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14 **Attorneys for RALPH CALLENDER Sr., D.D.S.**
15 **and RALPH CALLENDER Sr., D.D.S., P.C.**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT
STANLEY MOSK COURTHOUSE

13 ORTHODONTIC CENTERS OF
14 CALIFORNIA, INC.,

15 Plaintiff,

16 v.

17 RALPH CALLENDER, SR., D.D.S. and
18 RALPH CALLENDER, SR., D.D.S., P.C.,
19 a California Professional Corporation,

20 Defendants.

Case No. BC337400
Assigned for all purposes to Judge Fahey in
Dept. 78

**DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE,
SUMMARY ADJUDICATION OF ISSUES**

Date: June 20, 2006 [Reserved]
Time: 9:30 a.m.
Dept.: 78

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON Tuesday, June 20, 2006, at 9:30 a.m., or as soon
thereafter as the matter may be heard in Department 78 of the above-captioned Superior Court, the
Honorable William F. Fahey presiding, located at 111 North Hill Street, Los Angeles, California
90012, Defendants RALPH CALLENDER Sr., D.D.S., and RALPH CALLENDER Sr., D.D.S., P.C.,
will and hereby do move this Court to grant Defendants' Motion for Summary Judgment or, in the
Alternative, Summary Adjudication of Issues pursuant to Code Civ. Proc., § 437c, on the grounds
that there are no genuine issues as to any material fact concerning the legality and enforceability of

ORTHODONTIC CENTERS OF CALIFORNIA, INC., V.
RALPH A. CALLENDER, SR., D.D.S., ET AL.
CASE NO. BC337400

1 the Business Services Agreement and that, therefore, the Defendants are entitled to judgement as a
2 matter of law. Defendants seek, in the alternative, summary adjudication of the following issue:

- 3 1. Whether the Business Services Agreement between Plaintiff and Defendants is illegal
4 and unenforceable under California's prohibition against the corporate practice of
5 medicine.

6 This Motion is based on this Notice of Motion, the accompanying Memorandum of Points
7 and Authorities in support of Defendants' Motion for Summary Judgment or Summary Adjudication,
8 the Declaration of Ralph A. Callender Sr., D.D.S. in support thereof, Defendants' Statement of
9 Uncontroverted Facts filed concurrently herewith, and such other and further evidence and argument
10 as may be presented at the hearing on said motion.

11 Dated: March 14th, 2006

12 Respectfully submitted,

13 PHILIP A. METSON, ESQUIRE

14 and

15 GOLDSTEIN, TANEN & TRENCH, P.A.
16 Richard M. Goldstein, Esquire
Keith R. Gaudio, Esquire

17
18 By: 

19 Keith R. Gaudio, Esquire,

20 **COUNSEL FOR DEFENDANTS**
21 RALPH CALLENDER Sr., D.D.S.
22 and RALPH CALLENDER Sr., D.D.S., P.C.

1 PROOF OF SERVICE

2 STATE OF FLORIDA

3 COUNTY OF MIAMI-DADE

} ss

4 I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to
5 the within action. My business address is One Biscayne Tower, Suite 3700, Two South Biscayne
Boulevard, Miami, Florida 33131.

6 I am readily familiar with the practice of this business for collection and processing of
7 documents for mailing with the United States Postal Service. Documents so collected and processed
8 are placed for collection and deposit with the United States Postal Service that same day in the
ordinary course of business.

9 On the date indicated below, I served a true copy of the following documents:

10 **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY**
11 **JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF**
ISSUES

12 ☒ by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon
fully prepaid, in the United States Post Office mail at Miami, Florida, addressed as set forth below.

13 ☐ by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and
14 at the address(es) set forth below.

15 ☐ by causing a true copy thereof to be delivered to the party or parties at the address(es) listed
below, by and/or through the services of:

16 _____ Federal Express

17 _____ Express Mail

_____ Facsimile transmission (followed by first class mail)

18 DANIEL L. BAXTER, ESQUIRE
19 Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall, 22nd Floor
20 Sacramento, CA 95814

GIBSON E. PRATT, ESQUIRE
3850 N. Causeway Boulevard, Suite 800
Metairie, LA 70002

21 I declare under penalty of perjury under the laws of the State of Florida that the foregoing is
true and correct.

22 Executed on March 14th, 2006, at Miami, Florida

23 
24 Paola E. Montes

GOLDSTEIN, TANEN & TRENCH, P.A.
RICHARD M. GOLDSTEIN, ESQ., Fla. Bar No. 197319
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Attorneys for RALPH CALLENDER Sr., D.D.S.
and RALPH CALLENDER Sr., D.D.S., P.C.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT
STANLEY MOSK COURTHOUSE

ORTHODONTIC CENTERS OF
CALIFORNIA, INC.,

Plaintiff,

v.

RALPH CALLENDER, SR., D.D.S. and
RALPH CALLENDER, SR., D.D.S., P.C.,
a California Professional Corporation,

Defendants.

Case No. BC337400
Assigned for all purposes to Judge Fahey in
Dept. 78

DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS

	Undisputed Material Facts	Supporting Evidence
1.	Dr. Ralph Callender, Sr., D.D.S. ("Dr. Callender") is a well-established, successful doctor of dental surgery specializing in the field of orthodontics.	Dr. Ralph Callender, Sr., D.D.S.'s declaration ("Callender Declaration"), Exhibit 1, ¶¶1 and 5.
2.	Dr. Callender is licensed to provide orthodontic care in the State of California and provides orthodontic care to his patients through Ralph Callender, Sr., D.D.S., P.C., which is a California professional corporation.	Callender Declaration, Exhibit 1, ¶¶1 and 3.

ORTHODONTIC CENTERS OF CALIFORNIA, INC., v.
RALPH A. CALLENDER, SR., D.D.S., ET AL.
CASE NO. BC337400

	Undisputed Material Facts	Supporting Evidence
3.	Orthodontic Centers of California, Inc. is a Delaware corporation, authorized to do business in the State of California. Orthodontic Centers of California, Inc. is a wholly-owned subsidiary of OCA, Inc. (collectively "OCA").	Plaintiffs' Complaint for specific performance, breach of contract, conversion, promissory estoppel, restitution based on unjust enrichment, quantum meruit, money had and received, and fraud, ¶1 and Callender Declaration, Exhibit 1, ¶9.
4.	OCA purports to provide non-clinical business services to affiliated orthodontic practices by providing such affiliates with office space, equipment, staff, and administrative services, included but not limited to, bookkeeping, payroll, advertising and marketing, purchasing, human resources, information technology, financial accounting, patient accounting, non-clinical training, and other administrative and non-clinical services, and by helping affiliates develop and expand their offices.	Plaintiffs' Complaint for specific performance, breach of contract, conversion, promissory estoppel, restitution based on unjust enrichment, quantum meruit, money had and received, and fraud, ¶5 and Callender Declaration, Exhibit 1, ¶9.
5.	OCA and Dr. Callender began negotiations concerning a management business relationship in 1997, whereby OCA would provide comprehensive business and administrative services to Dr. Callender	Callender Declaration, Exhibit 1, ¶5.
6.	Orthodontic Centers of California, Inc. and Ralph A. Callender, Sr., D.D.S., P.C., and Dr. Callender entered into a Business Services Agreement ("BSA"), with an effective date of January 1, 1998. The actual start date of the relationship was July 1, 1998, after completion of the stock sale.	Callender Declaration, Exhibit 1, ¶¶6 and 9.
7.	On June 30, 1998, Dr. Callender and Orthodontic Centers of California, Inc., entered into a Stock Purchase Agreement whereby Dr. Callender sold all of the issued and outstanding shares of capital stock of Ralph A. Callender, Sr., P.C. to Orthodontic Centers of California, Inc.	Callender Declaration, Exhibit 1, ¶¶7 and 8.
8.	The purchase price of the stock was valued based upon a multiple of Dr. Callender's revenue for one year plus a signing bonus.	Callender Declaration, Exhibit 1, ¶8.

