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

| | | |
|---|---|---|
| **In re** | : | **Chapter 11 Case No.** |
| | : | **06-10179 (B)** |
| **OCA, INC., *et al.*,** | : | |
| | : | **(Jointly Administered)** |
| **Debtors.** | : | |

**MOTION TO DESIGNATE THE VOTE OF**
**BARTHOLOMEW F. PALMISANO, SR. PURSUANT TO 11 U.S.C. § 1126(e)**

The Official Committee of Unsecured Creditors (the "Committee") of OCA, Inc., *et al.* (the "Debtors"), hereby moves this Court (the "Motion") to designate all votes cast by Bartholomew F. Palmisano, Sr. ("Palmisano") in Class 4 -- Unsecured Claims with respect to the Amended and Supplemental Joint Chapter 11 Plan of Reorganization of the above-captioned debtors (the "Debtors"), as not cast in good faith pursuant to section 1126(e) of chapter 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). In support of this Motion, the Committee respectfully states as follows:

## PRELIMINARY STATEMENT

1. Palmisano is the terminated former Chairman and Chief Executive Officer of the Debtors. While at the Debtors' prepetition helm, Palmisano led the Debtors into: (a) default under their credit arrangements; (b) an SEC investigation, other inquiries, and lawsuits over accounting irregularities that resulted in an admitted need for financial restatements; (c) a complete inability to produce audited financial statements or timely make required securities filings; (d) the utter failure to meet credit obligations or arrange alternative financing for credit facilities coming due; and, (e) myriad other business and management failures that ultimately precipitated these Chapter 11 cases. Palmisano accomplished all this while simultaneously

transferring to his family-owned company a near-majority interest in the Debtors' international operations without so much as an appraisal or other valuation of the assets contributed by the Debtors to whom he owed both his undivided loyalty and a fiduciary duty.

2. Although the Plan is overwhelmingly supported by the unsecured creditors in Class 4 (according to preliminary tabulation results), Palmisano has voted to reject the Plan, which would provide unsecured creditors a significant distribution, with the potential to eventually recover 100% of the value of their claims. Palmisano is different from the typical unsecured creditor because, unlike the majority of unsecured creditors, Palmisano lacks a true economic interest in the claim that he has voted, as his subordination agreement with Bank of America, N.A. requires that any eventual distribution on the claim likely be delivered to the senior lenders. Moreover, Palmisano apparently is attempting to torpedo the Debtors' plan of reorganization, while not offering any other confirmable plan of reorganization.

3. Palmisano's motives are clear: He candidly admits that he already has taken steps to establish a new business that likely will directly compete with the reorganized Debtors by offering business services to orthodontic practices. (Palmisano Dep. at 231-32). Palmisano's naked attempt to gain an unfair advantage by voting suspect claims in order to keep the Debtors hobbled in Chapter 11 while he pursues his competing business should not be countenanced and the Court should designate Palmisano's votes. Palmisano does not propose any other or better treatment of unsecured creditors. Palmisano has had since at least June 2005 to come up with a plan to pay off the senior lenders and to pay a dividend to unsecured creditors. The Plan that he seeks to reject is the only avenue before creditors and the Court which leads to reorganization and unsecured creditor payments. Rejection of the only economic deal that makes sense cannot be in good faith.

## JURISDICTION AND VENUE

4. The Court has jurisdiction over this Motion pursuant to section § 1126(e) and 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L), and (O).

## BACKGROUND

6. On June 1, 2006, Palmisano filed proofs of claim in the amounts of $1,234,751.50 (Claim No. 238, the "Severance Claim") and $3,195,534.44 (Claim No. 239, the "Promissory Note Claim," together with the Severance Claim, the "Palmisano Claims"). The Severance Claim is for certain severance payments alleged to be due Palmisano from the Debtors under the terms of an employment agreement dated November 21, 1994.

7. The Promissory Note Claim purports to be based on two promissory notes entered into between Palmisano and the Debtors, which purportedly relate to two advances made to the Debtors by Palmisano. On or about June 9, 2005, Palmisano received a promissory note in the face amount of $2,000,000, due and payable on June 9, 2006. On or about August 18, 2005, Palmisano received a second promissory note in the face amount of $1,000,000, due and payable on January 6, 2006. In addition to the $3,000,000 principal amount purportedly advanced by Palmisano, the Promissory Note Claims includes a request for prepetition interest on both notes of an additional $195,534.44, for a total claim of $3,195,534.44.

8. On August 3, 2006, Palmisano moved to temporarily allow the Severance Claim for purposes of voting (Docket No. 1317). The Court conducted a hearing on August 16, at the conclusion of which the Court temporarily allowed Palmisano's severance claim for purposes of voting, but limited the claim amount to $300,000 in accordance with an acknowledged

Bankruptcy Code limitation on severance claims. On August 18, the Debtors, the Committee, and Bank of America, as administrative agent, filed motion to reconsider the order (Docket No. 1546).

