

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA

RELIABLE AIR, INC.,	.	Case No. 05-85627
	.	Adv. No. 07-06352
Plaintiff,	.	
	.	
v.	.	75 Spring Street S.W.
	.	Atlanta, Georgia 30303
DANIEL L. JAPE, et al.	.	
	.	
Defendant.	.	August 9, 2007
	.	10:21 a.m.
.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JAMES MASSEY
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 THE CLERK: This is Reliable Air Inc. v. Jade et al.
2 It's a motion by plaintiff for preliminary injunction.

3 THE COURT: Parties ready?

4 MR. MALONE: Ready for the movant, Your Honor.

5 MR. MCBRYAN: Ready for respondent, Judge. Ms. Jape
6 is here.

7 THE COURT: Go ahead then. Mr. Malone. You are Mr.
8 Malone, right?

9 MR. MALONE: Yes, Your Honor. Cyrus Malone.

10 THE COURT: We have electronic court reporting. You
11 have to be at a microphone. The microphone in effect has a
12 cone that comes out. You've got to be within that cone in order
13 for your voice to be -- if I can without meaning to have a pun,
14 you can reliably record your voice.

15 MR. MALONE: Thank you, Your Honor. I understand the
16 microphone at table may not pick up as well as this microphone.

17 THE COURT: Well it will if you pull it to you.

18 MR. MALONE: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. MALONE: At this time the petitioner plaintiff
21 will call Ms. Barbara Jape to the stand.

22 THE COURT: Before we do that, let me have -- just --
23 I've read the brief that the debtor filed but I would like just
24 about five minutes for each side to tell me what their position
25 is.

1 MR. MALONE: Certainly Your Honor. On behalf of the
2 plaintiff in this case, Reliable Air, Inc. I believe it is
3 undisputed that since the company was incorporated in July of
4 1999 it has exclusively and consistently done business under
5 the name Reliable Heating & Air. It is registered Reliable
6 Heating & Air as a service mark pursuant to the Georgia service
7 mark registration statute. It has a stylized logo consisting
8 of the capital letter R with blue and red over it and followed
9 by the word Reliable Heating & Air.

10 It has used that trade name and service mark on its
11 buildings, on all of its trucks, on all of its stationery, on
12 all of its uniforms, on all of its every marketing device it
13 has used. Advertisements in the yellow pages, the white pages,
14 flyers, circulars, it has exclusively used the trade name
15 Reliable Heating & Air since 1999.

16 The shareholders of Reliable Heating & Air are Ms.
17 Barbara Jape and defendant Daniel L. Jape. They own 50/50 all
18 the stock in the company and have since the company was formed
19 in 1999. In fact, Mr. & Ms. Jape prior to the incorporation of
20 Reliable Air Inc. also did business under the same trade name
21 Reliable Heating & Air as proprietors. When the company was
22 formed in 1999, from that point forward all the business was
23 conducted in the corporate form.

24 The corporation had a tax ID number. The corporation
25 paid all the employees. The corporation paid for all the

1 equipment. The corporation received all the income from the
2 customers. So the name Reliable Heating & Air was used
3 exclusively by the corporation from 1999 forward. Ms. Jape has
4 explained that the corporation since 1999 has spent an
5 estimated \$2 million in advertising and promotion of the trade
6 name Reliable Heating & Air.

7 Things were going fine until approximately 2005 at
8 which point in time the board of directors of Reliable Air
9 removed Mr. Jape as president. This petition for relief under
10 Chapter 11 was filed I believe on November 22nd, 2005. When
11 Mr. Jape was removed as president of the corporation he left
12 the State of Georgia for a brief time and in approximately
13 August of 2006 returned to the State of Georgia.

14 At that time he and defendant Ms. Ruse began doing
15 business in Woodstock, Georgia within two miles of the office
16 of the plaintiff under the name Reliable Heating & Air. Ms.
17 Ruse first filed a trade name registration in Cherokee County
18 with the name, I believe it was Reliable Air Conditioning &
19 Heating. I think that was August 14, 2006.

20 Approximately a month later Mr. Jape himself filed a
21 trade name registration in Cherokee County under the name
22 Reliable Heating & Air, the same trade name used by the
23 corporation. Since then Mr. Jape and Ms. Ruse have been
24 conducting business from an office on Highway 92 approximately
25 two miles from the office of Reliable Air using the name

1 Reliable Heating & Air.

2 Their initial logo which is in the record and is
3 attached as an exhibit to the verified complaint is similar to
4 the Reliable Heating & Air logo but not real close to it. In
5 approximately June of this year they modified that service mark
6 logo to be a stylized R in a circle followed by the name
7 Reliable Heating & Air. The colors are different but on
8 appearance the two marks look very, very similar.

9 Furthermore, they changed the phone number of the
10 company. It originally had been a 7-7-0-3-7-7 or 9-9-4-3-7-7-7
11 or something like that. They changed it to be one digit off of
12 the number which Reliable Air, Inc. has used since 1999. The
13 Reliable Air phone number is 7-7-0-5-9-4-9-0-6-6 and the number
14 for the defendant is 7-7-0-5-9-4-9-0-9-6. In fact, the numbers
15 are so close the six being above the nine, you can accidentally
16 hit one number meaning to hit the other number. We
17 respectfully submit that was part of an intentional plan on the
18 defendant's part.

19 There are emails from Mr. Jape to Mrs. Jape and to
20 his daughter Elizabeth who at that time was working in the
21 company wherein he states his intent is to, and I quote
22 "decimate the company." He says his intent is to destroy his
23 former company. He has employed I think five or six, at least
24 five employees have been taken by Mr. Jape from Reliable Air,
25 Inc. to his new business. The impact upon the business has

1 been considerable. The sales are down approximately \$1 million
2 from this time last year.

3 It is impossible, Judge, to point to a specific
4 dollar and say but for the action of defendant, we would have
5 made that dollar. Under the laws applicable to this case the
6 plaintiff does not have to prove that. The plaintiff shows an
7 infringement of a mark entitled to protection and then the
8 sales of the defendant become the measured damages and put the
9 burden upon the defendant to prove offsetting costs and
10 expenses or that it was not due to an infringement on their
11 part.

12 The plaintiff is seeking relief under both Georgia
13 common law, the Georgia statutory law, the uniform deceptive
14 trade practices act and the ladam act embodied in the federal
15 code. The applicable standard of law is announced both by the
16 Eleventh Circuit and the Georgia Court of Appeals is identical.
17 In fact if you read the Georgia cases they cite Eleventh
18 Circuit cases as the controlling law.

19 The question is whether or not there is a likelihood
20 of confusion. And the standards applied for that are the
21 similarity of the name, the similarity of customers, the
22 similarity of the markets, the similarity of the advertising
23 means, evidence of the intent of defendant and evidence of
24 actual confusion.

25 Your Honor, the plaintiff will establish that a day

1 does not go by that at least eight, ten or twelve customers
2 call confused as to why there are two Reliable Heating & Airc
3 both facing Highway 92 in Woodstock, Georgia two miles apart.
4 Shipments intended for the defendant are received at the
5 plaintiff's office and vice versa. Calls are misdirected from
6 one to the other.

7 We have evidence in the last two months alone of an
8 estimated 300 or 400 customer calls. My clients have dozens,
9 perhaps 50 or 60 coupons distributed by the defendant where a
10 customer thinks it is the plaintiff's coupon and calls for
11 service and the people show up and they present the defendant's
12 coupon. The plaintiff honors it because they don't want to
13 have the customer irritated. This type of actual confusion is
14 clear. When you read the cases, it's rare to see a case with
15 this many clear cut instances of actual confusion on the part
16 of the consumers.

17 The intent of the defendant is further clear,
18 changing the phone number to one digit from that of the
19 plaintiff. The email where he says he's going to decimate the
20 company, stealing the customers -- stealing employees rather
21 and the customers. The intent is clear. These are the same
22 companies selling the same services to the same market to the
23 same customers through the same advertising using the same
24 name.

25 When you get involved in cases like this there is

1 often a distinction is are the names similar. A famous case is
2 Conagra v Singleton. YOU had Singleton Packing v. Singleton
3 Shrimp. Are they close enough? Judge, we have the same name
4 here. The infringement is clear. We respectfully submit in
5 this case that more importantly if this is not stop and
6 enjoined, this debtor may not survive long enough to complete
7 his plan.

8 MR. MCBRYAN: Good afternoon, Your Honor. Lou
9 McBryan for the defendants. We've met before and on a
10 preliminary note I need to point out to you that you have made
11 this point and I think it's true, this is a divorce claim not
12 bankruptcy. Besides my lawyers and defendants, the parents of
13 Mr. & Mrs. Jape -- Mr. Jape. On this side the son, daughter
14 and fiancé of the Jape children. It's a divorce.

15 But Mr. Malone negates or fails to mention one
16 particular point for this whole case, he's got to prove the
17 ownership of the mark relies in the plaintiff or a completely
18 exclusive license granted to it by the Japes.

19 THE COURT: Let me ask you a question on that score.
20 Why doesn't -- as of the date of the petition was filed, why is
21 it that Reliable Air Inc. did not own the trade name under
22 common law?

23 MR. MCBRYAN: Never owned the trade name, Judge,
24 under common law at all.

25 THE COURT: It used it.

1 MR. MCBRYAN: So, you've got to own it.

2 THE COURT: Why isn't that an ownership right?

3 MR. MCBRYAN: It's not. The law on trade names,
4 trademarks is to own it, it must be transferred or assigned to
5 you. Just because it filed bankruptcy, it doesn't get any
6 better rights than what it had to begin with in the bankruptcy
7 code.

8 THE COURT: That's my point. If on November 21, 2005
9 Reliable Air Inc was using the trade name Reliable Heating &
10 Air, why isn't that a property right such that any attempt by
11 the defendants to use that trade name, registration for
12 example, is a violation of the automatic stay?

