

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
(NEW ORLEANS)**

IN RE:§

OCA, INC. *et al.*,

DEBTOR

§
§
§
§

CASE NO. 06-10179

CHAPTER 11

Jointly Administered

**REPLY MEMORANDUM IN SUPPORT OF
LIMITED MOTION OF DUDLEY M. HODGKINS, DDS, MSD,
AND DUDLEY M. HODGKINS, DDS, MSD, PC
FOR RELIEF FROM THE AUTOMATIC STAY**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COME NOW Dudley M. Hodgkins, DDS, MSD (“Dr. Hodgkins”), and Dudley M. Hodgkins, DDS, MSD, PC (“Hodgkins PC”) (collectively referred to as “Movants”), and hereby file this their Reply Memorandum in Support of their Limited Motion for Relief From the Automatic Stay, and respectfully state as follows:

1. On August 25, 2006, the Movants filed their Limited Motion for Relief from the Automatic Stay (the “Motion”). The Motion seeks limited relief from the automatic stay to permit the Movants only to take steps necessary to intervene in a pending action and obtain a final judgment from a Texas state or federal court regarding the illegality/unenforcability of the BSA at issue.

2. The Court has granted similar relief by Orders dated July 28, 2006 (Docket No. 1281), August 8, 2006 (Docket No. 1380), August 17, 2006 (Docket Nos.1505 and 1506), and September 20, 2006 (Docket No. 1861).

3. The Debtors filed their Opposition to the Motion on October 3, 2006. In sum, the Debtors argue that the Movants have failed to demonstrate cause for relief from stay, and even if

cause had been shown, the detriment to the Estates outweighs any interest of the Movants. Given the prior rulings of this Court and the circumstances of the Movants, the Debtors' arguments should fail.

4. First, "cause" obviously exists. It is the same cause that entitled Drs. Turner, Buck, Cole, Packard, Skibell, Corwin, Watson, Crist, McWilliams, Wetzell, Weinbach, Shaver, Mason, Schnibben, and Gentile, respectively, to relief from stay. In each case, the Court granted limited relief to allow only the question of the illegality/unenforceability of the respective BSAs under Texas law to be prosecuted to final judgment before the presiding Texas Court. "Cause" is an intentionally broad and flexible concept to permit Courts to respond in equity to fact-sensitive situations. *In re Sentry Park, Ltd.*, 87 B.R. 427, 430 (Bankr. W.D. Tex. 1988). The "cause" in this case, as in each of the others in which this Court has previously provided relief from stay, includes the need of the Movants and the Debtors for a uniform determination on the issue of illegality/unenforceability of the BSA under Texas law.

5. The distinctions between the Movants and the parties for whom the Court has previously provided relief from stay are distinctions without a difference: Yes, the Movants are currently defendants in an adversary proceeding before this Court filed by the Debtors in which the legality of the BSA is an issue. No, the Movants had not instituted litigation against the Debtors prior to the Bankruptcy Cases being filed. And yes, the Movants have filed a proof of claim. However, none of these facts preclude the limited relief sought in the Motion.

6. The Movants do not deny that this Court has jurisdiction over the claims at issue in the adversary proceeding. However, that jurisdiction is concurrent, not exclusive. *See* 28 U.S.C. § 1334(b) ("district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11"); *In re Poplar*

Run Five, Ltd., 192 B.R. 848, 855 (Bankr. E.D. Va. 1995) (citing *In re Marcus Hook Dev't Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991)).