	Undisputed Material Facts	Supporting Evidence
9.	Pursuant to the Stock Purchase Agreement, OCA acquired substantially all of the tangible and intangible assets that Ralph A. Callender, Sr., P.C. and Dr. Callender used to conduct his orthodontic practice, including the furniture, orthodontic equipment, and leases.	Callender Declaration, Exhibit 1, ¶¶8 and 9.
10.	Thereafter, OCA leased the assets back to the Defendants for use in the orthodontic practice pursuant to the BSA.	Callender Declaration, Exhibit 1, ¶10.
11.	The BSA obligates OCA to provide Defendants with all "business and administrative support and services reasonably required by [the Defendants] for the day-to-day operations of the Practice."	Callender Declaration, Exhibit 1, ¶11.
12.	The term (duration) of the BSA is for 25 years.	Callender Declaration, Exhibit 1, ¶12.
13.	The BSA required OCA to employ the Defendants' office staff, and provide for scheduling and training of the office staff.	Callender Declaration, Exhibit 1, ¶13.
14.	The BSA required OCA to provide and maintain office space, telephones and utilities for the Defendants. OCA leased in its name one of Dr. Callender's offices.	Callender Declaration, Exhibit 1, ¶14.
15.	The BSA required OCA to acquire and maintain all of the furniture, fixtures, leasehold improvements, and equipment required by the Defendants for the operation of the practice.	Callender Declaration, Exhibit 1, ¶15.
16.	During the term of the BSA, OCA leased to the Defendants all of the equipment, furniture, and improvements for the operation of the practice.	Callender Declaration, Exhibit 1, ¶16.
17.	The BSA required OCA to perform all payroll administration and accounting for the Defendants.	Callender Declaration, Exhibit 1, ¶17.
18.	The BSA required OCA to install computer hardware and software and train the office staff in the utilization of the computer hardware and software.	Callender Declaration, Exhibit 1, ¶18.

	Undisputed Material Facts	Supporting Evidence
19.	The BSA required OCA to order and manage the Defendants' supplies and inventory.	Callender Declaration, Exhibit 1, ¶19.
20.	The BSA required OCA to perform the Defendants' billing and collections.	Callender Declaration, Exhibit 1, ¶20.
21.	The BSA required OCA to provide bookkeeping, accounting, and preparation of financial statements for the Defendants.	Callender Declaration, Exhibit 1, ¶21.
22.	OCA controlled the processing and disbursement of payments for accounts and trade payables.	Callender Declaration, Exhibit 1, ¶22.
23.	The BSA required OCA to assist the Defendants in recruiting orthodontists.	Callender Declaration, Exhibit 1, ¶23.
24.	The BSA required OCA to prepare statistical data and analysis of the Defendants' operations.	Callender Declaration, Exhibit 1, ¶24.
25.	The BSA required OCA to provide legal services for the Defendants' routine operations.	Callender Declaration, Exhibit 1, ¶25.
26.	The BSA required OCA to provide the Defendants advice on practice efficiency and productivity, office locations and layouts, and staff salaries, benefits, and performance and incentive plans.	Callender Declaration, Exhibit 1, ¶26.
27.	The Defendants appointed OCA as their "sole and exclusive agent" for the provision of support and services to be provided by OCA pursuant to the BSA.	Callender Declaration, Exhibit 1, ¶27.
28.	The Defendants granted OCA an exclusive special power of attorney and appointed OCA as their exclusive true and lawful agent and attorney-in-fact for the purpose of preparing bills and statements, billing for orthodontic services performed by the Defendants, collecting and receiving orthodontic fees, and depositing all of Defendants' collected orthodontic fees into an account controlled by OCA (PC Account).	Callender Declaration, Exhibit 1, ¶28.

	Undisputed Material Facts	Supporting Evidence
29.	OCA had signatory authority over the PC Account and had exclusive control over disbursements from the PC Account.	Callender Declaration, Exhibit 1, ¶29.
30.	The Defendants had no authority to withdraw or disburse from the PC Account, or to make any modifications to or close the PC Account without the prior, express, written consent of OCA.	Callender Declaration, Exhibit 1, ¶¶30 and 31.
31.	OCA had authority to dictate to the Defendants various types of insurance which the Defendants must maintain and that the Defendants are obligated to name OCA as an additional insured under this coverage.	Callender Declaration, Exhibit 1, ¶31.
32.	Under the BSA, OCA can dictate the type of business activities that are conducted at the practice and which orthodontist(s) can practice with the Defendants, the type of assurance/utilization review to be adhered to by the practices, and how patient records must be kept.	Callender Declaration, Exhibit 1, ¶32.
33.	Pursuant to the BSA, OCA maintains all of the practice's business records, except patient records, and the BSA does not provide the Defendants with the right to review their records or obtain them from OCA. OCA has not provided Dr. Callender access to review his business records notwithstanding numerous requests.	Callender Declaration, Exhibit 1, ¶33.
34.	OCA mandated that the Defendants utilize only OCA proprietary business systems.	Callender Declaration, Exhibit 1, ¶34.
35.	The BSA contains a covenant not to compete that prevents Dr. Callender from practicing orthodontics within the area of dominant influence ("ADI") or within a radius of 1½ miles of any office location, and precluding the Defendants from servicing any patients or office staff for any other orthodontic practice.	Callender Declaration, Exhibit 1, ¶35.
36.	OCA pays itself a service fee from the revenues generated by the Defendants.	Callender Declaration, Exhibit 1, ¶36.

	Undisputed Material Facts	Supporting Evidence
37.	The OCA service fee was 35% of the Defendants' Net Operating Margin. Between January 1, 1999 and November 30, 2003, OCA collected service fees from the Defendants' revenues in the amount of \$653,505.62.	Callender Declaration, Exhibit 1, ¶37 and 38.
38.	Dr. Callender paid for all direct expenses of his offices such as rent, employee salaries, and equipment and furnishings. (BSA ¶3.3(b)).	Callender Declaration, Exhibit 1, ¶38.
39.	In addition, the Defendants paid to OCA \$415,389.52 for OCA corporate overhead allocations, which covered OCA's home office rent costs, accounting and legal costs, bank charges, cleaning, dues and subscriptions, equipment leasing, insurance, office expense and supplies, postage, meals and entertainment, telephones, utilities, equipment purchased, and director's fees, along with other overhead expenses.	Callender Declaration, Exhibit 1, ¶39.
40.	The BSA guaranteed OCA a minimum annual fee in the amount of \$116,777.00 ("Annual Guarantee Amount").	Callender Declaration, Exhibit 1, ¶40.
41.	The Annual Guarantee Amount represented 15% of the consideration paid by OCA pursuant to the Stock Purchase Agreement whereby OCA acquired the Defendants' tangible and intangible assets.	Callender Declaration, Exhibit 1, ¶41.
42.	The guaranteed minimum service fee was not determined based upon an assessment of the value of the services provided by OCA to the Defendants, but rather, upon the amount of consideration OCA paid to the Defendants under the Stock Purchase Agreement – \$926,319.00.	Callender Declaration, Exhibit 1, ¶42.

