UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

In re	*	**Chapter 11**
	*	**Case No. 06-10179 (B)**
OCA, INC., *et al.*,	*	
	*	**(Motion for Joint**
Debtors.	*	**Administration Granted)**
	*	

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SILVER POINT FINANCE, LLC's
MOTION FOR A PROTECTIVE ORDER

Silver Point Finance, LLC (together with its affiliates, "Silver Point") hereby moves (the "Motion") this Court pursuant to Federal Rule of Civil Procedure 26(c), made applicable hereto by Rule 7026 of the Federal Rules of Bankruptcy Procedure for an order entering the attached protective order ("Protective Order"), and in support thereof, respectfully represents as follows.

PRELIMINARY STATEMENT

Silver Point seeks entry of the Protective Order in response to a subpoena (the "Subpoena") issued by the Debtors' former Chief Executive Officer, Bartholomew F. Palmisano, Sr. ("Palmisano"), who is currently the CEO of a potential competitor. The Subpoena seeks the production of documents relating to the Debtor—not Silver Point—containing information that is valuable, confidential and commercially sensitive. The *most* sensitive information called for by the Subpoena relates to the business terms of the Debtors' relationships with its affiliated doctors. These business terms, as reflected in the contracts—or Business Service Agreements ("BSAs")—in place with the doctors are the lifeblood of the Debtors business. If Silver Point is required to produce the confidential

documents relating to the BSAs to a competitor without appropriate confidentiality protection, the Debtor's business may be harmed.

In such circumstances, a protective order limiting the dissemination of produced documents is necessary and entirely appropriate. In fact, the overwhelming weight of authority in this district, and throughout the federal system, is that courts should enter two-tiered protective orders such as that proposed here in circumstances where commercially sensitive information will be produced to a business competitor.

RELEVANT FACTUAL BACKGROUND

On March 14, 2006 and periodically thereafter, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"). The Debtors' cases are being jointly administered for procedural purposes only. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

Palmisano was a founder and long-time CEO of OCA, Inc. He was dismissed by OCA acting through its board of directors—not by Silver Point—from his position as CEO in May 2006, following a disastrous year for OCA—a year in which OCA (i) was forced to restate 4 years worth of earnings and failed to file certain requisite financial statements for the years 2004 and 2005, (ii) lost most of its market capitalization, (iii) became the subject of an SEC investigation into alleged fraud by OCA, its board, and its officers—including Palmisano; (iv) repeatedly defaulted on its outstanding loans and (v) filed for Chapter 11 protection.

In the wake of his departure and in connection with severance negotiations, Palmisano was asked to execute an agreement not to compete with OCA in the United States. He refused. Instead, following his departure from OCA, Palmisano sought, and eventually obtained, majority control of OCA International ("International"), a non-debtor entity in which OCA holds a minority interest. International operates substantially the same type of business as OCA. Palmisano is now the CEO of International.[1] International thus has the knowledge, ability, resources and motive to become a major business competitor to OCA.

Throughout all of this business turmoil, Silver Point continued to finance the Debtors—an extremely high risk venture and financing—when no one else, including the original secured lenders of the debtor, would do so. Indeed, it was the unwavering support of Silver Point that enabled the Debtors to stay afloat for as long as they did. Silver Point and other lenders forewent the opportunity to call a default and force a liquidation seven times during the course of the bank loan, instead choosing to keep OCA afloat by the execution of amendment, waiver, or forebearance agreements. Similarly, when the Debtors' efforts to refinance its debt stalled and the principal amount matured, Silver Point did not exercise its right to force a liquidation or involuntary bankruptcy. But for Silver Point's ceaseless efforts to breathe life into the Debtors, the Debtors would have long-since been defunct.

Against this backdrop, the Subpoena was issued on July 31, 2006. On August 3, 2006, Silver Point moved to quash the subpoena. On August 9, 2006, this Court granted in part and denied in part Silver Point's motion to quash, ordering Silver Point to produce

[1] Though his position as CEO, Palmisano has denied Debtors the opportunity to participate in the corporate affairs of International.

documents in response to four narrowed document requests. The four document request and deposition topics relate to: (i) the Debtors' potential federal and state income tax refunds for the years 2001 through 2005; (ii) the Debtors' insurance claims relating to the 2005 hurricane season; (iii) the Debtors' decision whether or not to approach doctors with proposed modifications to the BSAs and (iv) any plan or intention of Silver Point to obtain control of the Debtors' equity.

Due to the confidential nature of the information sought in the above document and deposition topic requests, Silver Point proposed a stipulated confidentiality agreement to Palmisano's counsel on August 13, 2006. The Silver Point proposal, similar to the proposed Protective Order attached hereto,[2] called for a two-tiered discovery plan with one level of discovery labeled "Confidential" and a second more restrictive level labeled "Confidential – Attorney's Eyes Only." The documents to be designated "Confidential" contain confidential financial or other information that may be reviewed by the receiving party, experts and other representative, but must be protected against disclosure to third parties. "Attorney's Eyes Only" designated documents would be limited to documents produced in response to category (iii) above and would apply to those documents in category (iii) that contain highly sensitive information that would put the Debtors—not Silver Point—at a competitive disadvantage if the information became known to the receiving party itself or third parties.

