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'S (i) RESPONSE TO CERTAIN OBJECTIONS TO CONFIRMATION OF DEBTORS' PLAN OF REORGANIZATION AND (ii) JOINDER IN (a) CREDITORS' COMMITTEE'S OBJECTION TO CLAIMS OF BARTHOLOMEW PALMISANO, SR. AND (b) CREDITORS COMMITTEE'S MOTION TO DESIGNATE PALMISANO'S VOTE

Silver Point Finance, LLC (together with its affiliates and subsidiaries, "Silver Point") hereby (a) responds to (i) Preliminary Objection (the "Preliminary Objection") of Bartholomew F. Palmisano Sr. ("Palmisano") to Confirmation of Amended and Supplemental Joint Plan of Reorganization for OCA, Inc. and Related Subsidiaries (the "Plan"), and (ii) Memorandum of Bartholomew F. Palmisano Sr. in Opposition to Confirmation of Amended and Supplemental Joint Plan of Reorganization for OCA, Inc. and Related Subsidiaries (the "Plan Memorandum" and, together with the Preliminary Objection, the "Objections"), and (b) joins in (i) Official Committee of Unsecured Creditors' (the "Committee's") Objection to Palmisano's Claim (the "UCC Objection"), and (ii) the Committee's Motion to Designate the Vote of Palmisano Pursuant to 11 U.S.C. § 1126(e) (the "Motion to Designate"). In support of the foregoing, Silver Point respectfully states as follows:

I. PRELIMINARY STATEMENT

At its core, all of Palmisano's scurrilous allegations and baseless revisionist history coalesce around one basic objective: namely, to sabotage OCA's last remaining hope of emerging from bankruptcy as a viable, stand-alone entity. In this case, every fiduciary, from the Debtors to the Committee and the official committee of equity holders (the "Equity Committee"), believes that confirmation of this Plan is in the best interests of their respective constituents. They have not come to this conclusion lightly. The Equity Committee, for instance, has scoured the capital markets for financing sources to repay OCA's secured debt and allow the current stockholders to retain ownership of the Company. As the Equity Committee has acknowledged this week in a Court filing, after "exhaustion of their investigation and due diligence, it [was] not feasible for them to propose an alternative transaction." This admission is telling. The Equity Committee's market test has proved what the Debtors and the Committee have believed throughout most of this case. The treatment provided in the Plan constitutes the best possible recovery for the Debtors' unsecured creditors and stockholders. Moreover, the overwhelming preference of the voting creditors favors confirmation of the Plan. Out of hundreds of accepting votes, only one potentially significant "creditor," Palmisano, has voted to reject the Plan.[1] This Court should not allow the private agenda of the man most responsible for the Debtors' current financial predicament to torpedo an otherwise consensual plan of reorganization.

During his tenure as the Chief Executive Officer and the president of the Board of Directors of OCA, Palmisano was directly responsible for the financial decisions that eventually led the Company to the brink of financial disaster. OCA's books were in shambles and its

[1] Only two general unsecured creditors voted to reject; Palmisano and one other creditor holding a $18.50 claim.

financial condition dire. No auditor would sign off on OCA's financial statements, and no third party investor was willing to refinance OCA's existing debt. Orthodontists -- the parties to whom OCA provided services as its primary means of revenue -- were fleeing from the Company in droves and OCA's stock, to quote Palmisano, was "falling like a rock." (Deposition of Palmisano, dated August 23 (the "Palmisano Dep."), 2006, 238:2-3, attached hereto as Exhibit A) Indeed, as a result of this series of events, OCA and Palmisano individually became defendants in a law suit initiated by OCA' shareholders, alleging, among other things, violation of federal securities laws, gross mismanagement, waste of corporate assets, and breach of fiduciary duties.

At significant financial risk, and despite the financial turmoil facing the Company, the lender group (collectively, the "Lenders") under OCA's prepetition credit agreement (the "Credit Agreement") repeatedly accommodated OCA's requests by waiving its continued defaults under the Credit Agreement and granting more time to OCA to attempt to rehabilitate its business or to refinance its secured debt. Indeed, when companies fail to repay their secured debt at maturity, as OCA failed to do on January 2, 2006, lenders typically demand payment and take immediate steps to move against their collateral, thereby forcing the borrower to file for bankruptcy (assuming the borrower has not already done so in order to address its financial problems). However, the Lenders in this case did not pursue this course of action. Instead, the Lenders provided OCA with an almost unprecedented opportunity to continue soliciting offers to refinance the Credit Agreement for months after the final maturity date. The Lenders' repeated accommodations and concessions to OCA in the face of the indifference and inattention of the Company's management and Board of Directors to addressing the Company's financial situation is certainly not the "loan to own" tactics that Palmisano alleges Silver Point pursued. Indeed, contrary to Palmisano's cavalier and inapplicable use of the term, Silver Point (a) has never converted any of the loans it has originated into the equity of the borrower, and (b) has seen a small fraction of 1% of the loans or debt securities it has acquired in the secondary market converted into equity securities of the issuer.

Proving again the maxim that "no good deed goes unpunished," Palmisano and the Board engaged in much mischief during these waiver and forbearance periods granted by the Lenders. These actions eroded collateral value, hurt the Company's business, and undermined trust in the Company. For instance, Palmisano transferred significant OCA assets (and the Lenders' collateral) to himself, fired OCA's financial consultants, engaged in fire sale settlements with defaulting doctors even after an explicit promise to the Lenders not to do so, and watched as both OCA's auditors and special counsel retained to investigate accounting irregularities (allegedly created by Palmisano's son) resigned because the Company refused to follow its recommendations or even abide by its own public announcements. As the culmination of his inequitable conduct and bad faith, after OCA's descent into bankruptcy was complete and Palmisano was finally terminated by OCA's Board, Palmisano set up a business to directly compete with OCA.

Now, Palmisano -- who stocked OCA's Board of Directors with friends and cronies, hired several family members as key employees of the Company, oversaw the financial deterioration of the Company, steered the Company into the rocks of financial accounting irregularities and an SEC investigation, and ran the Company while his son manipulated the Company's books and records -- attempts to prevent the confirmation of the Plan that enjoys the support of all major constituencies and fiduciaries in these cases, all victims of his malfeasance.

It is ironic, to say the least, to hear OCA's (i) former long-time CEO and chairman of the Board of Directors, (ii) co-founder, and (iii) significant stockholder allege that he and his hand-picked Board were somehow not in control of the Company. It is obviously convenient for Palmisano to believe that he did not control OCA and thus is not responsible in any way for its current situation; but, as shown below, such a belief is baseless.[2] Looking to tarnish another entity with culpability for his own misconduct, he decided to scapegoat one of the largest victims of his own malfeasance, Silver Point.[3]

Although Silver Point is not the proponent of the Plan, certain of Palmisano's objections to the confirmation of the Plan are directed against Silver Point, and Silver Point is compelled to respond to those objections (that are more or less the same as the allegations in the Complaint). In addition, Silver Point hereby joins in the UCC Objection and the Motion to Designate and requests that (a) Palmisano's claims be subordinated to those of the Debtors' other unsecured creditors, and (b) his vote be designated and not counted as a rejection of the Plan.

