

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

<b>IN RE:</b>	*	<b>CHAPTER 11</b>
	*	
<b>OCA, INC. <i>et al.</i></b>	*	<b>CASE NO. 06-10179 (B)</b>
	*	<b>(JOINTLY ADMINISTERED)</b>
<b>DEBTORS</b>	*	
<hr/>		
<b>OCA, INC.</b>	*	
	*	
<b>PLAINTIFF</b>	*	
	*	
<b>versus</b>	*	
	*	
<b>OCA INTERNATIONAL, LLC, GIMILI ENTERPRISES, LLC, and BARTHOLOMEW F. PALMISANO, SR.</b>	*	<b>ADVERSARY NO. _____</b>
	*	
<b>DEFENDANTS</b>	*	

**COMPLAINT**

NOW INTO COURT, through undersigned Special Counsel, comes OCA, Inc. and for its Complaint against OCA International, LLC, Gimili Enterprises, LLC, and Bartholomew F. Palmisano, Sr., states as follows:

**Allegations Concerning Jurisdiction and Venue**

1.

Made Plaintiff is OCA, Inc. (“OCA”), a Delaware corporation with its principal place of business in the Parish of Jefferson, State of Louisiana.

2.

Made defendant is OCA International, LLC (“OCA International”), a Florida limited liability company with its principal place of business in the Parish of Jefferson, State of Louisiana.

3.

Made defendant is Gimili Enterprises, LLC (“Gimili Enterprises”), a Louisiana limited liability company with its principal place of business in the Parish of Jefferson, State of Louisiana.

4.

Made Defendant is Bartholomew F. Palmisano, Sr. (“Palmisano”), a citizen of full age of majority and domiciled in the Parish of Jefferson, State of Louisiana.

5.

The allegations contained in this Complaint arise under Title 11 of the United States Code or arise in or are related to a case under Title 11.

6.

Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 157(b)(2) and 1334 in that OCA has filed a voluntary petition for bankruptcy under Title 11 on March 14, 2006 in the bankruptcy case entitled “*In re OCA, Inc.*,” Case No. 06-10179(B), United States Bankruptcy Court, Eastern District of Louisiana (the “Bankruptcy Case”).

7.

OCA is a debtor-in-possession pursuant to sections 1101(1) and 1107 of the Bankruptcy Code in the Bankruptcy Case.

8.

Venue is proper in this Court pursuant to 28 U.S.C. § 1409(a) in that the Bankruptcy Case is pending in the Eastern District of Louisiana.

### **Standing of Special Counsel**

9.

The Bankruptcy Court issued its Order Approving Plan Support Agreement Pursuant to 11 U.S.C. Section 105 (the “Plan Support Agreement”) on May 11, 2006 (P-480) in the Bankruptcy Case.

10.

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.

11.

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

12.

On June 5, 2006, pursuant to the Special Counsel Order, the Lenders (as defined in the Plan Support Agreement) requested through OCA that Special Counsel investigate:

All actions, omissions, transactions and activities connected with the purported capitalization (the “Capitalization”) of OCA International, LLC and all subsequent actions, omissions, transactions and activities connected with the Capitalization (including, without limitation, Gimili’s pending lift stay motion and whether the Company should object to such a motion) . . . .

13.

This Adversary Proceeding concerns transactions between OCA and OCA International including but not limited to the purported capitalization of OCA International.

14.

This Adversary Proceeding is within the purview and authorization of the Special Counsel to act on behalf of OCA.

### **Factual Allegations**

15.

OCA and its subsidiaries are engaged in the business of providing purchasing, financing, marketing, administrative, and other business services to orthodontic, pediatric, and general dental practices operated by licensed practitioners and/or their wholly-owned professional entities in forty-three states and prior to December 1, 2005 in five foreign countries.

16.

At all relevant times, Palmisano was the Chief Executive Officer and Chairman of the Board of OCA.

17.

Gimili Enterprises is owned by Palmisano and members of his family and controlled by Palmisano.

18.

OCA, as part of its business operations, formed subsidiaries to provide its services in Japan, Mexico, China, Spain and Brazil. OCA formed and owned the following:

- (a) Servicios Administrativos OCA, SA de CV; (Mexico)
- (b) OCA International, Inc.; (Brazil)

- (c) OCA China;
- (d) OCA Japan; and
- (e) Orthodontic Centers of America Europe, S.A. (Spain)

These corporations are collectively referred to herein as the “Foreign Subsidiaries.”

19.

Palmisano personally supervised the management of the Foreign Subsidiaries and his knowledge of the operations and finances of the Foreign Subsidiaries exceeded the knowledge of any other member of the Board of Directors of OCA.

