

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

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|---------------------------|---|--------------------------------------|
| In re: |) | Case No. 06-10179 (B) |
| |) | Chapter 11 |
| OCA, INC., et al., |) | |
| |) | Jointly Administered with |
| Debtors. |) | Case Nos. 06-10180 - 06-10223 |
| |) | |

**CHRISTINE MICHAELS, D.D.S., P.C., and CHRISTINE MICHAELS, D.D.S. MOTION
FOR AUTHORITY TO CONTINUE LITIGATION WITH DEBTOR OR IN THE
ALTERNATIVE FOR RELIEF FROM STAY**

CHRISTINE MICHAELS, D.D.S., P.C., and CHRISTINE MICHAELS, D.D.S. (collectively referred to as “MICHAELS”), respectfully request that this Court enter an order determining that the automatic stay does not apply to the claims asserted against MICHAELS by Debtor Orthodontic Centers of Illinois, Inc. (“OCS”) in Case No 04C-6852, pending in U.S. District Court in the Northern District of Illinois (“Illinois Litigation”), or in the alternative MICHAELS requests relief from the automatic stay to continue litigation and defense of such claims.

1. OCS commenced the Illinois Litigation by filing its complaint asserting claims against MICHAELS for breach of contract, conversion, unjust enrichment, promissory estoppel, default on promissory notes, and alter ego liability. MICHAELS countersued OCS for breach of contract and breach of fiduciary duty.

2. By Orders dated December 13, 2005 and December 22, 2005,¹ the District Court declared the parties’ Business Management Agreement (“BSA”) illegal and unenforceable, and

¹ **Orthodontic Centers of Illinois v. MICHAELS**, 403 F. Supp. 2d 690 (N.D. Ill. 2005); and **Orthodontic Centers of Illinois v. MICHAELS**, 407 F. Supp. 2d 934 (N.D. Ill. 2005).

dismissed all claims except Counts V and VI of OCS's Amended Complaint, which seek damages for breach of five (5) promissory notes.

3. MICHAELS intends to seek summary judgment solely on the issue of damages on Counts V and VI of OCS's Amended Complaint. A copy of the proposed Motion for Summary Judgment, Memorandum of Law, and Statement of Facts is attached hereto as Composite Exhibit "A".

4. OCS's claims against MICHAELS are not stayed by operation of 11 U.S.C. §362, and action by MICHAELS in defense of such claims is, likewise, not subject to the automatic stay.

5. Counsel for MICHAELS has contacted counsel for the Debtor in an effort to resolve the issues raised herein; however, counsel for the Debtor has advised that the Debtor's position is that any action by MICHAELS in the Illinois Litigation, including a motion for summary judgment on OCS's claims, would be a violation of the automatic stay.

6. In light of the Debtor's stated position and in light of the expedited procedures established by this Court in *Order Granting Motion to Establish Expedited Procedures for (i) Enforcement of the Automatic Stay with Respect to Debtors' Business Service Agreements and (ii) Adversary Proceedings Seeking to Compel Other Contracting Parties to Comply with Their Obligations Pursuant to the Business Services Agreement* (Docket # 38), MICHAELS requests a determination that the automatic stay does not apply to the claims asserted by OCS in the Illinois Litigation.

LEGAL SUPPORT FOR THE RELIEF REQUESTED

The automatic stay does not apply to lawsuits initiated by the debtor, as was the lawsuit in the instant case. *Crosby v. Monroe County*, 394 F.3d 1328, 1331 (11th Cir. 2004); *Matter of U. S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994); *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991); *Brown v. Armstrong*, 949 F.2d 1007, 1009 (8th Cir. 1991); *Martin-Trigona v. Champion Fed. Sav.*, 892 F.2d 575, 577 (7th Cir. 1989); *Trans Caribbean Lines, Inc. v. Tracor Marine, Inc.*, 49 B.R. 360, 362 (S.D. Fla. 1985); *Bill Heard Chevrolet Corp.*, 2006 U.S. Dist. LEXIS 8464 (M.D. Tenn. 2006).

For any event the automatic stay is inapplicable to suits *by* the bankrupt. . . . This appears from the statutory language, which refers to actions “against the debtor,” 11 U.S.C. § 362(a)(1), and to acts to obtain possession of or exercise control over “property of the estate,” § 362(a)(3) and from the policy behind the statute, which is to protect the bankrupt's estate from being eaten away by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal the estate's assets and distribute them equitably among the creditors The fundamental purpose of bankruptcy, from the creditors' standpoint, is to prevent creditors from trying to steal a march on each other, ... and the automatic stay is essential to accomplishing this purpose. There is, in contrast, no policy of preventing persons whom the bankrupt has sued from protecting their legal rights. True, the bankrupt's cause of action is an asset of the estate; but as the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is.

Martin-Trigona, 892 F.2d at 577 (emphasis in original).

Moreover, several courts, including the 5th Circuit, have held that the action of seeking dismissal or summary judgment as to a claim brought by the debtor in a pre-petition lawsuit is not a violation of the automatic stay. *Matter of U. S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994).

The 5th Circuit expressly held that “If a debtor’s offensive claims are not subject to the automatic stay, a fortiori a creditor’s motion to reinstate and seek summary judgment of such non-stayed claims is not subject to the automatic stay.” *Id* at 568. *See also Martin Trigona*, 892 F.2d at 577.

Alternatively, if this Court were to determine that the automatic stay applies to OCS’s claims in the Illinois Litigation, cause exists to lift the stay to allow the District Court to conclude its judicial labor with regard to OCS’s claims. Judicial economy is a proper basis to justify relief from the automatic stay. *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 807 (9th Cir. 1985) (“The prior extensive preparation for the damages retrial made proceeding with that trial efficient. The decision to lift the stay could be upheld on this ground alone”). The District Court has resolved nearly every aspect of the Illinois Litigation and it should be permitted to proceed with the resolution of the issue of damages on OCS’s remaining two Counts.

WHEREFORE, MICHAELS respectfully requests that this Court enter an order determining that OCS’s claims in the Illinois Litigation are not stayed pursuant to 11 U.S.C. §362, and that MICHAELS is permitted to defend such claims, including filing and prosecution of a motion for summary judgment, or in the alternative that the Court grant MICHAELS stay relief to file and prosecute a motion for summary judgment on OCS’s claims in the Illinois Litigation, and for any other relief that the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 11th day of April, 2006, by placing a copy of same in the United States mail, postage prepaid and properly addressed to: All parties on the attached Service List.

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