II. BACKGROUND

OCA, Inc. and its affiliated companies (collectively, the "Debtors" or the "Company") provide business services to orthodontic practices throughout the United States under contracts with orthodontists known as business service agreements. After defaulting on

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[2] Sadly, this history of scapegoating is a well-worn path for Palmisano. Over the past 15 months, Palmisano has alternately blamed Ernst & Young, Alvarez & Marsal, Hurricane Katrina, bad court decisions, defaulting doctors, the Lender group as a whole, Silver Point, and others for the Company's woes, which began with the accounting irregularities allegedly created by his son. Curiously, never has the co-founder and long-time CEO sought to accept responsibility for the corporate destruction he has overseen.

[3] In addition to objecting to the Plan, Palmisano had the gumption to file a complaint against Silver Point (the "Complaint") seeking to rescind a subordination agreement he had executed with the Administrative Agent (the "Subordination Agreement") and to subordinate Silver Point's claims to those of the Debtors' unsecured creditors or, at least, just to those of Palmisano. The Complaint borders on the frivolous: the claims asserted therein against Silver Point are clearly barred under the doctrine of *res judicata* by the Final DIP Financing Order previously entered by this Court. Further, once the Plan is confirmed, all of the claims asserted in the Compliant will either become moot or be precluded.

their bank debt and repeatedly failing to find refinancing, the Company filed for Chapter 11 protection on March 14, 2006.

A. <u>Palmisano's Tenure was Riddled with Accounting Irregularities</u>

Palmisano was CEO of the Debtors from 2000 until May 12, 2006. Prior to that, from 1989, Palmisano held various other managerial positions with the Debtors. During Palmisano's tenure as CEO, and reaching its apex in 2005, a series of scandals related to questionable – and potentially fraudulent -- accounting entries and practices going back to 2001 rocked OCA. The specific accounting issues that were uncovered and disclosed during Palmisano's tenure in 2004 and early 2005 included the following:

1. OCA's independent auditors, Ernst & Young, notified the Company of a material weakness in OCA's internal control with regard to the financial reporting process at the end of fiscal year 2004 (OCA 7/7/05 8K at p. 5). OCA then fired Ernst & Young.
2. In May or early June 2005, the accounting firm of Postlethwaitve & Netterville identified irregularities with OCA's accounting in 2000 and 2001;
3. OCA admitted that it had overstated by material amounts the patient receivables it had reported on March 31, June 30 and September 30, 2001 (OCA 7/7/05 8K at p. 6);
4. OCA announced that certain previous financial reports were unreliable and that it would have to restate its earnings for much of 2004 (*Id.*); and
5. OCA hired Pricewaterhouse Coopers ("<u>PwC</u>") in the wake of the Debtors' termination of Ernst & Young, but OCA nevertheless failed to complete its audit for fiscal year 2004 and failed to timely file its 10-K for 2004 and its 10Q for the first quarter of 2005 in contravention of the Securities and Exchange Act and OCA's covenants under the Credit

Agreement. OCA was unable to finalize the audit of its 2004 financials at any point during Palmisano's tenure, and PwC ultimately resigned its affiliation with OCA.[4]

The fallout from these scandals devastated OCA. The value of the business plummeted and, in June 2005, Palmisano and OCA were sued for securities fraud by OCA shareholders. *See Thomas v. OCA, Inc.*, Civ No. 05-2220, E.D. La 2005. In addition, the Securities and Exchange Commission and other federal agencies are investigating the alleged malfeasance by Palmisano and others.

OCA sought to reassure investors by placing its Chief Operating Officer, Bartholomew F. Palmisano, Jr. ("Palmisano Jr.") on administrative leave. A special committee (the "Special Committee") of purportedly independent directors was formed to investigate the accounting irregularities. The Special Committee retained Fulbright and Jaworski ("Fulbright") to spearhead the investigation into the accounting irregularities. Fulbright resigned after the Company refused to adopt their proposed remedies. Further, during this time, doctors began leaving OCA, deciding it was worth the risk of breaching their contracts with OCA, rather than remain affiliated with a company whose financial viability and the integrity of its top management were in serious doubt. (Palmisano Dep. 33:17-20; 47:23-24; 48:4, attached hereto as Exhibit B) In short, the failure of OCA under the leadership of Palmisano and his hand-picked Board to address these accounting and financial issues directly led to a crisis of confidence by the doctors and the unraveling of the Company.

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[4] According to a November 8, 2005 press release by the New York Stock Exchange, announcing its decision to suspend trading in OCA stock, PwC's resignation was an important factor in this decision. According to a letter from PwC, PwC "believed that OCA had not taken timely and appropriate remedial actions in response to the discovery of potential illegal acts at OCA related to alleged alterations of records provided to OCA's contract internal auditors, current independent registered public accountants and prior independent accountants from January 2000 through May 2005."

As these financial catastrophes were unfolding, OCA "undertook exhaustive efforts to find refinancing" of its defaulted debt. In May 2005, OCA met with the Chase Manhattan Bank ("Chase") to explore the possibility of a bond offering for OCA. (Palmisano Dep. at 176:1-16, attached hereto as Exhibit C) Palmisano testified that Chase was unwilling to go forward with the refinancing because of OCA's failure to complete its audit. (Palmisano Dep. 176:16-18, attached hereto as Exhibit D) OCA then obtained a term sheet from the private equity firm of Leonard Green & Partners, LP ("Leonard Green"). Leonard Green pulled out of the potential deal because of concerns about doctor attrition and financial viability. (Palmisano Dep. 176:18-25, attached hereto as Exhibit E). OCA also attempted, without success, to obtain financing through the services of Jefferies & Co. and CapitalSource Finance LLC. All of these attempts at potential refinancing failed because of OCA's deteriorating financial condition that could and should have been addressed by Palmisano (or, indeed, should have been avoided had Palmisano performed even at a minimum level of competence).

B. Lenders' Repeatedly Accommodate and Acquiesce to OCA Requests

Given Palmisano's vitriolic and obfuscatory allegations, Silver Point believes the Court may benefit from a more detailed and accurate history of the relationship between Palmisano and the Lenders.

- Silver Point Becomes a Lender. Silver Point first became a Lender under the Credit Agreement in July 2005. As Silver Point told Palmisano repeatedly (and which Palmisano never disputed in person), it purchased the debt as a passive investment fully expecting to be repaid at or prior to maturity of the loan on January 2, 2006 (much as it has done with hundreds of other investments).

- The Sixth Amendment. In August 2005, the Company acknowledged to the Lenders that it was in default of the Credit Agreement, and requested an amendment and forbearance agreement to allow it a more meaningful opportunity to refinance the debt prior to the January 2, 2006 maturity date. The Lenders accommodated this request pursuant to the Sixth Amendment to the Credit Agreement (the "Sixth Amendment"), a copy of which is attached hereto as Exhibit F. The Sixth Amendment contained a number of common covenants found in defaulted loan and restructuring contexts. Many of these covenants related to and evolved from the Company's stated desire to conduct a robust refinancing effort to replace its senior debt. For instance, the Company agreed to provide the Lenders with periodic updates on the refinancing process (*see* § 1(k)), to retain a financial advisor to assist it in refinancing (*see* § 7.16) and to provide an alternative restructuring plan to the Lenders (*see* § 7.15). The Company also promised the Lenders that it would provide them with a copy of the Special Committee's report into Palmisano's financial irregularities (*see* §1(n)) and retain a turnaround consultant (*see* § 7.15). The Sixth Amendment also prohibited the disposition of certain significant assets (such as the stock of OCA's subsidiaries) without the Lenders' consent (*see* § 8.4). While Palmisano contends that these covenants are examples of overreaching, in reality, they were designed to simply reflect OCA's articulated action plan when it requested the forbearance from the Lenders and are generally commonplace provisions designed to maintain the *status quo* while the borrower pursues its annunciated path. In any event, OCA apparently had no intention of complying with many of these promises. The promises were either not complied with within the applicable time frames or breached completely. Obviously, a standard covenant package that is repeatedly breached by the borrower is no indicia of lender control.

