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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PLAN SUPPORTERS' REPLY TO BARTHOLOMEW F. PALMISANO, SR.'S (I) PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND (II) POST-HEARING MEMORANDUM

OCA, Inc. ("OCA") and certain of its subsidiaries[1], as debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), the Official Committee of Unsecured Creditors of OCA, Inc., et al. (the "Creditors' Committee"), the Official Committee

[1] Orthodontic Centers of Alabama, Inc. (06-10180); Orthodontic Centers of Arizona, Inc. (06-10181); Orthodontic Centers of Arkansas, Inc. (06-10182); Orthodontic Centers of California, Inc. (06-10183); Orthodontic Centers of Colorado, Inc. (06-10184); Orthodontic Centers of Connecticut, Inc. (06-10185); Orthodontic Centers of Florida, Inc. (06-10186); Orthodontic Centers of Georgia, Inc. (06-10187); Orthodontic Centers of Illinois, Inc. (06-10188); Orthodontic Centers of Indiana, Inc. (06-10189); Orthodontic Centers of Kansas, Inc. (06-10190); Orthodontic Centers of Kentucky, Inc. (06-10191); Orthodontic Centers of Louisiana, LLC (06-10192); Orthodontic Centers of Maine, Inc. (06-10193); Orthodontic Centers of Maryland, Inc. (06-10194); Orthodontic Centers of Massachusetts, Inc. (06-10195); Orthodontic Centers of Michigan, Inc. (06-10196); Orthodontic Centers of Minnesota, Inc. (06-10197);Orthodontic Centers of Mississippi, Inc. (06-10198); Orthodontic Centers of Missouri, Inc. (06-10199); Orthodontic Centers of Nebraska, Inc. (06-10200);Orthodontic Centers of Nevada, Inc. (06-10201); Orthodontic Centers of New Hampshire, Inc. (06-10202); Orthodontic Centers of New Jersey, Inc. (06-10203); Orthodontic Centers of New Mexico, Inc. (06-10204); Orthodontic Centers of New York (06-10205); Orthodontic Centers of North Carolina, Inc. (06-10206); Orthodontic Centers of North Dakota, Inc. (06-10207); Orthodontic Centers of Ohio, Inc. (06-10208); Orthodontic Centers of Oklahoma, Inc. (06-10209); Orthodontic Centers of Oregon, Inc. (06-10210); Orthodontic Centers of Pennsylvania, Inc. (06-10211); Orthodontic Centers of Puerto Rico, Inc. (06-10212); Orthodontic Centers of Rhode Island, Inc. (06-10213); Orthodontic Centers of South Carolina, Inc. (06-10214); Orthodontic Centers of Tennessee, Inc. (06-10215); Orthodontic Centers of Texas, Inc. (06-10216); Orthodontic Centers of Utah, Inc. (06-10217); Orthodontic Centers of Virginia, Inc. (06-10218); Orthodontic Centers of Washington, Inc. (06-10219); Orthodontic Centers of Washington, D.C., Inc. (06-10220); Orthodontic of West Virginia, Inc. (06-10221); Orthodontic Centers of Wisconsin, Inc. (06-10222); Orthodontic Centers of Wyoming, Inc. (06-10223); OrthAlliance, Inc. (06-10229); OrthAlliance New Image, Inc. (06-10230); OCA Outsource, Inc. (06-10231); PedoAlliance, Inc. (06-10232); Orthodontics Centers of Hawaii, Inc. (06-10503); Orthodontics Centers of Iowa, Inc. (06-10504); and Orthodontics Centers of Idaho, Inc. (06-10505).

of Equity Security Holders of OCA, Inc. (the "Equity Committee"), and the pre-petition and post-petition secured lenders of the Debtors (the "Senior Secured Lenders" and together with the Debtors, the Creditors' Committee and the Equity Committee, the "Plan Supporters") reply to Bartholomew F. Palmisano, Sr.'s ("Palmisano's") (i) Proposed Findings Of Fact And Conclusions Of Law, and (ii) Post-Hearing Memorandum (the "Palmisano Memorandum"), and, in further support of the confirmation of the Amended and Supplemental Joint Chapter 11 Plan of Reorganization for OCA, Inc. and Filed Subsidiaries as of September 14, 2006 (the "Plan"),[2] respectfully state as follows:

Preliminary Statement

1. OCA, its directors and officers, the Senior Secured Lenders, the Creditors' Committee, and the Equity Committee engaged in arms-length, good faith negotiations and bargaining prior to reaching agreement on the Plan and the Equity Settlement. The Plan is confirmable as a matter of fact and law. Virtually every creditor save ***one*** voted in favor of the Plan. The sole objector to confirmation is Palmisano, OCA's founder and former CEO. Palmisano objects to confirmation of the Plan even though on April 20, 2006 he: "told the Board that for the sake of the company, employees, doctors, shareholders and creditors, the board should adopt the proposed term sheet" and that the "board should adopt the plan for the good of the company and all of its constituencies" (Debtors' Ex. 41; Palmisano Ex. 32, page 2).

2. The Plan satisfies the absolute priority rule and the cramdown requirements of section 1129(b) of the Bankruptcy Code and can be confirmed so long as the Court finds that the value of OCA does not exceed approximately $111,036,257, being the sum of (a) the approximately $101,496,257 that is owed to the Senior Secured Lenders plus (b) the

[2] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

approximately $9,540,000 in presently expected Allowed Administrative Claims that will be paid on or before the Effective Date of the Plan.[3] (See Plan Supporters' Initial Brief at 9 and 15). For the Court to deny confirmation of the Plan, the Court would have to adopt Palmisano's lay opinion, which was worked out on one page, with no supporting documentation, over the weekend prior to commencement of the Confirmation Hearing, which asserts that the value of OCA is between $148,000,000 and $189,900,000 (Palmisano Ex. 89, 9/14 Tr. at 41). Palmisano's lay opinion of value is entitled to no weight and the Court must find that, based upon the expert testimony of Messrs. Gries and Jones, the total value of OCA is not greater than $96,000,000 (Debtors' Ex. 20). This finding will result in confirmation of the Plan.

3. Palmisano's lay opinion is entitled to no weight not only because it is an unsubstantiated, undocumented, last minute creation, but because his "valuation opinion" defies logic, common sense, the undisputed facts and the reasonable and logical inferences that must be drawn from the undisputed facts. Put simply, Palmisano's valuation opinion is rebutted by the undisputed fact that at no time since late 2004 has any person been able to raise any source of debt or equity financing that would satisfy the Senior Secured Lenders' Claims, let alone any source of debt or equity financing that would fund the purchase of the stock or assets of OCA for more than those claims.[4] Moreover, to conclude that Palmisano's valuation is accurate, the Court would have to conclude that OCA, its officers and directors, the Creditors' Committee, the Equity Committee, the long list of professionals they have all retained, *and Palmisano himself*, have all failed to realize Palmisano's inflated value despite their own economic interests in doing so. The Plan must be confirmed because the value of OCA does not exceed the amount of the

[3] The actual amount of Allowed Administrative Claims to be paid on the Effective Date is, to be sure, increasing, in part due to the escalation in professionals' fees and expenses.

[4] Not surprisingly, this is a stark fact the Palmisano Memorandum ignores.

Senior Secured Lenders' Claims; therefore, any distributions to Class 4 or Class 6 are gifts of property that otherwise would be distributed to the Senior Secured Lenders in accordance with the absolute priority rule.

4. More specifically, Palmisano's lay opinion is entitled to no weight because: (a) he testified that he objected to confirmation of the Plan because he believes the Plan is "unfair" to shareholders (9/14 Tr. at 46), despite the fact that on April 20, 2006, when OCA's board was considering the plan term sheet upon which the Plan is based, he "told the Board that for the sake of the company, employees, doctors, shareholders and creditors, the board should adopt the proposed term sheet" and that the "board should adopt the plan for the good of the company and all of its constituencies" (Debtors' Ex. 41; Palmisano Ex. 32, page 2); (b) although he testified that he has more knowledge about OCA than any other person (9/11 Tr. at 231 and 9/14 Tr. at 41), he has failed to realize for creditors and shareholders the alleged value that he presently ascribes to the enterprise, despite having hired a series of professionals to come up with a debt or equity financing transaction and despite having tried to realize that value since 2004 (9/14 Tr. at 115 and at 43-44); (c) at no time has he contacted the Creditors' Committee to propose an alternative plan of reorganization or has he even sought to terminate exclusivity and file an alternative plan of reorganization (9/14 Tr. at 38); thereby demonstrating that even Palmisano realizes that the present Plan is the best available Plan for unsecured creditors; (d) the Debtors' expert credibly testified that the value of OCA is $96,000,000, based on an exhaustive and professional analysis (Debtors' Ex. 19); e) the Creditors' Committee supports the Plan after hiring financial advisors to conduct due diligence regarding the value of OCA because, despite its economic incentive to side with Palmisano, the Creditors' Committee does not believe the Debtors' value exceeds the Senior Secured Lenders' Claims (Debtors' Ex. 63 and testimony of

Jeff Jones); (f) in May 2006, the financial advisor for the Creditors' Committee concluded and reported that the value of OCA was less than the amount of the Senior Secured Lenders' Claims (Debtors' Ex. 66); (g) the Creditors' Committee's expert testified credibly that the value of OCA does not exceed the claims of the Senior Secured Lenders (Debtors' Ex. 63); and (h) the Equity Committee, despite initially insisting vehemently that the Debtors had substantial value over and above the amount of the Senior Secured Lenders' Claims, was not able to propose an alternative that would refinance the Senior Secured Lenders, even though the Equity Committee retained yet another investment banker to obtain such refinancing.

5. For the Court to side with Palmisano, it must disregard all of these facts, the reasonable and logical inferences to be drawn therefrom, and the professional valuations of two experts, in favor of Palmisano's undocumented, last minute, one page "analysis." This it simply cannot do. Although Palmisano's testimony regarding OCA's general business and corporate history was somewhat credible on a few issues (albeit self-serving, contradictory and replete with explanations and excuses regarding the events that led to OCA seeking Chapter 11 relief), his specific testimony on valuation issues was not credible at all.

