IT IS ORDERED as set forth below:

Date: March 09, 2007

James E. Massey
James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-85627
Reliable Air, Inc.,	
	CHAPTER 11
Debtor.	JUDGE MASSEY
Daniel L. Jape,	
Movant,	
v.	CONTESTED MATTER
Reliable Air, Inc.,	
Respondent.	

ORDER DENYING MOTION TO DISMISS

Almost eleven months after Reliable Air, Inc. filed this Chapter 11 bankruptcy case, Daniel Jape, a shareholder, director and creditor, filed a motion to dismiss Reliable's bankruptcy case pursuant to 11 U.S.C. § 1112(b)(1) on the ground that the bankruptcy filing was not properly authorized under the applicable corporate governance rules, thus depriving this Court of

jurisdiction. The Court held a hearing on the motion on January 29, 2007. The attorney for Mr. Jape proffered facts at the hearing, and the Court heard argument. On the basis of the argument, the proffered facts and the record in this case and in the related adversary proceeding involving Mr. Jape, the Court determined that there is no material fact in dispute, making an evidentiary hearing unnecessary. For the following reasons, Mr. Jape's motion is denied.

Reliable, a Georgia corporation, installs and services air conditioning systems in the Atlanta area. Prior to November 2005, the company was operated by Daniel Jape and Barbara Jape, his spouse. Mr. Jape served as its president. The Japes are the only shareholders of Reliable, and each owns one half of its capital stock. Each of them is a director of Reliable.

The Japes had marital problems and, in 2003, those problems began to disrupt Reliable's business operations. The Japes agreed to mediation at the suggestion of an employee, Dean Edelman. According to Mrs. Jape, the Japes appointed Dean Edelman, then an employee of Reliable, as the third member of the board of directors on July 8, 2004. Mr. Jape contends that he (Mr. Jape) intermittently slept through the meeting at which Mr. Edelman was purportedly elected to the board of directors, and he disputes that Mr. Edelman was properly elected to the board. Consent Pretrial Order in A.P. No. 05-6561, document no. 19, Attachment B.

On November 3, 2005, Mr. Jape and Mrs. Jape attended a meeting of the Board of Directors of Reliable and Mr. Edelman attended by telephone. Mr. Jape objected to the meeting. The meeting proceeded over Mr. Jape's objection, and Mrs. Jape and Mr. Edelman voted to terminate Mr. Jape's employment with Reliable and elected Mrs. Jape as president. Mr. Jape contends that at that point, he objected on the ground that Mr. Edelman was not duly elected to the board and then left the meeting. Consent Pretrial Order in A.P. No. 05-6561, document no.

19, Attachment B. The meeting continued after Mr. Jape's departure, and Mrs. Jape and Mr. Edelman passed a resolution authorizing the filing of a bankruptcy case.

Reliable filed its bankruptcy petition on November 22, 2005. Its schedules of assets and liabilities, filed on December 30, 2005, showed that as of the petition date, the Debtor had assets it valued at $2,418,860.47 and liabilities of $3,711,998.56. Reliable was insolvent when it filed its petition and remains insolvent.

On December 7, 2005, the Debtor commenced an adversary proceeding against Mr. Jape seeking injunctive relief. On December 12, 2005, the Court entered a temporary restraining order in the adversary proceeding to which Mr. Jape's then counsel, Daran Burns, consented on his behalf. The parties agreed in the order that it would remain in effect until the earlier of the first subsequent hearing in the adversary proceeding or the entry of a subsequent court order. The order permitted Mr. Jape to retain possession of a 2002 Mercedes S55, which was leased to Reliable, notwithstanding the fact that he no longer performed services for the company, and restrained him from appearing at Debtor's premises or contacting its employees.

It is undisputed that on January 5, 2006, Mr. Jape's attorney attended the meeting of creditors held pursuant to section 341 of the Bankruptcy Code. There is no evidence that Mr. Jape's attorney objected to the bankruptcy petition or otherwise challenged the Court's jurisdiction.

On January 6, 2006, Mr. Jape filed an answer in the adversary proceeding in which he generally denied Reliable's allegations. Although Mr. Jape denied the paragraph of the complaint asserting that the adversary proceeding involved a core proceeding, his answer did not address or challenge the Court's jurisdiction.