- First Refinancing Efforts Fail. While the Sixth Amendment was being negotiated and executed, developments were occurring on other fronts. During the summer of 2005, Leonard Green withdrew its refinancing proposal because of doctor defections and the Company's uncertain financial future. In response, OCA began to reach out to certain other funds and potential investors as it considered refinancing alternatives. The Company decided to discuss one of these alternatives with Silver Point.

- First Meeting. On September 6, 2005, Harry Wilson ("Wilson") of Silver Point and two of his colleagues met with Palmisano to discuss the status of OCA and possible paths to refinancing of its senior debt. Palmisano indicated that the Company needed to move quickly and wanted a term sheet from Silver Point as soon as possible.[5] That evening, Palmisano provided Silver Point with a spreadsheet showing estimated 2005 EBITDA of $35.6 million. Silver Point worked sedulously towards developing a term sheet on this basis, and provided a proposal to OCA within a day of the meeting. On September 11, 2005, Palmisano executed Silver Point's proposal letter and indicative term sheet. Immediately thereafter, Silver Point commenced the due diligence process to confirm the annunciated EBITDA numbers.

- Alvarez & Marsal Gets Fired. During the course of Silver Point's due diligence, OCA fired and failed to replace A&M, in violation of the Sixth Amendment. A&M, a financial advisor trumpeted by the Company in a June 7, 2005 press release as a key component of its refinancing team, had barely lasted three months. As will be seen, a remarkable number of qualified advisors were hired and resigned or were terminated all within a very short period of time.

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[5] Palmisano also indicated during this meeting that the report by the Special Committee should be completed by the end of September.

- Lower EBITDA and Second Refinancing Proposal. Silver Point's financial due diligence failed to support the elevated EBITDA numbers touted by Palmisano. Instead of a $35 plus million figure for 2005, the likely number, based on the work done by A&M, which Palmisano ridiculed, seemed to be between $20-25 million, with real risks around that earnings level, given the Company's poor financial controls and defaulting doctors. Accordingly, about October 18, 2005, Silver Point submitted a second refinancing proposal that reflected its concerns about OCA's business, its earning power, and, in particular, Palmisano's leadership, as determined during due diligence. Palmisano indicated that he would recommend the proposal to the Board, but later said the Board rejected the proposal and decided to pursue a refinancing with Jefferies.

- Palmisano's Son Returns and Fulbright Resigns. In October 2005, Palmisano brought his son back from administrative leave to work for the Company against the advice of counsel to the Special Committee. (OCA 10/31/05 8-K) Fulbright resigned from its representation of the Special Committee, apparently, in protest.

- Jefferies First Engagement. Within a few days of receipt of the second Silver Point proposal, the Company engaged Jefferies to search for a debt investment that would repay the Lenders in full. Jefferies commenced a search of the capital markets for a debt investment that could solve the Company's need to deal with the looming maturity of the Credit Agreement. The Lenders were told that a Jefferies deal could close by mid-December. However, by the middle of November, Jefferies would arrive at the conclusion that a debt-based solution was not feasible given the Company's condition and indicated that the Company had to work with the Lenders to address its financial problems.

- PwC Resigns. On November 1, 2005, PwC refused to continue its affiliation with OCA and resigned its engagement because of OCA's failure to take the appropriate remedial actions in response to the identified accounting irregularities and potentially illegal actions. PwC informed OCA that such failure compromised its ability to complete a thorough and independent investigation into these alleged illegal acts. (OCA 11/01/05 8-K) The revolving door of OCA professionals continued unabated.

- Company Defaults and Asks For More Loans. For nearly a month after the receipt of the second refinancing proposal from Silver Point, as Jefferies began its work, the Company did not have active discussions with the Lenders or Silver Point in particular regarding a revised refinancing proposal (this delay was emblematic of many such avoidable delays created by, among other things, the Company's revolving door of advisors). In addition to its silence, OCA was in breach of many of the salient covenants of the Sixth Amendment. While clearly within their rights to do so, the Lenders neither declared a default nor accelerated the loans. The Company made no apologies for or efforts to cure the defaults; rather, it sent a request to borrow the remaining committed amounts under the facility. The Lenders could have denied the request. Instead, they chose to fund the draw on October 28, 2005, while at the same time sending a letter of the same date to the Company listing the numerous defaults and preserving all rights and remedies. Throughout this time, the Lenders continued to wait patiently and expectantly for OCA's haphazard refinancing efforts to bear fruit.

- The EBITDA Debates. At a meeting in Dallas, attended by Wilson, David Sawyer of Silver Point, Palmisano and others, Palmisano suggested again that 2005 EBITDA should be approximately \$35-40 million. The Lenders advised OCA they believed the EBITDA was much lower, likely around \$20-25 million. In an attempt to close the gap, the Lenders and OCA amicably discussed their respective assumptions and the differences in the various EBITDA calculations. By the end of the meeting, the Company's outside advisors agreed that OCA's estimates were likely high and should be lowered. The parties adjourned the meeting, agreeing to work toward a consensual resolution on the EBITDA figure, which would in turn form the lynchpin for a restructuring proposal.

- Jefferies' Efforts Bear No Fruit; Third Proposal. On November 21, 2005, Jefferies advised the Lenders that, in its view, a debt-driven recapitalization was not possible. The Company's financial condition simply precluded it from raising sufficient debt to repay the Lenders in full. Jefferies then requested that Silver Point again craft a proposal for the Company to consider. On or about December 1, 2005, Silver Point presented yet another financing alternative to the Company. At this point, the process had unmistakably devolved into unproductive cycles of failed market searches and aborted discussions with the Lenders, all overseen by a Board and management team that relied on an ever-changing set of advisors. The Company had now been without the services of a turnaround consultant since September, when A&M was terminated. As a result, around this time, the Lenders suggested that the Company could benefit from a turnaround expert's advice and guidance. The Lenders submitted four suggestions for the spot. While Mike Gries ('Gries") was one of them, Silver Point has never hired him before in a case or transaction. In fact, Wilson met Gries for the first time only after the administrative agent for the Lenders (the "Administrative Agent") had suggested his candidacy.

- No Response; No Alternative. As with the prior proposals, OCA did not make a counterproposal to Silver Point's third proposal either. At this point, a telling and troubling pattern was emerging. Despite numerous attempts, the Company found no third party willing to refinance the debt. Always believing the value of the business to be higher than that reflected in any proposal, the Company seemed unfazed by repeated market pronouncements to the contrary.

Mounting liquidity concerns and the imminent maturity of the bank debt were similarly of little concern. OCA apparently believed that desperate times called for desperate measures and resorted to tactics that only the most unscrupulous borrowers employ: it decided to sell the Lenders' collateral for cash without the Lenders' prior knowledge or consent and without paying down the loans with the proceeds received from such sales.