6. For example, he attempted to substantially inflate the value of the Debtors' Katrina related tax refunds by insisting that all of the doctors who left between Katrina and late March 2006 were "Katrina related" and thus gave rise to tax losses for which refunds could be claimed. (9/11 Tr. at 247-48; Palmisano Ex. 89) But this claim is inconsistent not only with all the other evidence, but with his own testimony. Debtors' Exhibit 23 is composed of letters from doctors who terminated their relationships in 2006, and they cited several reasons for termination including OCA's financial inability to perform, but not Katrina. When confronted with this, Palmisano simply contended that the doctor letters did not state the "real" reasons why doctors

were leaving, which was Katrina. (9/14 Tr. at 79) This is not credible. Moreover, he did not even seem to notice the inconsistency between this claim and (a) his earlier testimony on direct examination that doctors were leaving OCA in 2006 because they were concerned about OCA's ability to refinance the matured obligation owing to the Senior Secured Lenders (9/11 Tr. at 216-17); or (b) his own March 10, 2006 letter (Debtors' Ex. 7, pages 1 - 2) in which he discusses doctor attrition at length without once blaming Hurricane Katrina for that attrition. Add to that his testimony that OCA had its US computer operations up and running in New York within 7 to 10 days after Hurricane Katrina (9/11 Tr. at 195-96), and that OCA had moved back into its Louisiana headquarters in November 2005 (9/11 Tr. at 196), and it becomes clear that his insistence, for valuation purposes, in relying on 2006 doctor attrition for Katrina tax refunds is not credible. Instead, it indicates a willingness to conveniently shift blame for all of OCA's problems to Hurricane Katrina, while disregarding or minimizing the damage done to OCA by its inability to generate accurate and timely financial reports, audits, records or SEC filings, its inability to deal with doctor attrition that occurred prior to Hurricane Katrina in 2004 and 2005, and its inability to satisfy its matured obligations to its Senior Secured Lenders.

7. Similarly, his testimony about the Debtors' recoveries under their business interruption policy was not credible. He testified that they should recover between $10,000,000 and $25,000,000. But on cross examination it was demonstrated conclusively that his estimate was not credible. He admitted that he had only "read bits" of the policy. (9/14 Tr. at 72) He also admitted that he was basing his estimate of the Debtors' recoveries on the value of lost doctor contracts (9/11 Tr. at 242), despite the policy provision which states that it does not "pay for any increase of loss caused by or resulting from any suspension, lapse or cancellation of any

contact." (9/14 Tr. at 74) His "estimate" of the value of the Debtors' business interruption claim, in other words, is simply uninformed and cannot be found credible.

8. To take a last example, Palmisano disputed the amount of corporate overheard that Reorganized OCA will require. He contradicted the testimony of Mr. Jones, and attempted to support his lowball estimate of corporate overhead, by claiming that his estimate equated to an EBITDA margin consistent with that of an OCA competitor, American Dental Partners. (9/14 Tr. 25-32) Because the lower overhead led to a higher projected EBITDA on a dollar for dollar basis, and because Palmisano applied a six times multiple to his higher EBITDA, this item was the most significant element in Palmisano's disagreement with the other experts over the Debtors' value. Nonetheless, in this too, Palmisano was shown not to be credible.

9. Gries' estimate of corporate overhead, nearly \$10,000,000 higher than Palmisano's estimate, is consistent with the Debtors' current run rate of corporate overhead and approximately \$15,000,000 less than pre-Katrina overhead. (9/14 Tr. at 149) More importantly, at \$22,000,000, Gries' estimate of OCA's go forward corporate overhead is very close to *Palmisano's own estimate of \$21,400,000* when he was still with the company. (9/14 Tr. at 150-51) Finally, Palmisano's reliance on a comparison to American Dental Partners for his otherwise unsupported reduction of OCA's projected corporate overhead to \$12,800.000 (Palmisano Ex. 89) was shown to be completely unavailing. As Gries demonstrated, Palmisano arrived at his understated level of corporate overhead for American Dental Partners, and therefore his inflated EBITDA margin and EBITDA for that company, by simply failing to read the footnotes of American Dental Partners' financial statements. (9/14 Tr. at 151). This oversight resulted in his failure to include key elements of American Dental Partners' corporate overhead in his calculation, including salaries and benefits and rental and occupancy costs. (Id.) When these

items are included, as they must be for an "apples to apples" comparison to OCA, American Dental Partners showed an EBITDA margin comparable to Gries' projected OCA EBITDA margin. (9/14 Tr. at 151-52)

10. To conclude, in order for the Court to adopt the lay valuation opinion of Palmisano, and to thereby deny confirmation of the Plan, the Court would have to find that the Debtors' expert opinion is wrong, the Creditors' Committee expert opinion is wrong, the Equity Committee investment banker is wrong, Jefferies is wrong, and the market itself is wrong through its inability to properly value OCA. There is no basis for the Court to so find. Finally, once the Court finds that the value of OCA is less than the claims of the Senior Secured Lenders, all of the legal objections to confirmation are, as a matter of law, unavailing.

Background

11. At the conclusion of the Confirmation Hearing, the Court instructed the parties to file proposed findings of fact and conclusions of law, as well as provide briefing on the issues of valuation, cramdown, and the absolute priority rule. Accordingly, on September 25, 2006, the Plan Supporters filed their Proposed Findings Of Fact And Conclusions Of Law And Incorporated Memorandum Of Law In Support Of Confirmation Of Amended And Supplemental Joint Chapter 11 Plan Of Reorganization For OCA, Inc. And Filed Subsidiaries As Of September 14, 2006 [P-1877] (the "Plan Supporters' Initial Brief"). The Plan Supporters hereby file their reply (the "Plan Supporters' Reply") to Palmisano's (i) Proposed Findings Of Fact And Conclusions Of Law [P-1879], and (ii) Post-Hearing Memorandum [P-1878] (the "Palmisano Memorandum").

12. History of Equity Settlement. Under the Plan, as proposed on July 24, 2006, the recoveries for holders of Equity Interests in OCA were contingent upon both Class 6 (composed

of holders of Equity Interests in OCA) and Class 5 (composed of holders of Subordinated (Securities Litigation) Claims) voting in favor of the Plan. Under this initial structure, if both Classes 5 and 6 voted to accept the Plan, they would share, *pro rata*, in certain contingent future payments, triggered by the occurrence of certain monetization events. On June 13, 2006, the United States Trustee appointed the Equity Committee whose "main goal" was "to explore strategic alternatives" that would refinance the Claims of the Senior Secured Lenders. (Tr. 6/27/2006 18:16-20). At the time, the Equity Committee was optimistic that it would be able to refinance the Claims of the Senior Secured Lenders because it believed that the value of the Debtors was in excess of $200,000,000 (Tr. 6/27/2006 115:6-17), or nearly double the amount of the Senior Secured Lenders' Claims, and on that basis recommended that Equity Security holders vote to reject the Plan. (See Equity Committee Solicitation Letter). Despite the marketing and solicitation efforts of its financial advisor, the Equity Committee, much like the Creditors' Committee and the Debtors before, was unable to come forward with any strategic alternative that would refinance the claims of the Senior Secured Lenders. Accordingly, the Equity Committee opened negotiations for a consensual resolution that would become the Equity Settlement.

13. Equity Settlement. The Equity Settlement came (a) after the close of the solicitation period, (b) after the Equity Committee failed to find an alternative transaction to pay the Claims of the Senior Secured Lenders, (c) after Class 5 and Class 6 each failed to vote to accept the Plan, and (d) was in exchange for the Equity Committee's support of the Plan. (See 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 (P-1684), (the "Modification Motion") at 5). The Equity

Settlement provides for the Senior Secured Lenders to transfer to qualified holders of Equity Interests in OCA the opportunity (the "Rights Offering") to purchase up to 15% of the common stock of Reorganized OCA (the "New Common Stock") that otherwise was to have been distributed on the Effective Date to the Senior Secured Lenders under the Plan. Id. As of the Participation Record Date, three days after the Effective Date of the Plan, any entity that is a qualified holder (i.e. owns approximately 1,000,000 shares of old common stock and is an 'accredited investor') will be eligible to participate in the Rights Offering and purchase their *pro rata* share of the New Common Stock eligible to be distributed under the Rights Offering. Accordingly, this purchase right is not limited to entities that were equity holders of the Debtors as of the Petition Date; rather, this purchase right is available to entities that purchase or hold equity at any time including up to three days after the Effective Date of the Plan.

REPLY

I. The Court Should Adopt Michael Gries' Valuation of $96,000,000 As The Reorganization Value of the Debtors

14. The Court should adopt the comprehensive valuation of the Debtors prepared by the Plan Supporters and Michael Gries ("Gries")[5], which valuation has been tested by numerous professionals and constituencies that had an economic interest in a higher valuation, rather than the one page "back of the envelope" valuation offered by Palmisano, which Palmisano prepared the weekend before Labor Day, on the eve of the confirmation hearing. (Gries Test. 9/5, p.142-143; Debtors' Exs. 10, 19 and 20; Palmisano Test. 9/14 at p.67; Palmisano Ex. 89).

15. In preparing the comprehensive CDG valuation report, Gries and his team of competent and capable professionals reviewed and analyzed a significant amount of financial information, interviewed employees of the Debtors and relied upon the expertise of numerous

[5]. Gries is the Chief Restructuring Officer and interim Chief Executive Officer of the Debtors, as well as a founding principal of Conway, DelGenio, Gries & Company, LLC ("CDG").

financial professionals, many of which had been retained by the Debtors while Palmisano was the chief executive officer of OCA. (Debtors' Ex. 19 at p.4). In reaching his opinion on valuation, Gries applied four widely recognized valuation methodologies: (a) comparable company trading multiples; (b) comparable company transaction multiples; (c) discounted cash flows using terminal multiples; and (d) discounted cash flows using perpetuity growth factors (Debtors' Ex. 19 at p.7; Gries Test. 9/5 at p.143). The conclusion Gries reached after the extensive work he detailed in his testimony and his report is that the Debtors' reorganization value is $96,000,000. (Debtors' Ex. 19; Debtors' Ex. 20; Gries Test. 9/5 at p.146-147).[6]

16. Gries' conclusion as to OCA's valuation reached through accepted valuation techniques is confirmed by the empirical evidence demonstrating the value of OCA, specifically the undisputed and indisputable market evidence that the Court heard from all of the witnesses, including Palmisano himself. Even more important than the results of the four accepted valuation methodologies employed by Gries is the fact that the financial markets have spoken with one clear and unwavering voice on the value of OCA – OCA has not been, and is not now, worth either more than the Claims of the Senior Lenders or as much as Palmisano mistakenly believes.[7] Beginning in late 2004, and continuing after the filing of these chapter 11 cases, the

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6 In contrast to Palmisano's representation (Palmisano Memorandum at p.4), all four of the methodologies supported Gries' reorganization value of $96 million. (Debtors' Ex. 19 at p.6).