13 MR. MCBRYAN: Because the registration was registered
14 by Mr. Jape.

15 THE COURT: I understand that.

16 MR. MCBRYAN: And he owns that name.

17 THE COURT: But if there is -- what I'm trying to get
18 to is and maybe you are answering my question, it is your
19 contention that simply registering the trade name is what it
20 takes to own a trade name? You can't own a trade name without
21 registering it.

22 MR. MCBRYAN: No, sir. I believe by using the trade
23 name and operating your business as a trade name and then
24 registering your trade name gives you the ownership rights.
25 And Mr. Jape did all those things prior to 1999. They skipped

1 a part. Remember you will see ads and they are in the booklets
2 by this debtor up until just recently where it says established
3 1978. And the allegation in the complaint is the corporation
4 was formed in 1999.

5 Now what got transferred to the corporation? The
6 evidence is going to show that not the trade name or the
7 service marks. So what we have here is -- the point is first
8 off is, Judge, this is a divorce case. Without knowing about
9 the bankruptcy all though it's irrelevant on November 23rd,
10 2006 in the Superior Court of Cherokee County in the Exhibit
11 Book we have a certified copy of the standing order of divorce
12 saying you can't transfer any assets of a divorced person to
13 without that Court's approval.

14 So I don't believe that this Court has jurisdiction
15 and Ms. Howick will talk to you about that issue because how
16 did the company get the name? I don't think that the evidence
17 is going to show that the company has an interest other than a
18 license terminable at will, which Mr. Jape did.

19 Second, to the extent that as Mr. Malone did point
20 out accurately, that Mrs. Jape was involved in the company, the
21 business of Reliable Heating & Air prior to 1999. She is
22 subject to the divorce to the extent that her interest is there
23 and she wants to transfer it, she's estopped from doing that as
24 well based upon that divorce matter. The Court is aware of my
25 withdrawal of the reference issue. We filed that yesterday.

1 We've asked for a jury demand. We'll leave it to a non-core
2 proceeding to which a district court needs to hear this.

3 I would like Ms. Howick to address the divorce action
4 before this Court is aware of that. But I want to go on in
5 just a moment on the non-core proceeding because it's a jury
6 demand that we've asked for. They've alleged that this is a
7 core proceeding. We dispute that entirely. First off, it's
8 not property of the estate. We have made this point time and
9 time again in multiple hearings or the adversary if the Court
10 recalls dismissed in 2006. This debtor has never listed in its
11 schedules or statement of financial affairs a property right
12 and any intellectual property, trademark or trade names. It
13 just never has.

14 Look on Schedule B on the exhibits, it's not in
15 there. Even as most recently as I believe May, the debtor
16 filed a second amended disclosure statement showing a
17 liquidation analysis, good will, trade name, registration
18 marks, not on it. No reference to it whatsoever.

19 So but here they come in today in August or late July
20 and ask for preliminary injunction on it. You've got to save
21 our trade name that we're not going to tell the other creditors
22 about. Disingenuous. Without waiving the objection to the
23 jurisdiction, Judge, let's go through this.

24 Mr. Jape forms this company in 1978, the entity with
25 money from family and brings it through. He owns it.

1 Corporation is formed in 1999. We have witnesses here. No one
2 has asked for sequestration. I don't think it's much in
3 dispute. No transfers. The lawyer who did the incorporation,
4 no transfer of assets. July 1999.

5 September 1999 Mr. Jape individually registers the
6 trade name, two months after the incorporation. Kind of
7 inconsistent with a transfer. He goes along there. They raise
8 the issue it's a license, we paid money. No doubt. But let's
9 look at this company. It's an S-corp, it's a pass-through.
10 The testimony, what's the difference between how you operated
11 before the incorporation and after? None. It's my company.

12 Ads post 1999, pictures of Mr. Jape, owner. It
13 doesn't say Reliable Inc. owner. It says Dan Jape, owner, 100
14 percent satisfaction guaranteed. He was there, maybe not
15 daily, but pretty much every day or every other day and so
16 forth and there's some sporadic issues. We're not going to
17 dispute that. This is a divorce case that started in 2003 and
18 didn't get filed until 2005.

19 But he was there. What was his job? Advertising,
20 marketing, sales, service, making sure the quality is there.
21 What's the license he granted? As long as I work there, you
22 get to use my name. I don't work there, you're going to cut me
23 out, I'm going to take it away. They raised the issue, he
24 moved to Florida. This Court heard testimony in other matters
25 that you'll hear it again today. Why did you move to Florida?

1 This is a regulated industry. He can't get a job if he's got a
2 criminal complaint pending against him. He just can't get a
3 job.

4 Mrs. Jape through what this Court hasn't ruled on but
5 the bankruptcy is filed. The bankruptcy is filed, we know
6 that. The Court has ruled on that. But how he was terminated
7 as an employee and a president, that's still an issue but
8 that's an issue against Ms. Jape personally and that'll be
9 counterclaims. But that's how it happened. That's a divorce
10 action, Judge. The criminal matter testimony you've already
11 heard, dismissed in September of '06.

12 August they start thinking about competing. Ms. Ruse
13 registers. What Mr. Malone said was wrong. In our exhibit
14 book is a certified copy of the registration by Dan Jape of the
15 trade name Reliable Heating & Air Conditioning. He did not re-
16 register Reliable Heating & Air. He didn't have to. He still
17 owned it.

18 At the time that he was fully sporadic and they are
19 trying to claim abandonment of the mark, he was in charge of
20 the mark. He's getting paid by the company to do exactly that,
21 to make sure that he's got quality control and making sure it's
22 a good company still. He's kicked out in '05. He gets started
23 to get his life back together in '06 after that trumped up
24 criminal matter. He starts competing because he owns the name.

25 He starts up Reliable Heating & Air Condition,

1 Reliable Air Conditioning & Heating. It doesn't make a
2 difference. He's competing. He's using the name Reliable
3 because he owns it. He gets complaints from customers that the
4 quality of service at Reliable Heating & Air which is plaintiff
5 using his name for that, that the plaintiff's quality has
6 diminished considerably under the tenure of Mrs. Jape. In
7 December of '06, I on behalf of him, sent a count letter to
8 plaintiff's counsel terminating the permissive use, the license
9 to use the name Reliable Heating & Air.

10 Plain and simple. They continue to operate. Mr.
11 Jape continues to operate. There is no acquiesces on either
12 part I don't think. But they've been operating since September
13 or August using what they say similar. We revoked in December
14 with the counterclaims. I don't think there is any acquiesces.
15 It's a question of perhaps something else. But in this
16 particular case, Judge, it's a license. That is terminable at
17 will. The Eleventh Circuit has said that. The case is Coach
18 House Restaurant Inc. v. Coach and Six Restaurants Inc. It's
19 an Eleventh Circuit case, 934 F 2nd 1551.

20 But I do want to make clear to the Court in that case
21 the Court found against the petitioner and said you waited too
22 long. And that particular case folks up in New York let the
23 folks in Atlanta use the mark of the transom and the horse.
24 Perhaps the Judge remembers Coach and Six on Peachtree Street.

25 That was a relationship, a familiar and friendly

1 relationship. You can use my mark. I'm going to try and help
2 you get started. Coach and Six actually does pretty well and
3 registers the mark. Coach House Restaurant in New York
4 complains. The Court says you waited too long. It's been
5 almost 20 years, you let them build up their book. I'm sorry
6 most licenses are terminable at will but in this case too long.
7 Not this case.

8 Dan Jape and Reliable Air d/b/a Reliable Heating &
9 Air at the time of corporation, they were the same. Dan Jape
10 is Reliable Heating & Air. Post-bankruptcy this debtor used on
11 its trucks Dan's Georgia registration number, on permits they
12 used his license number, post-bankruptcy. Dan complained
13 vehemently to his wife Barbara Jape, take my registration off
14 your trucks. And they did.

15 Is that marketing? Yeah because the Georgia
16 registration numbers aren't issued any more. Dan took steps to
17 protect his marks and they belonged to him and they are just
18 terminable at will and we've terminated and this Court should
19 find that these folks in the counterclaim which will be filed
20 on August 20, they are unfairly competing. I'm going to ask
21 the debtor not to use his marks and we want this Court to find
22 that Dan Jape is the owner not plaintiff.

23 THE COURT: Mr. McBryan, what is the status of the
24 divorce case right now?

25 MR. MCBRYAN: As I understand it from Mr. Jape that

1 his counsel, Ms. Patty Ball Hasty, Pope & Ball have requested
2 mediation or some discussion with Mrs. Ball -- Mrs. Jape's
3 lawyer and had not received a response. They can argue about
4 that but I understand -- basically it's still pending.

5 THE COURT: The case is still pending.

6 MR. MCBRYAN: It's still pending. Nothing's been
7 done. I, you know, I don't know what to tell you Judge.
8 Unfortunately you are more active in the divorce than the Judge
9 right now. I'd like Ms. Howick to address briefly if you don't
10 mind that divorce action.

11 THE COURT: Thank you.

12 MS. HOWICK: Good morning, Judge Massey. I'm Susan
13 Howick. I'm one of Mr. McBryan's partners. I have to agree
14 with what he is saying that this is a divorce case that's gone
15 awry. And the issues that are before you, Your Honor, are
16 usually issues that we resolve in divorce court. We don't
17 bring these issues into bankruptcy court.

18 I do commercial litigation and divorce and we
19 typically as divorce attorneys resolve the issue of equitable
20 division of marital assets. The plaintiff's case rests soundly
21 on their use of the trademark and trade name. If you listen
22 carefully to what Mr. Malone said in his opening remarks, he
23 stated that it is undisputed that the company has consistently
24 used the name on buildings, trucks, etcetera. The debtor has
25 used the name.

1 But they must show ownership. Now with certified
2 copies of the exhibits that we have, one of the certified
3 copies is a registration --

4 THE COURT: You are off divorce now.

5 MS. HOWICK: I'm going right into divorce, Your Honor.
6 -- is the registration by Mr. Jape of the trade name in
7 September of 1999. The company rocks along and uses the trade
8 name. However, it has never owned the trade name. It's been
9 consistently owned by Mr. Jape.

