IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
(NEW ORLEANS)

IN RE:	§	
	§	
OCA, INC. *et al.*,	§	**CASE NO. 06-10179**
	§	**CHAPTER 11**
DEBTOR	§	***Jointly Administered***

OBJECTION OF DUDLEY M. HODGKINS, DDS, MSD,
AND DUDLEY M. HODGKINS, DDS, MSD, PC,
TO PROPOSED "ASSUMPTION" OF BSA

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COME NOW Dudley M. Hodgkins, DDS, MSD, and Dudley M. Hodgkins, DDS, MSD, PC, and, pursuant to the Court's Order Granting in part, Denying in Part Motion for Entry of a BSA's Procedures Order for Assumption of Business Service Agreements Under Joint Chapter 11 Plan of Reorganization for OCA, Inc. and Filed Subsidiaries, file this their Objection to the Proposed "Assumption" of that one certain Business Services Agreement dated June 1, 1997, between Dudley M. Hodgkins, DDS, MSD, PC ("Hodgkins PC") and Dudley M. Hodgkins, DDS, MSD ("Dr. Hodgkins"), on the one hand, and Orthodontic Centers of Texas, Inc. ("OCA Texas") on the other, and in support would respectfully show the Court the following:

OBJECTION TO ASSUMPTION

1. On or about June 1, 1997, Hodgkins PC and Dr. Hodgkins, entered into that one certain Business Services Agreement (the "BSA") with OCA Texas. On or about April 4, 2005, Dr. Hodgkins and Hodgkins PC sent a detailed letter to OCA Texas providing notice of their claims arising under and relating to the BSA. The notice of claims also provided formal notice that OCA Texas was in material default under the BSA. A copy of the notice letter is attached

hereto as Exhibit "1." On May 5, 2005, OCA Texas having failed to correct and/or cure the material defaults outlined in the notice letter, Dr. Hodgkins and Hodgkins PC terminated the BSA (the "Termination"). A copy of the termination letter is attached hereto as Exhibit "2." Thus, the BSA was terminated long before the commencement of OCA's bankruptcy case and is not an "executory contract" as that term is used and defined by the Bankruptcy Code. Thus, the terminated BSA may not now be revived under any theory, including under any provision of the United States Bankruptcy Code. Moreover, OCA Texas should be precluded from arguing that the BSA was not terminated, because OCA Texas' conduct at all times following the Termination acknowledged the event, validity and effect of the Termination. Thus, applicable principles under Texas law of waiver, estoppel and laches preclude the proposed attempt to revive and assume the terminated BSA.

2. In addition, even if it had not been terminated, the BSA is invalid and unenforceable, because it violates the Texas Dental Practices Act and other applicable statutes, rules and regulations in Texas.

3. Further, even if it had not been terminated, the BSA is effectively a personal services contract that cannot be assumed by a Debtor absent the consent of Dr. Hodgkins and Hodgkins PC. Dr. Hodgkins and Hodgkins PC do not consent to such assumption. *See* 11 U.S.C. § 365(c)(1).

4. Additionally, it appears that, instead of merely assuming or rejecting BSAs, OCA Texas and the other Debtors are somehow attempting to impose a new agreement, described in attachments to the Debtors' Disclosure Statement as a Support Services Agreement ("SSA"),

through the assumption process.[1] More than likely, the reason for the new form of agreement is the risk the Debtors face—nationwide—that the BSAs are invalid. However, that is not a problem that is fixable through the assumption process. Even if the BSA had not been terminated pre-petition, the Debtor may not modify the BSA through the assumption process. Executory contracts can either be rejected or assumed under the Bankruptcy Code. They may not be modified involuntarily. Given the Debtors' fraudulent and deceptive practices prior to the time the BSA was terminated, Dr. Hodgkins and Hodgkins PC will never consent or otherwise voluntarily enter into an agreement or modification of an agreement with OCA Texas or any of its affiliates on any term or condition.