7. The United States Court of Appeals for the Fifth Circuit has held that, “if the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding; for example, an action by a trustee to avoid a preference. If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt.” *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). Conversely, if the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding. *Id.* With respect to the instant case, while the assumption of an executory contract under 11 U.S.C. § 365(a) may be core, the initial determination of whether or not a contract is illegal or void under Texas law is, at best, merely “related to” a case under Title 11. 28 U.S.C. § 157(e). An appropriate court in Texas would still have concurrent jurisdiction over the issue of legality. Like the other Doctors for whom the stay has been modified, Dr. Hodgkins and Hodgkins PC simply wish to have the issue of legality determined by a Texas court. Several cases are pending in which the Movants could quickly intervene and pursue the legality issue. Such cases include: *Skibell, D.D.S., M.S. et al v. OCA, Inc et al.*; Cause No. 05-cv-01564; In the United States District Court for the Northern District of Texas, Dallas Division; *Corwin, et al. v. OCA, Inc. et al.*, Cause No. 05-2271; In the United States District Court for the Southern District of Texas, Houston Division; *Turner, et al v. OCA Incorporated, et al.*; Cause No. 05-cv-00091; In the United States District Court for the Western District of Texas, Midland Division. The Debtors obviously have counsel in each case.

8. The lack of pre-petition litigation between the parties should not be dispositive. Prior to the Bankruptcy Case being filed, Dr. Hodgkins and Hodgkins PC considered the BSA in all respects terminated. Over a year before the Bankruptcy Cases were filed, on April 4, 2005, Dr. Hodgkins and Hodgkins PC sent a detailed letter to OCA Texas providing notice of their claims arising under and relating to the BSA. The notice of claims also provided formal notice that OCA Texas was in material default under the BSA. On May 5, 2005, OCA Texas having failed to correct and/or cure the material defaults outlined in the notice letter, Dr. Hodgkins and Hodgkins PC terminated the BSA (the "Termination"). The BSA was terminated long before the commencement of OCA's bankruptcy case. In fact, from the summer of 2005, until the Bankruptcy Cases were commenced in March of 2006, Dr. Hodgkins and Hodgkins PC had not heard a word from the Debtors about the BSA. Thus, there was simply no reason for Dr. Hodgkins and Hodgkins PC to have commenced litigation with the Debtors regarding the BSA. Dr. Hodgkins and Hodgkins PC should not be penalized or treated differently from the Drs. for whom the stay has been modified simply because the Debtors did not dispute the termination of the BSA at the time of termination. Had the Debtors challenged the termination in 2005, Dr. Hodgkins and Hodgkins PC would have commenced a suit in Texas.

9. It simply makes more sense for a Texas court to address the threshold issue of illegality under Texas law. If the stay were lifted, the Movants could, within 45 days, intervene and file a motion for summary judgment on legality. Such a process would not prejudice the Debtors' plan process, which should be complete before the intervention papers are filed. Moreover, the Debtors have retained special litigation counsel in each existing suit, which counsel should already be well versed in and ready to respond to the legality issues in Texas.

The Debtors simply cannot, with a straight face, argue that a limited modification of the stay on the legality issue would be extremely detrimental to the administration of the Debtor's Estates.

10. A Bankruptcy Court, in the interest of justice, or in the interest of comity with State courts or respect for State law, may abstain from hearing a particular proceeding arising in or related to a case under title 11. 28 U.S.C. § 1334(c)(1). In the instant case, such abstention would certainly be appropriate on the issue of legality. Texas has a significant interest in prohibiting the practice dentistry without a valid license issued by the Texas State Board of Dental Examiners. Texas courts are uniquely qualified to perform evaluation of the legality issue. The Texas courts are already reviewing contracts that are in all material respects similar to the BSA at issue. The State of Texas has a significant interest in having a uniformity of decisions regarding the unauthorized practice of dentistry. Thus, the Bankruptcy Court should grant the Movants the requested relief, allowing the Movants to obtain a ruling regarding the legality of the BSA under Texas law.

WHEREFORE, PREMISES CONSIDERED, the Movants request the Court grant the Motion for the limited purpose of allowing Movants to take all steps necessary to intervene and prosecute to final judgment in the United States District Court for the Northern District of Texas their claims that the Hodgkins BSA is illegal and/or unenforcable under Texas law. The Movants further request such other and further relief that the Movants are justly entitled in order to allow the automatic stay to be modified as requested herein.

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Respectfully submitted,

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By: /s/ Kell C. Mercer
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2006, a true and correct copy of the foregoing pleading was served, via regular first class mail, postage prepaid, on the parties on the attached service.

/s/ Kell C. Mercer
Kell C. Mercer