On April 5, 2006, Mr. Burns withdrew as Mr. Jape's counsel in this case and in the adversary proceeding, and Louis McBryan filed a notice of appearance as Mr. Jape's counsel.

On July 17, 2006, Mr. Jape filed a proof of claim in the amount of $138,500.

In mid-2006, Debtor filed a motion to approve a compromise with a customer, a motion to sell commercial real property, and a motion for authority to enter into a lease contract outside the ordinary course of business. Mr. Jape did not respond to any of these motions.

Prior to October 11, 2006, the respective attorneys for Debtor and Mr. Jape presented a proposed consolidated pretrial order in the adversary proceeding. The Court entered that order on October 11, 2006. In the portion of that order setting forth his position, Mr. Jape contended that some of the counts in the complaint were non-core proceedings. He did not, however, question the propriety of the filing of the bankruptcy petition or otherwise challenge the Court's jurisdiction in the pretrial order.

Mr. Jape filed his motion to dismiss this case on October 12, 2006, nearly 11 months after the case was filed. In the motion, he contests this Court's jurisdiction on the ground that the bankruptcy petition was not properly authorized because he did not vote for it and because Mr. Edelman was not properly elected as a director. Mr. Jape contends that Mrs. Jape could not have authorized the petition without his vote. In a response to the motion to dismiss filed on January 22, 2007, Reliable contends that its chapter 11 petition was properly authorized under the applicable corporate governance rules and, even if the petition were not properly authorized, Mr. Jape waived his right to object to the filing and ratified the filing.

On October 13, 2006, the Court held a pretrial conference in the adversary proceeding at which Mr. Jape's attorney did not mention the motion to dismiss filed less than 24 hours earlier and did not in any way challenge the Court's jurisdiction.

On November 11, 2006, the Debtor moved for an order approving a settlement and compromise agreement between the estate and Mingledorff's, Inc. Mingledorff's held a secured claim in excess of $590,000, which both Mr. Jape and Mrs. Jape guaranteed. Pursuant to the settlement agreement, Mingledorff's agreed to release Mrs. Jape's obligation under her guaranty. Mr. Jape was not mentioned in the settlement agreement. Debtor contended at the January 29, 2007 hearing, and Mr. Jape did not dispute, that he separately negotiated with Mingledorff's a release from liability under his guaranty in exchange for agreeing not to object to the settlement between Mingledorff's and Reliable. On December 13, 2006, the Court entered an order approving the settlement with Mingledorff's.

On November 14, 2006, Reliable moved for an order further extending the exclusivity period. It scheduled a hearing on that motion for December 19, 2006. On December 14, 2006, Mr. Jape filed a response opposing the extension because (1) the Debtor was in a delay mode, (2) "its 'officers' [had failed] to advise the Board of Directors of its plan," and (3) the Debtor's business operations were decreasing and a plan "under 'current management' is unlikely." There was not a word in the response about the Court lacking jurisdiction.

The motion to dismiss raises two issues: whether Mr. Edelman was properly elected to the Board of Directors of Reliable Air, Inc. and whether, even if Mr. Edelman was not duly elected, Mr. Jape ratified the decision to file this bankruptcy case. Prior to the January 29, 2007 hearing on the motion to dismiss, the Court informed the parties that the Court would consider only the

issue of ratification at that hearing. Hence, this Order does not address the issue of whether Mr. Edelman was duly elected to Reliable's board of directors.

A bankruptcy court does not have jurisdiction over a bankruptcy proceeding filed on behalf of a corporation unless it was "filed by those who have authority so to act." *Price v. Gurney*, 324 U.S. 100, 106 (1945); *Hager v. Gibson*, 108 F.3d 35, 41 (4th Cir. 1997). In *Hager*, as here, a close corporation owned by two individuals filed bankruptcy, and one of the shareholders challenged the jurisdiction of the bankruptcy court on the ground that the other shareholder lacked authority to file the bankruptcy petition. The issue before the Fourth Circuit was whether "the unauthorized filing of a voluntary petition in bankruptcy in behalf of a corporation might be ratified in appropriate circumstances by ensuing conduct of persons with power to have authorized it originally. " *Hager*, 108 F.3d at 40.