10 Upon the filing of the divorce which is quickly on
11 the heels of the filing of the bankruptcy in this case, the
12 Court issued a standing order. Exhibit 5 is a certified copy
13 of the standing order issued in the Superior Court of Cherokee
14 County in the divorce case.

15 Under Georgia law pending -- dealing with divorces
16 specifically OCGA Section 19-5-7 after a petition for divorce
17 has been filed, no transfer of property by either party except
18 a bonafide transfer in payment of pre-existing debt shall pass
19 title so as to avoid the vesting thereof according to the final
20 verdict. In English, what that means is, once a divorce is
21 filed the parties are prohibited from making any transfers of
22 assets until the Court has determined the issue of equitable
23 division of a marital asset.

24 So our position, this is a marital asset. It was
25 registered by Mr. Jape individually after the incorporation of

1 the business. He did in fact put both names on there. He
2 registered it but put his names and Barbara Jape's name as
3 operating the company but individually. The name Reliable Air
4 Inc. does not appear anywhere on the registration. That means
5 that the individuals owned it. They could not have transferred
6 it to the company post-divorce. They are prohibited from doing
7 so.

8 There is an enabling statute in Georgia law regarding
9 standing orders and that is OCGA 19-1-1 which again states that
10 it binds all of the parties and those acting in concert with
11 them, their agents, service and employees and enjoins and
12 restrains any party in a divorce action from selling,
13 encumbering, trading, contracting to sell, or otherwise
14 disposing or removing from the jurisdiction without permission
15 any property of the parties.

16 THE COURT: Ms. Howick, I'm going to ask you this
17 question. Why can't the divorce case just be put on the trial
18 calendar by Mr. Jape if Mrs. Jape doesn't do it?

19 MS. HOWICK: You know, Your Honor, it could be and it
20 needs to be clearly because this issue is out there floating
21 around and it needs to be resolved. But it needs to be
22 resolved by the divorce court and not by this court. It's a
23 marital asset.

24 THE COURT: Okay, thank you. All right, Mr. Malone,
25 call your first witness.

1 MR. MALONE: Very briefly Your Honor. I may be
2 assisted by Ms. Ray here on the intricacies of the bankruptcy
3 case and forgive me if I am not an expert in that area. I
4 profess no expertise, but I do note in the second amended
5 disclosure statement filed by the debtor in Section 3.7
6 discussing the adversary proceeding Daniel Jape, the debtor
7 stated, and I quote, "Mr. Jape and Ms. Ruse were operating a
8 competing business in the same market, are using the debtor's
9 trade name Reliable Heating & Air which is deceptively similar.
10 They are infringing upon the registered service mark."

11 I think the debtor has clearly stated this issue in
12 the pleadings in this case and has put them on notice. The
13 fact that they did not or may not have specifically said good
14 will or something like that it is inherent in the nature of the
15 business.

16 As far as the divorce goes, it is pitting but this
17 is not a divorce. This involves the corporation Reliable
18 Heating & Air. The fact that Mr. Jape when he filed a
19 registration in 1999 put it in the name of Dan Jape and Barbara
20 Jape has no impact upon this case. Registration is permissive.
21 If you don't register, the only penalty is you have to pay the
22 cost. It does not alter the rights of the party and what they
23 did in '99 does not undo what has happened from '99 through
24 2006.

25 All of the payments made were made by Reliable Air

1 Inc. And yes, I do say use because you have to use a trade
2 name to own the trade name. You don't own it before you use
3 it. You acquire trade name by use. It exists only as an
4 incident to the operation of a going concern. And as to both
5 the Ladam Act and Georgia case law recognizes and the cases are
6 cited in my brief, you can only own a name by using it.

7 That name is abandoned if it is not used in commerce.
8 Mr. Jape could not have this inchoate ownership floating around
9 while Reliable Heating & Air is spending millions of dollars to
10 further its name and to promote the name and to establish the
11 trade name. Cited in our brief is the case of Tanner Brice
12 Company in which the Georgia Court of Appeals stated that where
13 a license is coupled with the expenditure of funds, the license
14 becomes irrevocable. That applies to the trade name. That was
15 the issue in the Tanner Brice case. Can a license to use a
16 trade name become irrevocable and the answer is yes.

17 Here we have testimony and it is undisputed the
18 advertising has been shown by the defendant is copious. Ms.
19 Jape will testify to an estimated \$2 million since 1999.
20 They've clearly spent money. They've clearly relied. In fact,
21 I don't have the Coach and Six case at hand but I think the
22 principle announced in there by Mr. McBryan is true. There
23 would be an estoppel which is essentially what the Tanner Brice
24 case amounts to.

25 We submit this is the case Reliable Air Inc. is a

1 corporation. While the stock may be an asset of Mr. and Ms.
2 Jape, that's a personal asset. We're here just dealing with
3 the rights of the corporation. Not the ownership of Mr. and
4 Mrs. Jape. It's not a divorce, it's a bankruptcy. We need to
5 protect this debtor.

6 THE COURT: Call your first witness.

7 MR. MALONE: I call Barbara Jape.

8 B A R B A R A J A P E, WITNESS, SWORN

9 THE CLERK: Please be seated. State and spell your
10 last name.

11 THE WITNESS: Barbara Jape, B-a-r-b-a-r-a J-a-pe.

12 DIRECT EXAMINATION

13 BY MR. MALONE:

14 Q Ms. Jape, where are you employed and what is your job
15 title?

16 A I am employed by Reliable Air Inc. and I am the president
17 of the corporation.

18 Q Ms. Jape you have before you a collection of documents
19 with a binder clip. I ask you to please look at what is the
20 top exhibit marked as Plaintiff's Exhibit 1 and ask if you can
21 identify that please.

22 A Yes, sir. It is a certificate of existence from the State
23 of Georgia, Secretary of State's office, for Reliable Air Inc.

24 Q And that shows it was formed when?

25 A July 26, 1999.

1 Q Were you involved in the formation of that corporation?

2 A Yes, sir.

3 MR. MALONE: Your Honor, that is a certified copy
4 from the Secretary of State and we tender Exhibit 1 into
5 evidence.

6 THE COURT: Any objection?

7 MR. MCBRYAN: No objection.

8 THE COURT: Exhibit 1 is admitted without objection.

9 Q Before you formed Reliable Air Inc. were you doing
10 business in that same line of work?

11 A Yes, we were.

12 Q You say we, who is we?

13 A Mr. Jape and I.

14 Q That is Daniel L. Jape, the defendant in this case?

15 A Yes, sir.

16 Q And you and Mr. Jape as we know are married, correct?

17 A Yes, sir.

18 Q All right. When were you and Mr. Jape married?

19 A December 1, 1984.

20 Q And you are still married today?

21 A Yes, sir.

22 Q Who are the shareholders of Reliable Air Inc.?

23 A Mr. Jape and myself.

24 Q What is the respective ownership of the stock in that
25 company?

1 A We each own 50 percent.

2 Q Prior to the formation of Reliable Air Inc. under what
3 name were you and Mr. Jape doing business?

4 A Reliable Heating & Air.

5 Q How long had you been doing business under that name?

6 A Twenty -- well I met Mr. Jape in 1982 and we began working
7 together at that time. So since then and he had been using the
8 name before he met me.

9 Q At one point in time prior to 1999 did you file another
10 corporation did you not, or formed another corporation?

11 A We did.

12 Q What was the name of that corporation?

13 A Jape Air Inc.

14 Q Did it also do business with the name Reliable Heating &
15 Air?

16 A It did.

17 Q Who were the stockholders of that corporation?

18 A Mr. Jape and myself.

19 Q What was the stock ownership of Jape Air Inc.?

20 A I owned 51 percent and he owned 49 percent.

21 Q What happened to Jape Air Inc.?

22 A We dissolved the corporation.

23 Q When Reliable Air Inc. was formed in 1999, did it open a
24 bank account?

25 A Yes, sir.

1 Q Did it obtain a federal tax ID number?

2 A Yes, sir.

3 Q Did it have employees?

4 A Yes, sir.

5 Q Was all of the wages of those employees paid by Reliable
6 Air Inc.?

7 A They were.

8 Q What name did Reliable Air Inc. use when it began
9 operations in 1999 as a trade name?

10 A Reliable Heating & Air.

11 Q For clarity, I will refer to Reliable Heating & Air as
12 Reliable Air Inc. and the company being operated by Mr. Jape
13 and Ms. Ruse as Daniel Jape Company.

14 MR. MCBRYAN: I don't understand that.

15 THE COURT: I think what he's saying is so that the
16 record is clear he's going to refer to the plaintiff by it's
17 actual corporate name Reliable Air Inc. and he's going to refer
18 to the company operated by Mr. Jape and Ms. Ruse as the Jape
19 Ruse Company or something like that.

20 MR. MALONE: Yes, Your Honor. I will refer to
21 Reliable Air Inc. as Reliable Air Inc. I think that will be
22 more clear.

23 Q What is the business of Reliable Air Inc.?

24 A We service and install residential heating and cooling --
25 heating, cooling, and ventilation equipment as well as some

1 light commercial.

2 Q Is the sale and servicing of that equipment regulated by
3 the State of Georgia?

4 A Yes, sir.

5 Q In what way?

6 A You have to have a license to operate a -- you have to
7 have a warm air license in order to do that.

8 Q Do you have such a license?

9 A I do.

10 Q Is it in your name?

11 A Yes, sir.

12 Q And is your license the license being used by Reliable Air
13 Inc. for its operation?

14 A It is.

15 Q What type of heating and air conditioning equipment are
16 you permitted to sell and service?

17 A We, um, five ton or less.

18 Q So that would confine you to residential and light
19 commercial?

20 A Yes, sir.

21 Q And is that the business in which you are engaged, your
22 company rather?

23 A Yes, sir.

24 Q Where are your offices located?

25 A We are at 110 London Dairy Court, Woodstock, George,

1 30188.