20.

After OCA failed to file its SEC reports timely, and later as a result of the disclosure of the internal control and accounting fraud disclosures, OCA experienced liquidity problems, and its access to the line of credit under the Credit Agreement dated as of January 2, 2003, (as amended) was restricted and limited to fund ordinary domestic business expenses and working capital needs of OCA.

21.

In June 2005, certain of the Foreign Subsidiaries purportedly needed additional cash from OCA to fund and grow their operations. OCA’s consultant, Alvarez & Marsal, recommended that OCA curtail any further cash infusions to the Foreign Subsidiaries.

22.

Palmisano believed that it was important to continue to provide funding for the Foreign Subsidiaries. On or about July 8, 2005, Ashton J. Ryan, Jr. (“Ryan”), a member of the Board of Directors and Palmisano discussed a proposed joint venture between Palmisano and OCA to

provide funding to the Foreign Subsidiaries. On July 20, 2005, Palmisano disclosed to the Board of Directors that he would make an offer to OCA to purchase the Foreign Subsidiaries.

23.

On July 21, 2005, Palmisano presented a written proposal to the Board of Directors to purchase the Foreign Subsidiaries for \$1.00. Under the proposal, OCA was to receive no ownership interest and 10 percent of cash profits for five years with an undetermined and undefined right to buy back the Foreign Subsidiaries.

24.

Palmisano nominated a special committee of the Board of Directors to consider the proposal (the "Special Committee"). Subsequently, Mr. Ryan, Linda Girard and David Vignes were designated by Palmisano to serve on the Special Committee; Mr. Ryan served as chairman.

25.

Palmisano continued to discuss the proposed sale of the Foreign Subsidiaries with the Board of Directors. Palmisano misrepresented to the Board of Directors and in particular to Ryan that OCA had only invested \$19 million in the Foreign Subsidiaries. In fact, OCA had invested approximately \$65 million.

26.

Palmisano discouraged the Board of Directors from obtaining a fairness opinion concerning the proposed transaction because allegedly such an opinion would be too time-consuming and expensive.

27.

On August 18, 2005, Ryan made a new proposal to Palmisano. Ryan proposed the price to be based on what Ryan had been led to believe to be the amounts of money invested by OCA

in the Foreign Subsidiaries (*i.e.* \$19,000,000). As noted in Paragraph 33 *infra*, Ryan was not provided any other financial information.

28.

Palmisano responded to the proposal of Ryan on August 26, 2005 and reduced the proposed purchase price to \$14 million, which was consistent with the book value of the Foreign Subsidiaries, after disregarding all intercorporate accounts, as reflected on the financial records of OCA.

29.

By September 26, 2005, Palmisano had drafts prepared of the necessary documents including the proposed management and capitalization agreements relating to the proposed transaction.

30.

On October 7, 2005, Palmisano presented a one-page document to the Board of Directors to support his “valuation” of the Foreign Subsidiaries. This one page document contained the five-month EBITDA (*i.e.* Earnings Before Interest, Taxes, Depreciation and Amortization) and single line entries for the assets and liabilities of each of the Foreign Subsidiaries as of May 31, 2005, without including any of the significant material, intercompany debts or accounts of the Foreign Subsidiaries. The transaction was discussed at a Board of Directors meeting on October 9, 2005.

31.

A true and correct copy of the e-mail transmitting the document and the document itself as identified in Paragraph 30 is attached hereto as Exhibit A.

32.

OCA International was formed under Palmisano's direction on October 18, 2005 to own, control and operate the Foreign Subsidiaries.

33.

The Board of Directors approved the transfer of the Foreign Subsidiaries from OCA to OCA International on November 29, 2005 based on the recommendation of the Special Committee. No valuation or appraisal regarding the Foreign Subsidiaries was ever presented to the Special Committee or the Board of Directors. No analysis of the financial prospects of the Foreign Subsidiaries was ever presented to the Special Committee or the Board of Directors. No financial statements of the Foreign Subsidiaries were ever presented to the Special Committee or the Board of Directors. No analysis of return and risk to OCA of the OCA International transaction was ever presented to the Special Committee or the Board of Directors. No business plan or forecast of OCA International was ever presented to the Special Committee or the Board of Directors. No budget for OCA International was ever presented to the Special Committee or the Board of Directors. No analysis of the projected future cash needs of OCA International was ever presented to the Special Committee or the Board of Directors.

34.