	Undisputed Material Facts	Supporting Evidence
43.	Similarly, the consideration paid to the Defendants under the Stock Purchase Agreement was not commensurate with the value of the assets transferred. In June 1998, when the Defendants sold Ralph A. Callender, Sr., P.C. to OCA pursuant to the Stock Purchase Agreement, the assets of the practice had a fair market value of \$20,000 - \$25,000.	Callender Declaration, Exhibit 1, ¶43.
44.	Since OCA is precluded by law from operating an orthodontic practice and, as OCA had no intentions of operating Ralph A. Callender, Sr., P.C., there was no goodwill associated with the sale of Ralph A. Callender, Sr., D.D.S., P.C.	Callender Declaration, Exhibit 1, ¶44.
45.	During the term of the BSA, OCA was obligated to provide extensive business and administrative services, essentially taking over the entire business side of the Defendants' practice and freeing up Dr. Callender's time to concentrate on patient care.	Callender Declaration, Exhibit 1, ¶45.
46.	On November 4, 2005, OCA filed a Form 8-K with the Securities and Exchange Commission, in which OCA acknowledged that it was either a partner or owner of its affiliated practices, which included the orthodontic practice of Dr. Callender.	November 4, 2005 Form 8-K, Exhibit 2.

1 Dated: March 14th, 2006

2 Respectfully submitted,

3 PHILIP A. METSON, ESQUIRE

4 and

5 GOLDSTEIN, TANEN & TRENCH, P.A.
6 Richard M. Goldstein, Esquire
7 Keith R. Gaudioso, Esquire

8 By: 
9 Keith R. Gaudioso, Esquire,

10 **COUNSEL FOR DEFENDANTS**
11 RALPH CALLENDER Sr., D.D.S.
12 and RALPH CALLENDER Sr., D.D.S., P.C.

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ORTHODONTIC CENTERS OF CALIFORNIA, INC., V.
RALPH A. CALLENDER, SR., D.D.S., ET AL.
CASE NO. BC337400

1 PROOF OF SERVICE

2 STATE OF FLORIDA)

3 COUNTY OF MIAMI-DADE) ss

4 I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to
5 the within action. My business address is One Biscayne Tower, Suite 3700, Two South Biscayne
Boulevard, Miami, Florida 33131.

6 I am readily familiar with the practice of this business for collection and processing of
7 documents for mailing with the United States Postal Service. Documents so collected and processed
are placed for collection and deposit with the United States Postal Service that same day in the
ordinary course of business.

8 On the date indicated below, I served a true copy of the following documents:
9

10 **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THEIR**
11 **MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY**
ADJUDICATION OF ISSUES

12 ☒ by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon
fully prepaid, in the United States Post Office mail at Miami, Florida, addressed as set forth below.

13 ☐ by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and
14 at the address(es) set forth below.

15 ☐ by causing a true copy thereof to be delivered to the party or parties at the address(es) listed
below, by and/or through the services of:

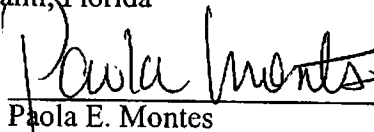
16 _____ Federal Express
17 _____ Express Mail
18 _____ Facsimile transmission (followed by first class mail)

18 DANIEL L. BAXTER, ESQUIRE
19 Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall, 22nd Floor
Sacramento, CA 95814

GIBSON E. PRATT, ESQUIRE
3850 N. Causeway Boulevard, Suite 800
Metairie, LA 70002

20 I declare under penalty of perjury under the laws of the State of Florida that the foregoing is
21 true and correct.

22 Executed on March 14th, 2006, at Miami, Florida

23 
24 Paola E. Montes

1 **GOLDSTEIN, TANEN & TRENCH, P.A.**
2 **RICHARD M. GOLDSTEIN, ESQ.**, Fla. Bar No. 197319
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14 **Attorneys for** RALPH CALLENDER Sr., D.D.S.
15 and RALPH CALLENDER Sr., D.D.S., P.C.

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
18 STANLEY MOSK COURTHOUSE

19 ORTHODONTIC CENTERS OF
20 CALIFORNIA, INC.,

21 Plaintiff,

22 v.

23 RALPH CALLENDER Sr., D.D.S. and
24 RALPH CALLENDER Sr., D.D.S., P.C.,
25 a California Professional Corporation,

26 Defendants.

Case No. BC337400

Assigned for all purposes to Judge Fahey in
Department 78

**MEMORANDUM OF POINTS AND
AUTHORITIES OF DEFENDANTS
RALPH CALLENDER Sr., D.D.S. and
RALPH CALLENDER Sr., D.D.S., P.C.
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE, SUMMARY
ADJUDICATION OF ISSUES AND
DECLARATION OF RALPH
CALLENDER Sr., D.D.S., IN SUPPORT
THEREOF [CODE OF CIV. PROC. §437c]**

Date: June 20, 2006 [Reserved]

Dept. 78

Time 9:30 a.m.

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2	(1986) 181 Cal. App. 3d 179	17
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6	(1984) 157 Cal. App. 3d 940	4
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10	(1987) 191 Cal. App. 3d 1136	13
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19	<i>Painless Parker v. Bd. of Dental Exam'rs</i>	
20	(1932) 216 Cal. 285	<i>passim</i>
21	<i>Penny v. OrthAlliance, Inc.</i>	
22	255 F. Supp. 2d 579 (N.D. Tex. 2003)	<i>passim</i>
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25	<i>R. M. Sherman Co. v. W. R. Thomason, Inc.</i>	
26	(1987) 191 Cal. App. 3d 559	17
27	<i>State Bd. of Med. Exam'rs v. Pac. Health Corp., Inc.</i>	
28	(1938) 12 Cal. 2d 156	5
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	(2000) 85 Cal. App. 4 th 458	8, 9
	<i>Stevens v. Boyes Hot Springs Co.</i>	
	(1931) 113 Cal. App. 479	17
	<i>Tiedje v. Aluminum Taper Milling Co.</i>	
	(1956) 46 Cal. 2d 450	17
	<i>Yuba Cypress Hous. Partners, Ltd. v. Area Developers</i>	
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1 **STATUTES**

2 CAL. BUS. & PROF. CODE § 1625 *passim*
3 CAL. BUS. & PROF. CODE § 1626 1, 6
4 CAL. CIV. PROC. CODE § 437c 4
5 CAL. CIV. CODE § 1598 16
6 TEX. OCC. CODE ANN. § 251.003(a)(4) (Vernon 2004) 6, 7, 15
7 ILL. COMP. STAT. §§ 25/8, 25/17, and 25/44 (2005) 10

8
9 **MISCELLANEOUS**

10 BLACK’S LAW DICTIONARY (6th ed. 1991) 6, 12

1 **ISSUE:** Whether the Business Services Agreement between Plaintiff and Defendants is illegal
2 and unenforceable under California's prohibition against the corporate practice of
3 medicine.

4 **I. SUMMARY OF THE ARGUMENT**

5 Defendant, RALPH A. CALLENDER, SR., D.D.S., is a California licenced dentist
6 specializing in orthodontics. In 1998, Dr. Callender entered into a series of contracts with Plaintiff,
7 ORTHODONTIC CENTERS OF CALIFORNIA, INC., a wholly owned subsidiary of OCA, Inc.,
8 f/k/a Orthodontic Centers of America, Inc. (collectively "OCA"), a public corporation which
9 purportedly provides comprehensive business and administrative services to orthodontists throughout
10 the country and internationally.