2 Q And is that on Highway 92 or does that face Highway 92?

3 A Yes, sir. It's clearly visible from Highway 92.

4 Q Does Reliable Air Inc. have a marking sign out close to
5 Highway 92?

6 A We have a billboard right directly in front of the
7 building that we occupy.

8 Q Since Reliable Air Inc. was incorporated, where have its
9 offices been located?

10 A Originally we were at -- when the incorporation took place
11 we were still in Roswell at 1264 Alpharetta Street. We had
12 purchased the land at 15021 Highway 92 and had not completed
13 construction. We moved into it I believe in January 2000.

14 Q When you say 15021 Highway 92 is that in Woodstock,
15 Georgia?

16 A Yes, sir.

17 Q How far is that address from the present address you are
18 occupying at London Dairy Court?

19 A Approximately two or three miles.

20 Q All right. How long did Reliable Air Inc. occupy the
21 offices at 15021 Highway 92 in Woodstock, Georgia?

22 A Until the end of September, beginning of October of 2006.

23 Q And 2006 September or October, you then moved to London
24 Dairy?

25 A Correct.

1 Q Where are the customers of Reliable Air Inc. located?

2 A The majority of the customers are in the north metro area,
3 specifically the Roswell, Alpharetta, Woodstock, East Cobb,
4 Marietta areas.

5 Q When you say north metro, you mean north metro Atlanta,
6 Georgia?

7 A Yes, north metro Atlanta, sorry.

8 Q Is that the area in which Reliable Air Inc. primarily
9 conducts its business?

10 A Yes, sir.

11 Q And where does Reliable Air Inc. market its services?

12 A In that same general area.

13 Q How do you market or how does Reliable Air Inc. market its
14 services?

15 A We are in coupon books, we are in newspapers, we do direct
16 mail, we are on the radio, we are in the yellow pages.

17 Q Do you have an Internet site?

18 A Yes, sir, we do.

19 Q What is the Internet address?

20 A ReliableAir.com.

21 Q Since the corporation was formed in '99, can you tell the
22 Court approximately how much Reliable Air Inc. has spent in
23 advertising and marketing?

24 A It fluctuates. We normally spend anywhere from \$210, just
25 so far this year we've spent \$237,000. When Neil Bortch

1 (phonetic) was an advertiser for us through Member Of's &
2 Carrier (phonetic) that was probably 300 or \$400,000 a year by
3 itself in addition to the other monies.

4 Q What would the estimate then be since 1999 the amount of
5 money Reliable Air Inc. has spent advertising and marketing?

6 A Somewhere between 1.5 to \$2 million.

7 Q In all of the ads and all of the marketing, has Reliable
8 Air Inc. always used the name "Reliable Heating & Air?"

9 A Yes, sir.

10 Q Has Reliable Air Inc. ever done business under any other
11 name?

12 A No, sir.

13 Q How many employees does Reliable Air Inc. now have?

14 A At this moment we have approximately 27.

15 Q And does Reliable Air Inc. pay all the wages for those
16 employees, withholding and similar payments?

17 A Yes, sir.

18 Q From what companies does Reliable Air Inc. purchase the
19 equipment that it installs?

20 A We are predominately Carrier and Trane.

21 Q Where do Carrier -- excuse me, where does Carrier maintain
22 its manufacturing facilities?

23 A They have one in Tennessee and one in -- hang on. The
24 Carrier's main plants are in Indianapolis, Indiana and
25 Collierville, Tennessee.

1 Q And your other distributor was who? Your other supplier.

2 A Trane.

3 Q Where are there facilities located?

4 A Cookville, Tennessee and Tyler, Texas.

5 Q Do you represent any other companies that have
6 manufacturing facilities outside the State of Georgia?

7 A We do a large number of work with research products which
8 is based out of Madison, Wisconsin.

9 MR. MCBRYAN: Objection, Your Honor. Ms. Jape is
10 referring to something and reading some documents. I don't
11 know what she's reading from. She's testifying it's Tennessee
12 and so I don't know if it's an exhibit. Is she looking at
13 documents that I'm not aware of.

14 THE WITNESS: It's simply a cheat sheet that I made
15 so that I would not forget the names of the towns.

16 THE COURT: Then turn the cheat sheet over then and
17 don't use it.

18 THE WITNESS: All right.

19 Q You mentioned that Reliable Air Inc. advertises on the
20 radio, which radio?

21 A 1620. It's a small AM station.

22 Q You previously said you advertised with Neil Bortch?

23 A Yes, sir.

24 Q Is that WSB AM 750?

25 A It was.

1 Q Do you know how wide a range WSB AM 750 covered at that
2 time?

3 A I would assume the majority of Georgia and possibly other
4 states. I don't really know.

5 Q Ms. Jape you have before you what has been marked as
6 Exhibit 2. Please look at that and identify it if you can.

7 A It is the certification of the registration of the service
8 mark for Reliable Air Inc..

9 MR. MALONE: Your Honor, that is a certified copy of
10 records from the Secretary of State of Georgia Corporation
11 Division concerning the registration of the service mark
12 Reliable Heating & Air. We tender this into evidence at this
13 time.

14 THE COURT: Any objection?

15 MR. MCBRYON: No objection, Your Honor.

16 THE COURT: Plaintiff's Exhibit 2 is admitted without
17 objection.

18 Q Ms. Jape did you anticipate in having that service mark
19 registered?

20 A I did.

21 Q And it is a service mark under the name of Reliable Air
22 Inc., correct?

23 A It is.

24 Q Please look at what has been marked as Exhibit 3 and tell
25 me if you can identify that for the Court please.

1 A It is a piece of our letterhead stationery that we use.

2 Q That is the letterhead stationery used by Reliable Air
3 Inc. in its operations?

4 A Yes, sir.

5 MR. MALONE: We tender Exhibit 3.

6 MR. MCBRYAN: No objection, Your Honor.

7 THE COURT: Exhibit 3 is admitted with no objection.

8 Q Does that exhibit show the service mark on the top of the
9 page?

10 A Yes, sir, it does.

11 Q That is a white capital R with a red semicircle above it
12 and a blue semicircle below it followed by the name -- the
13 words Reliable Heating & Air, correct?

14 A Yes, sir.

15 Q Reliable being in blue, Heating & Air being in red?

16 A Yes, sir.

17 Q Is that the service mark which is represented by Exhibit
18 P-2?

19 A Yes, sir.

20 Q Ms. Jape, you have before you what's been marked as
21 Exhibit 4. I ask if you can identify that please?

22 A It is a copy of the yellow page ad that Reliable Air Inc.
23 is running in the Roswell Alpharetta phone book.

24 Q Is that a true and correct copy of an advertisement being
25 used currently by Reliable Air Inc. in the yellow pages?

1 A Yes, sir.

2 MR. MALONE: I tender Exhibit 4 at this time, Your
3 Honor.

4 THE COURT: Any objection?

5 MR. MCBRYAN: No, Your Honor.

6 THE COURT: Exhibit 4 is admitted without objection.

7 Q Does that also reflect the service mark which was
8 registered on behalf of Reliable Air Inc.?

9 A Yes, sir, it does.

10 Q I note the words get comfortable with Reliable above the
11 service mark. Is that a tag which Reliable Air Inc. has used
12 in advertisement in the past?

13 A Yes, sir.

14 Q How long has Reliable Air used that tag in its
15 advertisement?

16 A I believe the first time we used it was in the yellow
17 pages either in 2000 or 2001.

18 Q What company or entity paid for the yellow page ads?

19 A Reliable Air Inc.

20 Q Yellow page ads are pretty expensive, aren't they?

21 A Yes, sir.

22 Q There's a telephone number displayed on Exhibit 4;
23 770-594-9066. Is that the telephone number for Reliable Air,
24 Inc.?

25 A Yes, sir, it is.

1 Q Has Reliable Air, Inc. had that number consistently since
2 it was incorporated in 1999?

3 A Yes, sir.

4 Q Has it used that telephone number in all of its
5 promotional activities?

6 A Yes, sir.

7 Q Ms. Jape, you have before you a photograph of a vehicle
8 marked as Exhibit 5. Can you identify that, please?

9 A It is a -- one of the service vans for Reliable Air, Inc.

10 Q Does that display the service mark logo on the side of the
11 van?

12 A Yes, sir.

13 MR. MALONE: Tender Exhibit 5 at this time.

14 THE COURT: Any objection?

15 MR. McBRYAN: No, Your Honor.

16 THE COURT: Exhibit 5 is admitted without objection.

17 Q How many trucks does Reliable Air, Inc. have out on the
18 roads right now?

19 A We have approximately 12 or 13 on the road. We have
20 probably 30 or 35 that we own.

21 Q Ms. Jape, you have before you a document that has been
22 marked as Exhibit 6. Can you identify that, please?

23 A That is the -- that is our marquee sign that we have on
24 our place of business.

25 Q That is the sign that appears above the place of business

1 of Reliable Air, Inc.?

2 A Yes, sir.

3 Q Htg. is an abbreviation for heating?

4 A Yes, sir.

5 Q Why'd you use an abbreviation?

6 A It would not fit between the two windows if it was spelled
7 out.

8 MR. MALONE: Tender Exhibit 6.

9 THE COURT: Any objection?

10 MR. McBRYAN: No, Your Honor.

11 THE COURT: All right. Exhibit 6 is admitted without
12 objection.

13 Q Ms. Jape, in addition to the building sign, the stationery
14 and the size of the truck, has that service mark, Reliable Heat
15 and Air, been used by Reliable Air, Inc. on all its employee
16 uniforms?

17 A Yes, sir.

18 Q Has it been used on all invoices and stationery and sent
19 out to customers?

20 A Yes, sir.

21 Q And has it been used in all advertisements of the company
22 since 1999?

23 A Yes, sir.

24 Q And you estimated approximately since 1999 that Reliable
25 Air, Inc. has spent \$2 million in advertising?

1 A Yes, sir.

2 THE COURT: I think she said between one and a half
3 million and two million.

4 MR. MALONE: I stand correct, Your Honor. I agree.
5 That is what she said.

6 Q Prior to its present location, you stated that Reliable
7 Air, Inc., doing business as Reliable Heating and Air, was
8 located at 15021 Highway 92 in Woodstock, Georgia from
9 approximately 2001 until 2006, correct?

