UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

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

UNSECURED CREDITORS' COMMITTEE'S RESPONSE TO MOTION AND INCORPORATED MEMORANDUM TO DISQUALIFY VOTE PURSUANT TO BANKRUPTCY CODE § 1126(E)

The Official Committee of Unsecured Creditors (the "Creditors' Committee") hereby files this response (the "Response") to the *Motion and Incorporated Memorandum of Palmisano to Disqualify Vote Pursuant to Bankruptcy Code § 1126(E)* (the "Motion") (Docket No. 1659), filed by Bartholomew F. Palmisano. In support of this Response, the Creditors' Committee respectfully states as follows:

BACKGROUND

1. There seem to be no lengths to which the Debtors' former Chairman and CEO, Mr. Bartholomew F. Palmisano, Sr. ("Palmisano"), will not go to prevent the confirmation of a plan that will pay legitimate third-party unsecured creditors a significant distribution on their claims, and possibly even a 100% recovery. His Motion is the latest in the series of efforts he has made to ensure that his alleged claims control the vote of Class 4, the general unsecured creditors, which has overwhelmingly accepted the plan when Palmisano's votes are set aside. This is despite the facts that (a) the Committee continues to believe Palmisano's claims are unlikely to be allowed (because they are subject to offset claims, equitable subordination, and

recharacterization), and (b) he will receive no recovery from them even if they are allowed due to his subordination agreement with Bank of America.

2. It is worth making the Court aware of the present status of the tabulation of voting by other creditors in Class 4 in order to make clear the degree of Palmisano's attempted overreaching.[1] As of this writing (August 31, 2006), the Debtors' balloting agent reports that among creditors in Class 4 entitled to vote under the voting procedures order (excluding both Palmisano's claims and the Jefferies' claim at issue here), 34 creditors, asserting claims totaling $4,868,403.06 have voted to accept the plan. In contrast, only 1 creditor asserting a claim totaling $18.50 has voted to reject the plan. Discounting Palmisano's votes (and even if Jefferies' vote is not counted) this would be an overwhelming acceptance by 99.99% in amount and 97.14% in number of voting creditors in Class 4.

3. Broadening the universe to include all purported Class 4 creditors who attempted to vote (excluding Palmisano), 69 creditors asserting claims totaling $8,895,570.95 have voted to accept the plan, and only 9 creditors asserting claims totaling $3,042,508.25 have voted to reject the plan. Moreover, of this latter number, the vast bulk, $3,041,238.76 worth of rejecting votes, are based on alleged claims asserted by 3 doctors. One of those doctors filed a claim for exactly $850,000 -- with no supporting documentation whatsoever. Another filed a claim for $1,191,678.76, but is a defendant in litigation with the Debtors. All three, the Creditors' Committee is informed, are "Stipulating Parties" that, as a condition to their stipulations with the Debtors, have agreed not to vote against or oppose the plan. The Debtors are seeking the withdrawal of these three doctor's rejections in accord with their stipulations.

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[1] All vote tabulations referred to herein are from the website of the Debtors' Balloting Agent, KCC, as of this date, are not final, and are subject to final tabulation by KCC.

4. More fundamentally though, among the hundreds of Class 4 *trade* creditors who received ballots in these cases, and among all creditors if the 3 doctors withdraw their rejections, a total of 7 claimants (other than Palmisano), with alleged claims totaling $1,287.99, have voted to reject the plan, and even giving the 3 doctor's rejections more credit than is their due, without Palmisano, Class 4 would still be an accepting class by 74.51% in amount and 87.34% in number.

5. But because of the size of Class 4, and because Palmisano, the subject of securities class actions and derivative suits, an SEC investigation, and soon to be a defendant in lawsuits to be brought by the Debtors, asserts highly suspect claims totaling nearly $3.5 million, he persists in trying to use what leverage he has to block a plan that will finally pay creditors some of what he failed to pay them when he ran the Debtors' business. Why? The answer became apparent in Palmisano's recent deposition. He is now acting as an intended competitor to the Debtors rather than a creditor and, as such, has no interest in seeing either a successful reorganization or a recovery for the Debtors' creditors. He testified at his deposition as follows:

> Q. Do you have any intentions of opening up a competing company with OCA at the present time?
>
> A. In orthodontics?
>
> Q. Yes.
>
> A. I intend to open up a company that's going to offer business services to healthcare providers. I have -- you know, at the moment I have not spoken to an OCA orthodontist, don't have any intention of talking to an OCA orthodontist at this time. But I am going to have a business that, you know, will lend itself to that using new technology, if that's what you're referring to, with OCAI. I just don't understand how you take an inte[national] operation and bring it to the United States. Maybe I just view things a little bit differently.
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> Q. OCAI question you've answered and I sort of moved on to the next question which were any intentions of opening a new business in the United States. And you were just testifying you were considering opening up a business that would focus on providing

business services to the healthcare industry but you hadn't spoken to any OCA orthodontist and you don't have any intention of speaking to one. Is that accurate?