11 On April 30, 2004, Dr. Callender terminated his relationship with OCA asserting that OCA
12 failed to comply with the terms of the parties' Business Services Agreement ("BSA"). OCA
13 responded by filing a Complaint against Dr. Callender and his professional corporation Defendant,
14 RALPH A CALLENDER, SR., D.D.S., P.C. (hereinafter collectively "Dr. Callender"), seeking
15 specific performance, breach of contract, conversion, promissory estoppel, restitution based on
16 unjust enrichment, quantum meruit, money had and received, and fraud. Dr. Callender asserts in the
17 Fourth and Fifth Affirmative Defenses that the BSA violates the laws and public policy of the State
18 of California and is, therefore, unenforceable.

19 The relationship between OCA and Dr. Callender created by the BSA is that of business
20 partners or employer/employee, both of which violate California's prohibition on the corporate
21 practice of dentistry. OCA is not licensed to practice dentistry in California. In a recent public filing
22 by OCA with the Securities and Exchange Commission, OCA admitted that it is a partner in the
23 practices with the affiliated orthodontists, or that OCA is itself an orthodontic practice. OCA's
24 involvement in the orthodontic practice is pervasive as OCA controls many of the fundamental
25 functions of the practice, some – particularly as they relate to financial control – to the exclusion of
26 Dr. Callender. By virtue of the BSA, OCA manages or conducts Dr. Callender's orthodontic practice
27 by engaging in managerial, proprietor, and lessor functions, in violation of the California Dental
28 Practices Act ("CDPA"). BUS. & PROF. CODE §§ 1625(e) and 1626. As OCA's claims in the

1 Complaint are premised upon contractual obligations and promises, and as that contract arrangement
2 is illegal under California law and against public policy, all of OCA's claims arising out of the
3 contractual relationship fail as a matter of law.

4 **II. STATEMENT OF UNDISPUTED FACTS**

5 Dr. Callender is a well-established, successful orthodontist with offices in Los Angeles and
6 Pasadena, California. *See*, Defendants' Separate Statement of Undisputed Material Facts ("SUF")
7 at ¶¶1 and 5. In 1997, OCA and Dr. Callender began negotiating the terms of a relationship whereby
8 OCA would provide comprehensive business and administrative services to Dr. Callender, freeing
9 his time so that he may concentrate on the treatment of patients. (SUF ¶¶5 and 45). OCA and Dr.
10 Callender consummated their relationship in 1998 upon the execution of the BSA and a Stock
11 Purchase Agreement. (SUF ¶¶6 and 7).

12 Pursuant to the Stock Purchase Agreement, Dr. Callender sold to OCA all of the issued and
13 outstanding shares of the capital stock of his professional corporation, Ralph A. Callender, Sr., P.C.¹
14 (SUF ¶7). As a result of the stock sale, OCA acquired substantially all of the tangible and intangible
15 assets of Ralph A. Callender, Sr., P.C., including all of the practice's equipment and furnishings.
16 (SUF ¶9). The purchase price of the stock was valued upon a multiplier of Dr. Callender's revenues
17 for one year, plus a signing bonus to Dr. Callender for entering into the BSA. (SUF ¶8).

18 Further, pursuant to the BSA, OCA leased the equipment purchased under the Stock Purchase
19 Agreement to Dr. Callender and took over the entire business management aspect of Dr. Callender's
20 practice. (SUF ¶10). The BSA obligated OCA to employ and train Dr. Callender's office staff,
21 provide and maintain office space, telephones and utilities, conduct payroll administration and
22 accounting, order and manage inventory, conduct billing and collection, and perform all bookkeeping
23 and financial functions, including disbursements for payment of accounts and trade payables. (BSA
24 ¶1.1; SUF ¶¶11-26). In order to perform these functions, OCA was appointed Dr. Callender's sole
25 and exclusive agent and attorney-in-fact. (BSA ¶¶1.1 and 1.7; SUF ¶¶27 and 28).

26
27 ¹ After the sale of Ralph A. Callender Sr., PC to OCA, as contemplated by the parties,
28 Dr. Callender organized a new professional corporation, Defendant RALPH A CALLENDER Sr.,
D.D.S., P.C., a California professional corporation.

1 Throughout the affiliation, OCA exercised complete and unfettered control over Dr.
2 Callender's finances. OCA was the only party with signatory authority on Dr. Callender's operating
3 bank account, and had exclusive control over disbursements from the account. (BSA ¶¶1.7 and 1.8;
4 SUF ¶29). Dr. Callender had no authority to withdraw or make any disbursements and could not
5 make any modifications or close the practice's account without OCA's written consent. (BSA ¶1.8;
6 SUF ¶30). OCA also controlled the creation, maintenance, and possession of Dr. Callender's
7 business records, with the lone exception being patient records. (BSA ¶1.9; SUF ¶33). Dr.
8 Callender's business records remain in the possession of OCA, and Dr. Callender has not been
9 allowed access to the records notwithstanding numerous requests. (SUF ¶33).

10 In exchange for OCA's investment, under the BSA, OCA received 35% of the practice's "Net
11 Operating Margin," with a minimum guaranteed service fee of \$116,777.00, "which represents 15%
12 of the aggregate consideration paid by [OCA] pursuant to the [Stock Purchase Agreement]." (BSA
13 ¶¶3.1 & 3.2; SUF ¶¶36, 37, 40, and 41). In addition, all of the expenses incurred by OCA in its
14 management of Dr. Callender's orthodontic practice were paid for by Dr. Callender. (SUF ¶38). For
15 example, payments for office rent, employee salaries, and equipment and furnishing purchases came
16 from the orthodontic fees generated by Dr. Callender. (BSA ¶3.3(b); SUF ¶38). In addition to the
17 direct expenses related to the operation of Dr. Callender's practice, Dr. Callender was required to
18 pay an allocated percentage of OCA's corporate home office (Metairie, Louisiana) overhead
19 expenses. (BSA ¶3.3(c); SUF ¶39). These overhead expenses include, but are not limited to, OCA's
20 Metairie, La. employee salaries, OCA's director's fees, utilities, telephone expenses, office supplies,
21 cleaning and maintenance, and licenses/taxes/fees. (SUF ¶39).

22 In November 2005, OCA admitted, in documents, including an 8-K, filed with the Securities
23 and Exchange Commission in accordance with OCA's public reporting obligations, that it is either
24 a partner in Dr. Callender's practice or that OCA is itself the owner of the practice under the BSA.
25 (SUF ¶46, Exhibit 2).

26 In the section of the 8-K titled "Financial Statements," OCA makes the following admissions:
27

28 ² OCA was entitled to the minimum guaranteed fee of \$116,770.00 during the first full
three years of the parties' relationship (1999-2001).

1 Before the issuance of Staff Accounting Bulletin 101 ("SAB 101")
2 by the SEC in December, 1999, we considered ourselves to be a
3 **partner in nationwide orthodontic practices and considered our
revenues to be derived from direct service to patients.**

4 * * *

5 With the issuance in December 2003 of revised Financial Accounting
6 Standards Board Interpretation No. 46 ("FIN 46"), we again tested
7 our relations with our doctors and determined on the basis of the FIN
8 46 guidance that **we were indeed an orthodontic practice** for
financial reporting purposes and therefore must recognize our revenue
on that basis under SAB 101 and FIN 46. . . **[B]ecause we are the
only publicly traded orthodontic practice**, we have no peer
guidance or rulings to look to for assistance in developing methods
that comply with SAB 101 and FIN 46.

9 (SUF ¶46, Exhibit 2)(Emphasis added).