10 A Yes, sir.

11 Q Did the company have a prominent street sign visible from
12 Highway 92 throughout that time?

13 A Yes, sir.

14 Q Is Highway 92 a heavily traveled street in Woodstock,
15 Georgia?

16 A Yes, sir, it is.

17 Q How many lanes are on Highway 92? Do you know?

18 A Four.

19 Q Who are the members of the board of directors of Reliable
20 Air, Inc.?

21 A I'm a member of the board, Mr. Jape is a member, and Dean
22 Edelman is a member.

23 Q Did Mr. Jape -- Daniel L. Jape -- ever hold an office in
24 Reliable Air, Inc.?

25 A He did.

1 Q What office was that?

2 A He was the president.

3 Q Ms. Jape, you have before you a letter marked as
4 Plaintiff's Exhibit Number 7. Can you identify that, please?

5 A It is a letter from the firm of Meadows Ichter & Trigg to
6 a businessman who -- to a Mr. Williams who was operating a
7 business, Reliable Duct Cleaning.

8 Q Was that document kept in the regular course of business
9 from Reliable Air, Inc.?

10 A Yes, sir.

11 Q And was it the regular course of business to keep and
12 maintain records such as that?

13 A Yes, sir.

14 MR. MALONE: We tender Exhibit 7 as a business
15 record.

16 THE COURT: Any objection?

17 MR. MCBRYAN: No, Your Honor.

18 THE COURT: Exhibit 7 is admitted without objection.

19 Q Exhibit 7 indicates that a copy was sent to Mr. Dan Jape.
20 Do you know if that is, in fact, how you got that copy or had
21 the company?

22 A Yes, sir.

23 Q Did Mr. Jape, in fact, deal with the attorneys that were
24 handling that matter?

25 A He did.

1 Q Was he the one that employed them?

2 A Yes, sir.

3 Q All right. On the first line it says, "The firm
4 represents Reliable Air, Inc. D/B/A Reliable Heating and Air."
5 Throughout the time he was working the company, did Mr. Jape
6 ever question or dispute the right of Reliable Air, Inc. to use
7 the trade name Reliable Heating and Air?

8 A No, sir.

9 Q Was there a time at which Mr. Jape ceased to be an officer
10 of the corporation?

11 A Yes, sir.

12 Q And when was that, approximately?

13 A November of 2005.

14 Q And how was it he ceased to be a member -- or rather an
15 officer of the corporation?

16 A A board meeting was held at the offices of Kelley Kitchens
17 and Gaynes, and he was removed from office by action --

18 Q Who was present?

19 A -- of the board.

20 Q Who was present at --

21 Q Richard Bennett was the attorney present. I was present.
22 Mr. Jape was present, and Dean Edelman was present on speaker
23 phone. He had since moved to Las Vegas.

24 Q Following that removal as an officer of the corporation,
25 did Mr. Jape ever have occasion to leave the State of Georgia?

1 A Yes, sir.

2 Q Where did he go?

3 A To Florida.

4 Q And how do you know that?

5 A At the time I'm not quite sure how I found out. I think
6 the children may have found out or somebody else told me. I
7 don't really know.

8 Q Ms. Jape, you have in front of you --

9 MR. MALONE: -- and I have one exhibit, Your Honor,
10 which is a certified copy of a trade name registration in
11 Cherokee County for which I don't have with me extra copies. I
12 have photocopies, but I just got the certified copy this
13 morning and had not yet had a chance to make a photocopy for
14 counsel. May I show it to counsel?

15 THE COURT: Yes.

16 (Pause)

17 THE COURT: Has that exhibit been marked? The one
18 you just --

19 MR. MALONE: It has been marked, Your Honor, but I
20 have Exhibit 8. The trade name application registration filed
21 by Ms. Ruse has been marked Exhibit 9, I have a certified copy.

22 THE COURT: That's the one you don't have the -- any
23 other copy.

24 MR. MALONE: That's the one that I have not yet
25 copied.

1 THE COURT: All right. I just wanted to know what
2 the exhibit number was. That's fine.

3 MR. MALONE: I'll put it -- it's marked. I'll put it
4 on the screen. Exhibit 8 is a certified copy from the clerk
5 Superior Court of Cherokee County of a registration of a trade
6 name by Kim Ruse, R-u-s-e, conducting the business as HVAC
7 Contractor under the name Reliable Air Conditioning and
8 Heating, which was apparently filed on August 14th of 2006. I
9 would tender that in the record at this time.

10 MR. McBRYAN: We have no objection to the --

11 THE COURT: No, he said Exhibit -- Plaintiff's
12 Exhibit 8 --

13 MR. MALONE: Eight. Correct.

14 THE COURT: -- which is what was admitted. What's on
15 the screen, apparently, is nine.

16 MR. MALONE: Is nine. Yes.

17 MR. McBRYAN: We have no objection to either
18 certified copy, Judge. And Exhibit 8 or 9, we have Exhibit 9
19 as our Exhibit 4 in our book.

20 MR. MALONE: Fine. Thank you, Your Honor.

21 THE COURT: All right. Then Plaintiff's Exhibit 9 is
22 also admitted without objection.

23 Q Ms. Jape, were you aware that those trade name application
24 and registration were filed by Ms. Ruse and Mr. Jape at the
25 time they were filed?

1 A No, sir.

2 Q How did you come to find out they were filed?

3 A I believe Mr. Jape told me after the fact in a phone
4 conversation.

5 Q When did you first become aware that Ms. Ruse and Mr. Jape
6 were doing business in the Woodstock, Georgia area?

7 A I believe I first became aware somewhere in maybe late
8 August, early September of 2006.

9 Q How did you become aware of that?

10 A I don't really remember. I know someone told me that they
11 had -- that Dan was answering his cell phone at Reliable, at
12 which point I made the phone call to his cell phone and he did,
13 in fact, answer the phone that way.

14 Q How did he answer the phone?

15 A Reliable.

16 Q Did he say, "Reliable Heating and Air" or --

17 A No. He just said Reliable at that point.

18 Q And your best guestimate is that it was August or
19 September of 2006?

20 A Yes, sir.

21 Q Ms. Jape, you have before you a document marked as Exhibit
22 10. I'd ask you to tell the Court if you could identify that,
23 please?

24 A Yes, sir. It is a letter from Mr. McBryan to Robert -- to
25 Rob Williamson acknowledging his representation of Dan Jape and

1 saying that he is withdrawing his permission for us to use the
2 name Reliable Heating and Air.

3 MR. MALONE: I believe that's also one of the
4 defendant's exhibits. I tender it into evidence at this time.

5 THE COURT: Any objection?

6 MR. McBRYAN: No objection, Your Honor.

7 THE COURT: All right. Exhibit 10 is admitted.

8 Q Ms. Jape, to your knowledge, did Daniel Jape ever enter
9 into a license with Reliable Air, Inc. to use the name Reliable
10 Heating and Air?

11 A No, sir.

12 Q The company just used the name?

13 A Yes, sir.

14 Q But, he was a president of the company?

15 A Yes, sir.

16 Q He was certainly aware of the name?

17 A Yes, sir.

18 Q Ms. Jape, you have before you what has been marked as
19 Exhibit 11. I ask if you can identify that, please.

20 A It is a coupon from Mr. Jape's company.

21 Q A coupon. How exactly would that be distributed?

22 A Direct mail.

23 Q So, it would come in a package with other coupons?

24 A No, sir. This actually is a book that is -- a small book
25 that is delivered through the mail.

1 Q Do you know where that is distributed? Or to whom it is
2 distributed?

3 A They have quite a wide distribution area. I don't know
4 all of the books that Mr. Jape is in. I know that this one
5 came from the Woodstock area. I also received copies of one
6 from the Roswell, the Alpharetta and the Canton area.

7 Q Do you recall when you saw this or when you received this?

8 A In all honesty, I do not know. It was probably the end of
9 last -- November, December of last year or January of 2007.

10 Q Does Reliable Air, Inc. advertise through this same
11 medium?

12 A No, sir, we do not use this coupon book.

13 Q But, this is widely distributed in the North Georgia --
14 North Atlanta, Georgia area?

15 A Yes, sir.

16 Q All right. The name -- they're Reliable Heating and Air,
17 and there's Mr. Jape's picture to the right, correct?

18 A Yes, sir.

19 Q And there's a phone number; 770-924-3777. Is that the
20 number he was using at that time?

21 A It is.

22 MR. MALONE: Tender Exhibit 11.

23 THE COURT: Any objection?

24 MR. MCBRYAN: Yes, Your Honor. No foundation. He
25 doesn't identify other than it's an ad (inaudible) Mr. Jape.

1 She didn't say who the coupon book is. It's not in complete --
2 exhibit because she refers to it came from a book. We don't
3 know what book. I'd like -- I haven't talked to my client
4 about this ad yet. We can reserve. I'll ask Ms. Jape some
5 questions about it, though. Where she got it.

6 THE COURT: When you make an objection, Mr. McBryan,
7 it's perfectly all right to sit down. Just pull the mike
8 closer to you.

9 MR. McBRYAN: Sorry, Judge.

10 THE COURT: All right. Any response Mr. --

11 MR. MALONE: Yes, Your Honor. I think that all
12 that's required for authentication is evidence to show that the
13 document is what it purports to be. I think the witness has
14 said that she stated she received this through regular channels
15 and found it as a regular course for business.

16 THE COURT: All right. The objection is overruled.
17 The exhibit is admitted.

18 Q Ms. Jape, could you --

19 THE COURT: Let me just say, though, that I think
20 based on -- just so everybody understands on Mrs. Jape's
21 testimony, she doesn't know who got that.

22 MR. MALONE: Correct.

23 THE COURT: She ended up with a copy, but the idea
24 that it was widely spread throughout North Metro area, there's
25 no foundation for that testimony.