A. The only inaccuracy is I don't intend to do it. I am doing it. We were developing the --

Q. You said you hadn't spoken to any OCA orthodontist. Have you spoken to any nonorthodontist OCA about your new entity you're opening up?

A. No.

Q. Do you have any intention of offering services to orthodontists in addition to healthcare sectors?

A. Sure, if there's a profit in it.

(Palmisano Dep. at 231-32).

6. Palmisano obviously believes he can damage or even eliminate a future competitor if he can leverage his position to prevent a reorganization of the Debtors. His objection to confirmation demonstrates as much. He has dropped most of the arguments cursorily raised in his "Preliminary Objection of Bartholomew F. Palmisano, Sr. to Confirmation of Amended and Supplemental Joint Plan of Reorganization for OCA, Inc. and Filed Subsidiaries" filed soon after the filing of the Plan, and instead focuses obsessively on arguing that Class 4 is not a consenting class and that the Plan cannot be crammed down over Class 4.[2]

7. Yet he offers no alternatives. As Chairman and CEO he spent almost 9 months post-default unable or unwilling to refinance or restructure the secured lender's debt before filing for Chapter 11 protection. In fact, he hired Jefferies in part to assist with a refinancing and they

[2] While the Committee believes it is important for the Class 4 votes to be reflective of the sentiment of Class 4 creditors as a whole, and that that sentiment clearly favors confirmation, even if the Court disagrees and allows Palmisano to control the class, the fact is, Palmisano is also wrong in his ultimate conclusion. Given the value that will be ascribed to the Debtors' businesses at the confirmation hearing by the only qualified witnesses who will testify on the subject, and the fact that Silverpoint is obviously not – Palmisano to the contrary notwithstanding – an insider, the Plan can, in fact, be "crammed down" over an almost unanimously willing Class 4.

were unable to get one done. He has not offered to buy the company, and although he argues that the Debtors are worth more than the senior lender's claims, he has been unable to obtain refinancing or find a buyer since June 2005, even though he was aware that the senior lender's loans were scheduled to mature at the end of 2005.

8. Moreover the Equity Committee, which at its formation was insisting that an "alternative transaction" would improve recoveries for creditors and equity in these cases and that the Debtors were worth tens of millions of dollars more than the senior lender's claims, has now joined in support for the – slightly modified – Plan, effectively acknowledging that the "alternative transaction" turned out to be a chimera. In fact, just as Jefferies failed on behalf of Palmisano to refinance the senior lenders, Imperial Capital failed on behalf of the Equity Committee to refinance the senior lenders. It is only Palmisano, a defendant and intended competitor, who is seriously trying to prevent reorganization of the Debtors and confirmation of the Plan. It is in this light that his allegations of bad faith by everyone else – the Debtors, the Creditors' Committee, and Silverpoint -- must be viewed.

ARGUMENT

9. Palmisano's Motion is replete with misstatements and innuendo, but short on valid reasons to deny Jefferies the right to vote. Palmisano's argument has basically two parts: (a) that the Debtors nefariously attempted to allow Jefferies' vote to count in violation of the Voting Procedures Order (the "VPO") and under cover of darkness; and (b) that the Debtors (in conspiracy with the Creditors' Committee) "bought" Jefferies' vote. Both arguments are meritless and one is virtually libelous.

10. Palmisano begins by misstating the terms of this Court's VPO and then making the nonsensical assertion that there was something sinister in the stipulation to temporarily allow

Jefferies' claim for voting purposes only (the "Stipulation") being filed on the voting deadline. He asserts that the VPO does not permit a Jefferies vote to be counted "unless and until the Court temporarily allows it for voting purposes" and goes on to assert that "[a]s Jefferies never sought temporary allowance of its claim before filing of the Stipulation, the timing of the filing of the Stipulation clearly was intended to deprive other interested parties of a fair opportunity to oppose the stipulated relief."

11. Palmisano is wrong on multiple levels. First of all, the VPO did not require Jefferies to file a motion for temporary allowance. That was only one of several options spelled out in the VPO for claimants such as Jefferies. Specifically, the VPO provides that ballots on objected to claims shall not be counted unless:

> (a) such Claim(s) or Interest(s) have been temporarily allowed for voting purposes pursuant to Bankruptcy Rule 3018(a) . . .; (b) the objection to such Claim(s) or Interest(s) has been resolved by the Court in favor of the holder asserting the Claim(s) or Interest(s); *or (c) a stipulation has been entered into between such creditor or holder of equity securities and the Debtors (with the prior consent of the Lenders and the Creditors' Committee) with respect to such objection, without prejudice to the rights of the Equity Committee, if any*.