- <u>Wrongful Conversion I: Unauthorized Doctor Settlements</u>. Unsurprisingly, the Sixth Amendment prohibited the sale of the Lenders' collateral without their consent. Recent contractual promises, however, did not deter OCA. Rather, it proceeded apace in the program of facilitating doctor terminations in exchange for small cash payments. The Lenders' collateral included a lien on the doctors' furniture, fixtures and equipment ("<u>FF&E</u>") and on certain promissory notes owed by the doctors to OCA. In December 2005, as the maturity on the Credit Agreement approached and no refinancing appeared on the horizon, OCA entered into a series of settlements that allowed certain doctors to terminate their relationships with OCA for a small lump sum cash payment (at a small fraction of the value of historical settlements, hence the "fire sale" characterization) in exchange for a purported forgiveness of the promissory note and release of the FF&E. OCA lacked any plan and made no effort to collect amounts owed by such doctors to OCA, and apparently not intending to do so, the Board caused the Company to breach Section 8.17 of the Credit Agreement, which prohibits forgiveness of this type of indebtedness. The Company did not ask the Lenders to provide the additional liquidity or to consent to the settlements with the doctors. When confronted with this bald-faced and shameless breach of the Credit Agreement, OCA promised the Lenders not to do it again. The Lenders were shocked to learn a week later that OCA had entered into more objectionable settlements only a few days later. When pressed at a meeting on January 3, 2006, Anthony Correro, OCA's outside corporate counsel, told the Lenders that the Board's fiduciary duty to bring cash into the Company trumped any contractual obligations owed to the Lenders, as well as the Lenders' property rights in the collateral.[6] The Lenders were quickly learning that the Company rewarded the Lenders' good faith and patience with the wholesale and destructive disregard of their contract and property rights.

- Wrongful Conversion II: Palmisano Seizes OCAI. On December 9, 2006, the Board approved the transfer of significant assets of OCA (and the Lenders' collateral), namely its international business, to a new entity created by Palmisano. The pattern of mischief was the same: OCA ignored and violated the Credit Agreement, it provided no notice to the Lenders and claimed a liquidity need as its justification (even though Palmisano contributed no incremental cash for the assets at the time, and the Lenders were never asked to provide the necessary liquidity, if any). Apart from a desire to benefit a fellow Board member, it is hard to explain how the Board could conclude, as it must with respect to insider deals, that the Company received fair value for the sale of this asset when it (i) did not obtain a fairness opinion, (ii) did not canvass the market for bids from independent third parties, (iii) did not approach its current lender group to discuss alternative methods of addressing its purported liquidity needs, and (iv) did not ask its current financial advisor to opine as to the probable value of this asset. OCA was hurting itself and the Lenders. These actions lowered the value of the Company and of the collateral still further. No one benefited but Palmisano. Given these actions, no one could have faulted the Lenders had they formally declared one of the many defaults then and there and proceeded to sell OCA's assets at foreclosure; but, they did not. Again, they showed restraint.

[6] It was during this same meeting that Wilson asked Palmisano to provide the rationale for his belief that the various financing proposals he had received undervalued the Company. Palmisano was unable or unwilling to provide any such rationale.

One may wonder why the Lenders showed such restraint in the face of such indefensible behavior, with such restraint being wholly inconsistent with a "loan to own" approach. In fact, the Lenders exercised such restraint simply because they were trying, as they had been for months, to work with OCA towards a consensual effort of addressing the Company's financial problems, and hoped for a refinancing (however uncertain those prospects may have been by the time). The Lenders believed that this was in the best interests of the business and proceeded down this path for months. It was only after an extraordinary amount of evidence regarding Palmisano's and the Board's lack of concern for the welfare of the business that the Lenders were forced to abandon all hope of a consensual process or refinancing of any kind.

- <u>Final Maturity and (Surprise!) Another Forbearance Request</u>. On January 3, 2006, the Lenders met with Palmisano and OCA. The final maturity date had arrived. There was no further need to discuss defaults or acceleration; the amounts under the Credit Agreement were now due. Brazenly, Palmisano admitted that the Company failed in its prior attempts to refinance the Credit Agreement and did not have a likely path to a quick repayment, but suggested that Jefferies continue its second search for refinancing or an outright sale of the Company. Palmisano urged that Jefferies be given the first three months of 2006 to find and close a transaction to repay the Lenders. Most lenders facing final maturity and a borrower with OCA's history of transgressions and broken promises would not have granted an additional forbearance. Desiring a refinancing and showing undeserved patience, however, the Lenders granted the forbearance. It is memorialized in the Seventh Amendment to the Credit Agreement (the "<u>Seventh Amendment</u>"), a copy of which is attached hereto as Exhibit G. The Seventh Amendment allowed the Company until March 31, 2006 to repay the Lenders. To ensure that the Company was performing in a manner that was likely to result in payment by the end of the first quarter, the Seventh Amendment provided that non-binding letters of intent were due on February 15, 2006, and definitive documentation was due on February 28, 2006. In addition, the Company had to provide the Lenders with a doctor incentive plan by February 28, 2006 and the Special Committee's report by February 15, 2006 (this was the same report that Palmisano had said would be completed by the end of September and which the Lenders now saw for the first time).

- Breach of the Seventh Amendment; Doctor Defections; Bankruptcy. Within a couple of weeks of the execution of the Seventh Amendment, the Company was in breach of its commitments to the Lenders. It failed to deliver the doctor incentive plan or the Special Committee report. The Lenders received the letters of intent late. While several of these letters indicated potential expressions of interest in acquiring the Company (valuing the Company at 4-6 times EBITDA), none of these progressed to a formal term sheet stage. All letters of intent contained numerous contingencies, and the potential investors refused to remove them or enter into binding documentation. Still, the Lenders did not terminate the Seventh Amendment or move against collateral. Instead, the Lenders discussed alternative restructuring scenarios suggested by OCA. However, by the second week of March, OCA advised the Lenders that, because of the increased numbers of doctors attempting to terminate their contracts and leave the OCA system, the Company had no choice but to seek the protection of chapter 11. OCA then requested the Lenders to provide a DIP facility in 3-5 days. In less than 5 days, the Lenders agreed to the terms of such a facility and proceeded, as an additional accommodation to OCA, to fund the facility based solely upon a term sheet as OCA stated it could not afford to remain outside bankruptcy any longer. Furthermore, Silver Point continued to advance funds to OCA through the six-week period it took to negotiate and finalize the definitive DIP credit agreement. Once again, Silver Point saw its investment put at greater risk by Palmisano's tardiness in addressing the Company's problems, only to be asked to bend over backwards to accommodate the Company's urgent needs in a very short time frame.

- <u>Palmisano Refuses to Resign, is Removed, and now Competes with OCA</u>. In connection with negotiating a potential pre-arranged plan of reorganization for OCA, Silver Point, Palmisano and OCA's Board discussed the terms on which Palmisano would resign his positions with the Company to enable OCA to bring in new leadership that had credibility with the Lenders, the investment community and the doctors. The parties were close to a deal providing for Palmisano's removal, when Palmisano balked at the request to execute a non-compete agreement that would have prevented him from competing with OCA for a period of 5 years following his departure. (Palmisano Dep. 228:25 – 231:8, attached hereto as Exhibit H) Palmisano was removed from his position as CEO by OCA's Board in May 2006. In July 2006, Palmisano renamed the company he had organized in August 2005 under the name BDB Enterprises, L.L.C. "Practicehealth, L.L.C.". This is the same company whose email address Palmisano Jr. has used in his correspondence on behalf of OCAI. Palmisano's business plan for Practicehealth, L.L.C. calls for providing business services to medical professionals, including dentists and orthodontists, using a business model similar to, and competing directly with, OCA.

