

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS**

JAMES NATION	)	
	)	
Plaintiff,	)	
	)	No. 09 CV 6917
	)	Hon. Judge Matthew F. Kennelly
AMERICAN CAPITAL, LTD., d/b/a	)	
American Capital Strategies, Ltd., a	)	
Delaware corporation	)	
	)	
Defendant.	)	

**PLAINTIFF’S REPLY TO DEFENDANT’S  
RESPONSE TO HIS MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Plaintiff, James Nation, (“Jim”) by and through his attorneys, Fritzshall & Pawlowski, and for his Reply to Defendant’s Response to His Motion for Summary Judgment states as follows:

**I. Argument**

Jim’s Motion should be granted. Robert Hellyer, Spring Air’s former CEO, affirms that only American Capital’s Michael Michienzi made the decision to breach Jim’s Agreement. American Capital was well aware of Spring Air’s obligations to Jim, they intentionally induced the breach and Jim suffered more than \$400,000.00 in damage as a result. American Capital had no privilege to induce the breach and cannot sustain its claim of an offset. Jim is entitled to summary judgment.

**A. American Capital’s Objections to Jim’s Local Rule 56.1 Statement**

American Capital has objected and moved to strike certain portions of Jim’s Local Rule 56.1 Statement. First, it claims that, because there are no line numbers referencing the pages to the depositions cited in the Local Rule 56.1 Statement, the entire submission should be stricken. However, there is no case law supporting such a draconian interpretation of the Rule. Even in American Capital’s own case, Tel-Lock, Inc., v. Thomson Consumer Electronics, 2005 WL 741930

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(N.D. Ill. March 30, 2005), Judge Lefkow did not go so far as to require line numbers. Omitted from American Capital's quotation in Tel-Lock was the reference to Malec v. Sanford, 191 F.R.D. 581, 583 (N.D. Ill. 2000), stating, "In other words, citations must include page (or paragraph) numbers, as opposed to simply citing an entire deposition, affidavit, or other exhibit document. Tel-Lock, at \*3. Jim's Local Rule 56.1 Statement cites to page numbers and paragraph numbers just as the Tel-Lock decision requires.<sup>1</sup>

American Capital also objects in several responses to the "length" of some of Jim's paragraphs, i.e., Response to Paragraph 4, 5, 6, 19, 21, 26, 27, 34 and 37. It does not cite any specific case law on the definition of a "short" paragraph, but relies on the language of the Rule. However, Paragraph 4 contains three sentences, Paragraph 5, contains two sentences (consisting of two lines), Paragraph 6 contains 8 sentences (consisting of nine lines, citing to only 6 deposition pages), Paragraph 19 contains two sentences, Paragraph 21 contains 5 sentences, Paragraph 26 contains 4 sentences, Paragraph 27, contains 4 sentences, Paragraph 34 contains 5 sentences, Paragraph 37 contains 4 sentences. Even using the stringent language of Tel-Lock, nothing in any of the objected paragraphs is abusive, unduly lengthy or creates a "hunt for the peanut" for this Court. Not to mention that Jim's paragraphs are no different in length than American Capital's Local Rule 56.1 Statement Paragraphs 12, 25, 29, 37, 40. It is readily apparent that American Capital objected to any paragraph that contained any facts that could ultimately win Jim's case, while ignoring other paragraphs. American Capital is simply off base on this argument.

Lastly, American Capital attacks the affidavit of Robert Hellyer, referenced in Jim's Local Rule 56.1 Statement paragraphs 35-40, primarily because Hellyer's testimony directly contradicts American Capital's company line that only Spring Air decided to stop Jim's payments. It claims that Hellyer's affidavit lacks foundation for the statements in Paragraphs 4, 5 and 6 of Hellyer's affidavit,

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<sup>1</sup> Should the court require citations to line numbers, Plaintiff requests leave to supplement his Rule 56.1 Statement with line numbers.

attached to Jim's Local Rule 56.1 Statement as Exhibit 17. Rule 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e); *see also Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir.2003) (noting that affidavits based on personal knowledge may include reasonable inferences, so long as those inferences are based on observation or first-hand experience); *Vissier v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir.1991). When addressing the sufficiency of such affidavits, the Seventh Circuit has held that "[e]vidence presented to defeat a summary judgment motion need not be in admissible form, but it must be admissible in content." *Polansky v. Anderson*, 2007 WL 4162807, 1 (N.D.Ill.,2007) citing *Juarez v. Menard, Inc.*, 366 F.3d 479, 484 n. 4 (7th Cir.2004); *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir.2007).

Hellyer states that he was the CEO of Spring Air and when he was hired, Jim was the President. (Hellyer Affidavit, ¶2). As CEO, Hellyer testified that he worked closely with Michienzi, who was appointed Chairman of the Board. (Id. ¶4). Hellyer sufficiently laid the foundation for his "personal knowledge" that Michienzi was "making all of the financial decisions for Spring Air," in late June and early July, 2008. (Id., ¶5). He even gave a specific example of how Michienzi terminated a long standing Spring Air account despite Hellyer's objection. (Id.). American Capital has not presented any contrary evidence that Hellyer did not have the "personal knowledge" to make the statements. In fact, it admits that Michienzi worked with Hellyer "from March 2008 until he left Spring Air around September 2008." American Capital Response to Jim's Local Rule 56.1 Statement, ¶37.