CURE AMOUNT

5. Assuming *arguendo* that assumption was somehow appropriate despite the pre-petition termination, illegality of the BSA and the fact that it is a personal services agreement, the "cure amount" under 11 U.S.C. §§ 365(b)(1)(A) and (B) is in excess of TWO MILLION DOLLARS. Dr. Hodgkins and Hodgkins PC reserve all rights herein regarding the specific calculation of any "cure amount" regarding the BSA. No discovery regarding issues relating to the calculation of the "cure amount" has been conducted. The vast majority of the documents necessary to properly calculate the cure amount are in the hands of the Debtors and their representatives. Thus, Dr. Hodgkins and Hodgkins PC place all parties on notice that the amounts required under 11 U.S.C. §§ 365(b)(1)(A) and (B) may be substantially higher than the estimation provided herein. It is clear that in order to assume an unexpired executory contract

[1] The Debtors were to have amended and filed their disclosure statement to provide additional information regarding the SSAs. To date, they have not. The financial projections contained in the Debtors' current draft Disclosure Statement are based upon ONE HUNDRED SIXTY-EIGHT (168) SSAs and ZERO (0) BSAs. *See* Amended and Restated Joint Disclosure Statement for Joint Chapter 11 Plan for OCA, Inc. and Filed Subsidiaries as of June 23, 2006, Exhibit D-4 at 15. It is unclear how this end result would be accomplished via the assumption process.

under 11 U.S.C. § 365(a), the Debtor in Possession must cure, or provide adequate assurance of prompt cure of, any default, and compensate, or provide adequate assurance of prompt compensation, for any actual pecuniary loss resulting from such default. The events of default were significant. They included: (1) OCA Texas's failure to provide accurate bookkeeping and accounting services as required by the BSA; (2) OCA Texas' failure to provide computer, management information, and business systems that function as represented and that met the requirements of Dr. Hodgkins and Hodgkins PC; (3) OCA Texas' failure to perform and provide adequate services as required by the BSA; (4) OCA Texas' assessment of Dr. Hodgkins and Hodgkins PC of unauthorized and inappropriate charges, including, without limitation, charges for advertising, leasehold expenses, and corporate allocations; (5) OCA Texas' failure to provide for the upkeep, maintenance and/or replacement of fixed assets; (6) OCA Texas' failure to provide accurate payroll reports; (7) OCA Texas' inaccurate billing of Dr. Hodgkins' and Hodgkins PC's patients; (8) OCA Texas' failure to make requested charitable contributions; (9) OCA Texas' failure to establish administrative controls to prevent theft from Dr. Hodgkins and Hodgkins PC; (10) OCA Texas' failure to prepare adequate and appropriate analysis of office operations; (11) OCA Texas' failure to promote Dr. Hodgkins' and Hodgkins PC's practice through its internet site; (12) OCA Texas' failure to make required payments timely, including required lease payments; (13) OCA Texas' failure to deliver benefits and services promised to Dr. Hodgkins and Hodgkins PC as a member of the Roncone Division; and (14) OCA Texas' failure to recruit and hire an associate to be affiliated with Dr. Hodgkins and Hodgkins PC. In addition, OCA Texas owed fiduciary duties—which they breached—to Dr. Hodgkins and Hodgkins PC., including duties of loyalty, obedience, full disclosure, skill, care, diligence, and accounting of all monies. In addition, on numerous occasions prior to the

execution of the BSA, OCA Texas, its agents, employees, and representatives of every nature, made affirmative representations to Dr. Hodgkins and Hodgkins PC regarding the nature and quality of the services to be performed under the BSA by OCA Texas. These representations were patently false. In addition, OCA Texas omitted material information regarding the actual quality and nature of the services to be performed under the BSA by OCA Texas. Dr. Hodgkins and Hodgkins PC reasonably relied upon these representations and upon the omission of material information in executing the BSA. Throughout the life of the BSA, OCA Texas fraudulently concealed its fraudulent conduct from Dr. Hodgkins and Hodgkins PC. OCA Texas is required to compensate OCA at the time of assumption for any and all pecuniary loss to Dr. Hodgkins and/or Hodgkins PC resulting from such defaults.

Respectfully submitted,

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By: */s/ Kell C. Mercer*
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2006, a true and correct copy of the foregoing pleading was served, via regular first class mail, postage prepaid, on the parties on the attached service.

/s/ Kell C. Mercer
Kell C. Mercer