

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: * CHAPTER 11
*
OCA, INC., *ET AL.* * CASE NO. 06-10179 (B)
*
DEBTORS * (JOINTLY ADMINISTERED)

**OPPOSITION OF SPECIAL COUNSEL TO MOTION AND
INCORPORATED MEMORANDUM FOR TEMPORARY ALLOWANCE
OF CLAIM PURSUANT TO RULE 3018(a)**

NOW INTO COURT come Leon J. Reymond, Jr. and Philip K. Jones, Jr. (the “Special Counsel”), as Special Counsel to OCA, Inc., *et al.* (“OCA”), debtors-in-possession, and object to the Motion and Incorporated Memorandum for Temporary Allowance of Claim Pursuant to Rule 3018(a) (the “Motion”) (P-1317) for the following reasons:

I. STANDING OF SPECIAL COUNSEL

1.

The Court issued its Order Approving Plan Support Agreement Pursuant to 11 U.S.C. section 105 on May 11, 2006 (P-480).

2.

On May 15, 2006, OCA proposed Special Counsel be appointed in accordance with Section II of Exhibit A of the Plan Support Agreement. Subsequently, OCA requested that Leon J. Reymond, Jr. and Philip K. Jones, Jr. be appointed as Special Counsel.

3.

By Order Granting Motion for Authority to Engage Special Counsel to the Debtor (the “Special Counsel Order”) dated May 31, 2006 (P-568), the Court appointed Leon J. Reymond, Jr. and Philip K. Jones, Jr. as Special Counsel.

4.

On August 8, 2006, pursuant to the Special Counsel Order, the Lenders (as defined in the Plan Support Agreement) requested through OCA that Special Counsel investigate:

Any and all bases for challenging Palmisano’s claims against the Company or its affiliates or subsidiaries (including among other things, his subordinated note claim and severance claim) and any and all bases for challenging Palmisano’s ability to vote his claims.

5.

The Motion concerns the severance claim of Mr. Bart Palmisano and the Subordination Agreement dated August 19, 2005.

6.

The Motion is within the purview and authorization of the Special Counsel to act on behalf of OCA.

II. THE MOTION

7.

The Motion was filed on August 3, 2006 and set for hearing on August 16, 2006.

8.

The Motion asserts the existence of an employment agreement between Orthodontic Centers of America, Inc. and Bartholomew F. Palmisano, Sr. dated as of November 21, 1994 (the “Alleged Employment Agreement”).

9.

Paragraph 1 (Employment) provides that Employee [Palmisano] shall “hold” the title of Chief Financial Officer, Senior Vice President, Secretary and Treasurer of the Company.

10.

The Motion further alleges that Mr. Palmisano was discharged pursuant to Section 5.2 (Termination Other Than for Cause) and is entitled to an unsecured claim of \$1,234,751.50 as severance damages pursuant to Section 6.2. of the Alleged Employment Agreement.

11.

The Motion fails to disclose that Mr. Palmisano was Chief Executive Officer of OCA, Inc. and Chairman of the Board of OCA, Inc. at the time of the Plan Support Agreement.

12.

Pursuant to Section III of Exhibit A-1 of the Plan Support Agreement, OCA, Inc. agreed to terminate Mr. Palmisano as Chief Executive Officer. The agreement expressly permitted Mr. Palmisano to remain on the Board of Directors. Mr. Palmisano voluntarily resigned from the position of Chairman of the Board.

**III. MR. PALMISANO IS WITHOUT STANDING
TO ASSERT THE CLAIMS IN THE MOTION**

13.

In connection with the Sixth Amendment to the Credit Agreement, Mr. Palmisano executed the Subordination Agreement that was by and among OCA, Inc., Bank of America, N.A., as Administrative Agent, and Mr. Palmisano. A copy of the Subordination Agreement is attached as Exhibit A to the “Bank of America N.A., as Administrative Agent’s, (A) Limited Objection to Motion for Temporary Allowance of Claim of Bartholomew Palmisano, Sr. and (B)

Motion for Temporary Allowance of Claims for Voting Purposes Under F.R. Bankr. P. 3018(A).”

14.

