

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>IN RE:</b>	)	<b>CASE NO. 05-85627</b>
	)	
<b>RELIABLE AIR, INC. d/b/a</b>	)	<b>Chapter 11</b>
<b>RELIABLE HEATING AND AIR,</b>	)	
	)	<b>JUDGE MASSEY</b>
<b>Debtor.</b>	)	

**DEBTOR’S RESPONSE TO DANIEL L. JAPE’S MOTION TO COMPEL  
DISCOVERY AND MOTION TO CONTINUE CONFIRMATION HEARING**

Reliable Air, Inc. d/b/a Reliable Heating & Air (“Debtor”), makes and files this Response to the Motion to Compel Discovery and Motion to Continue Confirmation Hearing (the “Motion”) filed on October 18, 2007, by Daniel L. Jape (“Mr. Jape”).

Introduction

On September 14, 2007, following the conclusion of a hotly contested evidentiary hearing conducted over several days, this Court entered an order in Adversary Proceeding No. 07-6352 (the “Adversary Proceeding”) granting in part and denying in part the Debtor’s Motion for Preliminary Injunction against Mr. Jape (the “Preliminary Injunction”). The Debtor’s claims against Mr. Jape in the Adversary Proceeding center around allegations that he is operating a competing business which is improperly using the Debtor’s trade name, similar advertising and logos, and otherwise deliberately trying to harm the Debtor’s business and confuse its customers and vendors. As a predicate to entry of the Preliminary Injunction, the Court made a number of detailed findings, including that the Debtor had established a substantial likelihood of prevailing on its claims at trial and that the Debtor would suffer irreparable harm if a preliminary injunction was not entered.

The Preliminary Injunction was stayed through September 26, 2007, and the stay was

subsequently extended through October 13, 2007. Notwithstanding the expiration of the stay, Mr. Jape has and continues to flout this Court's authority by violating the Preliminary Injunction. For example, Mr. Jape continues to use for his business the prohibited telephone number 770- 594-9096 and operates service trucks with the name "Reliable" and the prohibited telephone number on the side.

Now, unable to wrest the Debtor's goodwill and business away from it in the Adversary proceeding, Mr. Jape seeks to accomplish the same thing through the ploy of launching a last ditch challenge to confirmation of the Debtor's Plan in hopes of overwhelming the Debtor and this Court with discovery and pleadings and derail the Plan confirmation effort. However, Mr. Jape can not escape the fact that the Debtor's Plan has been overwhelmingly accepted by its creditors, who believe it is their best and only hope of a fair return in this case. The Summary of Balloting filed on October 19, 2007, shows that the Plan has received the acceptance of 10 out of 12 of the unsecured creditors voting in Class 5, by a margin of \$576,001.78 to \$140,341.47 in dollars. That analysis included a rejection by Mr. Jape with an asserted claim of \$138,500 which is likely to be disputed and/or offset by a judgment for significant damages in the Adversary Proceeding. The Court should not countenance Mr. Jape's thinly veiled attempt to delay the Plan process and obtain through that vehicle what he was unable to do in the Adversary Proceeding. Therefore, the request for a continuance should be denied. Additionally, as the record shows, the Debtor has been more than cooperative with and responsive to any legitimate and reasonable requests by Mr. Jape for discovery, and thus his motion to compel should likewise be denied.

Argument

On May 24, 2007, the Debtor filed its First Amended Plan of Reorganization (the "Plan") and Amended Disclosure Statement to Accompany Debtor's First Amended Plan of Reorganization. On July 6, 2007, Debtor filed its Second Amended Disclosure Statement to Accompany Debtor's First Amended Plan of Reorganization (the "Disclosure Statement") to address objections raised solely by Mr. Jape. On September 13, 2007, the Court entered an Order and Notice (1) Approving Disclosure Statement, (2) Directing Debtor's Counsel to Serve the Disclosure Statement, Plan and a Ballot on Creditors and Equity Security Holders, (3) Fixing Time for Filing Acceptances or Rejections of the Plan, (4) Fixing Time for Filing Objections to Confirmation of the Plan, and (5) Fixing the Date of the Hearing on Confirmation of the Plan, setting a hearing on confirmation of the Plan for October 24, 2007 (the "Confirmation Hearing").

