. Page 1 of 7 refers only to the price of monthly support, not the duration of it. The same is true for Page 3 of 7. The **Recap**, an important part of the contract by the testimony of both parties, is likewise silent as to the duration of the "monthly support charges." No express term of the contract is provided for at all. This brings us the fine print portions. Part 2 (e) has a termination section, expressly conferring upon Defendants the right to terminate on 30 days written notice to ABC. This section must be interpreted to mean what it says: Defendants could terminate the contract, and thus all of its continuing obligations, on 30 days written notice.

Consider now Part 5 of the fine print portion. This section states, among other things, that for "any account reaching sixty (60) days past due, ABC will find it necessary to suspend all services." But, as noted above, this payment section is entirely for nonpayment of the "**one time**

Equipment and Application Software charges”(Emphasis added). It says nothing about monthly support services. Thus Part 5 has no application to monthly support fees, by its own terms.

Next consider Part 6, which is entitled **Application Support Services**. Here the fine print provides that so “long as Customer is **current** in the Application Software Support Services” ABC “agrees to provide telephone services on an as needed basis. . . documentation updates, improved versions of existing functions” and the like. But what about termination of these monthly services? Part (d) explicitly states that ABC has the right to terminate its support services “after thirty (30) days prior written notice” if, among other things, “Customer shall fail to make prompt payment of charges.” Thus ABC also has a 30 day termination right for nonpayment.

Lastly, consider Part 14 (k), which provides that the monthly support fee “is owed throughout the term of this contract.”

If we evaluate these various sections together, Exhibit “A” negates any notion that there is a continuing duty to buy software support on the part of Defendants. The contract is, as a matter of law, terminable at will by Defendants and terminable for cause by ABC. And if either party gives notice of termination, the services expressly terminate, at least upon the expiration of the 30 day notice period. The Court should so rule as a matter of law.

IV. ABC’s Damages Are Limited to No More Than The 30 Day Notice Period

The above analysis raises the further question as to when, on this factual record, did Defendants cease to have an obligation to continue to purchase software support services? Both parties admit that no written termination notice can be found. But ABC also admits that (a) Defendants “abruptly . . . severed their relationship with ABC without notice in October 2005” (Sec. Am. Complaint ¶ 24) and that (b) support services were neither sought by Defendants nor provided by ABC thereafter. (Hedy 7-11-08 Depo., 92:11 to 93:11). Thus whether Defendants complied literally with the requirement of *written* notice of termination or not, the contract between the parties was unquestionably terminated in fact and ABC rendered *no support services* after October 2005. (*Id.*). Logically it must follow from these facts that Defendants’ duty to pay for software support ended sometime between October 2005, when the relationship was terminated, and the expiration

of a 30 day notice period. That is, if both parties could terminate on 30 days written notice, and the contract *did* terminate without written notice in October 2005, the notice period should set the outer limits of ABC's damages as a matter of law. Even if one looks at this issue from the perspective of ABC, and assumes that Defendants breached the contract by failing to give the 30 day notice, the result is the same: ABC's damages are limited to the 30 days available to either party for a termination and associated nonpayment for support.

Indeed it is a nearly universal rule that where a contract provides for termination upon notice, the damages for breach are limited to the profits that the claimant would have earned during the stipulated notice period. Thus in *Banker Risk Management Services, Inc v. Av-Med Managed Care, Inc.*, 697 So.2d 158, 161 (Fla. 2d DCA 1997), the court noted: "if an employment contract provides that it can be canceled on giving ninety days' written notice, it is logical to limit the damages to ninety days because the employee could at best earn ninety days of wages." Likewise where a contract provides, or the UCC as a gap-filing measure requires, that "reasonable notice" be given before termination of a contract, the injured party is limited to recovering the profits, if any, it would have earned in the period found to be reasonable. *Crawford v. Shapiro & Co., P.A.*, 490 So.2d 993, 997 (Fla. 3rd DCA 1986) ("Logic dictates that the measure of damages cannot be any greater than that which would follow from a termination of the contract at the earliest possible time after the commencement of performance"); *Maytronics, Ltd v. Aqua Vac Systems, Inc.*, 277 F.3d 1317, 1321 (11th Cir. 2002) ("... we hold that when a party is not given reasonable notice prior to termination of a terminable-at-will contract, under Florida law it is entitled to recover the profits it would have made from the contract during the notice period"); *Smalley Transportation Co., Inc v. Bay Dray, Inc.*, 612 So.2d 1182, 1188 (Ala. 1992) (noting that rule limiting damages to the notice period "has been adopted and followed in cases involving a wide variety of commercial transactions" and collecting extensive cases); 25 CJS, *Damages* § 90, at 978 (1966) ("Where a contract provides for its termination by either party on notice of a specified number of days, profits may be recovered for only that length of time.")