The only documents that Silver Point would propose producing pursuant to the Attorney's Eyes Only provisions of the Protective Order are documents that reflect the

[2] The Protective Order differs from the confidentiality stipulation Silver Point proposed to the Palmisano in that it (i) includes the Equity Committee as a party to the order, (ii) allows the dissemination of Confidential and Attorney's Eyes Only Information to outside consultants and experts subject to the execution of an undertaking, (iii) protects only Silver Point as the producing party, rather than to both Palmisano and Silver Point and (iv) is styled as a court order instead of a stipulation.

terms or proposed terms of any renegotiated BSAs—information that was supplied to Silver Point and that could be directly used by the Debtors' competitors to undermine the Debtors' reconstituted business. All other documents and testimony are less sensitive and thus entitled to, at most, Confidential protection. Under the proposed Protective Order, Palmisano could challenge before this Court prior to the Silver Point deposition any Confidentiality or Attorney's Eyes Only designations that he felt were inappropriately asserted.

Palmisano's attorney did not respond to Silver Point's e-mail seeking comments on the proposed confidentiality agreement.[3] Instead, at a hearing before the Court yesterday, Palmisano's counsel indicated for the first time that he had concerns about the proposal. Specifically, Palmisano's counsel argued that he objected to allowing Silver Point to designate any documents as Attorney's Eyes Only.

ARGUMENT

Upon a showing of good cause, a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including ordering that "a deposition after being sealed be opened only by order of the court," and "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Fed. R. Civ. P. 26(c)(6)-(7). The Supreme Court has interpreted Rule 26(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

[3] Had Palmisano's counsel taken the time to confer with Silver Point prior to August 16 hearing, perhaps this matter could have been resolved without the need for the Court's intervention.

Where parties to an action are in competition with one another, a court may require the entry of a protective order that limits access to certain information on an "attorney's eyes only" basis. *See Blanchard & Co., Inc. v. Barrick Gold Corp.*, 2004 WL 737485, *6 (E.D.La. 2004). This protects against potentially predatory practices, yet still recognizes the broad scope of discovery in a federal action. *See id.; U.S. v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir. 1969) ("courts will…exercise their discretion to avoid unnecessary disclosure of [confidential] information, particularly where the action is between competitors.").

It is the burden of the party seeking protection to show good cause for the necessity of the level of proposed "confidentiality." *See Harris v. Amoco Production Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985), *cert denied*, *Amoco Production Co. v. E.E.O.C.*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). Good cause for designating documents for "attorney's eyes only" exists where a party would be competitively disadvantaged by the disclosure of such information or, put another way, where the risk of injury outweighs the need for disclosure. *See Westside-Marrero Jeep Eagle, Inc. v. Chrysler, Inc.*, 1998 WL 186728, *2 (E.D.La.) (finding that disclosure of confidential information should be limited where there is risk that a party might use the information to gain a competitive advantage over the producing party); *Se-Won Industries, Co., Ltd. V. Pres-Vac Engineering A/S*, 1992 WL 202332, *1 (E.D.La.) (request to remove documents from "attorney's eyes only" protective category denied where requesting party unable to show that information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the defendant).

Courts have repeatedly found that good cause may be shown for "attorney's eyes only" designations where the parties to an action are competitors. *See Blanchard*, 2004 WL 737485, *6; *U.S. v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 161-62 (D.Del. 1999) (even in-house counsel was barred from viewing sensitive proprietary documents because he had real involvement in competitive decision making); *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255 (M.D.N.C. 2001) (disclosure of supplier lists limited to attorney's eyes only); *Westside-Marrero Jeep Eagle, Inc.*, 1998 WL 186728 at *2.

The Debtors face from Palmisano competitive pressure similar to those faced by the producing parties in the cases outlined above. Palmisano has the motive and a well-established organization at his disposal to enable him to begin competing with the Debtors. Palmisano's refusal to sign a U.S. non-compete agreement upon his departure from OCA signals his intention to at some point enter into direct competition. The danger that Palmisano may at any moment use International to compete directly with OCA is great.

Accordingly, Silver Point asks this Court to authorize it to designate documents reflecting renegotiated BSA terms as Attorney's Eyes Only. Silver Point respectfully requests that the Court enter the attached proposed Protective Order.

CERTIFICATION AS TO GOOD FAITH CONFERENCE

The undersigned counsel hereby certifies that it attempted to confer in good faith with Palmisano's counsel in an effort to resolve amicably the issues set forth herein. Palmisano's counsel, however, did not respond to the undersigned's attempts to confer on

the issues presented herein. Silver Point is thus filing the motion promptly to avoid any delay in resolution of this matter.

NOTICE

Notice of this Motion will be provided to (a) the Debtors and their professionals, (b) the U.S. Trustee and its counsel, (c) the Unsecured Creditors' Committee and its counsel, and (d) Palmisano and his counsel. Silver Point submits that no other and further notice need be given under the circumstances.

NO PREVIOUS REQUEST

No previous application for the relief requested herein has been made to this or any other court.

CONCLUSION

For the reasons set forth above, Silver Point respectfully requests that this Court enter the attached Protective Order.

Dated: New Orleans, Louisiana
August 17, 2006

LEMLE & KELLEHER, L.L.P.

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