Section 1 (Indebtedness Subordinated) provides in pertinent part as follows:

Creditor [Palmisano] hereby subordinates all Indebtedness (as hereinafter defined) now or at any time hereafter owing from Borrower or the Guarantors (each a “Credit Party” and collectively, the “Credit Parties”) to such Creditor (the “Junior Debt”), including without limitation, interest thereon which may accrue subsequent to any Credit Party becoming subject to any state or federal debtor relief statute, including without limitation, the existing Indebtedness described on Schedule I attached hereto, to all Indebtedness now or at any time hereafter owing from the Credit Parties to the Lenders including without limitation the Indebtedness arising under the Credit Agreement and the other Credit Documents (collectively, “Senior Debt”). Creditor irrevocably consents and directs that all Senior Debt shall be paid in full prior to any Credit Party making any payment on any Junior Debt As long as this Agreement is in effect, Creditor will not take any action or initiate any proceedings, judicial or otherwise, to enforce Creditor’s rights or remedies with respect to any Junior Debt, including without limitation, any action to enforce remedies with respect to any collateral securing any Junior Debt or to obtain any judgment or prejudgment remedy against any Credit Party or any such collateral. The Creditor also unconditionally subordinates any liens held by the Creditor with respect to any of the Credit Parties’ assets.

15.

Section 2 (Indebtedness Defined) provides 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, now 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.

16.

Section 5 (Agreement to be Continuing; Applies to the Credit Parties' Existing Indebtedness and Any Indebtedness Hereafter Arising) provides:

This Agreement shall be a continuing agreement and shall apply to any and all Indebtedness of the Credit Parties to Lenders or Creditor now existing or hereafter arising, including any Indebtedness arising under successive transactions, related or unrelated, and notwithstanding that from time to time all Indebtedness theretofore existing may have been paid in full.

17.

Finally, Section 7 (Transfer of Assets or Reorganization of Credit Parties) provides as follows:

If any petition is filed or any proceeding is instituted by or against any Credit Party 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, or seeking the appointment of a receiver, trustee, custodian or liquidator of or for any Credit Party or any of its assets, 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 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.* (Emphasis supplied.)

18.

Any claim that Mr. Palmisano may have under the Alleged Employment Agreement is subject to the Subordination Agreement. Any right to enforce or vote such a claim is within the control of Bank of America as Administrative Agent until such time as Bank of America as Administrative Agent has been paid in full.

-5-

19.

As Bank of America as Administrative Agent has not been paid in full, Mr. Palmisano may not assert the claims or seek the relief sought by the Motion. For this reason, the Motion should be denied.

IV. PROCEDURE FOR ESTIMATING CLAIM UNDER RULE 3018(a)

20.

Rule 3018(a) of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

21.

“In estimating a claim, the bankruptcy court should use whatever method is best suited to the particular circumstances.” *In re American Solar King Corp.*, 90 B.R. 808, 829 n.39 (Bankr. W.D. Tex. 1988). When estimating a claim under Rule 3018(a), the court is bound only by the “legal rules that govern the ultimate value of the claim.” *Id.* citing (3 *Collier on Bankruptcy*, para. 502.03 at p. 502-75 (15th ed. 1988); see *Matter of Brints Cotton Marketing, Inc.*, 737 F.2d 1338, 1341 (5th Cir. 1984)). These rules clearly include giving effect to an offset claim, whether asserted by way of recoupment or via a counterclaim. *Id.* (citing *In re Yonkers Hamilton Sanitarium, Inc.*, 34 B.R. 385, 387 (S.D.N.Y. 1983); *In re Hamby*, 19 Bankr. 776, 783-84 (Bankr. N.D. Ala. 1982)).

22.

Factors to be considered in determining whether a claim should be temporarily allowed for voting purposes, and if allowed, the extent of the allowance, include the following: (1) the manner in which the debtor originally scheduled the claim, (2) the proof of claim filed by the

creditor, and (3) the objection of the debtor to the claim. *In re Stone Hedge Properties*, 191 B.R. 59, 65 (Bankr. M.D. Pa. 1995).

23.

Assuming the Court permits Mr. Palmisano to proceed with the Motion, the claims asserted in the Motion should be estimated at \$0.00, for the reasons discussed below.

V. OPPOSITION OF SPECIAL COUNSEL

A. THE ALLEGED EMPLOYMENT AGREEMENT IS NOT THE APPLICABLE AGREEMENT; MR. PALMISANO WAS AN EMPLOYEE AT WILL

24.

