

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA**

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In re	:	Chapter 11 Case No.
	:	06-10179 (B)
OCA, INC., <i>et al.</i> ,	:	
	:	Jointly Administered
Debtors.	:	
-----X		

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
THE MOTION AND INCORPORATED MEMORANDUM OF BARTHOLOMEW F.
PALMISANO FOR TEMPORARY ALLOWANCE OF CLAIM
PURSUANT TO RULE 3018(A)**

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) hereby files this objection (the “Objection”) to the Motion And Incorporated Memorandum Of Bartholomew F. Palmisano (“Palmisano”) For Temporary Allowance Of Claim Pursuant To Rule 3018(a) (the “Motion”). In support of this Objection, the Creditors’ Committee states:

PRELIMINARY STATEMENT

The Motion seeks the temporary allowance, for voting purposes, of Palmisano’s Claim No. 238 in the amount of \$1,234,751.50 (the “Claim”). The Claim is for severance alleged to be due Palmisano from the Debtors under the terms of an employment agreement dated November 21, 1994. The Motion, however, states no reason for the temporary allowance of the Claim other than that “it is necessary that Palmisano’s claim should be temporarily allowed pursuant to Bankruptcy Rule 3018(a) in order for his ballot can [*sic*] be counted.” The Creditors’ Committee does not object, in principal, to the temporary allowance of the Claim *for voting purposes only*,¹ if and only if any order temporarily allowing the Claim for voting purposes provides that the Claim may only be voted by Bank of America, N.A. (“Bank of America”). This is a critical

¹ The Creditors’ Committee also intends, however, and hereby reserves the right, to object to the Claim (as well as Palmisano’s other claims) on substantive grounds.

point for the Creditors' Committee because the Motion improperly and inappropriately implies that Palmisano has the right to vote the Claim. Palmisano has no right to vote the Claim, and he knows it. As explained in more detail below, Palmisano is party to a Subordination Agreement, dated August 18, 2005 (the "Subordination Agreement")—a copy of which is attached hereto as Exhibit A and incorporated herein by reference—pursuant to which Bank of America, as Agent for the Debtors' senior secured lenders (the "Senior Lenders"), is entitled to vote the Claim. The Subordination Agreement and the assignment of voting rights contained therein are enforceable in these Chapter 11 proceedings. In fact, the mere filing of the Motion constitutes a breach by Palmisano of his promises under the Subordination Agreement. The Senior Lenders have advised the Creditors' Committee that they intend to enforce these rights, and the Creditors' Committee, having reviewed the Claim and the Subordination Agreement, agrees that they are entitled to do so. As a result, the Creditors' Committee requests that any order temporarily allowing the Claim identify Bank of America as the proper party who may vote the Claim.

Moreover, if for some reason the Court determines not to enforce Bank of America's rights under the Subordination Agreement, the Claim should not be temporarily allowed at all. As described below, Palmisano is the former Chairman and Chief Executive Officer of the Debtors who was removed because of serious allegations of wrongdoing. The likelihood is that the Debtors have substantial offset rights against Palmisano, and that the termination of his employment meets the definition of "for cause" under his employment agreement (resulting in the Claim being disallowed under the employment agreement's terms). In either event, it is unlikely that the Claim will ultimately be allowed. This counsels against permitting Palmisano to vote the Claim. Moreover, at a minimum, the Claim is overstated in that it fails to account for any mitigation, as provided for in the employment agreement.

ARGUMENT

I. If The Claim Is Temporarily Allowed, The Order Should Make Clear That Bank Of America Is Entitled To Vote The Claim

A subordination agreement is enforceable in a bankruptcy case “to the same extent that such agreement is enforceable under applicable nonbankruptcy law.” Bankruptcy Code § 510(a); *see generally Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 527 (5th Cir. 2004) (“This subordination agreement would be enforceable outside of bankruptcy and, thus, would also be enforceable in bankruptcy. The Carieri Group, therefore, cannot take post-petition steps to try to alter its subordination agreement . . .”). Here the subordination agreement is plain. In the key Section, it provides:

If any petition is filed or any proceeding is instituted by or against any Credit Party [the Debtors herein] under any provisions of the Bankruptcy Reform Act, Title 11 of the United States Code, or any other or similar law relating to bankruptcy, insolvency, reorganization or other relief for debtors, or generally affecting creditors’ rights, . . . , any payment or distribution of any Credit Party’s assets, whether in cash, securities or any other property, which would be payable or deliverable with respect to any Junior Debt, shall be paid or delivered to Administrative Agent on behalf of the Lenders until all Senior Debt is paid in full. Creditor [Palmisano] grants to Administrative Agent the right to enforce, collect and receive any such payment or distribution and to give releases or acquittances therefor, and *Creditor authorizes Administrative Agent as its attorney-in-fact to vote and prove the Junior Debt in any of the above-described proceedings* or in any meeting of creditors of any Credit Party relating thereto.