7 Market tests have been uniformly favored by bankruptcy courts as the true barometers of value and courts are loathe to stray from such market values. See In re Leblanc, 346 B.R. 706, 714 (Bankr. M.D. La. 2006) (arm's length sale is "the best evidence of the property's fair market value at the relevant time"); Serra Builders, Inc. v. John Hanson Savings Bank, FSB (In re Serra Builders, Inc.), 128 B.R. 615, 620 (Bankr. Md. 1991) (a bid that a potential seller is willing to make for a particular asset is "the best evidence" of such asset's actual value); In re Torch Offshore, Inc., 327 B.R. 254, 258 (E.D. La. 2005) (holding that although assets were recently appraised for higher amount "this is not an indication of market value because no firm was willing to offer this amount"); In re Oneida Lake Dev., Inc., 114 B.R. 352, 356 (Bankr. S.D.N.Y. 1990) (same; unsupported allegations of higher value could not controvert the evidence of the actual bids received). The fact that Palmisano completely ignores the numerous market tests set forth in the Plan Supporter's Initial Brief and discussed at length during the Confirmation Hearing is particularly telling. He is doing nothing less than asking this Court to take the unprecedented step of overlooking numerous market tests (which flies in the face of applicable law) and ignoring the considered judgment of three fiduciaries, each of which has an economic incentive to agree with Palmisano's valuation

Debtors (including Palmisano) actively sought refinancing of their debt obligations, recapitalization, a sale of their assets or other restructuring. (Debtors' Ex. 10; Gries Test. 9/5 at p.149-151; Palmisano Test. 9/14 at p. 44 and 55). The Debtors employed experienced, nationally recognized professionals to help with these refinancing, recapitalization or restructuring efforts, including: Alvarez and Marsal, LLC, Jefferies & Company, Inc. and Conway, DelGenio, Gries & Company, LLC. (Debtors' Ex. 10; Gries Test. 9/5 at p.149-151). From the filing of these chapter 11 bankruptcy cases, the Unsecured Creditors Committee and its financial advisors, Loughlin, Meghji + Company[8], and the Official Equity Committee and its financial advisors, Imperial Capital, LLC, have also sought alternative financing options, recapitalization or other restructuring alternatives for the Debtors . (Debtors' Ex. 10; Gries Test. 9/5 at p. 151). Despite all sharing the same economic motive, and, in the case of the estate fiduciaries, the fiduciary obligation, to maximize the value of OCA, not one of these parties (Palmisano included) has been successful in obtaining any option to refinance, recapitalize or restructure OCA in a way that pays off the Senior Secured Lenders in full, consistent with the requirements of the absolute priority rule, and preserves more value for other creditor groups. (Gries. Test. 9/5 at p. 113). This market measure of value cannot and has not been rebutted by Palmisano. In fact, the Plan that Palmisano now claims is deficient because he alleges the Plan provides the Senior Secured Lenders with property in excess of their Claims, is the very same plan that Palmisano approved and recommended to the Debtors' Board of Directors. (Debtors' Ex. 41; Palmisano Ex. 32, page 2).

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claims if they were true.

8 The only other expert to give testimony and prepare a report on valuation in these bankruptcy cases was Jeffrey Jones of L&M who independently came to substantially the same conclusion on value as did Gries. (Jones Test. 9/11 at p.52 and Debtors' Ex. 63).

17. In stark contrast to the comprehensive valuation prepared by Gries using accepted valuation techniques and the indisputable market evidence, Palmisano presented a 1 page document (Palmisano Ex. 89) for the purposes of establishing valuation, which he testified he prepared on a Saturday or Sunday before Labor Day (Palmisano Test. 9/14 at p. 67). Palmisano, a lay witness with no known experience as a valuation professional, could not point to any specific documents and/or information that supported the purported valuations. (Palmisano Test. 9/14 at p. 67-69). Palmisano did not provide any underlying documentation and/or written analysis to support his valuations; instead, relying on the single piece of paper (Palmisano Test. 9/14 at p. 67-69) while vaguely testifying about "computations", "analysis" and "spreadsheets" he had while he was still at the Debtors to support his valuations (Palmisano Test. 9/11 at p.211 and 9/14 at p.69, 86, and 91). These "computations", "analysis" and/or "spreadsheets" relied upon by Palmisano to generate his 1 page report were never produced to the Debtors during discovery or presented to this Court as evidence. (Palmisano Test. 9/14 at p. 67-68). No credible evidence was ever provided in support of Palmisano's "numbers." Given these deficiencies, the Court should reject Palmisano's valuation testimony.

<u>Gries' Valuation of the Enterprise is Reasonable</u>

18. In his brief, Palmisano criticizes Gries' enterprise valuation of the Debtors' enterprise. Palmisano points to three distinct areas of Gries' valuation which Palmisano contends are undervalued by Gries: (i) Gries' treatment of revenues from "active and stipulating doctors"; (ii) Gries' treatment of revenues from "collection of capital advances made to Affiliated Practices"; and (iii) Gries' estimate of corporate overhead. *See* Palmisano Memorandum at p. 5-9.

19. <u>First</u>, Palmisano argues that Gries "offered no sound explanation" for his failure to include revenue from "active and stipulating doctors" in determining EBITDA prior to

application of the multiplier for the purposes of calculating perpetual enterprise value. *See* Palmisano Memorandum at p.6. The "active and stipulating doctors" Palmisano refers to in this context are the Affiliated Practices that have been *ordered* by this Court to continue depositing even though they have objected to the Debtors' attempts to assume their BSA's and have expressed their desire to stop depositing as soon as the BSA litigation is completed. (Gries Test. 9/11 at p.81 and 85).

20. As Palmisano concedes, he was not present for Gries' testimony with respect to this component of valuation (or any of the other components of Gries' valuation) and therefore may not have been aware of the extensive testimony Gries gave on this particular issue. (Palmisano Test. 9/14 at p. 96). Had he been in Court during the testimony, he would have heard Gries' precise and painstakingly detailed explanation of how he valued the revenue streams from the active and stipulating doctors, and why the method proposed by Palmisano is not appropriate. (Gries Test. 9/5 at p.147; Gries Test. 9/6 at p.82 and 85-89).

21. As Gries explained, the revenues from these particular Affiliated Practices - the "active and stipulating doctors" - are not permanent. Gries testified that after consultation with counsel and after reviewing the *Stipulations and Order By and Between the Debtors and Other Stipulating Parties* [P-1316] setting scheduling deadlines, he valued this revenue stream as the market would – by determining how long it would exist and using a discounted cash flow method to calculate the value of that cash flow. (Gries Test. 9/6 at p.89). Unlike Palmisano, Gries did not assume for valuation purposes that the revenue from the "active and stipulating doctors" would last indefinitely, because that is not a reasonable assumption. Even Palmisano, on cross-examination, agreed that applying a six times multiple to service fees that would have a life span of only two years would be inappropriate. (Palmisano Test. 9/14 at p.97). Despite his

own clear testimony on this issue, that is exactly what Palmisano is asking this Court to do - apply a six times multiple to the service fees from the "active and stipulating doctors" to arrive at a valuation, notwithstanding the short duration that these revenues are expected to continue. *See* Palmisano Memorandum at p. 6 ("this reduction lowered … the ultimate estimate of enterprise value, by and between $13,050,000 to $18,850,000"). Gries' testimony on this point – endorsed by common sense and Palmisano's own admissions - cannot meaningfully be disputed. Contrary to Palmisano's assertion in his papers, no market actor would value a disputed, litigated, short-term cash flow using the same methodology as for determining core revenue (specifically a multiple of EBITDA) that is expected to continue in perpetuity.

22. Second, Palmisano contends that "Gries' treatment of revenues from the allocation of the capital advances" is questionable. *See* Palmisano Memorandum at p.6. Unfortunately for him, Palmisano simply misunderstands Gries' testimony on this issue. Only by obscuring Gries' clear testimony on the value of capital advances can Palmisano advance this argument. Once stripped of Palmisano's obfuscation, Gries' testimony is clear and incontrovertible. Palmisano mistakenly says that Gries valued these assets only at $8,100,000. *See* Palmisano Memorandum at p. 6. To the contrary, Gries testified that the value of these capital accounts was $16,000,000 to $18,000,000, and that the value is captured in several of his valuation components. (Gries Test. 9/6 at p. 71-72 and 84-85, and 9/14 at p.152-153). Palmisano simply ignores many of the components included in Gries' valuation testimony that add up to the value of the capital accounts in the hope that he can create an issue where none exists.

23. Palmisano's one page valuation included a line item that he called "capital accounts," in which he conflated several of the independent items that appeared on Gries'

valuation. Notwithstanding that Gries included the value of the "capital accounts" in several different places in his valuation, Palmisano ignores these other entries in favor of the sensationalistic argument that the capital accounts were not accounted for at all ("there was nothing for the capital account") and therefore the Gries valuation was understated by $25,000,000 to $38,000,000. (Palmisano Test. 9/11 at p.249 and Palmisano Ex. 89). Gries explained the fallacy of Palmisano's contention to the Court and Palmisano's counsel on cross-examination, including explaining in great detail his reasoning for his valuation of the capital accounts. (Gries Test. 9/6 at p. 72 and 83-84; 9/11 at p.243 and 9/14 at p.151-152). Gries testified that the value of the capital accounts were included in several different components of his valuation of certain "Non-Operating" Assets ("Capital Account Amortization," "Prior Period Shortfall Collection," and "BSA Debt Amortization") and the other "Non-Core Asset" of "Proceeds Related to Inactive Litigating Doctors." (Gries Test. 9/6 at p.72 and 83-84 and 9/14 at p. 152-153; and Debtors Ex. 19 at p. 10-11, 18, and 32-34). Gries further testified that his valuation of the capital accounts was adjusted based upon a doctor by doctor review that, contrary to Palmisano's "guess" that 70-80% of the Affiliated Practices were currently amortizing this debt, showed that only 15% of the Affiliated Practices were amortizing the debt. (Palmisano Test 9/14 at p. 89-90; Gries Test 9/6 at p.83-84 and 9/14 at p.152-153). Moreover, contrary to Palmisano's testimony, many of the capital accounts included in Palmisano's $38,000,000 value involved "inactive" and litigating practices. (Palmisano Test 9/14 at p. 89-90; Gries Test. 9/6 at p.83-84 and 9/14 at p. 152-153).