The Alleged Employment Agreement dated November 21, 1994 related to services to be provided by Mr. Palmisano as Chief Financial Officer, Senior Vice President, Secretary and Treasurer of the Company. Mr. Palmisano was discharged from his duties as Chief Executive Officer. Mr. Palmisano resigned from his position as Chairman of the Board of Directors.

25.

There is not any evidence that has been provided to Special Counsel reflecting any employment agreement governing the services of Mr. Palmisano as CEO and Chairman of the Board.

26.

There is a reference to a contract with Mr. Palmisano relating to his services as Chief Executive Officer and President in the minutes of the Compensation Committee in 2003 and the Schedule 14A (Proxy Statement) filed on May 5, 2004. The Proxy Statement does refer to a contract dated November 21, 1994.

27.

In both the minutes and the Proxy Statement, however, the Base Salary is stated to be \$230,000. Special Counsel has not found any record of the Compensation Committee or Board of Directors approving a base salary of \$300,000 as alleged in the Motion.

28.

OCA, Inc. issued checks to Mr. Palmisano in 2005 in the aggregate amount of \$300,000; however, a Form W-2 was not filed reflecting the employment status of Mr. Palmisano.

29.

Thus, it is not clear that Mr. Palmisano was an employee of OCA, Inc. or that the Alleged Employment Agreement is applicable to his relationship with OCA, Inc. From the records, it appears Mr. Palmisano was an employee at will, and as such, does not have any claim for severance damages.

B. MR. PALMISANO MAY HAVE BEEN DISCHARGED FOR CAUSE PURSUANT TO SECTION 5.1 OF THE ALLEGED EMPLOYMENT AGREEMENT AND SEVERANCE COMPENSATION IS NOT OWED TO HIM.

30.

Section 5.1 of the Alleged Employment Agreement provides:

“Termination for Cause” shall mean termination by the Company of the Employee’s employment by the Company by reason of the Employee’s (i) conviction of a felony, (ii) willful dishonesty towards, fraud upon, or deliberate injury or attempted injury to the Company, or (iii) willful material breach of this Agreement which has resulted in material injury to the Company.

31.

Special Counsel reserves the right to assert that Mr. Palmisano’s termination was for cause in accordance with Section 5.1 and that Mr. Palmisano is not owed any further payments

under the Alleged Employment Agreement. This cause includes, but is not limited to, the following: (1) the events described in the June 7, 2005 8-K filed by OCA, including potentially colluding with his son Bart Palmisano, Jr. in manipulating the accounting records of OCA; (2) the submission and payment of expenses for operating his personal corporate jet airplane after June 7, 2005 in violation of OCA policy; (3) the negotiation and sale of the international assets of OCA to a company controlled by Mr. Palmisano (i) without independent review or valuation of the terms of the transaction, (ii) without appropriate financial information from the international operations, and (iii) without disclosing to the board of directors the amount of funds owed to OCA by the international subsidiaries; and (4) Mr. Palmisano ordering the payment of salary and other compensation to himself without reporting the payments to the IRS on Form W-2 or Form 1099.

C. EVEN IF MR. PALMISANO WAS TERMINATED WITHOUT CAUSE, THE SEVERANCE PAYMENT PROVISIONS OF SECTION 6.2 ARE NOT APPLICABLE.

32.

Section 6.2 (Termination Other than for Cause) provides as follows:

6.2. Termination Other Than for Cause. In the event the Employee's employment is terminated in a Termination Other Than for Cause, the Employee shall be paid as severance compensation his Base Salary, at the rate payable at the time of such termination, for a period of three (3) years from the date of such termination, on the dates specified in Subsection 4.1; provided, however, 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 Company.

Notwithstanding any provision in this Subsection 6.2 to the contrary, the Employee may, in-the Employee' sole discretion, by delivery of a notice in the Company within thirty (30) days

following a Termination Other Than for Cause, elect to receive from the Company a lump sum severance payment by bank cashier's check equal to the present value of the flow of cash payments that would otherwise be paid to the Employee pursuant to this Subsection 6.2. However, in no event shall payment pursuant to this Subsection 6.2 be less than two (2) times the Base Salary for the applicable period. Such present value shall be determined as of the date of delivery of the notice of election by the Employee and shall be based on a discount rate equal to the interest rate on 90-day United States Treasury bills, as reported in the Wall Street Journal, or similar publication, on the date of delivery of the election notice. If the Employee elects to receive a lump sum severance payment, the Company shall make such payment to the Employee within ten (10) days following the date on which the Employee notifies the Company of the Company's election.