Acknowledging that there was no Virginia case or statute on point, the Court of Appeals began its analysis by noting that Virginia would apply the general principle of agency law that "one may ratify an unauthorized act by accepting its benefits with full knowledge of the relevant facts, or, if upon learning of the act, he fails promptly to disavow it." *Id.* at 39 (quoting *Kilby v. Pickurel*, 240 Va. 271, 396 S.E.2d 666, 668 (1990)).

In the *Hager* case, the president, director, and 50-percent shareholder of a Virginia corporation filed a bankruptcy petition on behalf of the corporation in April 1993. In December 1994, Hager, who was also a director of the corporation and held the balance of the debtor's capital stock, filed a motion to dismiss the case on the ground that the filing was unauthorized. *Id.* at 38. Hager became aware of the bankruptcy proceeding no later than November 1993, when he received notice of the proceeding from the trustee. But he "took no step through available

corporate governance procedures to attempt withdrawal of the corporation from the voluntary proceeding" until "more than a year after his first undisputed awareness that it had been filed." *Id*. at 40. Additionally, he formally participated in the bankruptcy as party to an adversary proceeding beginning in August of 1994 but did not voice an objection until four months later, which was a year after he was first aware of the bankruptcy proceeding. *Id*. Hager "received the benefits of the protection against the claims of creditors that was provided his equity interest by the automatic stay provisions invoked by the bankruptcy filing." *Id*. Based on these facts, the Fourth Circuit held that Hager ratified the filing by his post-petition conduct and that the ratification related back to the filing date, thereby preserving jurisdiction. *Id*. at 41.

Georgia also adheres to the principle that a person can ratify an unauthorized act by accepting its benefits with knowledge of the facts. *Bresnahan v. Lighthouse Mission, Inc.*, 230 Ga. App. 389, 391, 496 S.E.2d 351, 354 (Ga. App. 1998) ("For ratification to be effective, the principal must know of the agent's unauthorized act and, with full knowledge of all the material facts, accept and retain the benefits of the unauthorized act."); *see also In re Valles Mechanical Industries, Inc.*, 20 B.R. 355, 356 (Bankr. N.D. Ga.1982) (holding that "the actions of a corporate officer acting without authority may be ratified by the Board of Directors after the fact."). "Under Georgia law, principles of agency law apply to corporations and their officers." *Gift Collection, Ltd. v. Small Bus. Admin.*, 738 F.Supp. 487, 493 (N.D. Ga. 1989).

There is also support in Georgia law that an unauthorized act may be ratified by failing to promptly disavow that act promptly upon its discovery. *Southtrust Bank of Georgia v. Parker,* 226 Ga. App. 292, 295, 486 S.E.2d 402, 406 (Ga. App. 1997) ("For ratification to be effective, the principal must know of the act of the agent, either at the time of making the declaration deemed to

be ratified or at the time of doing acts which indicate the ratification; either action or inaction may be evidence of ratification."). "It is a general rule of law that shareholders in a corporation who participate in the performance of an act, or who acquiesce and ratify the same, are estopped to complain thereof in equity." *Pickett v. Paine*, 230 Ga. 786, 792, 199 S.E.2d 223, 228 (Ga. 1973).

In this case, Mr. Jape, as a director and 50-percent shareholder, possessed sufficient voting power to provide authorization for the bankruptcy filing. Because Mrs. Jape voted in favor of filing the bankruptcy petition, Mr. Jape's affirmative vote would have authorized the filing irrespective of Mr. Edelman's role. Accordingly, if subsequently ratified by Mr. Jape, the decision to file bankruptcy on behalf of Reliable would constitute a properly authorized corporate action as of the time it was made. *See* Ga. Code Ann. § 10-6-52 (ratification relates back under Georgia agency law); *Hager*, 108 F.3d at 41.

In this case, Mr. Jape's conduct over the 11 months between the filing of Reliable's bankruptcy petition and the filing of his motion to dismiss shows that he ratified the petition through his participation in, his acquiescence to, and his acceptance of benefits from, this Chapter 11 proceeding. At the latest, Mr. Jape became aware of Reliable's bankruptcy proceeding when he consented to the restraining order entered on December 12, 2005. With respect to that order, he negotiated for and accepted the use of a vehicle leased to the Debtor for which he paid the Debtor and the lessor nothing in lieu of challenging the jurisdiction of the Court. He filed an answer in the adversary proceeding without raising the issue of the validity of the bankruptcy filing.