24. In an effort to support his "valuation" testimony with respect to capital accounts and receivables, from Affiliated Practices, Palmisano claims that prior to leaving OCA he "had undertaken a detailed analysis of these accounts and that approximately $38,000,000 should be

collected." *See* Palmisano Memorandum at p.6. Palmisano also claims his "estimate was based on a doctor by doctor analysis". *See* Palmisano Memorandum at p.7. It should be noted that Palmisano did not produce a shred of evidence either in discovery or at trial demonstrating this "doctor by doctor analysis," leading a reasonable person to wonder whether such an analysis exists, and, if it does, why Palmisano did not disclose it. On cross examination, Palmisano could not remember exactly how many Affiliated Practices were in this group (Palmisano Test. 9/14 at p.85); how much of this debt was reflected in promissory notes (Palmisano Test. 9/14 at p.86); how much of this debt was from advances to start-up Affiliated Practices (Palmisano Test. 9/14 at p.86); or how many Affiliated Practices were paying on a currently amortizing basis (Palmisano Test. 9/14 at p.90). Moreover, Palmisano did not discount the value of these capital accounts for the costs and risks of collection and litigation. In deciding not to discount for the risk of collection, Palmisano ignored his own prior testimony that "our history of collections from doctors [ ] has been dismal" and testified instead that OCA's history of litigation to collect the amounts due to the Debtors on account of capital accounts and advances to doctors was "very successful". (Palmisano Test. 9/14 at p.81 and p.89). Palmisano's about face, when it suited his needs, on OCA's litigation track record is another example of his desperation to defeat confirmation and his resulting lack of credibility on valuation.

25. Finally, Palmisano erroneously argues that Gries "grossly overstated" corporate overhead, which Gries testified would be approximately $22,100,000, by almost $10,000,000. Because EBITDA, which is earnings after, among other things, corporate overhead, is used in a comparable company multiplier to determine enterprise value, Palmisano alleged this had the effect of drastically lowering the value of the Debtors. *See* Palmisano Memorandum at p. 8. In support of this argument, Palmisano again relies on the "detailed analysis" he claims to be aware

of in connection with his reorganization proposals to Silver Point. See Palmisano Memorandum at p.8. As with the other support for his testimony, however, this detailed analysis was never produced or explained. Palmisano conclusorily contends that the overhead will be significantly less than assumed by Gries because the Debtors are a smaller company servicing fewer doctors, the litigation expenses should be reduced, and the company will not bear the expense of operating as a public company. *See* Palmisano Memorandum at 8-9. Again, Palmisano offers no specifics; instead, he continues to make bald, unsupportable general statements in response to clear, specific testimony from Gries supported by an extensive evidentiary record. The contrast in the bases for their opinions is striking: for one example, Gries testified that he determined the corporate expenses based upon historical financial information and a "bottoms up" analysis done by OCA management at his direction; by contrast, Palmisano testified only that he thought the corporate expenses would be lower because they were servicing fewer doctors. (Gries Test. 9/6 at p. 75, Palmisano Test. 9/14 at p.22-23).

26. Gries' testimony – unrebutted by Palmisano – was that the Debtors have an infrastructure that is not easily scalable based on the number of Affiliated Practices. (Gries Test. 9/6 at p. 76). Many of the corporate expenses are fixed and will be incurred notwithstanding a reduction in the number of Affiliated Practices. (Gries Test. 9/6 at p.76-77). Moreover, Gries testified that the Debtors needed to hire additional practice enhancement employees to provide quality services to the Affiliated Practices to avoid the problems that certain doctors alleged plagued OCA in early 2005, leading to the problem situation it now faces. (Gries Test. 9/6 at p.77-78). In addition, Palmisano's tenure as CEO left OCA's financial accounting function in shambles, necessitating OCA to bring on additional experienced financial professionals to improve the Debtors' heavily criticized internal controls. (Gries Test. 9/6 at p.77-78 and 9/14 at

p.149-150). Palmisano recognized this when in June 2005, OCA when filed an 8-K with the Securities Exchange Commission stating that correcting the control deficiencies and weaknesses in OCA's accounting systems would require the company to "add additional, experienced staff in the Company's financial reporting area." (Debtors' Ex. 33a at 6).

27. Moreover, the historical corporate overhead of the Debtors supports Gries' testimony. OCA's corporate overhead in 2003 was $37,000,000. In 2004, OCA's corporate overhead was $37,000,000. In 2005, OCA's corporate overhead was pacing at $30,000,000 until Katrina and thereafter was pacing at about $22,000,000. In 2006, the corporate overhead so far is pacing at $22,000,000. (Gries Test. 9/14 at p.149). Finally, when Palmisano was with the Company (and when he fully supported the reorganization plan being considered by the Court, rather than opposing it as he does now), he recommended Gries use $21,400,000 as the projected corporate overhead for purposes of projections. (Gries Test. 9/14 at p. 151).

28. Palmisano did not present any evidence that would support his lower corporate overhead figure other than his attempt to use American Dental Partners Inc ("ADPI") to explain anecdotally the rationale for his "numbers". Palmisano testified that he believed that his estimate of $12,000,000 to $15,000,000 of corporate overhead was conservative because ADPI's corporate overhead was only approximately $9,600,000 (Palmisano Test. 9/14 at p. 30-31), notwithstanding that the comparable company approach cannot be used in this manner. Gries testified on rebuttal that Palmisano misleadingly used only a *portion* of ADPI's actual corporate overhead; failing to include rent and more than $14,000,000 of corporate salaries and benefits (Gries' Test. 9/14 at p.151). Gries testified that ADPI's actual corporate overhead was approximately $27,700,000, not the $9,600,000 that Palmisano presented. (Gries Test. 9/14 at p.151; ADPI Form 10K at p. 23 and 43). Had Palmisano properly counted all of the corporate

expenses for ADPI, he would have had to testify that ADPI's ratio of corporate overhead to patient revenues is 9.1 percent, supporting Gries' estimate of the Debtors' ratio of corporate overhead to patient revenues of approximately 8.7 percent. (Gries Test. 9/14 at p.151-152)

29. Lastly, Palmisano argues in support of his corporate overhead estimate, without any evidence, that the Reorganized Debtors should experience reduced litigation expenses and not incur the expense of operating as a public company. *See* Palmisano Memorandum at p.8. The latter allegation is ironic because under Palmisano's leadership the Debtors failed to comply with the obligations of being a public company for at least the last two years, and given the various allegations, potentially much longer. It is undisputed that by the end of 2005, OCA was under investigation by the SEC; had failed to file its 2004 or 2005 annual reports and has not filed any quarterly reports; had reported that its prior financial statements could not be relied upon; it had failed to file tax returns for 2004 or 2005; was delisted from the New York Stock Exchange; had reported that its auditors resigned; had reported that the counsel to its special committee of the board of directors resigned; was in default under its credit agreements; and its chief operating officer (Palmisano's son) had lied to OCA's auditors regarding accounting entries and had falsified records and was put on administrative leave. What is clear from this list of failures under Palmisano's watch is that OCA under Palmisano was hardly the sort of company that spent the corporate overhead necessary to comply with the "rigorous" obligations of being a public company, and as a result it is not credible for Palmisano to contend that a significant reduction in corporate overhead should be expected once OCA is freed from the shackles of being a public company.

30. In regard to reduced litigation expenses, Gries testified that the Debtors expect the litigation expenses to eventually go down but at the same time recognized that there is still

substantial litigation that remains to be completed. (Gries Test. 9/6 at p.75). Gries further testified that he expected to spend the savings from the reduced litigation expenses on improved services to Affiliated Practices. (Gries Test. 9/6 at p.75). As before, this was a topic on which Palmisano took both sides of the argument, testifying when it was convenient for him that that "the likelihood of getting those cases settled in three months is really remote" (Palmisano Test. 9/14 at p.83) only to argue now that the litigation expenses should be reduced.

Gries' Values for the Non-Core Assets Are

<u>Reasonable and Should Be Adopted by the Court</u>

31. Palmisano fleetingly challenges Gries' valuation of three "Non-Core" assets: (1) the potential Katrina Tax Refund under the Go-Zone Legislation ("Katrina Tax Refund"); (2) the Debtors' claim under its business interruption insurance ("Business Interruption Claim"); and (3) the Accounts for the Affiliated Practices (repeat of argument addressed above and will not be addressed again). *See* Palmisano Memorandum at p. 9-12.

32. In determining the values of the Katrina Tax Refund and the Business Interruption Claim, Gries consulted with the experts hired by Palmisano when he was at OCA, KPMG and Alex Sill. Based upon those consultations, the opinions of those experts and his own analysis and experience, Gries determined the reasonable values that should be attributed to each potential non-core asset. (Debtors' Ex. 19 at p. 4 and 11; Palmisano Test. 9/11 at p.243 and 9/14 at p.74; and Gries Test. 9/6 at p.93-95).

33. Palmisano questions Gries' valuation of both the Katrina Tax Refund and Business Interruption Claim on the basis that <u>all</u> of the Debtors' problems are directly attributable to Katrina and that Katrina caused "hundreds of millions of damage" to the Debtors. (Palmisano Test. 9/11 at p. 242). Obviously, it is beyond any reasonable dispute that Katrina had a dramatic effect on the Debtors and interrupted their businesses, as it did with all residents of

the New Orleans area. It is exactly for that reason that the Debtors are pursuing vigorously both the Katrina Tax Refund and Business Interruption Claim. Palmisano refuses to admit, however, notwithstanding the voluminous and undisputable evidence to the contrary, that the Debtors had significant problems before and after Katrina that were not the result of that devastating event, including, but not limited to, defaults under their credit obligations, accounting irregularities, failure to comply with SEC reporting requirements, an SEC investigation, significant litigation with Affiliated Practices and defections of Affiliated Practices. The question is not whether OCA can recover for losses related to Katrina, but rather how any losses proximately caused by Katrina should be valued.

