

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

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

**RALPH A. CALLENDER Sr., D.D.S. and RALPH A. CALLENDER Sr., D.D.S., P.C.’s
MOTION FOR AUTHORITY TO CONTINUE LITIGATION WITH DEBTOR OR IN
THE ALTERNATIVE FOR RELIEF FROM STAY**

RALPH A. CALLENDER Sr., D.D.S. and RALPH A. CALLENDER Sr., D.D.S., P.C. (collectively referred to as “CALLENDER”), respectfully request that this Court enter an order determining that the automatic stay does not apply to the claims asserted against CALLENDER by Debtor Orthodontic Centers of California, Inc. (“OCS”) in Case No. BC337400, pending in the Superior Court for the State of California, Central District (“California Litigation”), or in the alternative CALLENDER requests relief from the automatic stay to continue litigation and defense of such claims.

1. OCS initially commenced the California Litigation by filing a Complaint asserting claims against CALLENDER for specific performance, breach of contract, conversion, promissory estoppel, restitution based on unjust enrichment, quantum meruit, money had and received, and fraud, in the U.S. District Court for the Central District of California, Western Division, Case No. CV04-8694 PA(CWx). CALLENDER defended OCS’s claims, in part, on the basis that the parties’ Business Services Agreement (“BSA”) violated California’s prohibition against the corporate practice of dentistry.

2. The parties conducted discovery in the federal proceedings and CALLENDER filed a Motion for Summary Judgment on the issue of the illegality and unenforceability of the BSA. CALLENDER's Motion for Summary Judgment was fully briefed and scheduled for oral argument when Judge Percy Anderson ruled *sua sponte* that the U.S. District Court lacked subject matter jurisdiction over the parties' dispute.

3. On August 1, 2006, OCS re-filed its claims in the Superior Court of the State of California, County of Los Angeles, Central District, Case No. BC337400. Again, CALLENDER defended, in part, on the basis that the BSA violates California's prohibition against the corporate practice of dentistry.

4. On March 14, 2006, CALLENDER served a Motion for Summary Judgment on OCS in the California Litigation. A copy of CALLENDER's Notice of Motion and Motion for Summary Judgment, Separate Statement of Undisputed Material Facts, and Memorandum of Points and Authorities is attached hereto as Composite Exhibit "A". However, undersigned counsel discovered the existence of the instant bankruptcy filing and instructed local California counsel to cease his activities and not file the Motion for Summary Judgment, in order to avoid inadvertently violating the automatic stay provisions of the United States Bankruptcy Code, 11U.S.C. § 362.

5. A hearing date and time is scheduled on CALLENDER's motion for summary judgment for June 20, 2006 at 9:30 a.m. before Judge Fahey.

6. CALLENDER is seeking summary judgment solely on the issue of whether or not the BSA violates the public policy and statutory law of California prohibiting the corporate practice of dentistry.

7. OCS's claims against CALLENDER are not stayed by operation of 11 USC § 362, and action by CALLENDER in defense of such claims is, likewise, not subject to the automatic stay.

8. The regulation of medical and other professional disciplines is uniquely within the purview of the state of California and the California court should be permitted to determine whether California state law and public policy prohibits OCS from conducting business in the State of California under the BSA.

9. Counsel for CALLENDER 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 CALLENDER in the California Litigation, including a motion for summary judgment on OCS's claims, would be a violation of the automatic stay.

10. 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), CALLENDER requests a determination that the automatic stay does not apply to the claims asserted by OCS in the California 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 California Litigation, cause exists to lift the stay to allow the Superior 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").

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