In addition to the severance payment payable under this Subsection 6.2, the Employee shall be paid an amount equal to two (2) times the average annual bonus earned by Employee in the two (2) years immediately preceding the date of termination and the Company shall be entitled to an accelerated vesting of any awards granted to the Employee under the Company's Incentive Stock Plan.

33.

Applying the first paragraph of Section 6.2 requires the denial of all severance compensation, as Mr. Palmisano is receiving compensation from OCA International since his termination by OCA, Inc. His compensation from OCA International, Inc. is equal to or greater than the amount he received from OCA. See Transcript dated July 11, 2006 on Motion and Incorporated Memorandum to Modify Stay filed by Gimili, LLC.

D. ASSUMING THE SEVERANCE PAYMENT PROVISIONS OF SECTION 6.2 ARE APPLICABLE, THEN ANY RECOVERY OF MR. PALMISANO IS LIMITED BY SECTION 502(B)(7) OF THE BANKRUPTCY CODE.

34.

Section 502(b)(7) provides that “the claim of an employee for damages resulting from the termination of an employment contract” cannot exceed “the compensation provided by such contract, without acceleration, for one year ... [plus] any unpaid compensation due under such contract, without acceleration”

35.

Thus, assuming *arguendo* that Mr. Palmisano is entitled to severance damages pursuant to the Alleged Employment Agreement (which he is not for the reasons set forth above), section 502(b)(7) limits any unsecured claim of Mr. Palmisano to no more than the Base Salary under the Alleged Employment Agreement. See 4 Collier on Bankruptcy ¶ 502.03[8][a].

36.

According to the records of OCA, Inc., Mr. Palmisano was paid \$300,000 in compensation in 2005.

37.

Notwithstanding this payment, the last official statements of OCA, Inc. (the Proxy Statement) indicated an authorized annual Base Salary of \$230,000. This is the only amount that Special Counsel can determine was approved by the Compensation Committee and Board of Directors.

38.

Mr. Palmisano did not receive a bonus in 2005.

39.

The stock options allegedly granted in 2002 would vest under Section 6.2. However, Mr. Palmisano is not entitled to recovery against OCA, Inc., as there is not any obligation on the part of the company to acquire the stock at the identified price as asserted in the Motion.

40.

Thus, the last official Base Salary under any employment agreement is \$230,000, and this is the maximum possible amount of any severance claim of Mr. Palmisano under section 502(b)(7) of the Bankruptcy Code.

41.

Furthermore, the numerous claims either filed by the Debtors or anticipated to be filed by the Debtors against Mr. Palmisano can be offset against the alleged claim of Mr. Palmisano. *In re American Solar King Corp.*, 90 B.R. 808, 829 n.39 (Bankr. W.D. Tex. 1988) (citing *In re Yonkers Hamilton Sanitarium, Inc.*, 34 B.R. 385, 387 (S.D.N.Y. 1983); *In re Hamby*, 19 Bankr. 776, 783-84 (Bankr. N.D. Ala. 1982)). Consequently, the alleged claim of Mr. Palmisano should be estimated at \$0.00 under Rule 3018(a).

NOW WHEREFORE Special Counsel object to the Motion and Incorporated Memorandum for Temporary Allowance of Claim Pursuant to Rule 3018(a) and request that after due proceedings, the Motion be denied in all respects. In the alternative, the claim should be estimated at \$0.00, subject to the right of OCA, Inc. to object to all amounts.

Respectfully submitted,

/s/ Philip K. Jones, Jr.

Leon J. Reymond, Jr. (Bar #11196)

Philip K. Jones, Jr. (Bar #7503)

John C. Anjier (Bar # 20083)

Carey L. Menasco (Bar # 28131)

LISKOW & LEWIS, APLC

701 Poydras Street, Suite 5000

New Orleans, Louisiana 70139

Tel: 504-581-7979

Fax: 504-556-4108

SPECIAL COUNSEL TO OCA, INC., ET AL.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition of Special Counsel to Motion and Incorporated Memorandum for Temporary Allowance of Claim Pursuant to Rule 3018(a) has been served (1) electronically upon PACER system participants on the 14th day of August, 2006 and (2) by United States mail, properly addressed and postage prepaid, to those on the attached service list on the 15th day of August 2006.

/s/ Philip K. Jones, Jr.