34. One fundamental failing of Palmisano's valuation of the Katrina-related recoveries is that he does not appreciate that OCA cannot recover a windfall as a result of Katrina; rather it is limited to recovering each dollar lost as a result of Katrina only once. Palmisano's opinion rests on the faulty belief that OCA will recover the same lost dollar three times -- through tax refunds, litigation with the doctors, and again from its business interruption insurers. Palmisano further believes that the "no questions asked" Katrina Tax Refund will add another 35% on top of the first two dollars in litigation and business interruption claims for each dollar lost. (Palmisano Test. 9/14 at p.81-82).[9] Unfortunately for Palmisano and for all of OCA's other stakeholders, Katrina does not present the opportunity for a windfall that Palmisano believes.

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[9] Palmisano responded to questions on the Go Zone legislation as follows:

Q. … If in 2006 there is a reasonable prospect of collection from the doctor in a lawsuit that's filed, can OCA claim a loss under the tax return?
A. Under the go zone legislation, I understand that you can.

Q. --- If you have a reasonable prospect of collection in 2006 from the doctor, can you claim a loss on the go zone return?
A. I believe so, yes.

(i) Katrina Tax Refund

35. In reaching his opinion on the value of the Katrina Tax Refund, Palmisano relied upon his own "understanding" of the applicable legislation, ignoring the testimony of KPMG as to the actual limitations on, and risks of, recovery for the Katrina-related losses. Refusing to accept any responsibility for the mismanagement of OCA during his tenure, Palmisano contends that *every* Affiliated Practice that stopped depositing between August 29, 2005 and March 14, 2006 is a loss directly attributable to Katrina and the Debtors should seek a tax refund based upon all of those terminations, while at the same time litigating against those doctors and pursuing recovery from business interruption claims. (Palmisano Ex. 89 and Palmisano Test. 9/14 at p.248). Palmisano's basis for this exceptionally broad reading of the Go Zone Legislation is that the legislation is "relief" legislation and that the federal government is writing checks with "no questions asked". (Palmisano Test. 9/11 at p.246). Palmisano goes on further to testify that the "worst case" is "you may have to pay some tax possibly on the insurance refund if you ever receive it." (Palmisano Test. 9/14 at p.84). The Debtors would suggest that there could be far worse cases than Palmisano's idea – including possibly fraudulently filing a tax refund claim without any evidence to relate the claims to the loss event, and the attendant consequences of attempting to defraud the Internal Revenue Service. Palmisano's belief that you should "file first and ask questions later" has little relevance to a valuation of OCA for the purposes of these chapter 11 cases and is indicative of the management style that resulted in OCA being unable to produce audited financial statements and timely filed SEC reports.

36. The flaw in Palmisano's opinion is demonstrated by considering the reasoned and measured approach, based on actual evidence and experience, taken by the Debtors, with the assistance of KPMG. Gries testified that, consistent with KPMG's advice, the value he

attributed to the Katrina Tax Refund was based upon the loss of the Debtors' investment in the Affiliated Practices that left between Katrina and the date the Debtors were again fully operational, December 31, 2005. (Gries Test. 9/6 at p.99 and 199). Gries further testified that it became much more difficult for the Debtors to take the position that the loss of the Affiliated Practices after December 31, 2005 was by reason of Katrina (or the primary reason the Affiliated Practices left) after the Debtors became fully operational, especially considering the substance of the default letters received from the Affiliated Practices in 2006, none of which stated that any of the Hurricanes were reasons for termination. (Debtors Exs. 23 and 62; Gries Test. 9/6 at p.100; and Jeandron Test. 9/6 at p.233). Finally, Gries testified, consistent with the testimony of Mr. Jeandron of KPMG (an expert in tax and tax preparation), that the valuation of the Katrina Tax Refund could be impacted by recoveries for the same dollar of loss from other sources such as litigation with the Affiliated Practices and the Business Interruption Claim. He therefore made appropriate adjustments. (Gries. Test. 9/6 at p.199; and Jeandron Test. 9/6 at p. 213 and 237). Gries' approach to the question of valuing the Katrina Tax Refund, which included consulting with experts, considering the evidence, and using sound economic approaches to difficult questions of allocation, contrasts sharply with Palmisano's testimony that was, in effect, an argument to make as large a claim as you can write down on paper, whether supported by evidence or not, and then sort out the ramifications of that claim later.

(ii) Business Interruption Claim

37. Palmisano also questions Gries' valuation of the Business Interruption Claim. Palmisano states this argument notwithstanding his concessions that: (a) he made no calculations as to the loss of business income for the period covered by the policy – "we hired Alex Sill to do it" (Palmisano Test. 9/14 at p.74); (b) he is a "layman" with "limited knowledge of insurance"

and is not a specialist in business interruption insurance [like Alex Sill] (Palmisano Test. 9/14 at p.71 and 75); (c) he did not read the entire insurance policy but only "read bits of it" (Palmisano Test. 9/14 at p.72 and 74); (d) he did not understand the provision that only the loss of business income was recoverable (Palmisano Test. 9/14 at p.74); and (e) he fails to appreciate that OCA cannot recover twice for the same lost dollar (Palmisano Test. 9/14 at p.83-85). Palmisano's only apparent support for his valuation of the Business Interruption Claim is the size of the insurance policy ($30,000,000), rather than the terms of the coverage provided under the insurance policy or the losses actually experienced by OCA. (Palmisano Test. 9/11 at p.242, 245-246).

38. Again, the Debtors with the assistance of Alex Sill undertook a more reasonable and measured approach than Palmisano. Gries testified that his valuation of the Business Interruption Claim was based upon the income lost from the Affiliated Practices who left the Debtors as a result of Katrina. (Gries Test. 9/6 at p.93). Consistent with his approach to preparing the whole of his comprehensive valuation report, Gries further testified that he interviewed and relied upon advice from Alex Sill in making this estimate of the Business Interruption Claim. (Gries Test. 9/6 at p.93 and 95).

39. The Debtors and Gries' valuations of these "Non-Core" Assets, the Katrina Tax Refund (supported by KPMG) and the Business Interruption Claim (supported by Alex Sill), were based upon a reasoned analysis of the available corporate records, were guided by consultation and assistance from experts in their respective fields, and were specifically tied to the actual events in this case. Palmisano's "back of the envelope" calculation of the value of these assets, by contrast, did not consider any available relevant evidence (notwithstanding his access to such information through discovery), did not rely on the advice of any experts in their

respective fields (notwithstanding his ability to retain experts) and was not tied to actual events in these cases, but rather reflects speculation of the most unreliable form.

The Value of Equity Interests in the Reorganized Debtors is Less Than $28,600,000

40. Palmisano uses his valuation testimony to attempt, ineffectively, to allege that the Senior Secured Claims are being paid more than in full for their claims. For the reasons above, contrary to Palmisano's argument based upon his 1 page valuation, it is clear that equity value of the New Common Stock that will be issued to the Senior Secured Lenders on the Effective Date of the Plan will not be more than $28,600,000, and will likely be significantly less. (Gries Test. 9/5 at p.152-153; Debtors' Ex. 11). The equity value of the New Common Stock to be issued to the Senior Secured Lenders on the Effective Date is dependent in part upon the amount of borrowings made by the Reorganized Debtors under the Working Capital Facility on the Effective Date. (Debtors' Ex. 11). As provided for in the immaterial modifications to the Plan approved by this Court, the Working Capital Facility has been increased twice at the Debtors' request from $10,000,000 to $20,000,000 and then to $25,000,000 to cover additional expenses due on the Effective Date. See Plan at section 1.117. If borrowings under the Working Capital Facility exceed the estimate of $11,400,000 (consisting of $8,400,000 to repay the revolving DIP loans and $3,000,000 for the General Unsecured Claims Pool) used by Gries for purposes of Debtors' Exhibit 11, including for example due to increased Allowed Administrative Claims associated with the contested confirmation hearing (including additional amounts borrowed under the DIP Facility) and the subsequent briefing, then there will be a corresponding decrease in the equity value of the New Common Stock of the Reorganized Debtors. As of the beginning of the Confirmation Hearing, the Debtors' estimate of Administrative Claims to be paid on the Effective Date (which were not included in the $11,400,000 estimate noted above) had reached

approximately $9,540,000, reducing the value of the New Common Stock to only $19,060,000. (See Plan Supporters' Initial Brief at p.13-14). Accordingly, the total value of the recoveries to the Senior Secured Lenders under the Plan with respect to their Claims (which, exclusive of Administrative Claims paid in full in cash on the Effective Date are approximately $93,000,000) is no more than the sum of the following: $19,060,000 (on account of the New Common Stock to be issued to them) *plus* $50,000,000 (on account of the note they receive under the New Term Loan Facility), i.e. $69,060,000.[10] Under no credible analysis of the value of OCA are the Senior Secured Lenders' Claims paid in full.

II. Palmisano's Attacks on Gries are Utterly Baseless

41. Palmisano's attempt to impugn the credibility of Gries through specious and unsupported arguments must fail. Although Palmisano asserts that the situation here has "striking similarities" to that in In re Oneida, 2006 WL 2506493 (Bankr. S.D.N.Y. 2006), nothing could be further from the truth. In Oneida, the proposed financial advisor to an official equity committee testified that he would "absolutely not" enter into a **contingent fee arrangement** if retained in the case. Id. at *9 (emphasis added). Subsequently, however, such firm was retained and was to be compensated with a "transaction fee" of one percent of the recovery equity holders realized in that case. Id. In other words, the advisor's fee would go up dollar for dollar for every increase in the recovery of equity holders. Id. Rather than a typical bankruptcy success fee, which compensates a professional a fixed amount upon the consummation of a successful restructuring, the transaction fee at issue in Oneida gave a financial advisor to an official equity committee a direct financial incentive to improperly inflate

[10] Indeed, it is presently expected that Administrative Claims will be significantly higher than the $9,540,000 estimate, due to, among other things, increasing professional fees and expenses. Accordingly, the equity value of the New Common Stock of Reorganized OCA may be far lower then even now projected and the shortfall between the dollar amount of the Claims of the Senior Secured Lenders and the purported value they will receive on account of such Claims will be larger.

value, as one cent would flow directly into his firm's pocket for each additional dollar of value the court found.

