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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos. 63-03163 and 63-03274

MEMORANDUM IN SUPPORT OF MOTION
FOR PROTECTIVE ORDER

COMES NOW DBSI Tiegs 979, LLC ("Claimant"), through undersigned counsel of record, and hereby files this Memorandum in Support of Motion for Protective Order, pursuant to Idaho Rule of Civil Procedure 7(b) and Rule 6(f)(4)(a) of this Court's Administrative Order 1.

I.
FACTUAL BACKGROUND

On November 3, 2008, this Court entered an Order Granting Joint Stipulation and Motion for Order Governing Consolidated Proceedings, and a Summary Judgment Scheduling

Order. Together, these orders consolidated the two above-referenced subcases with five other subcases for the purpose of addressing the legal authority of the Idaho Department of Water Resources to impose new annual diversion volume limitations on previously licensed water rights, and established a summary judgment schedule, including a deadline of February 15, 2008 for the completion of all discovery.

On October 21, 2008, counsel for Claimant received the State of Idaho's First Set of Discovery Requests to DBSI Tiegs 979 LLC. (*See* Notice of Service and Certificate of Service, Subcase Nos. 63-3163 & 63-3274 (Oct. 20, 2008).) Shortly thereafter, and beginning on November 6, 2008, DBSI, Inc. and several of its related entities filed for bankruptcy protection under the federal Bankruptcy Code. (*See In re: DBSI, Inc., et al.*, Notice of Commencement of Chapter 11 Bankruptcy, p. 1, Case No. 08-12687 (PJW).)¹ The Claimant itself is not listed on that original bankruptcy notice. (*See id.*) However, Claimant is a member-managed limited liability company,² whose member-manager is DBSI, Inc.³ —the second entity listed in the aforementioned notice of bankruptcy.

The bankruptcy filing of Claimant's member-manager DBSI shortly after the State's discovery requests has impaired the ability of Claimant to respond to those requests. Therefore, on November 17, 2008, Claimant requested an extension of the deadline for responding to those requests until December 24, 2008. (*See* E-mail from Lawrence to Barber of

¹ (*See* Lawrence Aff., ¶ 2, Ex. A.)

² (*See* Lawrence Aff., ¶ 3, Ex. B.)

³ Claimant's most recent annual report on file with the Idaho Secretary of State identifies "DBSI Housing, Inc." as the member-manager of the Claimant. (*See* Lawrence Aff., ¶ 4, Ex. C.) To clarify, DBSI Housing Inc. has officially changed its name to DBSI Inc. (*See* Lawrence Aff., ¶ 5, Ex. D.)

Nov. 17, 2008.)⁴ The State approved that extension on November 20, 2008. (See E-mail from Barber to Lawrence of Nov. 20, 2008.)⁵

Despite that agreed-upon extension, on December 15, 2008, the State sent a letter to Claimant threatening to file a motion to compel discovery responses if complete responses were not received by December 19, 2008. (See Letter from Barber to Lawrence of Dec. 15, 2008.)⁶ Counsel for Claimant responded to that letter on December 16, 2008, noting the questionable basis of the State's letter. (See Letter from Lawrence to Barber of Dec. 16, 2008.)⁷ The State subsequently indicated that it would "honor" the agreed-upon December 24 response deadline. (See Letter from Barber to Lawrence of Dec. 17, 2008.)⁸ However, now that the State has threatened Claimant with a motion to compel, Claimant feels it must file its Motion for Protective Order, for the reasons discussed in this Memorandum.

II. LEGAL ARGUMENT

Given the circumstances of DBSI's bankruptcy, this Court should enter a stay of the deadline for Claimant's response to the State's discovery requests, pursuant to Idaho Rule of Civil Procedure 26(c). That rule provides in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matter relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from

⁴ (See Lawrence Aff., ¶ 6, Ex. E.)

⁵ (See Lawrence Aff., ¶ 7, Ex. F.)

⁶ (See Lawrence Aff., ¶ 8, Ex. G.)

⁷ (See Lawrence Aff., ¶ 9, Ex. H.)

⁸ (See Lawrence Aff., ¶ 10, Ex. I.)

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information inclosed in sealed envelopes to be opened as directed by the court.

I.R.C.P. 26(c).

Under this rule, this Court has broad discretion to take a variety of actions to limit discovery for “good cause shown” and “when justice so requires.” *See also Selkirk Seed Co. v. Forney*, 134 Idaho 98, 996 P.2d 798 (2000). Due to the recent bankruptcy filing, there is good cause for this Court to stay the deadline for Claimant’s response to the State’s pending discovery requests, until issues related to the DBSI bankruptcy filing can be resolved.

The State’s letter which threatens to file a motion to compel accurately notes that Claimant itself is not listed on the bankruptcy notice. (*See Lawrence Aff.*, ¶ 8, Ex. G.) However, the Court should not rely upon this fact, for a variety of reasons. First, Claimant is a limited liability company whose member-manager is DBSI, Inc.—the second entity listed on the bankruptcy notice. (*See Lawrence Aff.*, ¶ 2, Ex. A., p. 1.) The Claimant is a single-purpose entity; it is not a company with its own employees and organizational structure.

Instead, decisions affecting the Claimant’s property and water rights are made largely by employees of DBSI, Inc. and Kastera Development, LLC. Regardless of whether the Claimant itself is listed in the bankruptcy notice, the effect is still the same: massive layoffs and

departures of employees at DBSI and Kastera have resulted in the loss of individuals who previously made decisions with respect to Claimant's property and water rights. And, those few employees who remain now have workloads that were previously handled by multiple employees, hindering the ability to respond to the State's discovery requests at this time. In addition, it is also possible that some or all of the Claimant's real property is currently collateral in the bankruptcy proceeding, depending upon the structure of the financing of the purchase. Counsel for Claimant is still attempting to confirm if this is the case.

Notably, Section 362 of the federal Bankruptcy Code provides for an automatic stay against certain judicial and administrative proceedings against a debtor, and against certain types of actions affecting the assets in the bankruptcy estate. *See generally* 11 U.S.C. § 362. Counsel for Claimant does not, at this time, maintain that the automatic stay definitely applies in this situation. However, counsel for the Claimant submits that the existence of the automatic stay provision necessitates that the Court proceed carefully with respect to DBSI's bankruptcy and its effect upon these proceedings. Even if it is not directly applicable in the SRBA, by analogy, the automatic stay provision supports Claimant's position that a reasonable extension of time to respond to the State's discovery requests is appropriate, while Claimant works through issues related to the bankruptcy filing.

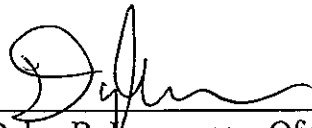
III. CONCLUSION

To be clear, Claimant is not requesting to be wholly relieved of its responsibility to respond to the State's discovery requests. Instead, Claimant requests that the Court stay the deadline for Claimant's responses for a reasonable amount of time, while it works through these bankruptcy issues. Surely, any harm that would accrue to the State from this delay can be remedied. Under these circumstances, Claimant believes there is good cause for this Court to

issue a reasonable stay of its deadline for responding to the State's discovery requests, and respectfully requests the Court to do so.

DATED this 19th day of December, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Claimant DBSI Tiegs 979, LLC

CERTIFICATE OF SERVICE

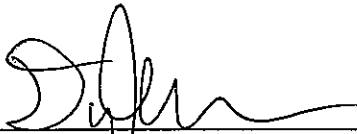
I HEREBY CERTIFY that on this 19th day of December, 2008, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER to be served by the method indicated below, and addressed to the following:

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