Mr. Jape did not request any discovery, formal or informal, from the Debtor in regard to the Plan, as amended, before October, 2007, despite the fact that he has known since May of the Debtor's proposed Plan. On or about October 5, 2007, Mr. Jape requested that the Debtor make Ms. Birkhoff, Mr. Infante, Ms. Jape and Mr. Kerr all available for deposition during the week of October 15. The Debtor agreed to make each of the requested deponents available prior to the Confirmation Hearing and within a few days of the originally requested deposition dates. The Debtor provided several alternative dates for each intended deponent and communicated with counsel for Mr. Jape that the Debtor would cooperate to make these individuals available. Moreover, the Debtor has repeatedly stated that the Debtor or Ms. Birkhoff and Mr. Infante would produce the documents requested in conjunction with the requested deposition, subject to the usual objections. The depositions had not occurred at the time Mr. Jape filed his Motion. The fact that the Debtor had not

yet produced the requested documents was simply because the requested production date had not yet passed. Mr. Infante and Ms. Birkhoff did, in fact, provide the Debtor with documentation requested in conjunction with each of their depositions on October 12 and October 16, respectively, again before Mr. Jape filed his Motion.

The documents requested by Mr. Jape pursuant to O. C. G. A. §14-2-1602 are simply a red herring and not a basis for continuation of the Confirmation Hearing. As an initial matter, the Debtor agreed to produce the portion of requested documents which actually fall within the scope of O. C. G. A. § 14-2-1602. The Debtor communicated this agreement prior to Mr. Jape filing his Motion. The documents requested by Mr. Jape pursuant to O. C. G. A. § 14-2-1602 are not related to the Confirmation Hearing or the requested depositions. The only documents which would arguably be related were also requested in conjunction with the depositions of Mr. Infante and Ms. Birkhoff, and although they are not corporate records of the Debtor, were produced by Mr. Infante on October 12, 2007, and by Ms. Birkhoff on October 16, 2007. Virtually all of the remaining documents are either not corporate records maintained by the Debtor in the normal course of its business or are available in the public record because they are included as attachments to the monthly operating reports filed by the Debtor in this bankruptcy case.

Rather than asserting the numerous objections the Debtor could have asserted with respect to the documents requested by Mr. Jape pursuant to O. C. G. A. § 14-2-1602, the Debtor agreed to provide access to the requested documents. As noted above, this effort by Mr. Jape is simply a delay tactic. Mr. Jape's request for production of documents in connection with the requested depositions have failed to allow the Debtor thirty (30) days in which to produce such documents pursuant to Fed.R.Civ.P. 34, make applicable to this proceeding by Fed.R.Civ.P. 7034. Nonetheless, the Debtor has agreed to produce the requested documents. In fact, the documents were made available to Mr.

Jape only one day after the original request date, and this was simply because Mr. Jape requested to move Ms. Jape's deposition back one day.

The documents requested pursuant to O. C. G. A. § 14-2-1602 are not within the scope of documents allowed under the statute, the request was not made in good faith as is required by O. C. G. A. § 14-2-1602(d), and the documents requested are related to a new civil lawsuit filed by Mr. Jape against Ms. Jape within the last week in the Superior Court of Cherokee County (in which Mr. Jape violates the automatic stay by asserting derivative and/or other claims against Mrs. Jape which, if valid, would be property of the estate). The appropriate vehicle for requesting and producing these documents is in that new state court action. Nonetheless, the Debtor has agreed to make the accounting records requested by Mr. Jape available for his inspection, and Mr. Jape was aware of this agreement prior to filing the Motion.

The Debtor has not caused Mr. Jape any delay in obtaining information needed to prepare for the Confirmation Hearing. The Debtor has cooperated to make deponents available and to produce documents requested by Mr. Jape. The Debtor has the overwhelming support of the creditor body, and any further attempts to delay confirmation of the Plan is not in the best interest of the creditor body as a whole.

#### Conclusion

For the reasons set forth herein, the Court should deny the Motion to Compel Discovery and Motion to Continue Confirmation Hearing, and grant the Debtor such other and further relief as the Court deems just and proper.



**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a true and correct copy of the attached **Debtor's Response to Daniel L. Jape's Motion to Compel Discovery and Motion to Continue Confirmation Hearing** by causing it to be deposited in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to the following persons:

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This 19<sup>th</sup> day of October, 2007.

SCROGGINS & WILLIAMSON

/s/ J. Robert Williamson

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