10 **III. APPROPRIATE LEGAL STANDARD**

11 To prevail on a motion for summary judgment, a defendant must show one or more elements
12 of the plaintiff's cause of action cannot be established or that there is a complete defense to that
13 cause of action. CODE OF CIV. PRO. § 437c(o). The evidence of the moving party is strictly
14 construed and that of the opponent liberally construed, and any doubts as to the propriety of granting
15 a motion are to be resolved in favor of the party opposing the motion. Summary judgment provides
16 courts with a mechanism "to cut through the parties' pleadings in order to determine whether, despite
17 their allegations, trial is in fact necessary to resolve their dispute." *See, generally, Aguilar v. Atlantic*
18 *Richfield Company* (2001) 25 Cal. 4th 826, 843. A court must grant a motion "if all the papers
19 submitted show that there is no triable issue as to any material fact." CODE OF CIV. PRO. §§ 437c(c),
20 437c(f)(2).

21 In California, "courts [do] not enforce contracts requiring the performance of an illegal act."
22 *Evans Prods. Co. v. Millmen's Union No. 550* (1984) 159 Cal. App. 3d 815, 819. "A contract may
23 be illegal or in contravention of public policy ... in its apparent substance and purpose" *Kallen*
24 *v. Delug* (1984) 157 Cal. App. 3d 940, 949. Stated otherwise, "[w]here the object of the contract
25 is illegal, courts generally will not enforce [the contract] or lend assistance to a party who seeks to
26 benefit from an illegal act." *Yuba Cypress Hous. Partners, Ltd. v. Area Developers* (2002) 98 Ca.
27 App. 4th 1077, 1082. "Whether a contract is illegal or contrary to public policy is a question of law
28 ..." *Jackson v. Rogers & Wells* (1989) 210 Cal. App. 3d 336, 349-50.

1 **IV. ARGUMENT AND AUTHORITIES**

2 **A. The Agreements Illegally Permit OCA to Engage in the Unauthorized**
3 **Corporate Practice of Dentistry in Violation of California Law.**

4 Dr. Callender raised as affirmative defenses the doctrine of illegality on the basis that OCA's
5 claims are premised upon an illegal, unenforceable contract that violates the public policy of the
6 State of California (Affirmative Defenses Four and Five). As set forth in detail below, the BSA
7 impermissibly allows OCA to engage in the unauthorized corporate practice of dentistry in violation
8 of California law. The BSA accomplishes this illegal end by delegating rights and responsibilities
9 to OCA, a non-licensee, that permit it to own, manage and/or conduct the business affairs of Dr.
10 Callender.

11 **1. California recognizes a broad prohibition on the corporate practice of**
12 **dentistry.**

13 The corporate practice of dentistry doctrine prohibits corporations from engaging in the
14 learned profession of dentistry either directly or through licensed professionals who are otherwise
15 authorized to practice dentistry. *See, State Bd. of Med. Exam'rs v. Pac. Health Corp., Inc.* (1938)
16 12 Cal. 2d 156, 158; *Painless Parker v. Bd. of Dental Exam'rs* (1932) 216 Cal. 285, 295-96; *Pac.*
17 *Employers, Inc. v. Carpenter* (1935) 10 Cal. App. 2d 592, 595-96. The foundation of the corporate
18 practice of dentistry doctrine rests on the principle that corporations cannot be licensed to practice
19 dentistry because only a human being can sustain the education, training, and character-screening
20 processes which are prerequisites to receiving a dental license. *See, Carpenter* 10 Cal. App. 2d at
21 595-96; *Painless Parker* 216 Cal. at 295-96; *see also, Berlin v. Sarah Bush Lincoln Health Ctr.*, 688
22 N.E. 2d 106, 110 (Ill. 1997)³; *Dr. Allison, Dentist, Inc. v. Allison*, 196 N.E. 799, 801 (Ill. 1935)⁴.

23 The prohibition on the corporate practice of dentistry is supported by several public policy
24 concerns, including the dangers of lay control over the professional judgment of dentists, the division
25 of the dentist's loyalty between his patients and profit-making master, and the commercialization of
26 the medical professions. *See, Berlin* 688 N.E. 2d at 110; *Conrad v. Med. Bd. of Cal.* (1996) 48 Cal.

27 ³ Attached hereto as Exhibit "A".

28 ⁴ Attached hereto as Exhibit "B".

1 App. 4th 1038, 1040-44. “The ethics of any profession is based upon personal or individual
2 responsibility. One who practices a profession is responsible directly to his patient Hence, he
3 cannot properly act in the practice of his vocation as an agent of a corporation or business partnership
4 whose interests in the very nature of the case are commercial in character.” Ezell v. Ritholz, 198
5 S.E. 419, 424 (S.C. 1938)⁵. As the California Supreme Court stated:

6 The practice of dentistry is not open to commercial exploitation
7 That a corporation may not engage in the practice of law, medicine,
8 or dentistry is a settled question in this state. None of those
9 professions which involves a relationship of a personal as well as
 professional character, which has to do with personal privacy, can be
 placed in the same category as druggists, architects, or other vocations
 where no such relationship exists.

10 Painless Parker 216 Cal. at 298.

11 The State of California has codified the ban on the corporate practice of dentistry by adoption
12 of the CDPA, although the Act itself is merely confirmatory of the already existing common law.
13 *See, Carpenter* 52 P. 2d at 994. Specifically, the CDPA provides that, “[i]t is unlawful for any
14 person to engage in the practice of dentistry in the state ... unless the person has a valid, unexpired
15 license or special permit from the board.” BUS. & PROF. CODE § 1626. Section 1625(e) of the
16 CDPA provides that “a person practices dentistry within the meaning of this chapter who ...
17 ***[m]anages or conducts as manager, proprietor, conductor, lessor, or otherwise***, a place where
18 dental operations are performed.” BUS. & PROF. CODE § 1625(e)(emphasis added). This section is
19 written in the disjunctive. Accordingly, it is not necessary that an unlicensed person or entity own,⁶
20 manage ***and*** conduct a place where dental operations are performed. Rather, the section is violated
21 if a person or entity ***either*** owns, manages ***or*** conducts a place where dental operations are
22 performed. *See, e.g., Penny v. OrthAlliance, Inc.*, 255 F. Supp. 2d 579, 581 (N.D. Tex. 2003)⁷, in
23 which the District Court construed a Texas statute containing similar language. *See, TEX. OCC.*

25 ⁵ Attached hereto as Exhibit “C”.

26 ⁶ Black’s Law Dictionary defines “proprietor” as: “One who has the legal right or
27 exclusive title to anything. In many instances it is synonymous with owner.” BLACK’S LAW
28 DICTIONARY (6th ed. 1991)

⁷ Attached hereto as Exhibit “D”.

1 CODE ANN. § 251.003(a)(4)⁸.

2 Moreover, the means by which a person may “conduct” an orthodontic office under the
3 CDPA is intentionally drafted broadly so as to apply to managers, proprietors, conductors, lessors,
4 “*or otherwise.*” Clearly, this section is designed to prevent lay corporations and other unlicensed
5 persons from circumventing the restrictions of the CDPA through mere shams that elevate form over
6 substance. California jurisprudence is consistent with this interpretation of the CDPA, and it has
7 been so for at least the past seventy years.