Effective December 1, 2005, OCA executed the Capitalization Agreement with an entity identified as Gimili, LLC, pursuant to which OCA contributed the shares of the Foreign Subsidiaries to OCA International. OCA was to receive in return for its transfer of ownership of the Foreign Subsidiaries to OCA International the following: (1) promissory notes from each of the Foreign Subsidiaries totaling the principal amount of \$12,500,000 (the "Promissory Notes");



and (2) an equity/ownership interest of 53.57% in OCA International. The remaining equity ownership of OCA International was to be owned by “Gimili, LLC.”

35.

A true and correct copy of the Capitalization Agreement is attached hereto as Exhibit B.

36.

Palmisano has represented that Gimili Enterprises was the actual party to the Capitalization Agreement and not Gimili, LLC, and the identification of Gimili, LLC was an error.

37.

Gimili, LLC is not a legal or juridical entity.

38.

The last sentence of Section 1.3(a) of the Capitalization Agreement, which defers payments under the Promissory Notes, speaks of deferring note payments until “OCAI has achieved profitability so that debt coverage is over 1.25 times profits.” Debt coverage is not an amount. It refers to a financial test where profits cover debt amortization payments. Section 1.3(a) speaks of debt coverage exceeding 1.25 times profits. If debt coverage is principal and interest amortization under the Promissory Notes, then debt coverage exceeds 1.25 times profits if profits are less than 80% of the principal and interest amortization. This provision is unintelligible.

39.

The Promissory Notes were never prepared, executed or delivered to OCA.

40.

As noted in ¶ 38 *supra*, under the purported terms of the Promissory Notes, all payments of principal and interest under the Promissory Notes are “deferred until such time that [OCA International] has achieved profitability so that debt coverage is over 1.25 times profits.” OCA has not received any interest payments.

41.

As a result of the Capitalization Agreement, OCA forfeited approximately \$53.5 million that it had invested in the Foreign Subsidiaries.

42.

As Palmisano explained to the manager of the former OCA subsidiary in China, but not to the Board of Directors, “There are debts due by each country to OCA which are far lower than they would have been had this arrangement not taken place.” (Emphasis added)

43.

It is highly probable if not certain that OCA will never receive any interest or repayment of principal under the Promissory Notes. In the opinion of Mr. Palmisano, as of August 23, 2006, the Promissory Notes are without any value.

44.

Effective December 1, 2005, OCA International executed the Management Agreement with an entity identified as Gimili, LLC pursuant to which Gimili, LLC was authorized to provide management, administrative and investment services to OCA International and the Foreign Subsidiaries.

45.

A true and correct copy of the Management Agreement is attached hereto as Exhibit C.

46.

The Capitalization Agreement and Management Agreement gave Palmisano the ability through Gimili Enterprises to make capital calls on OCA. If OCA did not fund its portion of a capital call made by Palmisano through Gimili Enterprises, then OCA's percentage interest ownership in OCA International would be reduced and Palmisano's interest through Gimili Enterprises, would be correspondingly increased.

47.

Palmisano knew at all times that OCA was not in the position to pay any capital calls and that he would dilute OCA's interest in OCA International by making capital calls.

48.

On December 9, 2005 and January 5, 2006 Palmisano through Gimili Enterprises delivered to OCA Director, Dennis Buchman, capital calls on behalf of OCA International in the amounts of \$300,000 each.

49.

True and correct copies of these capital calls dated December 9, 2005 and January 5, 2006 are attached hereto as Exhibits D and E, respectively.

50.

Mr. Buchman did not inform the Board of Directors of the capital calls he received. He simply signed the rejection form on the same day and returned them to Palmisano.

51.

Palmisano through Gimili Enterprises directed another capital call on behalf of OCA International on July 18, 2006 for \$1,374,160.

52.

A true and correct copy of the capital call dated July 18, 2006 is attached hereto as Exhibit F.

53.

A majority of funds sought in the capital call of July 18, 2006 was to pay Palmisano and his son, Bartholomew F. Palmisano, Jr. (“Bart Jr.”), large salaries. Accordingly, even though Palmisano, *i.e.* Gimili Enterprises, also had to meet the capital call, the money was almost immediately paid back to himself and his son while at the same time having the effect of diluting the ownership interest of OCA in OCA International.

54.

As noted *supra* under the Management Agreement, Gimili, LLC had agreed to provide management, administrative and investment services to OCA International. Gimili, LLC further had agreed that it would not charge a management fee, but would only be reimbursed for costs incurred.

55.

Palmisano directed that he receive three hundred thousand dollars (\$300,000) per year in salary and that his son, Bart, Jr., receive a salary of two hundred thirty-eight thousand dollars (\$238,000).

56.

Palmisano breached the Management Agreement and charged substantial, extravagant, and unreasonable salaries to OCA International for himself and his son, Bart Jr. as a “cost incurred.”

