

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

IN RE:	*	NO. 06-10179
	*	
OCA, INC., et al.,	*	SECTION B
	*	
Debtors.	*	CHAPTER 11

	*	
GARY D. SEXSON II and SEXSON ORTHODONTICS, LTD.,	*	ADV. PRO. NO. 06-01126
	*	
Plaintiffs	*	C/W 06-01113
vs.	*	
	*	
OCA, INC., and ORTHODONTIC CENTERS OF ILLINOIS, INC.	*	
	*	
Defendants	*	

**MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO DISCOVERY**

At issue in the pending adversary proceeding filed by Gary D. Sexson II and Sexson Orthodontics, Ltd. (collectively, "Sexson") is the return to Sexson of payments that he made to the Debtors during the term of a contract that he alleges to be illegal. Under Illinois law, that issue will turn on the public policy of that state and whether Sexson was *in pari delicto* with OCA as the unlicensed party rendering orthodontic services. In a decision under the architectural licensing statute in Illinois, which is similar to that which governs the separate profession of orthodontics, the Court in Ransburg v. Haase, 586 N.E. 2d 1295 (Ill. App. 1992), recognized a cause of action for the return of fees paid to an individual practicing architecture without a license, even after finding the original contract to render architectural services null and void as a result of the failure of the purported architect to have a license. The analysis for

determining whether recovery should be granted for moneys paid under an illegal contract is whether the law should aid the party who is comparatively more innocent.

Sexson believes that one factor in that analysis is OCA's knowledge of whether the contract that OCA presented to Sexson for signature was illegal or subject to ongoing challenges for illegality. OCA has, in its disclosure statement filed in connection with the effort to confirm a plan in the main case, made certain representations as to the status of litigation regarding illegality of its contracts with affiliated practices. The challenged discovery requests seek OCA's documentation and the identification of witnesses so that Sexson can cross-examine OCA on those representations.

OCA has objected to the challenged discovery requests on the basis that they are "overly broad, seek matters not relevant to the subject matter involved in the pending adversary proceeding, and are not reasonably calculated to lead to the discovery of admissible evidence." This objection can be reduced to two parts: overbreadth and irrelevance.

OCA did not specify the basis for its assertion that the challenged requests were overly broad. The failure to support that objection may be sufficient to overrule it. "The burden rests upon the objecting party to show why a particular discovery request is improper." Kodish v. Oakbrook Terrace Fire Protection District, 235 F.R.D. 447, 450 (N.D. Ill. 2006). An unsupported assertion that an interrogatory or request for production is overly broad "is not adequate to voice a successful objection." St. Paul Reinsurance Company, Ltd. v. Commercial Financial Corp., 198 F.R.D. 508, 511 (N.D. Iowa 2000). OCA must come forward with a specific basis for its objection. *Id.*

In the discovery conference held before the filing of this motion, OCA provided one potential basis for its objection. OCA suggested limiting its responses to litigation that occurred

in Illinois. This suggestion is an unbalanced "Russian Roulette" approach to discovery. OCA knows which chamber of the pistol is loaded because it knows the states in which the universe of complaints have been asserted. Sexson has no comparable knowledge. Furthermore, OCA's limiting approach misses the point of the discovery requests. Sexson seeks the witnesses and documents that will disclose the issues that gave rise to all claims of illegality. If, for example, OCA's repeated characterization of its relationships with affiliated practices as "partnerships" gave rise to claims of illegality in multiple jurisdictions, the critical issues for Sexson's purposes are the extent, number and timing of those claims of illegality. If it is disclosed that the plan of operation that OCA proposed for Sexson was subject to attack at the time it was being proposed to Sexson, OCA's knowledge of those attacks could bear on the relative culpability of the parties, regardless of whether the attacks were pursuant to Illinois law. A response limited to claims made under Illinois law is not sufficient for Sexson's purposes. The challenged requests are not overly broad.

OCA's second objection to the challenged requests is that they are irrelevant. The relevance of the requests has been established in the preceding paragraph. Requests for discovery are considered relevant if there is "any possibility" that the requested information may be relevant to the subject matter of the action. Kodish, *supra*, 235 F.D.R. at 450. There is no question that Sexson's requests are relevant under the relaxed standard applicable to discovery.

OCA's objection, in lieu of a response which the Court had ordered to be made prior to the commencement of the recent round of general depositions, may have prejudiced Sexson. If the issues involved are determined to be general, rather than practice-specific, Sexson has been deprived of the ability to question OCA on the areas of inquiry that will be suggested by the discovery that is sought. Accordingly, Sexson, in addition to requesting responses to the

outstanding discovery, requests an order either preserving this issue in the practice-specific discovery that is to be scheduled or re-opening the general discovery so that this issue can be covered.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that I conferred by telephone on October 27, 2006 with counsel for the debtors in an effort to resolve the dispute giving rise to this motion, but that resolution was not possible.

November 2, 2006.

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