8 The seminal case in the state of California on this subject is Painless Parker v. Board of
9 Dental Examiners (1932) 216 Cal. 285. In Painless Parker, the Board of Dental Examiners
10 suspended the license of a dentist who had been involved in the formation of corporations, which
11 were not licensed to practice dentistry, but whose enumerated purposes were “interlinked” in
12 “multifarious dental projects.” Id. at 290, 295. The dentist in Painless Parker was employed by
13 corporations that were not licensed to practice dentistry. Id. at 296. One of the unlicensed
14 corporations exercised management responsibilities over the dentist’s operations, leased various
15 office and office equipment to the dental operations, and collected money from the operations, which
16 the corporation then used to pay “all rentals, salaries of dentists and operative expenses of [the]
17 Painless Parker [Dental operations].” Id. at 293. In this case, OCA received 35% of the practice’s
18 profits, OCA leased one of the orthodontic offices and the BSA authorized OCA to exercise
19 complete management control over the practice, employ and supervise Dr. Callender’s staff, and
20 collect and control all revenues generated by the practice, including payment of Dr. Callender’s
21 salary. (SUF ¶¶13-34).

22 The California Supreme Court addressed the question of whether these activities ran afoul
23 of the predecessor to CDPA § 1625(e), which also prohibited lay corporations and unlicensed
24 persons from managing or conducting the affairs of dental offices. Id. at 295-96. The Supreme
25 Court concluded that the corporate activities violated the prohibition on the corporate practice of
26 dentistry:

27 Appellant claims that there is a distinction between the practice of
28

⁸ Attached hereto as Exhibit “E”.

dentistry which the statute undertakes to regulate and the purely business side of the practice; that the first requires skill and learning, while the latter requires only training in business transactions, ... [b]ut we are not prepared to hold with the contention that a corporation or an unlicensed person may not be prevented from managing, conducting or controlling what petitioner terms the “business side” of the practice of dentistry. ***The law does not assume to divide the practice of dentistry into such departments.*** Either one may extend into the domain of the other in respects that would make such a division impractical if not impossible. The subject is treated as a whole.

Id. at 295-96 (emphasis added). The California Supreme Court was especially mindful of the intrusion of “purely commercial enterprises” into the practice of dentistry and concluded that “[t]he practice of dentistry is not open to commercial exploitation [and] [s]uch would be its fate if the methods adopted [by the parties] should become general.” Id. at 298.

The Painless Parker decision remains binding authority in the State of California, some seventy years after its publication. The Supreme Court’s reasoning in Painless Parker has even been expanded to include other disciplines within the medical profession. In California Association of Dispensing Opticians v. Pearle Vision Center, Inc., the California Court of Appeal held that a retail optometric franchiser’s control over decisions made by practitioner constituted the illegal corporate practice of medicine. (1983) 143 Cal. App. 3d 419. The contractual agreement in California Association of Dispensing Opticians was illegal because, among other things, the agreement granted the franchisor “the power to control many facets of the optometrist’s practice of optometry. For example, with respect to real property arrangements, [the franchisor was authorized to] approve the site of the optometrist’s office.” Id. at 427. Citing this and other restrictive provisions in the franchise agreement, the Court of Appeal held that the franchisor’s control rendered the franchise program illegal. “The confidential health care relationship requires the professional’s ***undivided*** responsibility and freedom from commercial exploitation. This relationship is essential. The public would be jeopardized if a large corporation with pecuniary profits as its principal goal were allowed to dominate the field.” Id. at 434 (citing Painless Parker), emphasis added.

Likewise, in SteinSmith v. Medical Board (2002) 85 Cal. App. 4th 458, the California Court of Appeal addressed the question of whether a licensed physician was properly issued a citation by the California Medical Board for performing work at a clinic that was partially owned by two

1 individuals who were not licensed physicians. The physician contended that the non-licensed owners
2 of the facility did not practice medicine because they merely owned the clinic and “administered its
3 business affairs.” Id. at 465. Citing Painless Parker, the Court of Appeal rejected this argument.
4 “The dentist [in Painless Parker] argued, as Steinsmith does here, that the licensing requirements for
5 the provision of professional services did not apply to ‘the purely business side of the practice.’ Our
6 Supreme Court rejected that argument” Ibid.

7 The line of cases beginning with Painless Parker and including, most recently, the Steinsmith
8 case, is judicial confirmation of the broad proscription against the corporate practice of dentistry
9 codified by Section 1625(e) of the CDPA.

10 **2. OCA is a “partner” in the orthodontic practice in violation of the CDPA.**

11 For years OCA has been dodging and weaving, claiming publicly that it is an independent
12 service provider and disclaiming any ownership of its affiliated orthodontic practices, while OCA’s
13 contracts with its affiliates and accounting practices reflect an ownership/partner relationship.
14 Recently, OCA was forced to lift the veil on its duplicity and admit that it is an owner of the
15 affiliated practices.

16 On November 4, 2005, OCA filed a Form 8-K with the Securities and Exchange Commission
17 attempting to explain why it is unable to file reliable financial reports with the agency. (SUF ¶46,
18 Exhibit 2). The November 4, 2005 8-K contains two admissions which are relevant to the Court’s
19 consideration of the instant summary judgment motion. In the section of the 8-K titled “Financial
20 Statements,” OCA makes the following admissions:

21 Before the issuance of Staff Accounting Bulletin 101 (“SAB 101”) by the SEC in December, 1999, we considered ourselves to be a
22 **partner in nationwide orthodontic practices and considered our**
23 **revenues to be derived from direct service to patients.**

24 * * *

25 With the issuance in December 2003 of revised Financial Accounting
26 Standards Board Interpretation No. 46 (“FIN 46 ”), we again tested
27 our relations with our doctors and determined on the basis of the FIN
28 46 guidance that **we were indeed an orthodontic practice** for
financial reporting purposes and therefore must recognize our revenue
on that basis under SAB 101 and FIN 46. . . [B]ecause **we are the**
only publicly traded orthodontic practice, we have no peer
guidance or rulings to look to for assistance in developing methods
that comply with SAB 101 and FIN 46.

1 (SUF ¶46, Exhibit 2)(Emphasis added).

2 Based upon this admission, on December 13, 2005, Senior United States District Judge
3 Milton I. Shadur held OCA's contract with Dr. Christine Michaels in Illinois illegal under the Illinois
4 Dental Practices Act and, therefore, unenforceable. *See*, Memorandum Opinion and Order dated
5 December 13, 2005 filed in Orthodontic Centers of Illinois, Inc. v. Christine Michaels, D.D.S., P.C.,
6 et al., Case No. 04-C6852 in the United States District Court for the Northern District of Illinois,
7 Eastern Division, a copy of which is attached hereto as Exhibit "F". The Illinois Dental Practices
8 Act and the California Dental Practices Act are substantially identical and serve the same public
9 policy purposes. *See*, 225 ILL. COMP. STAT. §§ 25/8, 25/17, and 25/44 (2005)⁹. In his ruling, Judge
10 Shadur noted:

11 In this instance [OCA] cannot gainsay, in addition to the congeries of
12 other factors that go to make up its inter-relationship with Dr.
13 Michaels, that it receives 50% of Dr. Michaels' net profits. When all
14 the underbrush of attempted disclaimer is cleared away, that means
15 that every dollar derived from patient care – in the practice of
16 dentistry – by Dr. Michaels individually and by any other orthodontist
17 and dental technicians working in Dr. Michaels' facility, 50 cents less
18 a ratable part of the associated expenses go directly into [OCA's]
19 corporate pocket. [OCA] cannot divorce itself from that economic
20 reality by protesting that the people and the fruits of whose personal
21 service efforts it shares – efforts that provide patient care – are not
22 formally on its payroll.

23 Little wonder that the SEC accounting standards reflect that reality
24 and compile what is a fatal admission by [OCA]. In short, [OCA's]
25 attempted switch-hitting will not be sanctioned in this Court.