57.

Palmisano asserts that he and his son are entitled to be paid at the same rates that he was paid while CEO and COO, respectively, of OCA, a much larger company.

58.

Palmisano, by charging extravagant and unreasonable salaries as “costs incurred,” is able to ensure that OCA International will never make a profit and that the Promissory Notes will never have to be repaid.

59.

The obligations of the Foreign Subsidiaries to OCA allegedly to be evidenced by the Promissory Notes are illusory.

60.

In addition, Palmisano has directed that OCA International lease the second floor of a house owned by Palmisano and located in Uptown New Orleans at a rate of \$50,000 per year.

61.

As a result of the capital calls, Palmisano has purportedly increased ownership of OCA International by Gimili Enterprises from 46.3 percent to 69 percent and decreased OCA’s ownership of OCA International from 53.57 percent to 31 percent. Additional anticipated capital calls to pay the expenses of OCA International will reduce the ownership interests in OCA International of OCA to near zero.

### **Count I**

OCA incorporates the allegations of paragraphs 15-61, *supra*.

62.

Palmisano, as the President, Chief Executive Officer of OCA and the Chairman of its Board, and as the controlling member of Gimili Enterprises, was on both sides of the transaction between OCA and OCA International.

63.

Palmisano directly breached his fiduciary duties to OCA of loyalty, due care, independence, good faith and fair dealing. Instead of attempting to obtain the highest price reasonably available for the investment of OCA in the Foreign Subsidiaries, Palmisano structured the acquisition to meet the needs of himself and his family. Moreover, Palmisano urged the approval of this transaction without providing to the Special Committee or Board of Directors sufficient information to permit any determination of the fairness of the transaction.

64.

The Board of Directors of OCA approved the transaction between OCA and OCA International without sufficient information. Palmisano breached his duties to OCA of good faith and loyalty and he also breached his duties by encouraging the Board of Directors to approve the transaction without appropriate information on the terms of the transaction, including, among others: the amount invested by OCA in the Foreign Subsidiaries, the business prospects of OCA International, the business prospects of the Foreign Subsidiaries, and the terms of the transaction.

65.

Palmisano in accordance with his fiduciary duties of loyalty, care, and good faith, as an officer and director of OCA, was obligated to refrain from:

- a. Participating in any transaction where his loyalties were divided;

- b. Participating in any transaction where he received or was entitled to receive a personal financial benefit not equally shared by OCA; and/or
- c. Unjustly enriching himself at the expense or detriment of OCA.

66.

Palmisano, in connection with the OCA International transaction, violated his fiduciary duty owed to OCA insofar that he stood on both sides of the transaction, engaged in self-dealing and obtained for himself personal benefits to the detriment of OCA.

67.

By virtue of his position as President and CEO and Chairman of the Board of Directors, as well as effectively controlling OCA, Palmisano and/or OCA International must demonstrate the entire fairness of the OCA International transaction, which neither can do. Palmisano breached his fiduciary duty to OCA by directing OCA to enter into a transaction with himself without regard to the fairness of the transaction to OCA.

68.

The Special Committee had almost no information on the Foreign Subsidiaries, the extent of investment in the Foreign Subsidiaries, or the business prospects for each of them. In particular, the Special Committee did not obtain a fairness opinion or appraisal of the Foreign Subsidiaries in accordance with Palmisano's direction.

69.

As demonstrated by the allegations above, Palmisano failed to exercise the care required and breached his duties of loyalty, good faith, candor and independence owed to OCA, by among other reasons:

- a. Failing to implement procedures with the Board of Directors reasonably calculated to maximize the value that OCA would receive for the Foreign

Subsidiaries, including failing to obtain a fairness opinion or appraisal of the Foreign Subsidiaries;

- b. Failing to inform the Board of Directors and OCA of all material information in connection with the sale of the Foreign Subsidiaries, including the amount invested by OCA in the Foreign Subsidiaries, appropriate financial statements for the Foreign Subsidiaries and OCA International, appropriate projections and budgets for the Foreign Subsidiaries and OCA International and appropriate business plans for the Foreign Subsidiaries and OCA International; and
- c. Ignoring and not protecting against the conflicts of interest inherent with the OCA International transaction.

70.

OCA is entitled to rescind the transfer of the stock of the Foreign Subsidiaries effective December 1, 2005, and OCA requests such relief.

### **Count II – Declaratory Judgment**

OCA incorporates and reasserts the allegations of Paragraphs 15 - 61, *supra*.

71.

The Capitalization Agreement and Management Agreement should be declared null and void and OCA declared to have no obligations under such agreements.