Because there is no ambiguity in the contract terms on this issue, the Court should rule as a matter of law that ABC's damages, if any, for continued "support services" (or for any other alleged

monthly payment) are limited to the net profits ABC would have earned during the 30 day notice period following October 30, 2005.

V. **Because Defendants Own the Software They Had No Duty to Purge It**

ABC claims that Defendants breached the agreement when they failed to “purge ABC’s application software and all copies and any modifications or merged portions and failed further to provide ABC reasonable written certification of said . . . purgation.” Second Am. Comp. ¶ 17. ABC further states that it attempted to enter Defendants server to “purge” the software application itself, but was intentionally “locked out.” *Id.* at 19. ABC does not define, nor does the contract explain, what a “purge” or “purgation” of software is. In his deposition, ABC’s President refers to the purge obligation as “the obligation as far as the -- the end user upon termination of the contract is give us the ability so that we can get online and **remove the working applications.**” (Hedy 7-11-08 Depo., 193:1-10).

One would think that a contractual obligation to allow ABC to enter onto Defendants’ server to “remove” applications that were purchased for \$50,000 would be prominently noted in the contract. Yet language regarding this supposed “purge” requirement does not appear anywhere within the June 22, 1998 contract document or its June 24, 1998 modification, in Exhibit “A.” The only document referencing the supposed “purge” requirement is the “fine print” attachment to Exhibit “A.” Even assuming for the purposes of this motion that the fine print attachment is a part of the contract, the “purge requirement” is only contained in one sentence buried in the 4th paragraph of section 2. This sentence does not provide for ABC accessing Defendants’ server to “purge” or “remove” anything. The vague language simply refers to an obligation on the part of the “Customer” to “purge.” While ABC may interpret this provision as a requirement mandating they be allowed to access Defendants’ server and remove software, there is a separate Section 7 of the contract referencing “removal” of software and granting ABC access to the system for this purpose. But this Section 7 does not apply to software purchases, it only applies to “Application Rentals” – which would support the inference that the entire “purgation” obligation is for rentals, not purchase transactions like the present one.

Observe also that the Section 2 termination provision is distinct from the separate termination provisions of the monthly support service, Section 6. This would suggest that Defendants were free to drop ABC telephone support (along with periodic updates) without the obligation to destroy their software. When ABC's President was questioned regarding the purge requirement applying to software rental as opposed to software purchases he was unable to answer the question. (Hedy 7-11-08 Depo., 197:2-10). ABC cannot show that the purge requirement has any relation to Defendants' payment or non-payment of monthly support.

But if we grant ABC the benefit of the doubt and assume for purposes of this motion that the "purge" obligation is triggered once there has been a termination of either the agreement or software support, the question that remains is whether Defendants can lawfully be required to divest themselves of software which they have **purchased** and to which **title** has passed, because they have elected to terminate the contract as to support services. As a matter of law, they cannot be required to do so.

Florida's UCC Section 2-401 provides:

(2) Unless otherwise explicitly agreed **title passes** to the buyer at the time and place at which the seller completes her or his performance with reference to the physical delivery of the goods, despite any reservation of a security interest . . .

Fla. Stat. § 672.401(2).