(Exhibit A § 7 (emphasis added).)

“Creditor” is defined as “Bart Palmisano Sr.” and “Administrative Agent” is defined as “Bank of America, N.A., as Administrative Agent.” (Id., preamble) Moreover, the “Junior Debt” which Palmisano contractually authorized Bank of America to enforce, collect, receive payments and distributions on, give releases or acquittances for, and *vote* includes “all Indebtedness now or at any time hereafter owing from Borrower [the debtor OCA, Inc. against which the Claim is filed] . . . to [Palmisano].” (Id. § 1) In the event that this left any doubt about

the breadth of scope of claims Palmisano authorized Bank of America to vote, “Indebtedness” is specifically defined as follows:

The word “Indebtedness” is used herein in its most comprehensive sense and includes any and all advances, debts, obligations and liabilities of the Credit Parties heretofore, or hereafter made, incurred or created, whether voluntary or involuntary and however arising, whether due or not due, absolute or contingent, liquidated or unliquidated, determined or undetermined, and whether Borrower or any other Credit Party may be liable individually or jointly with others, including without limitation, obligations and liabilities arising from notes, repurchase agreements and trust receipts.

(Id. § 2) In short, there can be no doubt that Palmisano authorized Bank of America as his attorney-in-fact to vote essentially any claim of any kind he might have or assert against the Debtors, including the Claim at issue in the Motion.

Such agreements are properly enforceable by this Court. In addition to § 510(a)’s general teaching that subordination agreements are enforceable in bankruptcy cases, a few courts have considered the specific question of whether subordination agreement provisions that assign voting rights to senior creditors are enforceable. Most notably, the United States District Court for the Eastern District of Louisiana took up the question in *In re Inter Urban Broadcasting of Cincinnati, Inc.*, No. 94-2382, 1994 WL 646176, at *2 (E.D. La. Nov. 16, 1994), *appeal dismissed*, 74 F.2d 1238 (5th Cir. 1995).

In *Inter Urban*, the court considered this question even in the context of a plan that did not provide the subordinated creditor with any recovery. In that case, Firstmark was a creditor whose claim was contractually subordinated to that of Barclays under a subordination agreement pursuant to which “Barclays [wa]s granted the right to vote the claim of Firstmark” *Id.* at *2. Despite the fact that Firstmark was to receive nothing under a plan filed by Barclays, and over an argument that § 1126(g) *required* such a class to be deemed to reject, the district court held, citing § 510(a), that Barclays was entitled to vote the Firstmark claim in favor of the plan

unless the objectors succeeded in showing that the subordination agreement was unenforceable under non-bankruptcy law. *Id.* No such showing having been made, the court affirmed Barclays' right to vote the Firstmark claim and the bankruptcy court's confirmation of Barclays' plan. *See also In re Curtis Ctr. Ltd. P'ship*, 192 B.R. 648, 659-60 (Bankr. E.D. Pa. 1996) (holding that a senior creditor with a subordination agreement permitting it to vote a junior creditor's claim could do so because "[t]he language of the subordination agreement is plain and unambiguous" and "[t]he terms of this prepetition agreement are fully enforceable in this Bankruptcy case pursuant to 11 U.S.C. § 510(a)"); *but see In re Sentry Operating Co. of Tex., Inc.*, 264 B.R. 850, 858 (Bankr. S.D. Tex. 2001) (enforcing voting provisions of a subordination agreement, but in this case finding that subordinated creditor could vote against a plan because the terms of the contractual transfer of voting rights contained contingencies that were not met by the proposed plan).

This case is no different than *Inter Urban* and *Curtis*. There is no ambiguity in the subordination agreement which plainly and expressly permits Bank of America to vote all of Palmisano's claims. Moreover, there is no reason to think that this or any other provision of the subordination agreement would not be enforceable under non-bankruptcy law. Certainly the Motion makes no effort to explain any such infirmity. Under the circumstances, the Court should only temporarily allow the Claim for voting purposes if the Order entered on the Motion directs that the right to vote the Claim is vested in Bank of America, not in Palmisano.