As Palmisano objects to the Plan that enjoys the support of all major constituencies in these cases, he conveniently fails to mention that, rather than being an ordinary creditor of the Debtors whose interests are aligned with those of other creditors, he is a direct competitor of OCA and thus may personally benefit from the Debtors' failure to successfully reorganize.

III. PALMISANO'S PLAN OBJECTIONS MUST BE OVERRULED

In the Objections, Palmisano has objected to the confirmation of the Plan on multiple grounds. Since Silver Point is not the proponent of the Plan, it will only address those objections that directly implicate Silver Point. These are as follows: (1) the Plan was not proposed in good faith because its terms were dictated by Silver Point that exercised improper control over the Debtors, (2) the Plan was not proposed in good faith because it treats the holders of "other claims and interests" unfairly vis-a-vis Silver Point, (3) the Plan fails to satisfy section 1129(a)(10) because compliance with such subsection relies on Silver Point's vote in Class 3, while such vote cannot be counted because Silver Point is an "insider," and (4) the Plan cannot be crammed down on Class 4 under the absolute priority rule.[7]

A. All Objections Based on Assertions of Silver Point's "Control" Should be Overruled

The first and the third of the above objections are, essentially, the same objection since Palmisano's allegation that the Plan fails to satisfy section 1129(a)(10) because of Silver Point's alleged "insider" status is based exclusively on his allegation of control exercised by Silver Point over the Debtors,[8] which is also the basis of his "bad faith" objection.

First of all, these allegations of "control" are nothing more than an attempt to assert in a roundabout way a lender liability claim against Silver Point. Such claim, however, is barred by this Court's Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364 of the Bankruptcy Code (I) Authorizing the Debtors to Obtain Postpetition Financing and Use Cash

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[7] The Plan Memorandum also contains Palmisano's responses to the Motion for Reconsideration of the Court's prior order regarding Palmisano's right to vote his claims in light of the provisions of the Subordination Agreement filed on August 18, 2006 by the Debtors, the Committee and the Administrative Agent (the "Reconsideration Motion"). Silver Point hopes to address Palmisano's arguments under section 510(a) of the Bankruptcy Code when and if the Court sets the Reconsideration Motion for hearing.

[8] Silver Point clearly does not fit into any one of the statutory definitions of "insider." *See* 11 U.S.C. § 101(31).

Collateral, (II) Granting Liens, Security Interests and Superpriority Claims, and (III) Granting Adequate Protection, dated May 12, 2006 (the "DIP Financing Order").

The DIP Financing Order contains findings that Silver Point's claims and liens are valid, enforceable, and "not subject to avoidance, reduction, defense, disallowance, impairment or subordination pursuant to the Bankruptcy Code or non-bankruptcy law." (DIP Financing Order at 9-10) In addition, the DIP Financing Order effected a release of Silver Point, and its discharge from, "any and all claims . . . causes of action, indebtedness, and obligations, of every type, *including, without limitation, any so-called "lender liability" or equitable subordination claims or defenses* . . . with respect to . . . the Existing Senior Lender Indebtedness, the Existing Senior Loan Documents, the Debtors' attempts to refinance the Existing Senior Lender Indebtedness, the DIP Loans and/or the DIP Loan Documents." (DIP Financing Order ¶ 14; *emphasis added*). Finally, the DIP Financing Order, "forever barred" all parties in interest, from bringing or pursuing any claim or action of the type described above, except in accordance with, and within the time frame provided by, the DIP Financing Order (DIP Financing Order ¶12). Besides having still been a member of the Board at the time the Company approved the DIP financing, Palmisano, as any other party in interest, had the option of either objecting to the entry of the DIP Financing Order or pursuing the types of claims dealt with in such order before the expiration of the deadline established therein. He did neither. He should not be allowed now, in violation of the *res judicata* principles, to assert against Silver Point precisely the types of claims that the Final DIP Order has disposed of once and for all.

Under the principles of *res judicata*, "once a matter -- whether a claim, an issue, or a fact -- has been determined by a court as the basis for a judgment, a party against whom the claim, issue, or fact was resolved cannot relitigate the matter." *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322, 325 (4th Cir. 2004).[9]

Even without the *res judicata* argument, without special circumstances, the courts (including the Fifth Circuit) see no improper "control" where the only power a lender wields over a debtor arises from the terms of the applicable contractual agreement. *See, e.g., In re United States Abatement Corp.*, 39 F.3d 556, 561-562 (5th Cir. 1994) (holding that, while economic leverage asserted by creditor did cause the debtor to do certain acts, because such leverage stemmed from the terms of the contracts between such creditor and the debtor, it "did not give [the creditor] inequitable control over [the debtor]."); *In re Clark Supply Pipe & Supply Co.*, 893 F.2d 693 (5th Cir. 1990). Indeed, in *Clark Supply* the Fifth Circuit discussed the issue at length and held that:

> [Creditor's] control over [debtor's] finances, admittedly powerful and ultimately severe, was based solely on the exercise of powers found in the loan agreement. [Creditor's] close watch over [debtor's] affairs does not, by itself, however, amount to [improper] control . . . . Although the terms of the agreement did give [creditor] potent leverage over [debtor], that agreement did not give [creditor] total control over [debtor's] activities. At all material times [debtor] had the power to act autonomously and, if it chose, to disregard the advice of [creditor]; for example, [debtor] was free to shut its doors at any time it chose to do so and to file for bankruptcy.

Here, there can be no finding of control for at least four reasons: (a) Palmisano can point to no document or set of promises which provided the Lenders with control, (b) the covenant packages were not onerous, but quite standard, crafted simply to reflect the articulated

[9] A claim "is precluded when: 1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and 3) the claim in the second matter is based upon the same cause of action involved in the earlier proceeding." *Freishtat v. Blair*, 319 B.R. 420, 433 (D. Md. 2005) (*citing Grausz v. Englander*, 321 F.3d 467, 472 (4th Cir. 2003)).

action plan of the Company, (c) OCA repeatedly breached its promises to the Lenders within days or weeks of making them, and (d) there is no evidence of any instances where OCA lacked the ability to act autonomously.

In order to show enough "control" by a creditor to prove such creditor's "insider" status, Palmisano must show that the Lenders did more than merely demand compliance with the debtor's financial obligations and covenants. Instead, the courts require a showing that the debtor is completely dominated by the creditor and has, in effect, become the creditor's *alter ego*. *See*, *e.g.*, *In re Prima Co*., 98 F.2d 952, 965 (7th Cir. 1938), *cert. denied*, 305 U.S. 658 (1939) ("No doubt the debtor, because of its inability to meet its maturing obligations, acquiesced in [creditor's] recommendations [to install new management], but this . . . is not sufficient to constitute domination of its will."); *Nat'l Westminster Bank USA v. Century Healthcare Corp*., 885 F. Supp. 601, 603 (S.D.N.Y. 1995) ("There is nothing inherently wrong with suggesting what course the debtor ought to follow. Unless the creditor has become, in effect, the alter ego of the debtor, he will not be held to an ethical duty in excess of the morals of the market place").