He waited without objection while the Debtor sought approval over a period of several months in mid-2006 for authority to enter into transactions with third parties in its efforts to survive its financial predicament.

He filed his motion to dismiss about eleven months after learning of the bankruptcy case, but he did not bring the motion to the Court's attention at a pretrial conference held the following day, and his counsel did not schedule a hearing as required by the judges of this Court. *See* Restated Standing Order No. 1-JEM, dated January 19, 2005, available on the Court's website along with open calendar procedures followed by all of the judges of this Court. Bankruptcy Rule 2002(a)(4) requires a hearing on a motion to dismiss.

In November or early December 2006, Mr. Jape negotiated his own release from a guaranteed corporate debt as a price for not objecting to a motion to compromise with a secured creditor.

He chose to try the adversary proceeding on December 18, 2006, rather than to prosecute his motion to dismiss.

Mr. Jape's active participation in this Chapter 11 case over many months without asserting a failure of proper corporate authorization to file and his continued participation in the case after moving to dismiss in lieu of prosecuting that motion by setting a prompt hearing, amply support a finding that he ratified the filing of the petition commencing this case. *Hager*, 108 F.3d at 40; *Matter of Atlas Supply Corp.,* 857 F.2d 1061, 1064 (5th Cir. 1988) ("[T]he bankruptcy judge did not err in concluding that by waiting over a year before objecting, [Movant] forewent her right to complain that the bankruptcy petition was not authorized by the corporation."); *Alexander v. Farmers' Supply Co.,* 275 F. 824, 826 (5th Cir. 1921) (Holding that shareholder in

Georgia corporation moving to dismiss bankruptcy case on the ground the filing was not properly authorized "acquiesced in the bankruptcy adjudication" by waiting three months to file his motion.) Mr. Jape's extensive participation in the Chapter 11 case without prosecuting his belated contention of an unauthorized filing until forced to do so by the Court constitutes ratification of the decision to file the case. *See Pickett v. Paine,* 230 Ga. at 792.

Mr. Jape contends that he has not benefitted from the filing of this case. Under Georgia law, "[a]s a general rule, if the principal, with full knowledge of all the material facts, accepts and retains the benefits of the unauthorized act, he thereby ratifies the act." *Hyer v. Citizens & S. Nat. Bank*, 188 Ga. App. 452, 453, 373 S.E.2d 391, 393 (Ga. App. 1988).

In fact, Mr. Jape has benefitted from the filing of this case. Some of that benefit relates directly to his financial situation. He retained and was able to use the leased Mercedes automobile without having to pay for that privilege; the Debtor was liable for the lease payments post-petition. The Court infers that the Mercedes would have very likely been repossessed early in 2006 given the company's financial condition based on the filing of a motion to require an assumption of other vehicle leases or alternatively relief from stay filed by Lease Plan U.S.A, Inc. on March 14, 2006. The resolution of the Lease Plan motion favorably to the Debtor benefitted Mr. Jape because he guaranteed the master lease as reflected in that motion. By virtue of the settlement agreement between Reliable and Mingledorff's in the bankruptcy proceeding, Mr. Jape was able to negotiate the release of his guarantee of a debt in excess of $590,000 with Mingledorff's.

Mr. Jape enjoyed the same benefit that the shareholder in the *Hager* case enjoyed – protection of his equity interest from destruction by creditor action. *Hager v. Gibson*, 108 F.3d at

40. There is no doubt that Mr. Jape was in no position at the beginning of this case to save Reliable Air, Inc. on his own outside of bankruptcy. Although the Court basically ruled in the adversary proceeding that the Debtor failed to establish the need for injunctive relief in December 2006, several employees of this small company testified that they would have nothing to do with him. He had no money, he says. But in November 2005, the Debtor was insolvent and in grave danger of collapsing altogether without funds and without protection from creditors. Its business is cyclical, and cash flow predictably decreases during the winter months, as reflected by the monthly reports for January and February 2006. If the Debtor had failed, Mr. Jape might have the satisfaction of placing blame on Mrs. Jape, but he would not have a going concern to pay himself a salary. Mr. Jape has manifested a very strong interest in regaining control of Reliable. To a significant degree, the continuation of the reorganization has preserved that possibility by preserving the business itself. By not moving to dismiss early in the case, Mr. Jape accepted this benefit that the pendency of this case bestowed.