Transfer of title on delivery pursuant to § 672.401 is effective even if full payment has not been made. *St. Paul Fire & Marine Ins. Co. v. Pensacola Diagnostic Center & Breast Clinic*, 505 So. 2d 513 (Fla. 1st DCA 1987). This is no small matter. Once title passed, Defendants had the right to use or to dispose of their software as they saw fit.

In *St. Paul*, the parties contracted for the installation of medical equipment with 10% paid at the time of contracting and the remaining balance due on delivery. *Id. at 514*. After the equipment was installed, the buyer refused to pay the remaining balance due on the goods. In retaliation, agents of the seller entered onto the property without permission and removed parts of the equipment, disabling its operation. *Id.* The Court found that title had passed upon delivery of equipment and the subsequent disabling of that equipment was conversion of the buyer's property. *Id. at 515*. *St. Paul*

clearly establishes that once title passes, the vendor who sold the goods to the buyer can no longer exercise control over the property, even in an effort to be paid the balance, absent a properly perfected security interest in the goods. Hence it is an act of conversion to attempt to retake it or to destroy it. The ruling in *St. Paul* has been consistently applied to protect the attributes of title in personal property of all kinds. See, e.g., *Equico Lessors, Inc. v. Maruka Machinery Corp. Of Am.*, 523 So. 2d 665, 667 (Fla. 5th DCA 1998) (vendor who did not retain a security interest in machinery was liable for conversion when it repossessed the equipment from the buyer's assignee); *Le Daupon Condo. Assoc., Inc. v. Groundworks of Palm Beach County, Inc.*, 719 So.2d 13 (Fla. 2d DCA 1998) (conversion to reposses four trees for nonpayment where no lien secured the creditor).

In this case, unlike the cited cases, Defendants fully paid for their software *in advance*, and simply elected, as ABC alleges, to “abruptly and without cause” sever the relationship. (Second Am. Complaint ¶ 24) because they no longer wanted software support. ABC thus committed an even more egregious act than did the vendor in *St. Paul* by entering onto Defendants’ server and disabling the very goods it had transferred title to *years before*. ABC does not dispute that the equipment and software were delivered to Defendants around 1998 and that Defendants paid the full purchase price for them at that time. The first dispute regarding *monthly support* usage payments did not arise until after October of 2005. Thus even assuming there was a security interest in the software requiring a repossession or “purge” of the application, it was extinguished when Defendants paid the 50% balance of its **ONE TIME CHARGE** on delivery of the software. The security interest merged with the title at the point that the final payment was made on delivery. See *St. Paul*, at 515. How, then, can the “purge” right be enforceable against a perfected title holder?

It is a “time-honored practice” to view restraints against alienation of personal property with disfavor. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 194 (U.S. 1995) (“Generally the owner of personal property -- even a patented or copyrighted article -- is free to dispose of that property as he sees fit.”) (Stevens, J., dissenting); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 89 (2d Cir.) (“Restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they are ‘repugnant’ to the transfer of the

title.”). *Dyer v. Dyer*, 275 Ga. 339, 341 (Ga. 2002) (“It is the policy of the law to encourage free alienability of property, and attempts to remove either land or chattels from circulation in trade are discouraged not only by the rule against perpetuities, . . . but by the rule against unreasonable restraints on alienation.”) The Florida Supreme Court analyzes restraints on alienation to determine if they are reasonable. *Iglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980); *See also, Camino Gardens Ass., Inc. v. McKim*, 612 So. 2d 636, 639 (Fla. 4th DCA 1993)(finding “when determining the validity of restraints on alienation, courts must measure such restraints in terms of their duration, type of alienation precluded, or the size of the class precluded from taking”); *see also, Vinson v. Johnson*, 931 So. 2d 245, 249 (Fla. 1st DCA 2006) (An absolute restraint on alienation is inconsistent with the right of ownership and is therefore invalid); *Seagate Condominium Ass'n. v. Duffy*, 330 So. 2d 484, 485 (Fla. 4th DCA 1976).