Palmisano's threadbare allegations of control are false, slanderous, and in many instances irrelevant. An example of a purely false statement is an allegation that Silver Point purposefully delayed the Debtors' receipt of a tax refund and insurance claim proceeds. Palmisano does not even attempt to produce any evidence to prove this allegation. Nor could he because it is completely untrue. In fact, Ray Jeandron, the KPMG partner in charge of OCA's tax filings, has stated, under oath, that the extent of any communications he has had with Silver Point, the Administrative Agent, or any of their representatives related to the Katrina tax refunds was a call where he explained the methodology of estimating the potential amount of the refund.

During this call, a representative of FTI, the Administrative Agent's financial advisor, remarked that KPMG's tax position was aggressive, a characterization Mr. Jeandron did not disagree with (Jeandron Deposition Transcript 60:25 -63:24, attached hereto as Exhibit I).[10]

Further, Palmisano's allegation that the Lenders "threatened to sue OCA's directors personally" on various occasions is unsubstantiated and irrelevant. Given the Company's history of transgressions and broken promises, the Lenders would have been derelict in their duties to their investors had they not considered legal action to stem the tide of wholesale contractual breaches and collateral erosion. Indeed, it would be more surprising for a lender group not to consider or threaten legal action when its collateral is being wrongly converted. It is also true that OCA's lawyer believed (incorrectly, in the Lenders' opinion) that the Board owed no duties to the Lenders and were not at risk of successful legal action. Apparently, the Board gave little credence to the Lenders' rights or potential legal remedies. Now it is convenient for Palmisano to argue otherwise. It underscores his desperation that Palmisano is now trying to bootstrap potential legal liability for intentional breaches of the Credit Agreement into "control" for case law purposes. In Palmisano's looking glass, the greater the breach by the Company (and thus the greater the potential legal liability), the more the lenders are at risk of exercising control. Virtually every court that has considered the issue has found that a creditor's exercise of legal remedies cannot be "control" because the Board remained free to act as it determined. It could have filed for chapter 11 at any time and, once in chapter 11, it could have decided to pursue a different path (*e.g.*, a sale of the Company or a liquidation). There simply is no evidence of control. With respect to post-petition actions, all of the Debtors' decisions that were out of the

[10] Palmisano first mentioned a possible business interruption insurance claim to Silver Point during the September 6, 2005 meeting. If this was a valid claim, and so important, why did Palmisano fail to pursue it during the next four months, before Gries joined the Company and while the Company needed liquidity, or in the following four months before his departure?

ordinary course were subject to notice and a hearing. All parties in the case were afforded an opportunity to be heard on the propriety of the requested relief and the Court ultimately considered and ruled on the Debtors' request for DIP financing. If the Plan were not in the interest of the constituents, one would expect the Committee, the Equity Committee, or other creditors to be objecting.

Not pausing to consider the actual facts, Palmisano invites the Court to infer that Gries and Conway, Del Genio, Gries & Co., LLC, the Debtors' restructuring specialists, are mere Silver Point creatures. There is not a shred of evidence to support this extraordinary and untenable assumption. Silver Point has never hired Gries in any other case or transaction. Gries was one of the four persons suggested to OCA by the whole lender group, on the recommendation of the Administrative Agent, as a highly skilled professional with a lot of experience in helping companies in financial predicament. While the lending group required OCA, in several amendments to the Credit Agreement, to retain a seasoned restructuring advisor, it did not mandate the selection of any one advisor, but rather gave OCA a list of parties it believed would be acceptable without limiting OCA's ability to choose a qualified restructuring advisor who did not appear on the list. If OCA did not believe that any of the four candidates on the list were qualified, it could present other candidates to the Lenders or request additional recommendations. Finally, Palmisano has testified that had made the decision to hire Gries after discussing the four proposed candidates with Jefferies, Palmisano's hand-picked advisor. (Palmisano Dep. 28:14-31:21, attached hereto as Exhibit J) Since their collateral rights are directly implicated, it is customary and fair for secured lenders to have some input in the defaulting borrower's selection of professionals retained to help the borrower reorganize, in or out of court, and thus be in the position to repay their secured obligations. *Cf. Prima Co.*, 98

F.2d at 965 (there is nothing improper in a lender's requirement that the debtor replace its management to be in a better position to repay its debts). Indeed, the Company always remained free to breach its obligations, as it did in connection with the Sixth Amendment, to hire someone not on the list, to discuss alternatives with the Lenders, or to select any one of the four candidates. Case law makes it clear that this freedom of action precludes a finding of control (even had the covenants package been unusually onerous, which it is not).

However, by insinuating (without a shred of evidence) that Mr. Gries did not fulfill his contractual and fiduciary obligations to the Debtors, but merely followed Silver Point's directions to assure that Silver Point received some advantage over the other creditors, Palmisano attempts to impute to Silver Point "control" on account of what amount to perfectly legitimate, reasonable and volitional actions of the Debtors. Palmisano alleges that there was something improper about the terms of the latest amendments of the Credit Agreement, the DIP credit agreement and the Plan Support Agreement simply because they were negotiated by Mr. Gries on behalf of the Debtors. Palmisano conveniently forgets that these agreements were approved by OCA's Board, and the last two were also approved by this Court. Palmisano also alleges that there is something improper in the Board's delegating the day-to-day management of the Company to the chief restructuring officer it specifically retained for that purpose. All of these arguments are frivolous and inconsistent with the facts, yet Palmisano seems comfortable resting much of his case on them.

Finally, Palmisano also alleges that there is something improper (or "controlling") in the fact that Silver Point negotiated directly with the Committee regarding the treatment of the general unsecured claims under the Plan. From Silver Point's perspective, whatever recovery the unsecured creditors are to receive under the Plan, they are receiving purely as a "gift" from

Silver Point. Any lender who is willing to part with some of its collateral for these purposes would necessarily negotiate the terms of that agreement. Senior and junior creditors are involved in some form of direct negotiations in almost every case. Any agreements arising out of these discussions are then presented to the debtors for consideration, approval and implementation, as was the case here. There is nothing untoward about these discussions and it certainly does not rise to the level of "control."

Much more important, no actual "control" can be demonstrated here. On the contrary, the Company frequently failed to comply with its contractual promises. For instance, the Lenders first indicated a lack of confidence in Palmisano as early as October 2005, yet the Board did not remove him until May 2006, after the bankruptcy filing. Also, the Company rejected Silver Point's refinancing proposals made to it in October and December of 2005. Had Silver Point been exercising "control," it would have made sure its proposal was accepted.

Further, as described in detail above, OCA repeatedly failed to meet a number of commitments it had made to the Lenders, including violating a multitude of covenants it had agreed to as a condition to the Lenders' continued forbearance from exercising their remedies. These failed commitments and covenant violations included the delivery of a business plan, a delivery of a refinancing plan, and the prohibition against settling doctor claims. Even more egregiously, the Company played fast and loose with the Lenders' collateral, negotiating buyouts of BSA's at significant discounts to historical practice and transferring (for practically no consideration) some of the Lenders' collateral to an entity controlled by Palmisano -- all without seeking the Lenders' approval required by the Credit Agreement (or even giving them notice of these transactions) or disbursing the proceeds to the Lenders (again, as required by the Credit Agreement).