42. In this case, Gries and CDG do not have any agreement for the payment of any success fee. Contrary to Palmisano's accusations, Gries has had no discussions, understandings, or arrangements with Silver Point or any other person with respect to a success fee. (Gries Test. 9/5 at p. 186). Rather, what Gries and CDG have done here is to reserve their rights to seek, after a successful reorganization has been completed, a success fee based on the totality of their work. (CDG Engagement Letter (Ex. A to P-5), at p.4 "CDG and the Board [of Directors of OCA] agree to negotiate in good faith to establish an incentive fee, to be paid CDG . . . at the completion of CDG's engagement"). Such reservation of rights is common in the retention of turnaround or crisis managers in the bankruptcy context. See, e.g. In re Enron Corp., et al., No. 01-16034 (Bankr. S.D.N.Y.) (Order dated April 4, 2002 (P-2725), Findings of Fact dated July 15, 2004(P-19758) at p. 4 and Order Dated April 12, 2006 (P-29358))(finding testimony of CEO and crisis manager credible where, inter alia, he had reserved the right to seek a success fee at the end of the case and where he did in fact earn a $12,500,000 success fee). The type of direct financial incentive at issue in Oneida likely to skew an expert's valuation is simply not present here. Gries simply has no financial incentive to skew value towards any one group as there is no nexus between the valuation of the Debtors and any incentive fee that may subsequently be payable to Gries or CDG. There is simply no basis to believe that Gries' testimony has been manufactured to obtain a particular result. Indeed, all Gries and CDG have done is reserve the right to ask for a success fee, which they ultimately may or may not seek.

III. The Plan Does Not Violate the Absolute Priority Rule

43. Palmisano's claim that the Plan violates the absolute priority rule keeps missing the point; indeed, he simply regurgitates the same argument *verbatim* over and over again without even attempting to address the legal arguments made by the Plan Supporters. Yet again, Palmisano attempts to distinguish Official Unsecured Creditors' Committee v. Stern (In re SPM Manufacturing Corp.), 984 F.2d 1305, 1312-13 (1st Cir. 1993), on the basis of it being a chapter 7, rather than chapter 11 case. As demonstrated in the Plan Supporters' Initial Brief,[11] this is a "distinction" without substance: there is no legally relevant difference between a gift in a chapter 7 context and one in a chapter 11: as the First Circuit has noted, chapter 7 effectively embodies the absolute priority rule, and section 727 of the Bankruptcy Code, precisely like section 1129(b), provides that there can be no distribution to other creditors or interest holders until and unless all security interests are satisfied. SPM, 984 F. 2d at 1312.

44. In contrast, Palmisano keeps pointedly ignoring the real distinction between SPM (and numerous other cases cited by the Plan Supporters) and the only two cases that Palmisano cites in support of his position,[12] a distinction that is based on fundamental legal principles and is outcome determinative: the absolute priority rule applies solely to the distribution of the property of the debtor's estate and, accordingly, a voluntary decision by a **secured** creditor to carve out

11 Plan Supporters' Initial Brief at pp. 21-22.

12 One of which (as discussed below), In re Armstrong World Indus., Inc., 432 F.3d 507 (3rd Cir. 2005), in fact, supports the Plan Supporters' position. It is highly indicative of Palmisano's general "hide the ball" tactics that he keeps referring to "other courts" (pp. 16 and 17 of Palmisano Memorandum) supposedly holding in favor of his argument when, in reality, he only cites a **single** case that actually supports his interpretation of the interplay between "gifts" by secured creditors and the absolute priority rule, In re Sentry Operating Co. of Texas, Inc., 264 B.R. 850 (Bankr. S.D. Tex. 2001), which is a clear outlier. Indeed, as explained in the Plan Supporter's Initial Brief, Sentry is a flawed decision that is distinguishable on the following bases: (i) Sentry failed to even mention, let alone address, the overwhelming authority that supports the right of undersecured creditors to gift a portion of their recoveries to junior classes, (ii) Sentry engaged in a case specific analysis of unfair discrimination that was dependent upon the relative worth of the recoveries being transferred by an undersecured creditor to two junior co-equal classes and (iii) the Sentry court found there to be no legal or factual basis for the plan's differential treatment of two junior co-equal classes of unsecured claims.

value from the value of its lien to share or "gift" it to a subsection of junior creditors or equity holders (as did Class 3 here), **does not even implicate, let alone violate** the absolute priority rule.[13] Thus, where, as here, the Senior Secured Lenders, who are undersecured creditors, agreed to "gift" a portion of the New Common Stock they were to receive in partial satisfaction of its liens and claims to the holders of Equity Interests in OCA, a junior class, the absolute priority rule is not implicated.

45. As demonstrated in the Plan Supporters' Initial Brief, the overwhelming majority of the courts (with the **single** exception of <u>Sentry Operating</u>) that have analyzed "cram-down" plans involving gifts from secured creditors confirmed such plans as **not even implicating** the absolute priority rule. <u>See</u> <u>SPM</u>, 984 F. 2d at 1312 ("The [absolute priority rule] **does not come into play** until all valid liens on the property are satisfied.") (emphasis added); <u>In re Iridium Operating LLC</u>, 2005 WL 756900 (S.D.N.Y. April 4, 2005) *7 (where distribution to junior creditors comes from the secured creditor's collateral, it is a "distribution of nonestate funds. . . [and] the priority scheme for the distribution of estate assets under the Bankruptcy Code **is not implicated, let alone violated** . . .") (emphasis added); <u>In re Protocol Services, Inc.</u>, Nos. 05-6782 JM11 – 05-6786 JM11 at 3 (Bankr. S.D. Cal. Dec. 23, 2005) (attached to the Plan Supporters' Initial Brief as Exhibit B (sharing by the under-secured creditors of the proceeds of their collateral with a junior class was "an acceptable **carve-out provision**") (emphasis added); <u>In re Worldcom, Inc.</u>, 2003 WL 23861928 *61 (Bankr. S.D.N.Y. Oct. 31, 2003) ("Any enhanced value received by holders of [junior classes] on account of contributions from [secured creditors] is **not a treatment of these Claims under the plan** and does not constitute unfair discrimination. . . . . The greater value received by [a junior class] does not violate the

[13] Congress has clearly recognized this when it codified the absolute priority rule in section 1129(b) of the Bankruptcy Code: "Treatment of classes of secured creditors . . . do[es] not fall in the priority ladder . . . ." H.R. Report No. 95-595, 95th Cong. 1st Sess. at 413 (1977), U.S. Cong. & Admin. News 1978, p. 6369.

Bankruptcy Code because [such greater value is] the result of [secured] creditors . . . voluntarily sharing their recoveries under the Plan [and thus] **is not the result of the Debtors' distribution of estate property** to such creditors.") (emphasis added); In re Union Financial Services Group, Inc., 303 B.R. 390, 422 (Bankr. E.D. Mo. 2003) (Proceeds of secured creditors' collateral "represent **assets and distributions, in which the Debtors have no right, title or interest** . . . and, which would otherwise be required by applicable law to be paid directly to the [secured creditors]," accordingly, the plan provision that provided for payment of a portion of such proceeds to an intermediary class did not effect any unfair discrimination) (emphasis added); In re Genesis Health Ventures, Inc., 266 B.R. 591, 617 (Bankr. D. Del. 2001) (secured creditors "are free to allocate [value otherwise distributable to them] without violating the 'fair and equitable' requirement").

46. Palmisano has repeatedly urged this Court to follow Armstrong by claiming that (a) the Armstrong plan is "remarkably similar" to the Plan and (b) the Third Circuit has distinguished Armstrong from SPM and Genesis Health. These statements border on the frivolous. Indeed, as Judge Walsh (for whom Armstrong is binding authority) has recently explained in In re World Health Alternatives, Inc., 344 B.R. 291 (Bankr. D. Del. 2006), "Armstrong distinguished but did not disapprove of, SPM and the [Genesis Health] line of authority," stating that that line of authority **supported** "valid carve outs that allow the secured creditor to give up a portion of its lien for the benefit of junior creditors without violating the provisions of the Bankruptcy Code." 344 B.R. at 299 (citations omitted). See also In re Protocol Services, Inc., Nos. 05-6782 JM11 – 05-6786 JM11 at 3 (Bankr. S.D. Cal. Dec. 23, 2005) (a copy of which was attached to the Plan Supporters' Initial Brief as Exhibit B) (upholding the gifting of bankruptcy recoveries by undersecured creditors to junior classes through a chapter 11

plan of reorganization in the face of an Armstrong objection finding the facts consistent with and justifying the application of SPM rather than Armstrong). In other words, the Third Circuit distinguished SPM and Genesis Health on precisely the same grounds on which the Plan is easily and conclusively distinguishable from the Armstrong plan: the distribution to the junior classes came from secured creditors, rather than from the recoveries of unsecured creditors from property of the estate, as in Armstrong.

47. As the Plan Supporters have repeatedly demonstrated, the absolute priority rule is not implicated in determining the propriety of confirming plans of reorganization involving "gifts" from secured creditors and carve-outs from their liens in favor of selected junior classes. However, the Court does not even need to decide this issue to dispose with Palmisano's objection based on Bank of America, N.A. v. 203 No. LaSalle St. Partnership, 526 U.S. 434 (1999), with respect to distributions to Class 6 under the Equity Settlement (obviously, No. LaSalle is not applicable at all to the distributions to Class 4). That case, as well as all of its progeny, deals with the circumstances upon which old equity may receive or retain property in a reorganized debtor **under a plan of reorganization on account of old equity interests**. However, Class 6 is not receiving or retaining any property on account of its old equity interests under the Plan. As the Court is well aware, Class 6 has voted to reject the Plan and, in accordance with its terms, is not getting any distribution under the Plan. Instead, after Class 6 rejected the Plan, the Equity Settlement was negotiated whereby the Senior Secured Lenders have agreed to share a portion of **their** Plan distributions with Class 6 in consideration for the Equity Committee's support of the Plan. Thus, the only "property" (the right to participate in the Rights Offering) the members of Class 6 are receiving is being "distributed" under the Equity Settlement, rather than the Plan, and comes from the carve-out of the Senior Secured Lenders'

collateral, rather than property of the estate. As Judge Walsh noted in World Health, a global settlement among all parties in interest that involved no distribution of the property of the estate under a plan of reorganization does not implicate the absolute priority rule that, by its terms, only applies to plans. 344 B.R. at 296-298. See 11 U.S.C. § 1129(b). If the absolute priority rule is not implicated, clearly there is no reason for the distribution to Class 6 to pass muster under the "new value" corollary to such rule.