The purge provision, enforced pursuant to the views of ABC, would have the effect of completely nullifying the transfer of title that resulted from Defendants’ purchase of the software. Defendants paid \$50,000 for the finance software package and should be able to use the very expensive product it purchased for any lawful purpose – albeit without further updates or releases or other “support.” The fine print provisions requiring Defendants to completely forfeit their copy of the software after purchase amount to a complete restraint on possession and enjoyment of lawfully acquired property which is contraband. But if title means anything under the UCC, it cannot be divested by a vendor who has been fully paid for it and can no longer claim a security interest in it. *See, e.g., St. Paul*, at 505 So.2d 515. Accordingly the “purge” clause in the “fine-print” portion of Exhibit “A,” if part of the contract at all, is an unlawful restraint on alienation of purchased property.

VI. Because Defendants Own The Software They Have No Duty To Pay for its Continued “Use”

As discussed above, Defendants purchased the software from ABC and have no duty to pay an additional monthly fee to use software that they own. ABC has pulled the “software usage” fee from thin air. ABC’s President admits that under his view Defendants are essentially paying for what they have already purchased:

Q So identify for me the things that you would do that comprise the monthly support for – for which you would not make any other charge because the client is already paying you \$52,000 for it.

A. **The client is already paying me for what they have already purchased.**

(Hedy 7-11-08 Depo., 47:20-25)

Mr. Hedy then immediately counters his own testimony and claims only a “portion” of the charge is for paying for their already-purchased software and some is for monthly telephone support and additional programming:

Q. What do you do for the monthly support charge?

A. Oh, basically, again, a **portion** of that is usage, but for what we do for the customer is basically making sure that they're provided with someone that can pick up – pick up the phone and they can talk to immediately. We can basically provide someone that – on the spot that can tend to their needs. If they're – if they're opening up a new location and they need to – they need to get somebody on top of that, making sure that all the programming and all the forms are programmed, those are the kind of things that we provide for that, which we're entitled to.

(Hedy 7-11-08 Depo., 48:15 to 49:1)

However, Mr. Hedy later unequivocally reaffirms his view that the monthly support fee is payment for use of that which Defendants had already purchased:

Q. You believe that the monthly support fee really was just the right to have access to you, or was it something more than that?

A. **Well, let me clear it once and for all. The monthly support fee is what I'm entitled to for you to use my application, once and for all, so that everybody's clear in this room as to what the monthly support fee -- what the monthly usage fee is. The monthly usage fee gives you the right to use my application every single day going forward. If you don't pay me, I'm going to shut you down, and I'm going to do whatever it takes for you to pay me.**

(Hedy 7-11-08 Depo., 75:15 to 76:1)

Finally, Mr. Hedy admits that he never told Defendants that he would charge them a fee to use the application:

Q. Was there ever a time that you told anyone at Aycox and Aycox that you were going to charge them this fee just for the right to use it?

A. **Never.**

(Hedy 7-11-08 Depo., 76:22-25)

ABC has ambushed Defendants with this illusory fee for the software they spent over \$50,000 purchasing. There is simply no contractual obligation to pay a usage fee for something already purchased. ABC admits that it never disclosed to the Defendants that it would be charging such a fee; and no right to charge such a fee can be found in the contract documents. This court should find as a matter of law that Defendants were not obligated to pay a usage fee for software they already owned.

VII. Because Defendants Own the Software ABC Breached The Contract By Making it Inoperable

ABC committed a material breach of the contract of Exhibit "A" each time it disabled Defendants' software. The automatic shutdown remedy, if applicable at all, was only available to ABC when a customer failed to timely pay for its one-time software purchase price. (See Section 5 of the fine print terms and conditions). After the software was fully paid for by Defendants, full title was vested in the software for Defendants to use for lawful purposes without fear of interference. ABC thus had no cause or right to enter onto Defendants' server without permission to activate an automatic shutdown function in the software.