American Capital also take issue with Hellyer's testimony in Paragraphs 5 and 6 of the Affidavit that Michienzi was making "all" of the financial decisions and made "any and all" decisions to stop Jim's payments. It claims that "all" and "any and all" are too vague. However,

“all” and “any and all” could not be any more specific - all is all. While American Capital disputes Hellyer’s account citing to Michienzi’s deposition testimony claiming he did not make any financial decisions, it is certainly not the first time that there were two completely opposite accounts of a material fact in a record. Hellyer’s affidavit cannot be seen as self-serving since he has nothing to do with American Capital, Spring Air or Jim Nation. Moreover, a more than plausible explanation for the conflict between Hellyer and Michienzi’s testimony is simply that Michienzi was not accurate in describing his involvement in Spring Air in an attempt to avoid liability for American Capital. Hellyer’s affidavit must stand and his testimony weighed against Michienzi’s for the ultimate issue of fact.<sup>2, 3</sup>

**B. American Capital Controlled Spring Air and Ordered Spring Air To Breach Jim’s Contract**

This Court requested that the parties attempt to avoid duplication and unnecessarily lengthy briefs in their dual Motions for Summary Judgment. American Capital’s arguments and case law raised in their Response to Jim’s Motion for Summary Judgment are identical to those raised in their own Motion for Summary Judgment, to which Jim has already responded. In an attempt to facilitate an efficient and streamlined briefing process, Jim simply refers and incorporates his arguments set forth in his Response to American Capital’s Motion for Summary Judgment as his Reply brief herein to American Capital’s Response to his Motion for Summary Judgment.

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<sup>2</sup> American Capital raised issue with a citation to Exhibit “H” in paragraph 10 of Jim’s Local Rule 56.1 Statement. That reference was a typographical error and is hereby corrected to state “Exhibit 8.”

<sup>3</sup> American Capital points out that Oleg’s Deposition page 51, as references in paragraph 34 of Jim’s Local Rule 56.1 Statement, was not attached to the Statement along with Oleg’s other transcript pages. As a clerical copying error may have occurred, Jim has attached page 51 hereto and requests leave to have that appended to his Statement or leave to submit an Amended Statement attaching that page 51.

**III. Conclusion**

WHEREFORE, Jim prays that his Motion for Summary Judgment be granted and for such other and further relief as this Court deems just and equitable.

Respectfully submitted,  
James Nation

/s/ Steven N. Fritzshall  
By: one of his attorneys

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1 there.  
2 Q. Was it there prior to?  
3 A. I think so. I can't tell you for sure,  
4 but I think it was.  
5 Q. When was the last time --  
6 A. Well, during that time period, there  
7 were a lot of outside people involved in the  
8 business. Consultants for this area, consultants  
9 for that area.  
10 And at one of my trips to Tampa, when I  
11 was at the corporate office, the finance  
12 department was all introduced to Bill Byers.  
13 Q. Oh, so --  
14 A. And that was prior to me moving down  
15 here.  
16 Q. Did you have a time --  
17 A. Three, four months, maybe longer.  
18 Q. So May --  
19 A. Maybe, yes.  
20 Q. -- May or June of '08. Would that be a  
21 fair guess or estimate?  
22 A. Fair. I'm not saying it's entirely  
23 accurate. I can't remember for sure. I do know  
24 that I was there permanently in August of '08. It

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1 was a few months before that.  
2 Q. It was sometime in '08, and it was a  
3 few months before you were moved there  
4 permanently?  
5 A. Yes.  
6 Q. And what was the nature of this  
7 introduction?  
8 A. They brought him in and introduced him  
9 as an employee of American Capital. And we all  
10 introduced ourselves to him.  
11 Q. And that was it?  
12 A. Basically.  
13 Q. Did they introduce anybody else?  
14 A. No. Bill Byers was the only one in  
15 that meeting with us.  
16 Q. What was your understanding of Bill  
17 Byers -- well, what did they announce as his  
18 title?  
19 A. I honestly don't recall, to be honest.  
20 He was a finance guy from American Capital.  
21 Q. So were you given any further  
22 instructions or anything?  
23 A. No. Ron Lueptow was the one that had  
24 us in there with him.

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1 Q. Was the conference room office there at  
2 the time that Bill Byers was introduced?  
3 A. I don't recall.  
4 Q. Was Bill Byers there -- how long did  
5 you stay for this day at the Tampa office?  
6 A. That was probably a week's visit. They  
7 usually were.  
8 Q. Was Bill Byers there every day?  
9 A. I don't remember.  
10 Q. How about when you moved there in  
11 August of '08?  
12 A. My memory says he was there probably 90  
13 percent of the time.  
14 Q. You said that you had no firsthand  
15 knowledge of who was involved in the stopping of  
16 the severance payments to Jim Nation?  
17 A. No, I don't.  
18 MR. NICGORSKI: Objection. Asked and  
19 answered.  
20 Q. Is that correct?  
21 A. That's correct.  
22 Q. Did you speak with anyone regarding  
23 that?  
24 A. The severance payments were stopped

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1 more than once. I know that I talked to Jim a  
2 couple of times at the beginning during the first  
3 ones, just asking if I knew anything about his  
4 check.  
5 Q. Uh-huh.  
6 A. After that, no. I know there was a lot  
7 of office gossip and there were conversations you  
8 overheard in the hall where they would say we're  
9 stopping his payments because he's in breach of  
10 his severance agreement. And then they would  
11 start them back up.  
12 Now, when they finally stopped, I do  
13 not know that there was any reason for it other  
14 than monetary.  
15 Q. At the time that you moved from Chicago  
16 to Tampa in August of '08 --  
17 A. Uh-huh.  
18 Q. -- what was the condition of the  
19 company?  
20 A. We struggled the whole time. I mean,  
21 you know, at that point, it was getting a little  
22 worse.  
23 Q. Well, from a sale's standpoint?  
24 A. From a sales standpoint, yeah. Sales