As demonstrated above, the law attributes nothing improper to a lender enforcing its contractual rights and protections or availing itself of other legal remedies. How much less in "control" then is a lender who cannot even make the borrower comply with its covenants. Under the facts of this case, alleging that OCA was under Silver Point's control is ludicrous. Case law is clear that it is *actual*, not *potential*, control over the borrower's affairs that must be proven before culpable "control" is established. *See*, *e.g.*, *Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *see also Sanders Confectionary Prods., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 485 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993). Here, there was not even "potential," let alone actual control.

B. <u>The Plan Does Not Violate Absolute Priority Rule</u>

Palmisano also claims that the Plan cannot be crammed down on Class 4 (General Unsecured Creditors) because Classes 5 and 6 (which are junior to Class 4) receive distributions under the Plan, while the claims in Class 4 are not being paid in full, which violates the absolute priority rule.

Under the Plan as initially proposed, Classes 5 and 6 would have received contingent future recoveries only if both Class 5 and Class 6 voted to accept the Plan. The Debtors have informed Silver Point that Class 6 has overwhelmingly rejected the Plan as initially proposed and thus Classes 5 and 6 will not receive the recoveries provided for in the Plan.

Instead, the Debtors, Silver Point, and the Equity Committee have recently reached a settlement which was presented to the Court through the Joint Motion for Entry of Order Approving August 29, 2006 Immaterial Modifications To The Amended And Supplemental Joint Chapter 11 Plan of Reorganization For OCA, Inc. And Filed Subsidiaries, As of July 24, 2006. This settlement resolved the Equity Committee's objections to the Plan and provided for an alternative treatment for the members of Class 6. Generally, the settlement now provides that a portion (up to 15%) of the New Common Stock in OCA that Silver Point is entitled to receive under the Plan will be offered for purchase to existing equity holders at a price within an agreed upon range. There can be no argument that this settlement violates the absolute priority rule, as the property to be distributed to the members of Class 6 is the property that Silver Point is entitled to receive under the Plan and that it agreed, as consideration for the settlement, to pass on to the members of Class 6. *See*, *e.g.*, *In re MCorp Fin., Inc.*, 160 B.R. 941, 960 (S.D. Tex. 1993) (proposed chapter 11 plan did not "discriminate unfairly" against a non-consenting class where the distribution to an arguably junior class was being paid, as a result of a settlement, from the share distributable to a senior class); *Genesis Health Care Ventures, Inc.*, 266 B.R. 591, 612 (Bankr. D. Dela. 2001) ("permissible allocation by the secured creditors of a portion of the distribution to which they otherwise would be entitled" does not result in unfair discrimination against non-consenting classes).

Based on all of the foregoing, Palmisano's Objections should be overruled and the Plan, as modified, should be confirmed.

IV. JOINDER IN UCC OBJECTION AND MOTION TO DESIGNATE

A. Palmisano's Claims Should Be Subordinated to Other General Unsecured Claims

Silver Point also hereby joins in the Committee's request that all of Palmisano's claims should be subordinated to the claims of the other general unsecured creditors of the Debtors. The Fifth Circuit has enunciated a three prong test for determining the applicability of equitable subordination to a claim: (i) the claimant must have engaged in some type of inequitable conduct; (ii) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (iii) equitable subordination of the claim must not be inconsistent with the Bankruptcy Code. *Mobile Steel*, 563 F.2d at 700. Courts in the Fifth Circuit have generally recognized three types of conduct which satisfy the first prong of the Mobile Steel test, namely "(1) fraud, illegality, and breach of fiduciary duty; (2) undercapitalization; or (3) claimant's use of the Debtor as a mere instrumentality or alter ego." *Fabricators, Inc. v. Technical Fabricators, Inc.*, 926 F.2d 1458, 1467 (5th Cir. 1991). Furthermore, particularly "rigorous scrutiny" is given to insider dealings. *Fabricators.*, 926 F.2d at 1465 In contrast to Silver Point, Palmisano is, in fact, an "insider" of the Debtors. Not only was Palmisano an officer, a director and a "person in control of the debtor" at all times that his claims were incurred (*see* 11 U.S.C. §§ 101(31)(B)(i), (ii) and (ii)), Palmisano remains an insider under 11 U.S.C. §101(31)(E) since he is the Managing Member of OCAI, which is OCA's affiliate.

Palmisano's conduct, subjected to the mandated close scrutiny, clearly warrants equitable subordination. Palmisano has repeatedly demonstrated his cavalier attitude towards OCA and its creditors. As CEO of a publicly traded Company, with numerous stockholders, employees, and creditors, Palmisano has repeatedly breached his fiduciary duties to OCA, its shareholders, and its creditors by placing his personal interests and those of his family ahead of those of OCA. This impulse is demonstrated through (i) the failure to obtain any fairness opinion or valuation of the assets spun off in the OCAI transaction, which assets are now allegedly majority owned by Palmisano and his family; (ii) the rehiring of Palmisano Jr. after he had been placed on administrative leave by the special committee and while he was under investigation by the SEC due to his alleged misconduct with respect to OCA's financial records; (iii) Palmisano's causing the departure of A&M, whose retention was a condition of the waiver which allowed OCA to avoid having the amount loaned under the credit facility become due and payable; (iv) and Palmisano, together with the Board, directing repeated willful violations of the covenant package that the Company had agreed to as an inducement to its secured Lenders to forbear from exercising their remedies under the defaulted (and later matured) Credit Agreement. The cumulative effect of these breaches of fiduciary duty were to harm the creditors and stockholders of OCA by putting the Company in uncured default under its bank facility and introducing increasing uncertainty regarding the capabilities of management, which caused massive doctor defections that further endangered the Company's financial viability.

Accordingly, Silver Point joins in the Committee's request that Palmisano's claims be subordinated to the claims of the Debtors' other general unsecured creditors.

B. <u>Palmisano's Vote on the Plan Should be Designated</u>

Silver Point also joins in the Designation Motion and submits that grounds exist for having Palmisano's vote to reject the Plan designated pursuant to section 1126(e) of the Bankruptcy Code.

Section 1126(e) of the Bankruptcy Code provides that, "[o]n request of a party in interest, and after notice and hearing, the court may designate any entity whose acceptance or rejection of [a] plan was not in good faith... ." 11 U.S.C. § 1126(e). The term "good faith" as used in this section was intentionally left undefined, so that it may be developed by the courts as cases arose. *See, e.g., In re The Landing Assocs., Ltd.*, 157 B.R. 791, 802 (Bankr. W.D. Tex. 1993). The United States Supreme Court, when discussing the "good faith" standard under the predecessor statute, has explained that this requirement was designed to eliminate the votes that were cast to obtain an "unfair advantage." *Young v. Higbee Co.*, 324 U.S. 204, 212 (1945). Thus, one who casts a vote for "ulterior purpose" should have its vote designated and disregarded. *In re Gilbert*, 104 B.R. 206, 216 (Bankr. W.D. Mo. 1989).