Defendants did not learn the software they purchased contained a secret automatic shutdown feature until well after they had purchased the software, when they were late in paying for a monthly *support* payment. (Newell Depo., 46:20 to 49:1). Even ABC's president admits that this shutdown was implemented at least once prior to October 2005 simply because a monthly support payment was late "a day or so." (Shad Hedy 6-21-07 Depo., 74:4). But there is *no contract right to do this for failure of payment for software support*. As noted above, even the "fine print" portion of Exhibit "A" purports to confer a shut-down right on ABC only for the **purchase** of the software — as a type of security interest — not for the nonpayment of support for already purchased software. ABC's own fine print states in relevant part:

Payment for one time Equipment and Application Software shall be as follows:

(a) Fifty percent (50%) partial payment of the Total Purchase Price shall be paid by Customer upon execution of this Agreement. (b) The balance of the Equipment is due upon delivery of the Equipment and/or installation of Application Software, as is applicable. (c) If Customer is obtaining financing from a third party, Customer shall take all steps necessary for the release of funds to ABC. . . (e) For any account reaching sixty (60) days past due, ABC will find it necessary to suspend all services.

This includes the customer support help desk, software and documentation updates, parts prices updates, ABC host system access, training, installation activities, on-site assistance, and all purchase requests. Additionally ABC shall have the option of activating the software shutdown clock to prevent customer from accessing the ABC object code.”

(Ex. A, “fine print,” Section 5).

Not one word of this passage is directed to non-payment for support services. The entire paragraph is concerned only with payment of the one time fees for equipment and application software and the remedy of ABC if payment is not made. The next section, Section 6, is the portion of the “fine print” that addresses monthly support services, and that paragraph says *nothing about a shut down clock* or similar remedy for nonpayment of support fees. What it does say is that if fees are not paid, ABC can “terminate this Agreement and program licenses.” (Section 6(d)). As a matter of law, therefore, ABC had no right to implement the shut-down feature in the software *after* ABC was paid in full for the application software. That ABC did so is now clear.

Defendants were initially unable to determine how ABC deactivated the software. This is because ABC never disclosed the automatic shutdown function or its method of operation. Even at his initial deposition, ABC’s president was vague regarding the shutdown feature and how they had implemented it. (Hedy 6-21-07 Depo.,78:15-24). In a more recent deposition, when questioned regarding unexplained commands he had run during a litigation server audit in order to access a specific ARIMA0 file on the server, Mr. Hedy testified:

Q. April 2, '08, that we're seeing on the screen is the date of the audit, correct, Mr. Hedy?

A. I believe so.

...

Q. What file's open?

A. We're opening up a file called ARIMA0. **This is the file that contains the code for the shutdown mechanism.**

Q. And can you tell if the shutdown mechanism is activated from there?

A. Whatever that date translates to, those numbers translates into a date, **is as of the date.**

Q. Which numbers in particular?

A. The top number, the 119406. The X is a insignificant character.

Q. 119406 designating the year '06?

A. No. This is just a hexadecimal address for a date code.

Q. Okay. And how do you translate that code?

A. You have to run another program that basically translate that into a date.

(Hedy 7-29-08 Depo., 316:10 to 317:11)

Hedy later detailed the procedure they would follow to enter the shutdown date upon receiving payment and admits that's what probably happened to Defendants in 2006:

Q. And on that occasion, you set the clock to shut down at a given milestone in 2006?

A. No. The shutdown mechanism is embedded, **part of the operating system.**⁴

...
A. What I – what needs to happen, as soon as the payment is processed, then we get online with the customer, and then we update the table ARIMA0 with the date of the following month. If the date of the following month comes and goes without acknowledgment of the payment, then the system will go into a shutdown mode by itself, or the entry mode.

Q. And that's what happened here, right?

A. And that's what – I would presume that's what happened here, yes.

(Hedy 7-29-08 Depo., 375: 23 to 376:14)

Hedy has thus essentially admitted that ABC accessed Defendants' server and secretly embedded a code in a file in order to set a shutdown date after each monthly support payment was received. This was apparently done under the guise of accessing the system as part of monthly support operations and software updates. (Hedy 7-11-08 Depo., 94:16 to 95:18). The software application would read the ARIMA0 file every time it operated, in order to verify that it had not reached the shutdown date surreptitiously entered by ABC. If the shutdown date was reached, then the software would deactivate automatically. It is now clear why Hedy avoided divulging this secret file: if the Defendants had learned the simple process for changing a code in a file they would be able to turn off the automatic shutdown themselves, as would be their right as owners of the purchased

⁴ The ARIMA0 file is a part of the application software, not a part of the UNIX AIX "operating system" which operates the IBM server Defendants purchased. Whether or not Hedy activated a shutdown in the software or the operating system is irrelevant to the claim or the purposes of this motion.

software.