26 (Judge Shadur's Memorandum of Opinion and Order at page 17).

27 Under the accounting scheme referenced by Judge Shadur, OCA publicly reports all of the
28 orthodontic revenues generated by Dr. Callender as the revenue of OCA. As explained by OCA to
the public and the SEC in its Form NT 10-K, filed on March 18, 2005¹⁰:

[E]ffective January 1, 2004, the Company records patient revenue
under patient contracts between affiliated practices and their patients,
rather than fee revenue representing the Company's service fees, and
the portion of patient revenue that is retained by practitioners of
affiliated practices is now reflected as an expense in the Company's

⁹ Attached hereto as Exhibit "G".

¹⁰ Attached hereto as Exhibit "H".

1 consolidated statements of income (loss).

2 The accounting change was mandated by Financial Accounting Standards Board Interpretation No.
3 46R, “Consolidation of Variable Interest Entities – an Interpretation of ARB No. 51 (“FIN 46R”)¹¹.
4 By adoption of FIN 46R, “as required”, OCA admits that it has a “controlling financial interest” in
5 Dr. Callender’s practice.

6 OCA wants to play both sides of the argument. When it is time to collect its money and
7 publicly report its revenues, OCA is a partner in the affiliated orthodontic practices. When the
8 Defendants claim that the BSA violates state law, OCA claims that it is simply a management
9 services company providing services for a fee and an independent contractor. When the Defendants
10 claim that OCA fails to provide services, OCA points to the OCA-employed staff at the orthodontic
11 practice. But when OCA’s control and management of the practice is raised as a violation of state
12 law, OCA renounces any significant relationship with the staff. As Senior U.S. District Judge
13 Shadur noted, this Court should not countenance such gamesmanship.

14 The overall relationship between OCA and Dr. Callender indicates that OCA sought to and
15 became a “business partner” with Dr. Callender in the ownership and operation of the orthodontic
16 practice. Specifically, OCA paid Dr. Callender a substantial amount of consideration at the inception
17 of the affiliation, purportedly for the value of the assets it purchased under the Stock Purchase
18 Agreement. However, the amount of consideration paid to Dr. Callender under the Stock Purchase
19 Agreement (\$926,319.00) was not linked to the value of the assets being purchased, which had a fair
20 market value of \$20,000.00 to \$25,000.00. (SUF ¶¶41, 42). Rather, the amount paid by OCA under
21 the Stock Purchase Agreement was a multiple of Dr. Callender’s net income. (BSA ¶3.2(b)(I); SUF
22 ¶8).

23 What OCA really acquired was a percentage of the practice’s orthodontic revenues over a
24 term of 25 years, guaranteeing an income stream for OCA from the practice’s profits. (SUF ¶¶12,
25 37). OCA invested in the future income stream of Dr. Callender’s orthodontic practice and sought
26 to recoup its initial investment through guaranteed minimum service fees set at 15% rate of return
27 on OCA’s investment and a minimum term of twenty-five (25) years of service fee payments

28 ¹¹ Attached hereto as Exhibit “I”.

1 calculated at 35% of Dr. Callender's net operating margin.¹² (BSA ¶¶ 3.1, 3.2, and 4.1; SUF ¶¶ 12,
2 37, 40, and 41).

3 **3. The BSA illegally permits OCA to manage and/or conduct Dr.**
4 **Callender's practice.**

5 The terms "manage" and "conduct" are not defined by the CDPA. Black's Law Dictionary
6 defines the terms as follows: *Manage* – "To control and direct, to administer, to take charge of. To
7 conduct; to carry on the concerns of a business or establishment . . ."; *Conduct* – "To manage; direct,
8 lead; have direction; carry on; regulate; do business." BLACK'S LAW DICTIONARY (6th ed. 1991).
9 Under these generally understood definitions, the BSA clearly obligates OCA to manage and conduct
10 Dr. Callender's orthodontic practices in violation of the CDPA.

11 OCA purports to own the very assets that are essential to the operation of the orthodontic
12 practice. Likewise, OCA holds title to the leasehold interest of one of the facilities where Dr.
13 Callender practices orthodontics. (SUF ¶14). Consequently, under the BSA, OCA can directly
14 influence Dr. Callender's ability to practice orthodontics simply by prohibiting Dr. Callender from
15 using its space, or merely by defaulting under the terms of its lease agreements with the landlord.
16 Stated simply, if OCA, as owner and lessor of the orthodontic equipment and facilities, did not allow
17 Dr. Callender to use those assets and facilities, Dr. Callender would not have the essential
18 equipment, tools, furniture, furnishings, and facilities required to practice orthodontics.

19 OCA's control over the acquisition and ownership of equipment, as well as OCA's pervasive
20 control over how such equipment should be purchased and maintained, readily establishes that OCA
21 has a dominant voice in the daily operation of Dr. Callender's orthodontic practice and, as such, is
22 engaging in managerial responsibilities. As one California court has noted:

23 [T]he prospective purchase of a piece of [medical] equipment could
24 be impacted by business considerations (cost, gross billings to be
25 generated, space and employee needs), medical considerations (type
26 of equipment needed, scope of practice, skill levels required by
27 operators of the equipment, medical ethics), or by an amalgam of
28 factors emanating from both business and medical areas. The
interfacing of these variables may also require medical training,

12 Since virtually all of the costs incurred by OCA, including OCA's corporate overhead
expenses, are charged back to Dr. Callender and other affiliates as "Center Expenses," OCA's service
fee is all profit. (SUF ¶39).

1 experience, and judgment.

2 Marik v. Superior Court (1987) 191 Cal. App. 3d 1136 n.4. Since one of the purposes of the CDPA
3 is to prophylactically prevent the commercial concerns of lay corporations from infiltrating
4 professional decisions such as the acquisition, repair or upkeep of equipment, the delegation of such
5 power to OCA directly implicates the concerns of the Legislature. A significant part of the
6 relationship found to be illegal by the California Supreme Court in Painless Parker involved a lay
7 corporation's leasing of equipment and facilities to a licensed professional. *See, Painless Parker* 216
8 Cal. at 293. Likewise, in California Association of Dispensing Opticians, the franchise relationship
9 found to violate the ban on the corporate practice of medicine in that case involved a corporation's
10 control over the facilities of licensed professionals. 147 Cal App. 3d at 427.

11 Further, the BSA delegates authority to OCA that requires it to carry on Dr. Callender's on-
12 going business concerns, *i.e.*, to manage their orthodontic offices. (SUF ¶14-34). While OCA's
13 attorneys drafted the BSA to include language to conceal this and give the initial appearance that
14 OCA's obligations were limited merely to "consulting" with Dr. Callender, as opposed to actually
15 providing managerial services, the rights and responsibilities delegated to OCA under the BSA
16 demonstrate the contrary. Specifically, the BSA states that OCA shall provide the following
17 management and administration of the orthodontic practice: (a) employment, scheduling, and
18 training of the office staff (BSA ¶1.1(I); (b) provision and maintenance of office space, telephones,
19 and utilities (BSA ¶1.1(ii); (c) provision and maintenance of equipment (BSA ¶1.1(iii); (d) payroll
20 administration and accounting (BSA ¶1.1(iv); (e) installation of computer hardware and software,
21 and training of Dr. Callender's staff in the utilization thereof (BSA ¶1.1(v); (f) ordering and
22 management of supplies and inventory (BSA ¶1.1(vi); (g) billing and collections (BSA ¶1.1(vii); (h)
23 bookkeeping, accounting, and preparation of financial statements (BSA ¶1.1(viii); (I) processing and
24 disbursement for accounts and trade payables (BSA ¶1.1(ix); (k) assistance in recruiting
25 orthodontists (BSA ¶1.1(x); (l) preparation of statistical data and analysis of Dr. Callender's
26 operations (BSA ¶1.1(xi); (m) legal services for Dr. Callender's routine operations (BSA ¶1.1(xii);
27 (n) consulting advice on practice efficiency and productivity, center locations and layouts, and staff
28 salaries, benefits, and performance and incentive plans (BSA ¶1.1(xiii)).

