

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

In re:)	Case No. 06-10179 (B)
)	Chapter 11
OCA, INC., et al.,)	Jointly Administered with
Debtors.)	Case No. 06-10183 – 06-10223
)	
)	
)	
)	

MOTION FOR LEAVE TO JOIN IN STIPULATION REGARDING BSA LITIGATION
AND ALTERNATIVE MOTION TO AMEND TRIAL SCHEDULE FILED BY DR.
STEPHEN E. LUDWIG

NOW INTO COURT, through undersigned counsel, comes Stephen E. Ludwig DMD (hereinafter collectively “Dr. Ludwig”), who files this Motion for Leave to join the Stipulation and Alternative Motion to Amend Trial Schedule and avers as follows:

1. On or about June 30, 1999 Douglas J. Hudson, D.D.S., Inc. ("Hudson") entered into a Consulting and Business Services Agreement (“BSA”) with OrthAlliance, Inc., one of the affiliated debtors of the debtor-in possession, and OCA, Inc. (hereinafter collectively referred to as the “Debtors”).

2. Dr. Ludwig acquired Hudson's practice in 2003.

3. Dr. Ludwig has not filed a proof of claim in the Debtors' bankruptcy case, he has not been served with a summons or complaint by the Debtors, and he had not retained bankruptcy counsel to assist him with the Debtors' bankruptcy case until approximately August 2, 2006.

4. On June 30, 2006, this Court entered its Order on the Debtors' Motion for Entry of Procedures Order for Assumption of Business Service Agreements Under Joint Chapter 11 Plan

of Reorganization for OCA, Inc. and Filed Subsidiaries (the "June 30 Order"). The June 30 Order required the Debtors to serve a Notice of The BSA's Procedures Order (the "Objection Notice"), which notice provided that any Affiliated Practice identified on Exhibit 1 to the Objection Notice who objects to the assumption of its BSA shall file a statement on or before July 17, 2006 notifying the Debtors of its objection. See Docket Entry No. 882.

5. Dr. Ludwig is listed in Exhibit "D-5" of the Debtors' Amended Disclosure Statement as one of the Current BSA's that the Debtors intend to assume. Dr. Ludwig is also identified on Exhibit 1 to the Objection Notice.

6. While unrepresented by Counsel, Dr. Ludwig received the Objection Notice and hundreds of other pages of documents relating to the Debtors' bankruptcy case prior to July 17, 2006.

7. In order to understand the Objection Notice, Dr. Ludwig telephoned Anthony Patternostro, one of the Debtors' account representatives. Dr. Ludwig informed Mr. Patternostro that he wanted to discontinue any business relationship that might exist between Ludwig and the Debtors, and Dr. Ludwig asked Mr. Patternostro about filing an objection to assumption. In response, Mr. Patternostro told Dr. Ludwig that filing an objection to assumption might be viewed unfavorably by the Debtors and that the Debtors would be more likely to cooperate with Dr. Ludwig in the future if Dr. Ludwig did not file an objection to assumption. Mr. Patternostro did not inform Dr. Ludwig that any adverse consequences might result for Dr. Ludwig if Dr. Ludwig followed Mr. Patternostro's recommendation not to file an objection to assumption on or before July 17, 2006.

8. Prior to retaining bankruptcy counsel Dr. Ludwig was not aware of any adverse consequences that might result if I did not file an objection to assumption other than Mr.

Patternostro's warning that an objection could limit the Debtors' willingness to negotiate a resolution.

9. On July 31, the Debtors filed a Stipulation between the Debtors and certain stipulating doctors regarding the proceedings on the Debtors' proposed assumption or rejection of the Stipulating BSA's. See Docket Entry No. 1295.

10. On August 1, 2006, the Court entered its Scheduling Order Pursuant to Case Management Order which provides that except for the Stipulating Parties, the proposed assumption or rejection of all other Current or Defaulted BSA designated for assumption or rejection shall proceed to trial on September 5, 2006, at the Confirmation Hearing on the Plan. See Docket Entry No. 1300.

11. Between July 31, 2006 and August 2, 2006, Dr. Ludwig retained bankruptcy counsel to represent him in the Debtors bankruptcy case.

12. On August 3, 2006, the Court entered an Order pursuant to the July 31 Stipulation regarding the proceedings on the Debtors' proposed assumption or rejection of the Stipulating BSA's. See Docket Entry No. 1316.

13. The Stipulation and Order provides that Stipulating Parties shall have until January 15, 2007 to complete fact discovery and that they shall have their BSA Litigation decided at trial on March 1, 2007. The Stipulation and Order provides that it shall include and apply to any Stipulating Parties, any Affiliated Practice who timely objected to the proposed assumption by Debtors of its BSA and who files a joinder to this Stipulation on or before July 31, 2006, and any other Affiliated Practice who files a joinder to the Stipulation with the written consent of the Debtors.

14. On August 4, 2006, Dr. Ludwig, through counsel, contacted the Debtors counsel and requested the Debtor's consent to join in the Stipulation. On August 7, 2006, the Debtors responded that they would not voluntarily consent to Dr. Ludwig joining the Stipulation.

15. On August 8, 2006, pursuant to June 30 Order, and accompanying notice, Dr. Ludwig filed his objection to the assumption of the BSA by the Debtors. See Docket Entry No. 1392.