48. Even if the Court decides that this is a technical distinction and the Equity Settlement is too closely related to the confirmation of the Plan to be evaluated on a standalone basis, the same reasoning should still apply to the "gift" situation in the plan context.[14] The rationale for the prohibition on the "old equity" retaining or receiving any property "on account of" their equity interests in the debtors stems from "the danger inherent in any reorganization plan proposed by a debtor" (No. LaSalle, 526 U.S. at 444) that the "old equity" will manipulate the plan process and "dilute the creditors' rights" **to the property of the estate**. See, e.g., In re Woodbrick Assocs., 19 F.3d 312, 321 (7th Cir. 1994); In re Mortgage Co. of El Paso, 11 B.R. 604, 619 (Bankr. W.D. Tex. 1990). Here, the "old equity" (unlike in North LaSalle where the stock was that of a closely held private company) is publicly traded stock that is still trading and no stockholder controlled OCA's board of directors when the Plan was filed.

49. Obviously, where, as here, the "old equity" (a) is not retaining or receiving any property "on account of" its holdings of its equity interests in OCA (but rather as consideration

[14] In fact, in several recent cases, the Bankruptcy Court for the Southern District of New York has held that, when junior classes were technically receiving distributions, but such distributions were the result of settlements with other constituencies, and, based on the absolute priority rule, absent such settlements, the junior classes would not be getting any distribution, such junior classes were not entitled to vote on the plan because their "gifted" distributions were not properly plan distributions. See, e.g., In re RCN Corp., Case No. 04-13638 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2004) (P-297); In re Radio Unica Communications Corp., Case No. 03-16837 (CB) (Bankr. S.D.N.Y. Dec. 23, 2003) (P-154); In re XO Communications, Inc., Case No. 02-12947 (AJG) (Bankr. S.D.N.Y. July 22, 2002) (P-150).

for the Equity Committee's support of the global settlement and the consensual Plan), (b) is not receiving any property of the estate (but rather is receiving a portion of the Senior Secured Creditors' property), and (c) is not "diluting" the creditors' rights (other than to the extent the Senior Secured Creditors chose to voluntarily share a portion of their recoveries with holders of Class 6 Equity Interests), none of the concerns that have led to the codification of the absolute priority rule in section 1129(b)(2)(C) are implicated. Indeed, there is not a single case where the "new value" corollary was found to be relevant to a plan involving a "gift" to the old equity carved out from the recovery of the secured creditors, let alone discussed in such a context.

50. The importance of this distinction can easily be demonstrated by the practical consequences that would result from the Court's failure to approve the Equity Settlement. In such an instance, while the members of Class 6 would get no distribution at all (since they voted to reject the Plan and thus forfeited the right to the contingent distribution originally provided therein), this would have no impact on the distribution to the general unsecured creditors in Class 4 or any other creditor. The only Class that would benefit from such a failure would be Class 3, the Senior Secured Lenders themselves. They will not have to share the equity value of the Reorganized Debtors with the members of Class 6 in accordance with the Equity Settlement.[15]

[15] In addition, had the absolute priority rule applied under these circumstances (as it does not), the "new value" corollary would have been satisfied. The requirements that the holders of the "old equity" must satisfy for the "new value" corollary to come into play are as follows: they must make "a post-petition contribution to the debtor that (1) is new, (2) is in the form of money or money's worth, (3) is reasonably equivalent to the value of the interest retained, and (4) is necessary to the debtor's successful reorganization." Southern Pacific Transportation Co. v. Voluntary Purchasing Groups, Inc., 252 B.R. 373, 389 (E.D. Tex. 2000). See also Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 121-122 (1939). The sole distribution that the members of Class 6 receive under the Equity Settlement is the right to purchase up to 15% of the New Common Stock that had been allocated to the Senior Secured Lenders under the Plan. Those members of Class 6 that are eligible and that elect to exercise such purchase rights will have to pay, in cash, a strike price that is, in fact, the requisite "reasonably equivalent value." Indeed pursuant to the terms of the Equity Settlement, if all 15% of the New Common Stock of OCA is purchased pursuant to the Rights Offering, the total amount of money that would come in to the Reorganizaed Debtors would be, as of August 31, 2006, aqpproximately, $9,700,000. (See Exhibit A to Modification Motion at p.8). In addition, as Palmisano himself acknowledges, all that North LaSalle and its progeny stand for is the proposition that the value of whatever property the old equity retains or receives on account of the

Perversely then, Palmisano, by arguing against the Equity Settlement, would do a favor for those whom he openly despises.

IV. The Court Should Not Consider Palmisano's § 1123(a)(4) Objection Since It is Untimely and Palmisano Has No Standing to Assert It.[16]

51. Palmisano raises a new objection to the confirmation of the Plan for the first time in the Palmisano Memorandum, namely, that the Plan violates section 1123(a)(4) of the Bankruptcy Code because of the terms of the Equity Settlement. He attempts to "sneak in" this untimely new argument by suggesting that an objection under section 1123(a)(4) is the same as his timely raised objection under section 1129(b). This is a disingenuous position: while the section 1129(b) "unfair discrimination" standard has to do with the comparison of the treatment of the rejecting class as a whole to the treatment of other classes, section 1123(a)(4) has to do with "within-class treatment" and one is "irrelevant" to the other. In re Dow Corning Corp., 244

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alleged "new value" must be subjected to a market test to determine the adequacy of the new value being contributed. Palmisano's assertion that no market test has been conducted in this case again misses the substance behind the form of the North LaSalle requirement. First, because the old common stock of OCA continues to publicly trade, any equity holder is free to buy or sell such shares at any time, including buying shares in order to participate in the Equity Settlement. Thus the continued public trading of the common stock of OCA provides a true market test that clearly satisfies North LaSalle – anyone that wants to participate can participate if they believe that the "price is right." Further, as testified to in detail by Gries, (Gries Test. 9/5 85:25-86:25 and 110:21-115:14), the Debtors, the Creditors' Committee and the Equity Committee have all engaged in an extensive and prolonged effort to either refinance the Senior Secured Debt or to find investors to make an equity infusion (i.e., an acquisition) in an amount sufficient to take out the Senior Secured Lenders, but all of these efforts have come to naught since the market repeatedly ascribed value to the Debtors lower than the Senior Secured Debt. This is precisely the type of market test that should satisfy the North LaSalle requirements since it is conceptually no different from an open auction for the New Common Stock at which no third party, other than the members of Class 6, chose to bid. Finally, the Equity Settlement was a necessary element in achieving a plan that enjoys the support of all major constituents in these cases, and the infusion of the proceeds of the Rights Offering will be very helpful in defraying the escalating Administrative Claims (the Debtors have already requested the Senior Secured Lenders to raise the availability under the Working Capital Facility twice, from $10 million to $20 million and ultimately to $25 million).

16 The fact that Palmisano sees no conflict in arguing about purported violations of the absolute priority rule and section 1123(a)(4) of the Bankruptcy Code at the same time underscores the fact that he is not motivated by a legitimate desire to protect his rights and interests as either a Creditor or a holder of Equity Interests in OCA, but rather by an ulterior purpose to derail the Plan by any possible methods. Thus, on the one hand, Palmisano objects because holders of "old equity" are allegedly getting too much because they are receiving recoveries before the General Unsecured Creditors are paid in full while, on the other hand, he objects because not all holders of "old equity" are getting enough because the Equity Settlement purportedly discriminates against certain holders of "old equity."

B.R. 705, 711 n.3 (Bankr. E.D. Mich. 1999). See also In re Corcoran Hosp. Dist., 233 B.R. 449, 456-57 (Bankr. E.D. Cal. 1999).

52. Since Palmisano, despite filing more than 4 prior pleadings objecting to the Plan (P-1374, P-1651, P-1740 and P-1823) (including 2 pleadings specifically objecting to the Equity Settlement (P-1740 and P-1823)) has never raised this objection before, the Debtors never had a chance (or reason) to make the necessary evidentiary showing with respect to their sound business reasons for structuring the Equity Settlement the way they have and to demonstrate that 1123(a)(4) is not violated by the Equity Settlement. This is precisely why the Court should not allow Palmisano to raise this new objection for the first time after the evidentiary record with respect to the Plan has been closed. See In re Marcus Hook Development Park, Inc., 143 B.R. 648, 657 (Bankr. W.D. Pa. 1992) (finding that "matters [which] were unequivocally placed in issue for the first time in [the objector's] post-hearing brief, long after the record had been closed and [the other affected parties] had any opportunity to respond with record evidence . . . must be rejected."); see also In re Industrial Commercial Electrical, Inc., 319 B.R. 35, 57 (D.Mass. 2005) (same). Furthermore, Palmisano's section 1123(a)(4) objection is not a topic on which the Court requested briefing at the Confirmation Hearing (or for which Palmisano requested an opportunity to brief), and his raising it now reeks of gamesmanship as the Plan Supporters are unable to introduce evidence or otherwise appropriately respond to his objection. Palmisano's efforts to raise an untimely objection based on section 1123(a)(4) are particularly shocking given his strident opposition to the acceptance of certain ballots received by the Debtors after the voting deadline. In any event, this objection celebrates form over substance. The Equity Settlement is just that – a settlement of potential disputes between the Equity Committee and the Senior

Secured Lenders that, as the overwhelming case authority indicates, does not need any Court approval.

53. In addition, even had Palmisano's section 1123(a)(4) objection been timely, he has no standing to assert it. Under the terms of the Equity Settlement, only eligible holders (the "Eligible Holders") of Class 6 Equity Interests (i.e. those holding at least one million shares) are allowed to participate in the purchase of the New Common Stock. Palmisano has asserted that he owns more than 3,000,000 shares of OCA's common stock, which represents approximately 6% of the outstanding common stock. (See Palmisano Proof of Equity Interest No. 261). Accordingly, he is getting the full benefit of the Equity Settlement. As a result, he has no standing to object to the alleged discrimination of the shareholders holding less than one million shares of OCA's equity. Additionally, any equity holder may choose to increase its ownership at any time prior to the Participation Record Date in order to participate in the Rights Offering under the Equity Settlement. The opportunity to participate in the benefits of the Equity Settlement is thus equally open to all holders of old common stock of OCA. Indeed, some holders may choose to sell all their shares because they have no interest in participating in the Rights Offering whereas other may seek to increase their holdings to participate in a larger share of the Rights Offering.

