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

JAMES N. HARTEN, Clerk
[Signature]
Deputy Clerk

107-MI-0036

CIVIL ACTION NO.
05-000424-LED*

JTC

* Action is pending in the United States District Court for the Eastern District of Texas

ADVANCEME, INC.,

Plaintiff,

v.

RAPIDPAY LLC, et. al,

Defendants.

ADVANCEME, INC.

Plaintiff,

v.

AMERIMERCHANT LLC,

Defendant.

CIVIL ACTION NO.
06-000082-LED*

* Action is pending in the United States District Court for the Eastern District of Texas

Emergency

ADVANCEME, INC.'s **EMERGENCY MOTION FOR AN ~~EX PARTE~~ ^{EMERGENCY} HEARING FOR A PROTECTIVE ORDER IN CONNECTION WITH A SUBPOENA THAT WAS SERVED ON THIRD PARTY JOHN KONOP AND THE SCHEDULING OF HIS DEPOSITION ON FEBRUARY 8, 2007, A DATE THAT COUNSEL FOR ADVANCEME IS UNABLE TO ATTEND AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF**

Pursuant to Rules 45(c)(3)(A) and 26(c) of the Federal Rules of Civil Procedure and Local Rule 7.2(B), Emergency Movant AdvanceMe, Inc. (“AdvanceMe” or “Emergency Movant”), brings this emergency motion for a protective order in connection with a deposition subpoena that was issued by Joseph Gray, counsel for Defendants Merchant Money Tree, Inc. (“Merchant Money Tree”), Reach Financial LLC (“Reach Financial”), First Funds LLC (“First Funds”), and AmeriMerchant LLC (“AmeriMerchant”) and served on third party John Konop (“Mr. Konop”), commanding the production of documents and deposition testimony on Thursday, February 8, 2007, a date previously scheduled for the 30(b)(6) deposition of defendant Reach Financial and a date that other counsel for AdvanceMe is unable to attend due to depositions and other meetings in other matters that cannot be changed.

AdvanceMe brings this Motion for Protective Order in the United States District Court for the Northern District of Georgia, Atlanta Division, pursuant to an Order dated February 6, 2007 issued in the Eastern District of Texas wherein the United States Magistrate John D. Love determined that he was without authority to act on this Motion, and “. . . instruct[ed] the parties to seek relief from the United States District Court in the Northern District of Georgia . . .”

More specifically, this is the *second* emergency motion AdvanceMe has been forced to file in connection with the third party subpoena that was served on Mr. Konop. Previously, Defendants unilaterally noticed the deposition of Mr. Konop for Sunday, January 21, 2007 without AdvanceMe's consent and without the approval of Magistrate Judge Love or Judge Davis who preside over the two actions pending in the Eastern District of Texas. Despite the Eastern District of Texas Local Rule CV-30's clear prohibition against the taking of depositions on weekends without the approval of a judge or the agreement of counsel, counsel for Defendants nonetheless refused to take this deposition off calendar and even flew to Atlanta, Georgia for the purpose of taking Mr. Konop's deposition. Only after AdvanceMe filed an emergency motion in the Eastern District of Texas and made arrangements to file a similar motion in this Court did Defendants relent and agree to take Mr. Konop's deposition off calendar. Thereafter, Defendants again unilaterally scheduled Mr. Konop's deposition on February 8, 2007 -- a date previously set for the 30(b)(6) deposition of defendant Reach Financial. At the time Defendants unilaterally scheduled Mr. Konop's deposition for February 8, 2007, Mr. Konop was available "on any Thursday" in the month of February or March. In other words, it appears that Defendants deliberately noticed Mr.

Konop's deposition to conflict with the 30(b)(6) deposition of defendant Reach Financial.

After numerous attempts to informally resolve this issue over several days failed, on February 5, 2007, AdvanceMe filed an Emergency Motion for Protective Order in the Eastern District of Texas. Simultaneously, the Defendants filed a Motion to Compel the deposition of John Konop on February 8, 2007. The Honorable John D. Love, U.S. Magistrate Judge denied both motions, stating:

[t]his Court, sitting in the Eastern District of Texas, cannot compel attendance of a non-party witness outside its subpoena range. Accordingly, the Court **DENIES** the motions of both parties and instructs the parties to seek relief from the United States District Court in the Northern District of Georgia if they cannot seek favorable resolution of their own.

Affidavit of Ronald S. Lemieux in Support of AdvanceMe's Motion for Protective Order, Exh. I.

None of the senior counsel for AdvanceMe are available to attend the deposition of Mr. Konop on February 8, 2007 due to an expert deposition in another case that is presently pending in the Eastern District of Texas; a critical client conference that cannot be postponed in another matter; and other depositions. AdvanceMe would be severely prejudiced if this deposition of a former corporate officer of AdvanceMe were to go forward without the presence of

senior counsel since the subpoena calls for the production of documents and deposition testimony as to matters that are likely protected by the attorney-client privilege. AdvanceMe has made numerous attempts to informally resolve this scheduling matter; however, its efforts have been unsuccessful. For these reasons, AdvanceMe respectfully moves this Court for a protective order providing that (1) the production of documents and deposition testimony of Mr. Konop not go forward on February 8, 2007, as currently scheduled, (2) this deposition go forward at a date, time, and location that is mutually agreeable to counsel for AdvanceMe, counsel for Defendants, and third party John Konop, and (3) any documents Mr. Konop intends to produce in response to this subpoena be provided initially only to counsel for AdvanceMe, not counsel for Defendants, so that counsel for AdvanceMe can review these documents and remove from production any documents that are protected by the attorney-client privilege, and otherwise designate the remaining documents pursuant to the standing Protective Order, as appropriate.

In support of this motion, AdvanceMe relies on its supporting memorandum of points and authorities, filed contemporaneously with this emergency motion.

Dated: February 7, 2007

Respectfully submitted,

By: 

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