9. On August 28, 2006, the Committee filed an objection to Palmisano's Promissory Note Claim, on the basis that the claim was subject to offset, recharacterization and equitable subordination (Docket No. 1623). The Committee's objection noted that Palmisano's advances to the Debtor were made at times during which: (a) he indisputably was an insider; (b) the Debtors were in default under their existing credit arrangements; (c) the Debtors had recently announced an investigation into accounting irregularities; (d) the Debtors had failed to produce audited financial statements or timely make required securities filings; (e) the senior lenders had restricted the Debtors' borrowing capacity; and, (f) no similar financing would have been obtainable from an outside informed lender.

10. On August 28, 2006, Palmisano filed his motion to temporarily allow his Promissory Note Claim (Docket No. 1653) in order to validate the negative vote he cast against the Debtors' reorganization plan.[1]

11. As more fully set forth below, rather than having his claims temporarily allowed for voting purposes pursuant to Bankruptcy Rule 3018(a), any votes by Palmisano should be designated pursuant to Bankruptcy Code § 1129(e) as not cast in good faith and requiring that acceptance or rejection of the plan be determined under § 1126(c) without inclusion of such votes.

[1] Palmisano's motion does not refute any of the grounds the Committee cited in its objection to Palmisano's promissory note claim. The Committee will be separately filing a formal response to Palmisano's motion for temporary allowance.

## RELIEF REQUESTED

12. By this Motion, the Committee seeks entry of an Order designating the Class 4 votes of Palmisano rejecting the Debtors' Plan as not having been cast in good faith pursuant to section 1126(e) of the Bankruptcy Code, and ordering that such votes not be counted in determining whether Class 4 accepted the Plan under section 1129(d).

## ARGUMENT

13. Section 1126(e) imposes an obligation of good faith on creditors when voting on a plan, providing, in pertinent part, "after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was *not in good faith*." 11 U.S.C. § 1126(e) (emphasis supplied). If a court makes this designation, the designated votes are not considered when determining whether a plan has been accepted by a particular class of creditors. *See* 11 U.S.C. § 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors, *other than any entity designated under subsection (e) of this section* ….") (emphasis supplied).

14. The Bankruptcy Code does not define "good faith," but courts applying § 1126(e) have identified certain circumstances under which it is generally presumed that a creditor's vote was not cast in good faith. *See In re Landing Associates, Ltd.*, 157 B.R. 791, 802 (Bankr. W.D. Tex. 1993) ("The term "good faith" as used in this section was intentionally left undefined, so that it might be defined and developed in accordance with cases as they arose."). In particular, designating and disqualifying a vote is justified when, *inter alia*, a vote is motivated by an ulterior purpose of destroying or injuring the debtor's business to further a competing business. *See In re MacLeod Co., Inc.*, 63 B.R. 654, 655 -656 (Bankr. S.D. Ohio 1986); *see also Young v. Higbee Co.*, 324 U.S. 204, 201-11 (1945) (stating that the good faith requirement was designed

to eliminate "obstructive tactics and holdup techniques"); *In re Landing Associates, Ltd.*, 157 B.R. 791, 807-808 (Bankr. W.D. Tex. 1993) (stating that efforts to put the debtor out of business in order to realize competitive gain could result in vote disqualification and that "[p]urely malicious or mean-spirited conduct, such as an attempt to simply destroy the debtor via obstreperous conduct culminating in a negative vote certainly ought to result in disqualification."); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 290 (Bankr. W.D. Penn. 1990) (explaining that, "Votes must be designated when the court determines that 'the creditor has cast his vote with an 'ulterior purpose' aimed at gaining some advantage to which he would not otherwise be entitled in his position.'" (internal citations omitted)).

15. The *MacLeod* case, in which the court designated the votes of certain creditors, closely resembles the case before this Court. In that case, unsecured creditors in Class I voted, in both number and amount, to accept the plan, and creditors in Class II voted to accept the plan in number, but not in amount. The debtor brought a motion to designate certain Class II votes of individuals who previously worked for the debtor but who were now working for a competitor of the debtor that they had helped to form. The court found that "the rejection of debtor's plan by the named individuals was not in good faith, but rather was for the ulterior purpose of destroying or injuring debtor in its business so that the interests of the competing business with which the named individuals were associated, could be furthered." *In re MacLeod*, 63 B.R. at 655-56. The same rationale applies here. Virtually all unsecured creditors holding economic interests have voted to accept the Plan, which is their only road to recovery. There is no good faith basis to reject the Plan.