Even though Hedy claimed that the date would normally be set to shut down the next month if payment were not received, Defendants were able to run a standard hexadecimal to decimal algorithm on the number 119406 ABC recovered from the server and came out with the date of January 15, 2006. (Attachment 3 to this motion is a screenshot of a free website utility converting the hexadecimal value of 119406 to the regular decimal date value of 1152006). The automatic shutdown date loaded onto Defendants' server by ABC therefore automatically turned off Defendants' software applications on January 15, 2006. Hedy explained that Defendants permanently blocked ABC from accessing the system sometime around November 1, 2005. (Hedy 7-11-08 Depo., 94:4). Since the procedure was to move the date forward on receipt of payment, and the final payment for October was made sometime around the middle of the month, the final shutdown change must have been made sometime between the date of the last support payment check of October 12 and November 1. The monthly support payment would have been due on or about November 15, 2005. This establishes that ABC entered onto the server at a point when Defendants were current even on their monthly support obligation – for which there was no shut-down right – and triggered an automatic shutdown for January 15, 2006, 60 days after the next payment would be due on or about November 15, 2005.

The shutdown feature was continuously activated every time a monthly support payment was received; ABC was simply pushing back the date the software would be turned off. Defendants had no way to block ABC from implementing the shutdown clock because it was, in effect, constantly counting down to a shutdown date. Defendants' entire company operations were thus effectively held hostage by ABC until each month's support fee was paid. Because the software was necessary to Defendants' operations, ABC improperly had the power to bring Defendants' business to a standstill throughout the relationship. (Hedy 6-21-07 Depo., 77:18-24). It was because of this form of extortion that Defendants took steps to develop their own replacement software. (Newell Depo., 42:11).

When the shutdown was last implemented, in 2005, it made the software incapable of being used to generate accurate loan documents or to otherwise process consumer loans. (Hedy 6-21-07

Depo., 77:18-24). At most, Defendants were able to use the software – only by tricking the “clock” by backdating it to generate documents on old loans for archival purposes. (Hedy 7-29-08 Depo., 274:25 to 275:22). But Defendants did not pay more than \$50,000 for software simply to have an archive for past business; the software was intended to be used to generate *new* consumer transactions if Defendants wished, and to process loan payments, etc. on existing loans. By taking these features away, ABC deprived Defendants of the value of the software they had purchased. This was a material breach, and the Court needs no trial record to make a finding on this issue. As a matter of law, ABC breached the contract and did so by (a) using the shutdown mechanism during the period of contract between the parties to shut-down operations for late support payments, for which there was no authority, and (b) implementing the shut-down after October 2005, when the relationship was at an end, without the least authority to do so in the contract documents.

Conclusion

Though there are many issues in this case, and the contract documents are daunting to read, the essential facts are not in dispute and Defendants have shown that they are entitled to prevail as a matter of law on the following points: (a) Exhibit “B” was not a contract to which the parties mutually consented; (b) Defendants purchased and continued to own their particular copies of ABC’s software; (c) Defendants had no contract duty to continue to buy support services for that software, and were free to terminate the relationship without reason or cause; (d) because no written notice of termination can be proven, ABC’s damages beyond the October 30, 2005 termination date are limited to the 30 day notice period for which the parties bargained; (e) because Defendants owned title to their copy of the software, they could not be required to purge it and had no duty to pay for its continued “use;” and (f) ABC committed a material breach of contract by rendering the software inoperable with the automatic shut-down feature after Defendants fully paid for the software.

DATED: 9/25/08



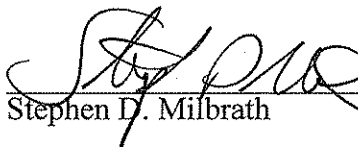
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished as follows: *ON* :

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