### **Count III – Declaratory Judgment**

OCA incorporates and reasserts the allegations of Paragraphs 15 - 61, *supra*.

72.

OCA is without any obligation to OCA International, Gimili Enterprises or Palmisano to provide funding or technical assistance to OCA International, Gimili Enterprises or Palmisano and OCA is entitled to a declaratory judgment granting such relief. Furthermore, OCA is entitled to declaratory relief requiring OCA International, Gimili Enterprises and Palmisano to



return to OCA all financial information, trade secrets, computer software and programs received from OCA or related to the Foreign Subsidiaries.

#### **Count IV – Fraudulent Conveyance**

OCA incorporates and reasserts the allegations of Paragraphs 15 - 61, *supra*.

73.

The transfer of the Foreign Subsidiaries from OCA to OCA International is subject to avoidance under section 548(a)(1)(B)(ii)(I) of the Bankruptcy Code in that OCA received less than reasonably equivalent value in exchange for the Foreign Subsidiaries and OCA was insolvent on the date of the transfer (*i.e.* December 1, 2005).

74.

According to the terms of the Capitalization Agreement, the net book value of the Foreign Subsidiaries on the books and records of OCA was \$14 million. Nevertheless, only a value of \$1,500,000 stated capital contribution was attributed to OCA's ownership interest in the Foreign Subsidiaries. The balance of the alleged book value, or \$12,500,000 was denominated as indebtedness to OCA evidenced by the Promissory Notes. This treatment accorded OCA an initial equity/ownership interest of 53.57% under the Capitalization Agreement.

75.

The Promissory Notes that were to be issued and as described in the Capitalization Agreement are worthless and any ascribed value is illusory.

76.

Gimili Enterprises was given equity credit for the entirety of the alleged cumulative contributions of Palmisano to the Foreign Subsidiaries in the amount of \$1,300,000. This

treatment accorded Gimili Enterprises an initial equity/ownership interest of 46.43% in OCA International under the Capitalization Agreement.

77.

The Capitalization Agreement provided for additional capital calls by OCA International to its members, OCA and Gimili [Enterprises], “from time to time,” with each member’s contribution treated as an additional capital contribution by that member. The additional contribution by one member proportionately increased its capital interest in OCA International while a member’s non-contribution proportionately decreased its capital interest in OCA International.

78.

Palmisano knew at the time of the execution of the Capitalization Agreement that OCA would be unable or unwilling to contribute additional capital pursuant to any capital calls. OCA did not have the financial ability to respond to the capital calls as OCA was insolvent on the effective date of the Capitalization Agreement (December 1, 2005).

79.

The ownership interest granted to OCA by the Capitalization Agreement was designed and intended to be diluted and reduced ultimately to near zero.

80.

OCA received nothing of value under the Capitalization Agreement in consideration for its interests in the Foreign Subsidiaries transferred to OCA International.

81.

Alternatively, the ownership interests of OCA International received by OCA pursuant to the Capitalization Agreement were of minimal value and not the reasonably equivalent value of the Foreign Subsidiaries that it transferred to OCA International.

82.

OCA is entitled to have the transfer of the stock of the Foreign Subsidiaries pursuant to the Capitalization Agreement avoided and rescinded.

**Prayer for Relief**

Therefore, Plaintiff OCA demands relief in its favor as follows:

Declaring and decreeing that the Capitalization Agreement was entered into in breach of fiduciary duties of Palmisano and is unlawful and unenforceable;

Rescinding the Capitalization Agreement and any resulting cash calls;

Granting declaratory relief as requested including (i) that the capitalization Agreement and Management Agreement are null and void, (ii) that OCA is without any obligation to OCA International, Gimili Enterprises or Palmisano, and (iii) ordering OCA International, Gimili Enterprises and Palmisano to return to OCA all financial information, trade secrets, computer software and programs received from OCA or related to the Foreign Subsidiaries.

Awarding OCA costs and disbursements of this action, including reasonable attorney fees and expert fees; and,

Granting such other and further equitable relief as this court may deem just and proper.

Respectfully submitted,

Leon J. Reymond, Jr. (Bar #11196)  
Philip K. Jones, Jr. (Bar #7503)  
John C. Anjier (Bar # 20083)  
Carey L. Menasco (Bar # 28131)  
Joseph I. Giarrusso III (Bar # 27476)  
LISKOW & LEWIS, APLC  
701 Poydras Street, Suite 5000  
New Orleans, Louisiana 70139  
Tel: 504-581-7979  
Fax: 504-556-4108

By:                     /s/ Philip K. Jones, Jr.                    

*SPECIAL COUNSEL TO OCA, INC., ET AL.*