16. In the case before the Court, the latest balloting report indicates that creditors in Class 4 entitled to vote (excluding Palmisano) have virtually unanimously voted to accept the

Plan by both number and amount. If one broadens the universe to include all purported Class 4 creditors who attempted to vote (excluding Palmisano), although the result is not quite as unanimous, a supermajority of Class 4 creditors, in both number and amount, have voted to accept the Plan. Despite this overwhelming support of the Plan by the class of unsecured creditors, Palmisano has voted to reject the Plan in an effort to block confirmation of the Plan. Palmisano clearly is seeking only to hold up the reorganization of the Debtors to gain a competitive advantage in the marketplace.

17. Even though a creditor may cast a vote in its own self-interest, "[i]t is always necessary to keep in mind the difference between a creditor's self interest *as a creditor* and a motive which is ulterior to the purpose of protecting a creditor's interest." *In re Crosscreek Apartments, Ltd.*, 211 B.R. 641, 644 (Bankr. E.D. Tenn. 1997) (emphasis added). Thus, "[t]he test is whether a vote is cast for the ulterior purpose of securing some advantage to which the creditor would not otherwise have been entitled." *In re Kovalchick*, 175 B.R. 863, 865 (Bankr. E.D. Pa. 1994); *see also Insinger Machine Co. v. Federal Support Co. (In re Federal Support Co.*, 859 F.2d 17, 19 (4th Cir. 1988) ("Each creditor is expected to cast his vote in accordance with his perception of his own self-interest, but he may not act with an ulterior or coercive purpose."); *Dune Deck*, 175 B.R. at 845 ("[W]here the record contains evidence that the creditor has voted without regard to the treatment of its claim, but instead, to achieve some benefit or goal inconsistent interests of the estate and its creditors, the Court must inquire into those motives in order to preserve the integrity of the Chapter 11 process.").

18. The principal inquiries are: (a) whether the challenged votes are cast merely out of self-interest, or cast with the intent of procuring an unfair advantage to which the voter is not entitled; and (b) whether a conflict of interest precludes a finding of good faith. This

determination must be made on a case by case basis. As one court applying this analysis explained, "Prior cases can offer guidance, but when all is said and done, the bankruptcy court must simply approach each good faith determination with a perspicacity derived from the data of its informed practical experience in dealing with bankrupts and their creditors." *In re Crosscreek*, 211 B.R. at 644.

19. In this case, Palmisano has cast his Class 4 votes to reject the Plan for the sole purpose of holding up the Plan, gaining a competitive advantage for his new personal business interests, and not for any good faith economic reasons *as a creditor*. As CEO, he led a refinancing search that failed. He knows that there is no other mechanism to pay dividends to unsecured creditors, other than through a consensual plan with the senior lenders. His role as a competitor or potential competitor creates a competing interest that mandates designation. Voting no to the only plan that provides a possible dividend (when no alternative, better plan is proposed) is evidence of an improper, ulterior motive. His agenda has nothing to do with the best interests of the Class 4 creditors whose vote he seeks to control. In fact, because of the subordination agreement between Palmisano and Bank of America, Palmisano lacks a true economic interest in the claims that he is voting. Because the Plan proposes to provide unsecured creditors a significant distribution with the potential to eventually recover 100%, Palmisano's actions can only be described as emanating from a disgruntled former insider of the Debtors who will go to virtually any lengths to block a successful reorganization of the Debtors. Consequently, this Court should conclude that Palmisano's votes appropriately should be designated as not cast in good faith pursuant to § 1126(e).

WHEREFORE, the Committee respectfully requests that this Court enter an order: (a) designating Palmisano's Class 4 votes as not cast in good faith pursuant to § 1126(e);

(b) requiring that that the acceptance or rejection of the Plan by Class 4 be determined under section 1126(c) without inclusion of such votes; and (c) granting such other relief as the Court deems just and fair.

Dated: August 31, 2006

Respectfully submitted,

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

William E. Steffes (La. Bar No. 12426)
Patrick S. Garrity (La. Bar No. 23744)
**STEFFES, VINGIELLO & McKENZIE, LLC**
13702 Coursey Boulevard, Building 3
Baton Rouge, Louisiana 70817
Telephone: 225-751-1751
Facsimile: 225-751-1998
*Local Counsel for the Official Committee of Unsecured Creditors*

-and-

By: */s/ Phillip W. Nelson*
One of Its Attorneys

Mark K. Thomas (Ill. Bar No. 06181453)
Michael S. Terrien (Ill. Bar No. 00211556)
Phillip W. Nelson (Ill. Bar No. 06283615)
**JENNER & BLOCK, LLP**
One IBM Plaza
Chicago, Illinois 60611
Telephone: 312-840-7622
Facsimile: 312-840-7722
*National Counsel for the Official Committee of the Unsecured Creditors*