16. August 28, 2006, is the last day for objections to confirmation to be filed.

DR. LUDWIG SHOULD BE ALLOWED REASONABLE DUE PROCESS FOR LITIGATION AND TRIAL REGARDING THE DEBTORS' PROPOSED ASSUMPTION OF THE LUDWIG BSA.

The Court's August 1, 2006 Scheduling Order allows only 35 days between the date the Order was entered and the date set for trial on the Debtors proposed assumption or rejection. In many cases, this amount of time would be sufficient, since an assumption proceeding is a quick, summary proceeding designed to review the trustee's business judgment in determining whether to assume or reject a contract – not the place to litigate breach of contract actions. *See e.g. In re Orion Pictures Corporation*, 4 F. 3d 1095 (2nd Cir. 1993); *In re Apex Express Corporation*, 190 F. 3d. 624 (4th Cir. 1999); *In re G.I. Industries, Inc.*, 204 F. 3d. 1276 (9th Cir. 2000); and, *In re Bankvest Capital Corp.*, 360 F. 3d. 291 (1st Cir. 2004).

However, the Debtors in this case seek a much broader form of relief in connection with assumption. For example, the Debtors' Plan provides at Section 5.1.2.1(b) that the Confirmation Order shall constitute a finding of fact and conclusion of law that an assumed Current BSA constitutes a "legal, valid, binding and enforceable contract" and that the "Affiliated Practice is required to and ordered to perform under and honor the terms of the assumed Current BSA."

As briefed in numerous prior pleadings by parties in the proceeding, a lawsuit for a prepetition breach of contract against a non-debtor defendant who has not filed a proof of claim is a non-core matter entitled to a jury trial. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 L.Ed. 2d 598, 102 S. Ct. 2858 (1982); *In re Orion Pictures Corporation*, 4 F. 3d 1095 (2nd Cir. 1993); *In re Apex Express Corporation*, 190 F. 3d. 624 (4th Cir. 1999); *In re G.I. Industries, Inc.*, 204 F. 3d. 1276 (9th Cir. 2000); and, *In re Bankvest Capital Corp.*, 360 F. 3d. 291 (1st Cir. 2004). It should be self-evident that the 7th Amendment's right to a jury trial cannot be abrogated by a case management order under Bankruptcy Code § 365. Likewise, Federal Rules of Bankruptcy Procedure, Rule 7001(7) requires the filing of an adversary proceeding to obtain an injunction.

Such complex and weighty matters as whether a 25 year BSA is legal and enforceable under California's public policy statutes limiting the right of non-dentists to practice dentistry and/or whether it is appropriate to issue a permanent injunction purporting to apply to a dentist's performance under a BSA require more than 35 days prior to hearing to develop factual and legal positions.

**DR. LUDWIG SHOULD BE ALLOWED TO JOIN IN THE STIPULATION
REGARDING BSA LITIGATION OR OTHERWISE HAVE HIS OBJECTIONS TO
ASSUMPTION HEARD**

Dr. Ludwig respectfully asks the Court for leave to Join in the Stipulation for BSA Litigation or for some other relief as the Court deems appropriate to have his Objections to Assumption heard on a reasonable schedule. Dr. Ludwig has not filed a proof of claim or otherwise voluntarily submitted himself to the jurisdiction of the Bankruptcy Court and he reserves all rights to a jury trial.

Although Dr. Ludwig did not file his Objections to Assumption prior to July 17, 2006, he did file his objections prior to the August 28, 2006 deadline for confirmation objections. Moreover, Dr. Ludwig's timing in filing his Objections to Assumption was excusable under the circumstances. The Objection Notice did not specify any adverse consequences that might result for a dentist that did not file an objection prior to July 17, 2006. Moreover, when Dr. Ludwig contacted to the Debtors to inquire about the Objection Notice he was told that filing an objection would limit his ability to deal with the Debtors regarding the BSA. As a result, Dr. Ludwig, who was unrepresented by counsel, was unaware that the Debtors were actually seeking findings of fact and conclusions of law regarding such significant issues as illegality of the BSA and injunctive relief.

Promptly after retaining counsel, Dr. Ludwig, through counsel, sought leave from the Debtors to join in the Stipulation but was denied. Dr. Ludwig's Objections to Assumption and this Motion follow shortly thereafter.

Under the circumstances, Dr. Ludwig should be permitted to join in the Stipulation or otherwise have his Objections to Assumption heard on a similar schedule. Dr. Ludwig's rights in regards to significant issues such as illegality and specific performance warrant a fair hearing. Although Dr. Ludwig, did not file his Objections until after July 17, his Objections were filed only a few days after Case Management Order. As a result, those proceedings have just begun and the Debtors will not suffer any prejudice if Dr. Ludwig's Objections are heard on the same schedule as all other stipulating dentists.

CONCLUSION

For the foregoing reasons, Dr. Ludwig respectfully requests that the Court grant him leave to join in the Stipulation regarding BSA Litigation or that the Court otherwise enter an

order that allows a reasonable schedule for hearing on Dr. Ludwig's Objections to Assumption that follows the schedule established for the Stipulating Parties. Any delay in filing Dr. Ludwig's Objections is reasonable under the circumstances and the Objections have been filed prior to the deadline for confirmation objections. Moreover, the issues raised by the Objections to Assumption are sufficiently complex and important that they require a reasonable time for pretrial preparation and hearing.

DATED: August 15, 2006

By: /s/ Jason E. Rios

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