1 MR. MALONE: Thank you, Your Honor.

2 Q Ms. Jape, please look at what has been marked as Exhibit
3 12 and tell me if you can identify that.

4 A That is the first sign that Mr. Jape had up in front of
5 his building.

6 Q Do you know when that photograph was taken?

7 A I believe this was taken August 11th or 12th -- not
8 August, I'm sorry, April 11th or 12th of 2007.

9 Q Okay. Does that photograph accurately depict the sign
10 which it purports to depict in front of Mr. Jape's place of
11 business as of April 11 or 12, 2007?

12 A Yes, sir.

13 MR. MALONE: Tender Exhibit 12 at this time.

14 THE COURT: Objection?

15 MR. McBRYAN: No objection, Your Honor.

16 THE COURT: All right. That exhibit is admitted.

17 Q Was that sign clearly visible to people driving by on
18 Highway 92 in Woodstock, Georgia?

19 A Yes, sir, it was.

20 MR. McBRYAN: Objection, Your Honor. Calls for
21 speculation. How could she testify as to what other people can
22 see clearly visible?

23 THE COURT: Sustained.

24 Q Ms. Jape, as you drove down Highway 92 in Woodstock,
25 Georgia the date that picture was taken, was there anything

1 impeding your view of that sign?

2 A No, sir.

3 Q Do you know what goods and services Mr. Jape was offering
4 for sale to the public when he opened his businesses at
5 Reliable Heating and Air on Highway 92 in Woodstock, Georgia?

6 A Yes, sir. He services and installs residential heating
7 and air equipment.

8 Q Does he hold the same license that you hold?

9 A Yes, sir.

10 Q So, that would be all he would be permitted to do by
11 license, correct?

12 A Yes, sir.

13 Q Have you had contact with people that were serviced by Mr.
14 Jape or his company?

15 A Yes, sir.

16 Q Ms. Jape, I ask you to look at what has been marked as
17 Exhibit 13, and tell the Court if you can identify that,
18 please.

19 A Yes, sir. It is the Around Town Woodstock magazine.

20 Q Where is that magazine distributed?

21 A In Woodstock, Georgia.

22 Q Do you live in Woodstock, Georgia?

23 A Yes, sir, I do.

24 Q Did you receive a copy of that in your mail at home?

25 A I did.

1 Q To your knowledge, do other people in your neighborhood
2 receive the same magazine in their mail at home?

3 A Yes, sir.

4 Q To your knowledge, is that received in most neighborhoods
5 of which you are aware in Woodstock in the mail at residential
6 addresses?

7 A Yes, sir.

8 Q Did you also receive a copy of this at your place of
9 business on Londonderry Court?

10 A Yes, sir.

11 Q To your knowledge, do other people in your immediate
12 vicinity, other businesses in that complex, also receive this
13 magazine in Woodstock, Georgia?

14 A Yes, sir. In fact, the postman when he brought it in
15 wanted to know where my picture was on it because he thought it
16 was our company.

17 MR. MALONE: Tender Exhibit 13.

18 MR. McBRYAN: Objection, Judge. That was hearsay as
19 to that statement as to what the postman said.

20 MR. MALONE: Tender Exhibit 13.

21 THE COURT: Any objection to the admission of 13?
22 Let's start off with that.

23 MR. McBRYAN: Well, Judge, lots of them, but we're
24 going to presume that -- I believe that Ms. Jape honestly
25 testified that she received the magazine to which this whole

1 thing includes, which this is not the magazine which is what
2 the testimony was. It's a part of it. This is the whole
3 thing.

4 THE WITNESS: I'm sorry. I have the magazine here.

5 MR. McBRYAN: Oh, she has the whole thing, Judge.

6 THE WITNESS: And the original, yes, sir.

7 MR. McBRYAN: I didn't know if she had the whole
8 thing, Judge, so I don't know what exhibit she's looking at.
9 She's not looking at this exhibit. And I didn't know that
10 counsel had given her --

11 THE COURT: Exhibit 13 is a three-page exhibit.

12 MR. McBRYAN: He's looking at the entire magazine,
13 Judge. She's not looking at --

14 MR. MALONE: I apologize. Let me clarify. She's
15 looking at the magazine. I have Exhibit 13, Your Honor. I
16 photocopied the cover of that magazine and a two-page article
17 that appears at Pages 22 and 23. Let me clarify my
18 documentation. I apologize to counsel and the Court. I
19 thought she had the document.

20 Q Ms. Jape, do you have the three-page document up there
21 that's marked Exhibit 13?

22 A Yes, sir, I do.

23 THE COURT: What about the magazine? Where is that?

24 All right. Come and get the magazine.

25 MR. McBRYAN: Your Honor, at this time -- this is the

1 second time it's happened. If there are any other documents
2 that she's referring to that -- not exhibits that she has --

3 THE COURT: Yes, Mr. Malone, the only documents that
4 should be on the witness stand are the exhibits. If there are
5 any other -- she's got one document, I know. A so-called cheat
6 sheet. If there are any other documents that Mrs. Jape has,
7 get them from her. The only documents that should be there are
8 the exhibits. All right. Any objection to the admission of
9 Exhibit 13 as --

10 MR. MCBRYAN: The testimony is inconsistent with
11 Exhibit 13, Judge, yes. Having said that -- true testimony is
12 that I've looked at a missing part of a magazine that I
13 received and --

14 THE COURT: I'm going to admit it on that basis. The
15 other testimony regarding the circulation, you know, is worth
16 what it's worth. But, there was not much of a foundation for
17 it, frankly.

18 Q Ms. Jape, what did you do when you received this magazine?

19 A Shortly thereafter, I called Mr. Jape within a day or so.

20 Q To discuss the magazine?

21 A To tell him to stop using the name. That it was confusing
22 and I was horrified that the number and the logo were almost
23 identical.

24 Q Now, looking at Exhibit 13, the logo there is different
25 from the original logo used by Mr. Jape, correct?

1 A Yes, sir.

2 Q And in the background is a phone number, do you see that?

3 A Yes, sir.

4 Q That phone number is 770-594-9096, correct?

5 A Yes, sir.

6 Q And that is one digit off from Reliable Air, Inc.'s phone
7 number of 770-595-9066, correct?

8 A Yes, sir.

9 MR. McBRYAN: Objection, Judge. Initially,
10 preliminary matters are okay, but he's just leading this
11 witness. So, we'll object to that statement.

12 THE COURT: Well, it's pretty obvious, isn't it?

13 MR. McBRYAN: Well, it is, but I think that's --

14 THE COURT: All right. Don't lead the witness, Mr.
15 Malone.

16 MR. MALONE: Yes, Your Honor.

17 THE COURT: And I mean, you know, and let's don't
18 beat horses that have already been beaten too much because
19 we'll be here all day long.

20 MR. MALONE: Right, Your Honor.

21 THE COURT: I'm listening.

22 Q Ms. Jape, do you have before you what's been marked as
23 Exhibit 14?

24 A Yes, sir.

25 Q Can you identify that, please?

1 A It is a copy of a coupon that is circulated through the
2 Choice Savings coupon book.

3 Q Are you familiar with the Choice Savings coupon book?

4 A Yes, sir.

5 Q Does Reliable Air, Inc. advertise in that manner?

6 A No, sir

7 Q Has it ever advertised in that manner?

8 A Yes, sir, many years -- well, no. Reliable Heating and
9 Air did before the incorporation.

10 Q But, you are familiar with Choice Savings and this coupon
11 book?

12 A Yes, sir.

13 Q Is it widely distributed in the North Metro area?

14 MR. McBRYAN: Objection, Judge. Calls for
15 speculation. No foundation.

16 THE COURT: Sustained.

17 Q Is this an ad that was run by Mr. Jape's company?

18 A Yes, sir.

19 Q Is this an ad that you received?

20 A Yes, sir.

21 Q How did you receive it?

22 A It came in the mail to my home.

23 MR. MALONE: Tender Exhibit 14.

24 THE COURT: Objection?

25 MR. McBRYAN: No objection based upon the statement

1 that it came to her home. She can identify that.

2 THE COURT: Exhibit 14 submitted.

3 MR. MALONE: Your Honor, at this time, I'm going to
4 ask the witness to identify two advertisements contained in
5 newspapers. The witness has the newspapers with her, but I had
6 the -- as I did with the magazine, I have photocopied just the
7 mast head of the newspaper and the two advertisements. I have
8 marked them as Exhibit 15 and 16. Counsel and I discussed this
9 previously and I believe he's agreed as for an exhibit, to
10 limit the newspaper to those three pages, is that correct?

11 MR. McBRYAN: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. McBRYAN: Subject to other foundation as to what
14 the documents are.

15 THE COURT: Yes. That's fine.

16 MR. MALONE: Please -- Your Honor, the only reason
17 she has the original newspapers is in the event the Court cared
18 to see the color ad. For no other purpose.