II. If The Court Does Not Enforce the Subordination Agreement, It Should Decline To Temporarily Allow The Claim For Voting Purposes

Whether to temporarily allow a claim for voting purposes is within the Court's discretion. *In re Zolner*, 173 B.R. 629, 633 (Bankr. N.D. Ill. 1994). As mentioned above, in this case, the Court should exercise that discretion by declining to temporarily allow Palmisano's Claim if it

does not enforce his Subordination Agreement in favor of Bank of America. The simple fact is that the likelihood of Palmisano's Claim ultimately being allowed is low and even if it is allowed, the recoveries will go, under the Subordination Agreement, to Bank of America. As such, it is unfair and unreasonable to give him the level of control over the voting of the Debtors' general unsecured class that he seeks. To do so simply shifts control from parties with an actual economic stake in the Plan's recoveries to a party who has little or none.

A. The Debtors Hold Substantial Setoff Claims Against Palmisano

On information and belief, Palmisano served as Chairman and Chief Executive Officer of the Debtors from July 2000 through May of this year. On further information and belief, he served as President of the Debtors going back to October 1999. As referenced in the Disclosure Statement, Palmisano is a defendant in both a shareholders lawsuit and a derivative lawsuit. Those lawsuits allege, among other things, that OCA under Palmisano's direction

- engaged in fraudulent accounting practices which materially inflated the Debtors' operating results;
- made and disseminated materially false and misleading statements in the Debtors' public filings and press releases related to the Debtors' financial results, the adequacy of internal accounting controls and management's purported remediation of concerns raised by the Debtors' auditors;
- terminated the Debtors' independent registered public accountants in response to questions they raised about the adequacy of internal accounting controls;
- provided materially false and misleading "Certifications Pursuant to Section 302 of the Sarbanes-Oxley Act of 2002";
- failed to make required public filings resulting in the delisting of OCA's stock;
- failed to take timely and appropriate remedial actions in response to the discovery of potential illegal acts related to the alleged alterations of records provided to Debtors' internal auditors, Debtors' independent registered public accountants and prior independent accountants from January 2000 through May 2005.

As a result, Palmisano is alleged to have committed numerous violations of the federal securities laws, including Section 10(b)(5) of the Exchange Act, Section 20(a) of the Exchange Act, to have breached his fiduciary duties to Debtors, and to have committed gross mismanagement, waste of corporate assets, and other wrongful acts. Under these circumstances, it is likely that the Debtors will ultimately have setoff claims against Palmisano sufficient to negate the Claim (as well as Palmisano's other claims) and it would be unfair to permit him to exercise significant voting control over the Debtors class of general unsecured creditors.

B. For The Same Reasons, Palmisano's Claim Will Likely Be Disallowed Because Cause Existed for His Termination

Even the Debtors' claims against Palmisano did not result in a setoff to Palmisano's Claim, the foregoing wrongdoing will likely result in a disallowance of Palmisano's Claim because "cause" (within the meaning of his employment agreement) existed to terminate Palmisano. The employment agreement defines "Termination for Cause" as

termination by the Company of the Employee's employment by the Company by reason of the Employee's . . . (ii) willful dishonesty towards, fraud upon, or deliberate injury or attempted injury to the Company

(Employment Agreement § 5.1) It further provides that upon Termination for Cause, Palmisano "shall not be paid . . . severance compensation." (Id.) Given the amount of wrongdoing alleged against Palmisano, and the consequences to the Debtors, their creditors, and their shareholders that resulted therefrom, it is likely that the Claim will ultimately be disallowed because "cause" existed to terminate Palmisano. For this reason too, the Court should exercise its discretion in favor of not temporarily allowing the Claim.

C. Even If Palmisano Were Entitled To A Severance Claim, The Claim Is Overstated

Even if Palmisano is allowed a severance claim, the Claim is overstated. On information and belief, Palmisano is receiving compensation from either or both of OCAI or Gimili, and his

employment agreement expressly provides “that if the Employee is employed by a subsequent company during such period, the severance compensation payable to the Employee during such period will be reduced by the amount of compensation that the Employee is receiving from the subsequent [c]ompany.” (Employment Agreement § 6.2) The Claim reflects no deduction for the compensation he is receiving from his current employment and thus, in Palmisano’s very best case scenario, is overstated. This is simply another reason for the Court to exercise discretion in favor of either denying the motion to temporarily allow the Claim or to temporarily allow the Claim in the amount of \$1 for voting purposes only.

[Concluded on the following page.]

WHEREFORE, for the foregoing reasons, the Creditor's Committee respectfully requests that (i) if the Court temporarily allows the Claim for voting purposes, it direct that Bank of America be permitted to vote the Claim; or (ii) the Court either deny the motion to temporarily allow the Claim or temporarily allow the Claim in the amount of \$1 for voting purposes only.

Dated: August 14, 2006

Respectfully submitted,

THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS

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