(VPO at 11, ¶ (g)).

12. Palmisano utterly ignores the relevant provision -- subsection (c) – which permits the Debtors to do exactly what they did. Moreover his innuendo about attempting to deprive parties of the opportunity to object is even more outrageous. In truth, the VPO did not require that the Stipulation even *be* filed, but counsel for the three parties whose consent was required – the Debtors, the Creditors' Committee, and Silverpoint – made the conscious and affirmative decision to file it *precisely to avoid being accused of attempting to hide it*. But no good deed goes unpunished. Palmisano has obviously *not* been deprived of the opportunity to object. He has done so.

13. Next Palmisano makes the inflammatory assertion that the Debtors "bought" Jefferies' vote. He leads up to this conclusion by attempting to attack Jefferies' claim, which is based on an engagement letter that Palmisano himself signed (the "Engagement Letter"). The grounds he cites for the meritlessness of Jefferies' claim are that (a) the Debtors, at a time when Palmisano was their CEO, did not seek this Court's approval to retain Jefferies as an advisor in these cases, as they had promised to do in paragraph 4 of the Engagement Letter that Palmisano signed; (b) the Debtors, who filed their schedules and statements when Palmisano was their CEO, did not schedule the Engagement Letter as an executory contract or schedule Jefferies' claim; and (c) Jefferies has not yet earned the fee that makes up the bulk of its claim.

14. Based on these relatively insubstantial arguments, Palmisano jumps to the inflammatory conclusion that the Debtors (with the Creditors' Committee's acquiescence) have attempted to "buy" Jefferies' vote. He does not explain how – even if all his premises are true -- he reaches this conclusion, as the Jefferies claim has not been allowed for distribution purposes and is subject to objection. He never identifies any purported *quid pro quo* in the transaction for Jefferies except a "platform from which to contend" that its claim should be allowed. (Motion ¶ 6) Jefferies had that platform anyway. It timely filed a claim, which claim, until objected to, is deemed allowed as filed. It is up to some other party, most likely the proposed Unsecured Creditors' Trust, to seek to have it reduced or disallowed, and Jefferies is fully entitled to oppose any such relief, with or without the Stipulation. The Stipulation only allowed Jefferies' claim *temporarily for voting purposes*, not for distribution. It states as much very clearly. The Creditors' Committee would not have consented to it on any other terms. The Creditors' Committee recognizes that Jefferies has a prima facie claim, but believes that there may be valid defenses that justify a reduction in the allowed amount of that claim. In fairness to the rest of the

general unsecured creditors, the Creditors' Committee would never agree to the full allowance of Jefferies' claim without either testing those defenses or reaching an acceptable compromise with Jefferies.

15. The fact is that Jefferies got nothing in exchange for the Stipulation except the right to have its vote counted. It has neither an express or implied assurance that its claim will be allowed in the stated amount, or in any amount. In fact, Jefferies entered into the stipulation after having been expressly informed that the Creditors' Committee believed its claim should eventually be reduced. But Jefferies' claim is plainly not entirely baseless. The allowed amount of Jefferies claim will be resolved in due course, either by compromise or by this Court. Jefferies' understands that, as do the Creditors' Committee, the Debtors, and Silverpoint. Amazingly, Palmisano never seems to consider the possibility that Jefferies may have voted to accept the plan because the plan, unlike Palmisano, promises Jefferies some recovery on whatever claim is eventually allowed.

16. And what makes Palmisano's accusation of "vote buying" all the more absurd is that Jefferies' ballot accepting the Plan is clearly stamped "Received August 17 2006 Kurtzman Carson." This is well before the Stipulation was entered into and, to the Committee's knowledge, it is before the possibility of a Stipulation was ever discussed by anyone. Jefferies decided how it wanted to vote on its own. All the Debtors did was agree to let its vote count.

17. Palmisano's entire request to designate Jefferies' vote is premised on the contention that it was "bought." But he has offered no evidence that it was bought, and he has not even *alleged* facts from which it is reasonable to infer that it was bought. Clearly Jefferies' claim was not allowed for distribution purposes, as the Stipulation expressly states. Moreover

the Stipulation was entered into in accordance with the provisions of the VPO and in the light of day. Under these circumstances, the Motion should be denied.

WHEREFORE, for the foregoing reasons, the Creditors' Committee respectfully requests that the Motion be denied and that the Court grant such other and further relief as is just and proper.

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