In order to distinguish between benign economic self interest and forbidden "ulterior motive," the courts analyze the specific interest that is being benefited by the questioned activity: as long as it is the interest of the creditor *qua* creditor, the vote is legitimate, but if it is the creditor's interest in some other capacity, designation is indicated. *See, e.g., In re P-R Holding Corp*., 147 F.2d 895, 897 (2nd Cir. 1945). This is also the principle followed by the Fifth Circuit. In *Town of Belleair, Fla. v. Groves*, 132 F.2d 542, 543 (5th Cir.), *cert. denied*, 318 U.S. 769 (1942), the Fifth Circuit found that the motivation behind the vote of a group of creditors was to benefit their interests in a capacity other than that of the debtor's creditors, and that, accordingly, such vote constituted bad faith sufficient to disqualify such creditors' votes.

As to such other capacities which creditors may be improperly focused on when casting their plan votes, the most obvious is that of a competitor whose "ulterior motive" in not wishing the debtor to reorganize successfully is obvious. In a case with a strikingly similar fact pattern, *In re MacLeod Co., Inc.*, 63 B.R. 654 (Bankr. S.D. Ohio 1986), the debtor's former insiders had formed a Company that directly competed with the debtor. The court designated these insiders' votes cast to reject the debtor's plan, having found that such votes were cast "not in good faith, but rather . . . for the ulterior purpose of destroying or injuring the debtor in its business so that the interests of the competing business with which the [insiders] were associated, could be furthered." *McLeod*, 63 B.R. at 656.

In this instance, the ulterior motives of Palmisano could not be clearer. In addition to wanting the benefit of the same releases afforded under the Plan to the Debtors' current directors, Palmisano, through his words and actions, has demonstrated an intention to compete with OCA in its core business of providing business services to orthodontists. He is clearly advancing interests other than those of a creditor in deciding to vote against the Plan, a plan which has the support of every other major constituency in these cases, including the Committee and the Equity Committee.

Indeed it is clear that Palmisano is advancing his twin interests as (i) a disgruntled former executive and director jealous of the releases being granted to other directors and officers and (ii) a competitor of OCA whose new business ventures would benefit greatly from a liquidation of OCA. Based on the foregoing, the Court should designate Palmisano's vote to reject the Plan.

V. CONCLUSION

For all of the foregoing reasons, Silver Point respectfully requests that the Court (a) overrule the Objections, (b) confirm the Plan, as modified, (c) order that Palmisano's claims be subordinated to all other general unsecured claims of the Debtors, (d) designate Palmisano's votes with respect to the Plan, and (e) grant Silver Point such other and further relief as may be just and proper.

Dated: New Orleans, Louisiana
September 1, 2006

LEMLE & KELLEHER, L.L.P.

By: /s/ Alan H. Goodman
ALAN H. GOODMAN (Bar #6131)
DAVID F. WAGUESPACK (Bar #21121)
BRENT C. WYATT (Bar #25308)
601 Poydras Street
2100 Pan-American Life Center
New Orleans, Louisiana 70130
Telephone: (504) 584-9419
Facsimile: (504) 584-9142
agoodman@lemle.com

-and-

Dennis F. Dunne, Esq.
William E. Wallace III, Esq.
Andrew Leblanc, Esq.
MILBANK, TWEED, HADLEY & MCCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005-1413
Telephone (212) 530-5000
Facsimile: (212) 530-5219
ddunne@milbank.com
wwallace@milbank.com
aleblanc@milbank.com
Attorneys for Silver Point Capital, L.P. and its Affiliates

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served on the following e-mail addresses (being the same used for service by others, including Palmisano's attorneys) this 1st day of September, 2006: wpatrick@hellerdraper.com; dsd@hellerdraper.com; markthomas@jenner.com; mterrien@jenner.com; bsteffes@steffeslaw.com; Robert.Gravolet@usdoj.gov; bmartin@mcglinchey.com; mbrannum@winstead.com; ddunne@milbank.com; araval@milbank.com; clonstein@bellboyd.com; cheathamrb@arlaw.com; bankruptcy@gra-arc.com; sarden@hssw.com; harnold@bakerdonelson.com; pbessette@akingump.com; rooth@chaffe.com; arnold@baldwinhaspel.com; lbenton@bcattys.com; dballina@hellerdraper.com; matt.beal@lowndes-law.com; lyman@belnapcurtis.com; abendana@lshah.com; lbenton@bcattys.com; cbergeron@kingsmillriess.com; kingriess@kingsmillriess.com; bberins@hellerdraper.com; rburvant@klb-law.com; nobankecf@lockeliddell.com; cbowman@monbar.com; Larry.Burick@ThompsonHine.com; rscohenesq@aol.com; ccousins@leakeandersson.com; scrouch@nsflaw.com; bdavis@alumni.duke.edu; mkelley@kkgpc.com; sdermody@kfplaw.com; philipadonisi@aol.com; eck@eck-law.com; jbellman@jonesday.com; wforeman@oca-law.com; rjclary@oca-law.com; jdf@sessions-law.com; stephen.roberts@strasburger.com; lf@cpmlaw.com; efutrell@joneswalker.com; wgambel@millinglaw.com; temple@orthodon.com; keithg@gttpa.com; snakebit@goldmanlawfirm.net; mgoldstein@lshah.com; rgoldstein@gttpa.com; bgreen@shaperolaw.com; sgreenberg@spvg.com; bhathaway@mailbmc.com; jhayden@hellerdraper.com; william@boyd-veigel.com; tah@kompc.com; hootsela@phelps.com; whorn@hellerdraper.com; bobhumb@hotmail.com; pkjones@liskow.com; mkingsmill@kingsmillriess.com; jkurtzma@klehr.com; persick@baldwinhaspel.com; jim.lackie@keanmiller.com; ray@ladouceurlaw.com; Hlandry@millinglaw.com; tlazich@ulmer.com; lebreton@frc-law.com; mclumsden@ulslaw.com; tmanthey@hellerdraper.com; joel@mbt-law.com; richard@rwmaplc.com; smccaffity@dewolfmccaffity.com; ffm@bostonbusinesslaw.com; martin@wmhllp.com; jmellen@kellerrohrback.com; CLMenasco@Liskow.com; Mendez, Andrew D.; kmercer@mailbmc.com; jmyers@winstead.com; rjnaus@wwmlaw.com; pnelson@jenner.com; docketing@jenner.com; wpatrick@hellerdraper.com; map@longlaw.com; ecfpigginsj@millerjohnson.com; mpinkerton@frilotpartridge.com; pollack@ballardspahr.com; capugatch@rprslaw.com; arice.ecf@rprslaw.com; jrios@downeybrand.com; jrios@downeybrand.com; stephen.roberts@strasburger.com; sseewer@honigman.com; pshapiro@shutts-law.com; sherrill-beards@sec.gov; robinsone@sec.gov; dsmith496@aol.com; dstewart@millinglaw.com; vanderpoellt@arlaw.com; marvic_thompson@bellsouth.net; dthuma@jtwlawfirm.com; hhecfb@hershnerhunter.com; rturnbow@hershnerhunter.com; eltjr01@bellsouth.net;

lawyer@wasslawfirm.com; watkinslaw@att.net; jfw@dfy.com; ilevee@lowenstein.com; jlandis@stonepigman.comraguilar@mcglinchey.com; pgarrity@steffeslaw.com; skupperman@barassousdin.com; ljreymond@liskow.com; thennican@kingsmillriess.com; nwehlen@stonepigman.com.

/s/ Alan H. Goodman
Alan H. Goodman