19 THE COURT: I don't, so let's --

20 MR. MALONE: Thank you. We'll dispense with that.

21 THE COURT: Let's substitute the three-page exhibits.

22 MR. MALONE: We have. We're using the three-page
23 exhibits and not the newspapers.

24 Q Ms. Jape, please look at Exhibit 15 and identify that,
25 please.

1 A It is the Roswell Neighbor newspaper from Wednesday,
2 August 1st, 2007.

3 Q Is that a newspaper which Reliable Air, Inc. advertises?

4 A Yes, sir.

5 Q And did Reliable Air, Inc. advertise in that edition of
6 that newspaper?

7 A Yes, sir, we did.

8 Q Does that ad appear as the second page of Exhibit 15?

9 A Yes, sir.

10 Q Did Mr. Jape's company also advertise in that same edition
11 of that same newspaper?

12 A Yes, sir.

13 MR. McBRYAN: Objection. No foundation.

14 Q Was there an ad for Mr. Jape's company in that same
15 edition of the newspaper?

16 A Yes, sir.

17 Q Does it appear as a third page of Exhibit 15?

18 A Yes, sir.

19 MR. MALONE: Tender Exhibit 15 at this time.

20 THE COURT: Any objection?

21 MR. McBRYAN: No, Your Honor.

22 THE COURT: Exhibit 15's admitted.

23 Q Please look at Exhibit 16.

24 A Yes, sir.

25 Q Can you identify that, please?

1 A It is the Alpharetta Neighbor from -- where's the date? I
2 believe it is August 1st, 2007.

3 Q Did Reliable Air, Inc. run an ad in that newspaper?

4 A Yes, sir.

5 Q Does that appear as the second page of Exhibit 16?

6 A Yes, sir.

7 Q Did you also see an ad from Mr. Jape's company in that
8 same edition of that same newspaper?

9 A Yes, sir.

10 Q Does that appear as the third page of Exhibit 16?

11 A Yes, sir.

12 MR. MALONE: Tender Exhibit 16 at this time.

13 MR. McBRYAN: No objection, Your Honor.

14 THE COURT: Plaintiff's Exhibit 16 is admitted.

15 Q Ms. Jape, in your work at Reliable Air, Inc., do you have
16 occasion to ever answer the telephone?

17 A Yes, sir, every day.

18 Q Who else at Reliable Air, Inc. is engaged in answering
19 telephones?

20 A Jessie Mercer and Amy.

21 Q Graham?

22 A And I'm not going to be able to give you Amy's last name
23 because --

24 Q Amy Graham?

25 A Graham. Thank you.

1 Q Have you personally received calls from customers of
2 Reliable Air, Inc. who were confused because there are two
3 companies in Woodstock, Georgia, visible on Highway 92 --

4 MR. McBRYAN: Objection, Judge. Leading.

5 MR. MALONE: May I finish the question?

6 MR. McBRYAN: No, I don't think so.

7 THE COURT: Well, I'm going to let him finish the
8 question.

9 Q Using the name Reliable Heating and Air?

10 A Yes, sir.

11 MR. McBRYAN: Objection. Leading.

12 THE COURT: I don't think that's necessarily leading.
13 I mean, otherwise, what are you going to do, say have you ever
14 received a call? Well, what did they say?

15 MR. McBRYAN: That would be hearsay.

16 THE COURT: No, it's not hearsay if somebody calls up
17 and is looking for a particular company by the name of Reliable
18 Heating and Air. I mean, that's not hearsay. That's what she
19 said she heard. Now, whether -- to prove the truth of it, it
20 would be a different proposition. But, to --

21 MR. McBRYAN: I think the word confusing in his
22 question, if that is part of his case in chief, he must prove
23 confusion.

24 THE COURT: I agree. I'm letting in the testimony,
25 though. I'm not -- I think I'm drawing a distinction between

1 did you get a call with somebody who asked for that number.
2 Whether it's confusing or not, we haven't gotten to yet,
3 regarding that name, rather. Whether it's confusing or not, we
4 haven't gotten to that yet.

5 Q Ms. Jape, how frequently, in your opinion, do you receive
6 calls from customers and potential customers who indicate
7 confusion as to which company is which?

8 A On a slower day, four or five calls. As with the weather
9 as it's been and as busy as we've been, probably 15 or 20 calls
10 a day in the last three days.

11 Q Okay. And would that be consistent back -- as long as
12 these -- as Mr. Jape's company's been in business?

13 A Yes, sir.

14 Q How do these calls come in? How do you know someone's
15 confused? Give the Court an example of a call you would
16 receive that would indicate that the person is confused as to
17 the identity or the extinction between your company and Mr.
18 Jape's company.

19 A I will receive a phone call from a customer that when I
20 pull their information up in the computer, they are there. We
21 have serviced them for years, and they have scheduled a routine
22 maintenance check, and we have no document of that in our
23 computer, and they will have a day and a time and say, I
24 scheduled this with your company.

25 Q In those instances, what do you do?

1 A We tell them that they have not made an appointment with
2 our company.

3 Q Do you question them as to the person with whom they
4 spoke, or do you find out have they talked to Mr. Jape's
5 company or if they spoke with Mr. Jape's company?

6 A Frequently, the customer will say, well, I spoke with
7 so-and-so or whatever. If they are saying no, I -- we've tried
8 very hard not to draw the customer into this any more than we
9 have to. We will on -- Jessie or I will say there is another
10 company using the name Reliable Heating and Air on Highway 92.
11 You may have inadvertently called them.

12 Q Now, these were customers that are on your books and
13 records as people that had been serviced or sold equipment or
14 supplies or service by Reliable Air, Inc., correct?

15 A Yes, sir.

16 Q And you would estimate this happens at least three or four
17 times a day?

18 A Just to myself. Jessie and Amy also receive phone calls.

19 Q Has that been consistent -- for how many months?

20 A Since Mr. Jape started using the Reliable name.

21 Q Would it fair to state you have received over the last six
22 months hundreds of those calls?

23 A Yes, sir.

24 Q Have you ever had customers that indicated -- strike that
25 question. Can you identify what's been marked as Exhibit 17?

1 A Yes, sir. It is a service invoice for Mr. Tom Little, a
2 customer of ours since 1993.

3 Q What does that indicate?

4 A It indicated that we did a check up for him for the cost
5 of \$69.95, which is not our cost for a check up.

6 Q Why would you do that for 69.95?

7 A Mr. Little produced a coupon at the end of the visit from
8 Mr. Jape's company and made the assumption that it was our
9 company, so we honored that coupon.

10 Q Is Exhibit 17 a document that was regularly kept in the
11 regular course of business of Reliable Air, Inc.?

12 A Yes, sir.

13 Q And was it the regular course of business of Reliable Air,
14 Inc. to keep that record?

15 A Yes, sir.

16 MR. MALONE: Tender Exhibit 17 as a business record.

17 MR. MCBRYAN: No objection, Your Honor.

18 THE COURT: All right. Exhibit 17's admitted.

19 Q Ms. Jape, please look at what has been marked as Exhibit
20 18.

21 A Yes, sir.

22 Q Can you identify that?

23 A It is a service ticket for a Virginia Welch.

24 Q Who is Ms. Welch?

25 A Ms. Welch is a customer of Reliable Air, Inc. A

1 maintenance contract customer of ours.

2 Q What does Exhibit 18 show?

3 A In the reported problem, it says that another company
4 must've scheduled her for her check up. She called in to ask
5 why we were not there. We had no record of the call, so we
6 wrote in there another company must've scheduled her for her
7 check up. Someone called her to tell her they were on the way.
8 She waited for hours and then called us. When she called us,
9 of course we had no record of the service call.

10 Q Was this a call that would've been placed to the other
11 Reliable?

12 A I would make that assumption.

13 MR. McBRYAN: Objection, Judge. No foundation.

14 THE COURT: All right. Well, I'll take that as a
15 motion to strike the last answer which is granted.

16 Q Is Exhibit 18 -- excuse me. Was Exhibit 18 kept in the
17 regular course of business of Reliable Air, Inc.?

18 A Yes, sir.

19 Q And was it the regular course of business to keep that
20 record?

21 A Yes, sir.

22 MR. MALONE: Tender Exhibit 18 as a business record.

23 MR. McBRYAN: No objection, Your Honor.

24 Q Can you --

25 THE COURT: P-18 is admitted.

1 MR. MALONE: Excuse me, Your Honor.

2 Q Can you identify Exhibit 19?

3 A It is a letter from Mula Keppler (phonetic), a customer of
4 Reliable Air, Inc.

5 Q Was that kept in the regular course of business of
6 Reliable Air, Inc.?

7 A Yes, sir.

8 Q And was it the regular course of business of Reliable Air
9 to keep that document?

10 A Yes, sir.

11 MR. MALONE: Tender Exhibit 19.

12 MR. McBRYAN: Objection, Your Honor. This is
13 hearsay. It's a letter from someone else to -- it doesn't
14 say -- it just says to Dear Barbara. Ms. Keppler's not here to
15 authenticate the letter.

16 THE COURT: I'm going to overrule the objection. The
17 testimony is a document kept in the ordinary course of
18 business, and it was ordinary course of business to keep it.
19 That takes care of the hearsay. Whether or not it means
20 anything or not is another question altogether, it seems to me.
21 I mean, I don't know who, you know, this is problematic on Mr.
22 Malone.

23 MR. MALONE: Sir, I'm not going to keep piling this
24 on Your Honor. I just need to set -- establish a baseline for
25 this.

1 Q Without reading anything in the letter, does this fairly
2 reflect an instance of confusion on Ms. Keppler's part between
3 Reliable Air, Inc. and Mr. Jape's company?

4 A Yes, sir.

5 Q Thanks. Please look at Exhibit 20.

6 A Yes, sir.

7 Q Can you identify that, please?

8 A This is a service ticket for a Mr. McDermott, a customer
9 of Reliable Air, Inc.

10 Q Exhibit 20 has several pages, including a coupon attached
11 to it, correct?

12 A Yes, sir.

13 Q Were these documents kept in the regular course of
14 business of Reliable Air, Inc.?

15 A Yes, sir.

16 Q And was it the regular course of business to keep these
17 records?

18 A Yes, sir.

19 MR. MALONE: Tender Exhibit 20.

20 MR. McBRYAN: Judge, it's a three-page exhibit.
21 There is -- it looks like a partial. There's some things
22 ripped out. Also, there's handwriting, and it includes a check
23 on the back that I'd like to ask a question about. On the
24 third page, it's 2001 and -- is the whole -- I guess the
25 question I have is, this whole three-page document, I went

1 through your files, this is all together as one three-page
2 document.

3 THE WITNESS: Yes, sir. Stapled just as it is.

4 MR. MCBRYAN: I'll ask some questions later, but --

5 THE COURT: All right. I'm going to admit it.

6 Again, you know, it's one thing to have a business record, it's
7 another thing to be able to draw any conclusions from it.

8 Q Ms. Jape, does this reflect another instance where a
9 customer had a coupon of Mr. Jape's and they expected Reliable
10 Air, Inc. to honor that coupon?