The pendency of the case also bestowed on Mr. Jape the benefit of some degree of leverage in dealing with the Debtor and with creditors, as reflected in his negotiation of the use of a vehicle for free and a release from liability from a significant debt, which he would not have had if creditors had been free to foreclose security interests and sue on claims.

Mr. Jape proffered several facts at the January 29, 2007 hearing on his motion to dismiss and made several arguments for granting his motion. The Court assumes those proffered facts, which are explained below, are true. First, in an effort to show that he did not acquiesce to Reliable's bankruptcy filing, Mr. Jape contends that he objected to the meeting at which the

decision to put Reliable in bankruptcy was made. That contention, even if true, would not undermine subsequent ratification.

Likewise, Mr. Jape asserts that he did not challenge Reliable's bankruptcy because he devoted his limited financial resources to defending criminal proceedings against him and to gain legal access to his family. Indeed, Mr. Jape experienced numerous personal and financial hardships following Reliable's bankruptcy filing. He was arrested in November 2005 and again in December 2005. He had trouble finding gainful employment due in part to the two arrests. Additionally, he stopped receiving regular income when his employment with Reliable was terminated in October 2005, and the pending divorce action prevented him from disposing of any personal property. Mr. Jape contends that he devoted his limited financial resources to more pressing needs than challenging the bankruptcy proceeding and had no ability to oppose it due to his financial circumstances.

These contentions, aside from being irrelevant, are plainly without merit. Mr. Jape had legal counsel throughout this case. He could have filed a motion to dismiss asserting his factual and legal position sufficiently on no more than two pages at any time during the pendency of this case. His active participation, with counsel, in Reliable's bankruptcy belies the contention that he lacked the resources to file a motion to dismiss at an earlier date. Indeed, a timely motion to dismiss, if granted, would have saved Mr. Jape the expenses he incurred in filing numerous documents in the case and otherwise attempting to protect his interests in this forum. Accordingly, Mr. Jape's reasons for delay in bringing this motion are not a sufficient basis for finding that he did not ratify the filing. *See Matter of Atlas Supply Corp.*, 857 F.2d at 1064 (finding that the "excuse of avoiding unnecessary litigation expenses is insufficient under the

circumstances" to excuse the movant's delay in bringing a motion to dismiss an unauthorized bankruptcy petition).

Mr. Jape further asserts that he did not object to various motions filed by Reliable in dealing with claims of creditors because his objections would have been futile under the circumstances. That argument is without merit. Had Mr. Jape prosecuted a motion to dismiss for lack of jurisdiction early in the case, the Court would have had no choice but to dismiss the case unless Reliable could show that Mr. Edelman was properly elected to the Board of Directors.

Finally, Mr. Jape argues that dismissal of this chapter 11 case would not harm creditors. This argument is plainly false. A secured creditor and a lessor have, during this case, moved for stay relief, showing that in the absence of bankruptcy, Reliable would be at the mercy of its creditors. Reliable's only hope of survival is reorganization. Further, Mr. Jape and Mrs. Jape cannot maintain an equity interest in this Debtor over the objection of creditors. 11 U.S.C. § 1129(b). The future of this company in bankruptcy is in the hands of creditors other than Mr. Jape, none of which has moved to dismiss and some of which have worked with the Debtor in its reorganization effort. Its future outside of bankruptcy would no doubt be plagued by further conflict between the Japes, which resulted in the mismanagement and harm to creditors that forced the bankruptcy filing in the first place.

Based upon these facts, the Court holds that Mr. Jape ratified the decision of the Board of Directors and Mrs. Jape to file this case and that his ratification relates back to the date of the filing of the petition.

Accordingly, it is

ORDERED that Mr. Jape's motion to dismiss Reliable's bankruptcy proceeding is DENIED. ***END OF ORDER***