54. Indeed, sections 1109(b) and 1128(b) of the Bankruptcy Code do not create unlimited rights for parties in interest to derail a reorganization by asserting the rights of others on issues on which their rights are not affected. Bankruptcy courts, although not Article III courts, enforce Article III limitations on standing. See, e.g., In re Tascosa Petroleum Corp., 196 B.R. 856, 863 (D. Kan. 1996), where, on the basis of "the general prudential principal that one does not have standing to assert another's rights, regardless of the severity of injury required,"

the District Court for the District of Kansas held that "third-party prudential concerns prevented . . . a class 5 creditor . . . from challenging those portions of the reorganization plan that did not affect its direct interests and from asserting the rights of the class 4 creditors." See also In re Seatco, Inc., 257 B.R. 469, 478 n. 3 (Bankr. N.D. Tex. 2001) ("After admitting that its due process rights were fully protected by the confirmation process, CIT continued its objection to the absence of an adversary proceeding on behalf of other creditors. CIT has no standing to so object."); In re New Midland Plaza Assocs., 247 B.R. 877, 892 (Bankr S.D. Fla. 2000) ("Coolidge is attempting to assert the right to object to classification of the claim of the City, which it does not hold. Coolidge does not have standing to do so."); In re Westwood Plaza Apartments, 147 B.R. 692, 698 (Bankr. E.D. Tex. 1992) ("creditors lack standing to challenge provisions of a plan that do not affect them."), aff'd in part, rev'd in part on other grounds, 192 B.R. 693 (E.D. Tex. 1996); id. at 699 ("If there has been any unequal treatment of claims, HUD has benefited from that treatment and does not have standing to object."); In re B. Cohen & Sons Caterers, Inc., 124 B.R. 642 (Bankr. E.D. Pa. 1991) ("creditors lack standing to challenge those portions of a reorganization plan that do not affect their direct interest"), In re Sky Valley, Inc., 100 B.R. 107, 114 (Bankr. N.D. Ga. 1988) ("Anchor Bank lacks standing, however, to argue on behalf of the other lienholders who, after due notice and opportunity to be heard, either never objected or filed objection to Debtor's motion and withdrew them during the hearings.").

55. The District Court for the District of Delaware has held that the term "party in interest" in section 1128(b) applies only with respect to issues that affect the party in question; i.e., as set forth in the authority cited above, a person cannot object to confirmation based on a provision of the plan that does not affect its rights. See In re Fuller-Austin Insulation, 1998 WL

812388, at *3 (D. Del. Nov. 10, 1998) ("'parties in interest'" under § 1128(b) must be 'directly and adversely affected' by the bankruptcy proceeding").

56. The alleged discrimination against the shareholders holding less than one million shares of OCA's equity does not adversely affect Palmisano; indeed, if anything, and particularly if Palmisano truly stood by his inflated valuation, this provision of the Equity Settlement benefits Palmisano as it allows him, through participating in the Rights Offering to retain a large equity stake in the Reorganized Debtors at, based on his alleged valuation, bargain basement prices. Westwood Plaza is thus squarely on point and leads to the inescapable conclusion that Palmisano does not have standing to object to the confirmation of the Plan on this basis.

V. The Plan Does Not Violate § 1123(a)(4).

57. Even if the Court overlooks the untimeliness and the lack of standing of Palmisano with respect to his section 1123(a)(4) objection and allows him to proceed with it, the Court should overrule this objection on the merits.

1123(a)(4) Not Applicable In Gift or Settlement Context

58. By its very terms, section 1123(a)(4) is not implicated by distributions of property other than distributions of property of the estate of a debtor pursuant to a chapter 11 plan. As one court has noted, "the requirements of 11 U.S.C. § 1123 concern a [p]lan, not other agreements." In re Middle Plantation of Williamsburg, Inc., 47 B.R. 884, 892 (D. E.D. Va. 1984). Further the prohibitions of section 1123(a)(4) only apply to distributions of property of a debtor's estate. See, Mabey v. Southwestern Electric Power Co. (In re Cajun Electric Power Cooperative, Inc.), 150 F.3d 503, 518 (5th Cir. 1998) (the Fifth Circuit found no violation of section 1123(a)(4) where some members of a class, but not others, received certain payments from a third party under an agreement entered into in connection with plan confirmation, stating that such payments "did not constitute discrimination amongst claims of the same class as

contemplated by [section 1123(a)(4)] because the payments were not derived . . . from assets of the bankruptcy estate").

59. As discussed above, the recoveries being afforded to the holders of Equity Interests in Class 6 are being granted to them by the Senior Secured Lenders as a "gift" out of the Senior Secured Lenders' own recoveries pursuant to the terms of the Equity Settlement – a settlement that was finalized after Class 6 voted to reject the Plan and thus not eligible for any recoveries under the Plan. Because the Plan provides no recoveries to holders of Class 6 Equity Interests (it is only the Senior Secured Lenders through the Equity Settlement that are providing such recoveries), section 1123(a)(4) , by its simple and express terms, is not implicated.

<u>1123(a)(4) Would Not Be Violated Even If It Applied</u>

60. In addition, had the Rights Offering been part of the original Plan, rather than the Equity Settlement, under prevailing case law, the Court would have been compelled to allow the Debtors to classify Eligible Holders separately from other shareholders and to treat them differently so long as the had Debtors demonstrated a legitimate business goal for such treatment. The result should not be different here simply because such business goal is being effectuated through a settlement as opposed to a plan of reorganization – form should not override substance.

61. It is an accepted principle that separate classification and disparate treatment of similar claims is permissible as long as such "discrimination"[17] is based on "good" or "legitimate" business reasons. <u>See</u>, <u>e.g.</u>, <u>In re Way Apartments, D.T.</u>, 201 B.R. 444, 450 (N.D. Tex. 1996) (plan proponent "may separate similar claims when there is a 'good business reason' for doing so"); <u>In re Bloomingdale Partners</u>, 170 B.R. 984, 999 (Bankr. N.D. Ill. 1994) (separate

[17] <u>See</u> <u>In re Pattni Holdings</u>, 151 B.R. 628, 631 (Bankr. N.D. Ga. 1992) ("Although the Code prohibits 'unfair discrimination,' it does not prohibit all discrimination.").

classification of similar claims is proper if the plan proponent can articulate "business reasons relevant to the success of the reorganized debtor").

62. As explained in the Equity Settlement term sheet (the "Equity Settlement Term Sheet") (attached as Exhibit A to the Modification Motion), the reason for limiting the Rights Offering to Eligible Holders is the Debtors' requirement to emerge from bankruptcy as a private company. Under applicable securities laws and regulations, if, at any time, there are 300 or more record holders of the Reorganized Debtors' securities, then the Reorganized Debtors would become a public reporting company subject to the onerous reporting requirements of the Securities Exchange Act of 1934. Securities Exchange Act of 1934 § 15(d). As has been demonstrated through testimony, the Debtors have historically been unable to file audited financial statements for several prior fiscal years, making it unclear if they could ever comply with stringent public company reporting requirements which, among other things, may require the completion of these same audited financial statements. Further, the costs of being a public company under the Securities Act of 1933 and subject to the reporting requirements of the Securities Exchange Act of 1934 are significant (Palmisano Test. 9/14 23:13-14). Given the fact that OCA's common stock was and is widely held, an offering to all current holders regardless of the size of their holdings will undoubtedly cause Reorganized OCA to exceed this limitation and remain a reporting public company. Consequently, the Equity Settlement was structured to meet the Debtors' requirement of emerging as a private company while allowing all holders of old common stock of OCA an equal opportunity to make an independent decision on their interest in participating in the Rights Offering. Because the eligibility of equity holders is determined as of the Participation Record Date, three days after the Effective Date of the Plan, all equity holders have an opportunity to buy shares to participate in the Rights Offering under the Equity

Settlement or to sell shares to those so interested. Indeed, the Equity Settlement has provided small shareholders with increased liquidity for the sale of their shares which might not otherwise have been available.[18]

63. In any event, avoiding the risk of the debtor losing its status as a private company is a legitimate "business reason relevant to the success of the reorganized debtor" that would have justified disparate plan treatment for small shareholders to save the reorganized debtors the added costs of being a public company. See, e.g., In re Piece Goods Shops Co., L.P., 188 B.R. 778 (Bankr. M.D.N.C. 1995) (confirming plan providing for separate classification and different treatment of unsecured creditors holding nominal amounts of claims for purpose of creating a private company; such classification and treatment did not violate Bankruptcy Code); In re Applied Extrusion Technologies, Inc., Case No. 04-13388 (MFW) (Bankr. D. Del.) (same).[19] In other words, the Debtors would have been justified separately classifying the Eligible Holders to accomplish the same business reason approved of in Piece Goods. Form should not triumph over substance and Palmisano's section 1123(a)(4) objection must fail.

CONCLUSION

Wherefore, the Plan Supporters respectfully request that the Court (i) confirm the Plan; (ii) enter a confirmation order in form attached hereto as Exhibit A , (iii) enter the Initial

[18] The economic cost, given that OCA's stock now trades for approximately $.03 (See Plan Supporters' Initial Brief at p.8), in acquiring enough shares to participate in the Rights Offering is a mere $30,000 – not an amount that is cost prohibitive for anyone that believes Palmisano's claims on value.

[19] In stark contrast, in the cases cited by Palmisano the discrimination had no legitimate reason whatsoever: in Modern Steel, the debtor moved post confirmation to modify the plan to effectively force one shareholder to give up all of his stock to the other shareholder/owner of the company and to force the first shareholder to sign a stockholders' agreement; in Orange County, the court held that seeking to equitably subordinate a claim after confirmation and when the right to seek subordination was not expressly preserved violated 1123(a)(4) -- because not everyone in that class was being subordinated; and in Huckabee a secured creditor was classified as an unsecured creditor but was going to be paid as a secured creditor and an unsecured creditor -- thereby getting more than the unsecureds. The rationale for this apparently was to create a consenting unsecured class as without the secured voting as an unsecured, the class rejects.

and Supplemental Findings of Fact and Conclusions of Law, and (iv) grant the Plan Supporters such other relief as is just and proper.

DATED: New Orleans, Louisiana
October 3, 2006

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