11 A Yes, sir.

12 MR. MCBRYAN: Objection. Calls for speculation to
13 what the customer expected.

14 THE COURT: I'll treat that as a motion to strike and
15 grant it.

16 Q Let me rephrase the question. When the service call was
17 conducted, did this customer present a coupon for Mr. Jape's
18 company?

19 A Yes, sir.

20 Q And -- to Reliable Air, Inc.?

21 A Yes, sir.

22 Q And did you honor that coupon?

23 A We did.

24 Q And that's what's reflected on Exhibit 20?

25 A Yes, sir.

1 Q In addition to the last four exhibits that we had marked
2 identified showing -- and that would be 17, 18, 19 and 20, does
3 Reliable Air, Inc. have other coupons and other invoices
4 indicating instances where customers have presented coupons
5 from Mr. Jape or who made service calls to his company and then
6 called you about -- with a complaint?

7 A Yes, sir.

8 Q How many such instances have you personally seen?

9 A Probably just the ones that we were able to keep up with,
10 30 or 40, 50 somewhere.

11 Q Are there more than that?

12 A Yes, sir.

13 Q But, you don't have records necessarily for them, correct?

14 A No, sir.

15 Q Ms. Jape, please look at Exhibit 21. Tell me if you can
16 identify that.

17 A It is an e-mail from Mr. Jape to myself.

18 Q Is that a printout of an e-mail that you received on a
19 computer at Reliable Air, Inc.?

20 A Yes, sir.

21 MR. McBRYAN: Objection, Judge. I talk to relevance.
22 We're here for a preliminary injunction hearing based upon his
23 motion to deal with the trade name, the phone number and the
24 name used by Mr. Jape. I think these e-mails go outside that
25 motion. And I think that'd be -- takes up the Court's time.

1 THE COURT: Well, maybe, but we haven't gotten far
2 enough for me to draw that conclusion yet.

3 MR. McBRYAN: Okay.

4 Q Ms. Jape, do you recognize the address at the top line,
5 DanJape@MSN.com as the e-mail address for Daniel L. Jape?

6 A Yes, sir.

7 Q Is that an address to which you have sent e-mails and from
8 which you have received e-mails, communications with him?

9 A Yes, sir.

10 Q In the course of dealing with Mr. Jape, have you had
11 occasion to discuss those e-mails either in person or by
12 telephone?

13 A Yes, sir.

14 Q Do you know that to be his e-mail address?

15 A I do.

16 Q All right. Is the content of that e-mail consistent with
17 your communications with Mr. Jape, both before and after you
18 received it?

19 A Yes, sir.

20 MR. MALONE: Your Honor, we tender Exhibit 21 as a
21 printout of an e-mail from Mr. Jape to Ms. Jape.

22 THE COURT: Any objection?

23 MR. McBRYAN: In this particular hearing yesterday,
24 it's irrelevant at today's hearing. I don't see where -- he
25 hasn't tied it into today's hearing. This is a preliminary

1 injunction, not a final hearing.

2 THE COURT: I don't think it's irrelevant because the
3 e-mail talks about I'm in negotiations with every reliable
4 employee I want to hire. That would indicate an intent to, I
5 guess to destroy this business, or at least be some evidence of
6 it.

7 MR. MCBRYAN: Well, again, that's a tortuous
8 interference, and this hearing, preliminary injunction
9 according to Mr. Malone's motion, seeks relief as to the trade
10 name, the phone number, the words of Reliable Hearing and Air
11 and Air Conditioning in any combination thereof. This deals
12 with the employees. And he's not put in his motion that he's
13 dealing with employees.

14 THE COURT: All right. What about it, Mr. Malone?

15 MR. MALONE: Your Honor, the defendant's intent is
16 relevant on the question of establishing likelihood of
17 confusion. Intention of the defendant to appropriate the trade
18 name to utilize it to take advantage of it shows not only the
19 distinctives of the trade name because it has value to him, but
20 his bad faith is an element decided by the cases, and clearly
21 set out as an issue to be decided by the Court. Is one of the
22 seven factors to be weighed in finding likelihood of confusion.

23 THE COURT: The objection's overruled. P-21's
24 admitted. In other words, it's not being offered to show
25 tortuous interference with the business being offered to

1 support an element of one of the claims the plaintiff is
2 making.

3 MR. MALONE: Correct. Thank you, Your Honor.

4 Q Ms. Jape, you have a document two pages in length which
5 has been marked as Plaintiff's Exhibit Number 22. I ask you to
6 look at that and tell the Court what that is.

7 A It is a copy of an e-mail that Mr. Jape sent to my
8 daughter Elizabeth.

9 Q At the time that e-mail was sent and received by your
10 daughter, were you present? Did you see her actually pull that
11 e-mail up on the screen?

12 A Yes, sir.

13 Q Was it at your place of business at Reliable Air, Inc.?

14 A Yes, sir, it was.

15 Q At the time that e-mail was sent and received, was your
16 daughter Elizabeth employed at Reliable Air, Inc.?

17 A She was.

18 Q This e-mail has apparently been -- on the second page is
19 says redacted, and on the first page it appears that there is
20 content that was above and below the quoted text. Has that
21 been removed -- has it in fact been redacted?

22 A Yes, sir, it has.

23 Q Why has it been redacted?

24 A Because of the nature of it. It is absolutely vulgar and
25 horrible in its content.

1 Q Was this redacted to reduce it to just those elements
2 which you consider germane to this proceeding?

3 A Yes, sir, it was.

4 Q Is everything that is left in the content of this e-mail
5 exactly what was appeared in the original e-mail and has not
6 been changed in any way?

7 A Yes, sir.

8 Q Do you have a printout of the full original e-mail in your
9 possession?

10 A Yes, sir, I do.

11 Q Do you recognize the line from DanJape@MSN to be his
12 e-mail address?

13 A Yes, sir.

14 Q Have you ever had occasion to discuss the subject matter
15 of this e-mail with Mr. Jape after it was received?

16 A Yes, sir, by e-mail and once on the phone.

17 Q Did he confirm that he had, in fact, sent this e-mail?

18 A Yes, sir.

19 Q Was this an e-mail document which we printed off the
20 computer at Reliable Air, Inc. and brought to court with the
21 redactions that you described?

22 A Yes, sir.

23 Q Was that done in the regular course of business of
24 Reliable Air, Inc.?

25 A Yes, sir.

1 Q And was the regular course of business of Reliable Air,
2 Inc. to keep these records such as this on this computer?

3 A Yes, sir.

4 MR. MALONE: Tender Exhibit 22.

5 THE COURT: Any objection?

6 MR. McBRYAN: We do have an objection, Judge. I need
7 a little bit more about it, but we're objecting to the purpose
8 for use. It is a hearsay document and it is -- it looks like
9 it goes to the complaint of the claims dealing with the
10 tortuous interference to the extent that it can -- he's using
11 it only for (inaudible) I understand the Court's ruling. But,
12 this, I guess the purpose is what I need to know, what I object
13 to.

14 THE COURT: I'm not considering this with regard to
15 any claim for tortuous interference with the business. This is
16 a claim dealing with what the plaintiff contains is the illegal
17 use of the trade name and trade -- and a service mark. So, the
18 objection is overruled, and Exhibit 22 is admitted.

19 Q Ms. Jape, you have before you what's been marked as
20 Exhibit 23. Can you identify that for the Court, please?

21 A Yes, sir. It is an unaudited income statement for
22 Reliable Air, Inc.

23 Q Was this kept in the regular course of business of
24 Reliable Air, Inc.?

25 A Yes, sir.

1 Q And was it the regular course of business of Reliable Air,
2 Inc. to make and keep records such as this?

3 A Yes, sir.

4 Q Is this an audited or unaudited financial report?

5 A Unaudited.

6 MR. MALONE: Tender Exhibit 23.

7 MR. McBRYAN: Judge, we absolutely object to Exhibit
8 23, Judge. This purports to be an income statement for 12
9 months in the operating report, Page 142, and this is
10 completely inconsistent with what they filed with the Court on
11 July 20 of 2007, Judge.

12 THE COURT: Without even getting into that, the
13 objection's sustained. We can't get it on that testimony.

14 Q Ms. Jape, what impact have the actions of Mr. Jape and Ms.
15 Ruse in using the Reliable Air trade name and service mark had
16 upon the business of Reliable Air, Inc.?

17 A It has had a great impact on us. We have numerous
18 customers who, before when they called Reliable Heating and
19 Air, expected to get Reliable Heating and Air with the
20 confusion over the telephone numbers, and the two Reliable
21 Heating and Airs on Highway 92, we have lost -- just from the
22 customers that I have spoken with, we have lost hundreds and
23 hundreds of customers.

24 Q Is that adversely affecting the business of Reliable Air,
25 Inc.?

1 A Absolutely.

2 Q Costing you money?

3 A Absolutely.

4 MR. MALONE: No further questions of this witness.
5 Thank you.

6 THE COURT: All right. How long do you figure your
7 cross examination's going to take? Do you know?

8 MR. McBRYAN: Probably an hour or more.

9 THE COURT: All right. I think it'd be more
10 efficient if we took a lunch break now since it's almost noon.
11 That way it'll be continuous. Any problem with that?

12 MR. McBRYAN: No problem.

13 THE COURT: Thank you. Ms. Jape?

14 THE WITNESS: Yes, sir?

15 THE COURT: Leave the exhibits where you find them.
16 Don't take anything with you off the stand.

17 THE WITNESS: Okay.

18 THE COURT: We will lock the courtroom so that the
19 attorney's are free to leave their materials in here. I don't
20 want anybody in the courtroom until Ms. Jackson opens it up at
21 one o'clock. Okay.

22 * * * * *

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24

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C E R T I F I C A T I O N

We, Lynn Schmitz and Kathleen Betz, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Lynn Schmitz

LYNN SCHMITZ

/s/ Kathleen Betz

DATE: August 9, 2007

KATHLEEN BETZ

J&J COURT TRANSCRIBERS, INC.