1 OCA has the power to influence how the business affairs of Dr. Callender's orthodontic
2 practice are carried out. For example, OCA purports to employ all of the non-professional staff who
3 work at Dr. Callender's orthodontic practice. (SUF ¶13). As a result, OCA has a direct influence
4 on those persons who are essential to the daily functioning of Dr. Callender's orthodontic practice.
5 Because the non-professional staff of Dr. Callender's orthodontic practice is responsible for the daily
6 operation of the practice, OCA – *a fortiori* – is also responsible for the daily operation of Dr.
7 Callender's orthodontic practice.

8 It is difficult to conceive how OCA could seriously deny that its extensive rights and
9 obligations under the BSA do not give it the right to “manage,” “control and direct” or “to carry on
10 the concerns” of Dr. Callender's orthodontic practice. The BSA was clearly drafted to accomplish
11 this objective, as it unequivocally obligates OCA to assume responsibility for the core management,
12 administrative, operational and financial functions of the practices. As the U.S. District Court for
13 the Northern District of Texas correctly found after analyzing a similar agreement, “the express
14 purpose of the Service Agreements is to allow OrthAlliance to control the functioning of or to
15 manage the orthodontic offices.” Penny v. OrthAlliance, Inc., 255 F. Supp. 2d 579, 582-583 (N.D.
16 Tex. 2003).

17 Agreeing with the analysis in Penny, the U.S. District Court for the Eastern District of Texas,
18 recently held that a business services agreement, which is identical in all material respects to Dr.
19 Callender's BSA, was illegal and unenforceable on the basis that “OCA owns, operates and
20 maintains [the] office.” See, David Becka, D.D.S., et al. v. Orthodontic Centers of America, Inc.,
21 Case No. 4:03CV80 in the U.S. District Court for the Eastern District of Texas, Sherman Division,
22 a copy of which is attached hereto as Exhibit “J”.¹³ The Texas statute construed in the Penny and
23 Becka cases employs language very similar to § 1625(e) of the CDPA. Under the Texas Dental
24 Practices Act, an unlicensed person or corporation practices dentistry if he or she “owns, maintains,
25 or operates an office or place of business in which the person employs or engages under any type of

26
27 ¹³ After the District Court found the BSA in the Becka case illegal and unenforceable
28 on March 31, 2005, OCA settled the case and, as part of the settlement, the District Court opinion
was withdrawn. Accordingly, the opinion is not precedent. However, the Court's analysis is given
the similarity of the statutes and contracts at issue.

1 contract another person to practice dentistry.” Section 251.003(a)(4), TEX. OCC. CODE ANN.
2 (Vernon 2004).

3 OCA cannot circumvent the ban on the corporate practice of dentistry simply by claiming
4 that its activities are limited to the “business side” of Dr. Callender’s orthodontic practice. Rather,
5 the relationship created by the BSA and Stock Purchase Agreement are the same as that of a “lessor”
6 or a “proprietor,” relationships expressly prohibited by the CDPA. Given the pervasive rights and
7 responsibilities delegated to OCA under the BSA, it is clear that OCA “manages” and/or “conducts”
8 Dr. Callender’s orthodontic practice in violation of the CDPA.¹⁴ The BSA, therefore, is void and
9 illegal as a matter of law.

10 **4. OCA illegally serves as Dr. Callender’s “employer” in violation of the**
11 **CDPA.**

12 In addition to managing and conducting Dr. Callender’s orthodontic practice, OCA also
13 violates the CDPA by serving as the “employer” of Dr. Callender. Although OCA went to great
14 efforts to disavow any direct or *de jure* employment relationship, the BSA nevertheless establishes
15 an indirect or *de facto* employment relationship which is equally prohibited under California law.
16 This is confirmed by OCA’s adoption of FIN 46R, which accounts for Dr. Callender’s salary and
17 profit sharing as an expense against OCA’s income, defined as all orthodontic fees generated by Dr.
18 Callender and OCA’s other affiliated orthodontists.

19 To ensure that OCA’s investment in the future income stream of Dr. Callender was not
20 hindered, OCA required Dr. Callender to agree to various covenants not to compete contained in the
21 BSA which effectively prevented Dr. Callender from practicing orthodontics within the Area of
22 Dominant Influence or within 1.5 miles of any of Dr. Callender’s current offices. (SUF ¶35). As
23 a result of these restrictions, OCA, a lay corporation that is statutorily prohibited from practicing
24 orthodontics, purports to have the right to prevent licensed professionals from treating their patients
25 even though OCA does not, by definition, compete with those professionals.

26 California law broadly prohibits lay corporations from influencing licensed professionals

27 ¹⁴ Whether OCA actually exercises the authority delegated to it is irrelevant as “it is the
28 evil tendency and not the actual result which is the test of illegality.” See, Noble v. City of Palo Alto
(1928) 89 Cal. App. 47, 51.

1 either through a direct or indirect employment relationship. As one California Court of Appeal has
2 reasoned:

3 [W]e need not quibble here over the use of terms as it is immaterial whether the
4 appointed practitioners are termed employees, agents, or appointees of the petitioner.
5 The fact remains that petitioner's agreement was to furnish, in consideration of the
6 premium paid by the insured, the services of doctors and dentists who were to be
appointed, engaged, hired or employed by petitioner for the purpose of furnishing
such services. *Any such agreement* is clearly condemned as unlawful and against
public policy

7 Pac. Employers Ins. Co. v. Carpenter (1935) 10 Cal. App. 2d 592, 601-02 (emphasis added).
8 Because OCA's BSA establishes a *de facto* employer/employee relationship, it is illegal and
9 unenforceable as a matter of law.

10 **B. The BSA Cannot Be Reformed Either Through Severance or Revision.**

11 The BSA cannot be reformed because the illegal portions of the BSA go to the core of, and
12 are essential to facilitate, the illegal management services relationship contemplated by the parties.
13 Accordingly, these provisions constitute the basis of the parties' bargain and serve as the
14 consideration for the parties' contractual scheme. If these provisions are severed, the BSA would
15 no longer even remotely reflect the parties' original intentions.

16 In addition, under California law, "[w]here a contract has but a single object, and such object
17 is unlawful, whether in whole or in part, ... the entire contract is void." CIV. CODE § 1598.
18 Likewise, "[c]ontracts that are contrary to express statutes or to the policy of express statutes ... are
19 illegal contracts. Any such illegality voids the entire contract." Green v. Mt. Diablo Hosp. Dist.
20 (1989) 207 Cal. App. 3d 63, 73. The Agreements, therefore, are void in their entirety and are not
21 subject to reformation.

22 **C. The Illegality Of The BSA Is An Absolute Bar To OCA's Claims.**

23 Under California law, the general rule is that an illegal contract is void as a matter of law and
24 that a court will afford no remedy to the parties thereto. *See, e.g., Colby v. Title Insurance Co. &*
25 *Trust Co.* (1911) 160 Cal. 632, 640. The only remedy for an illegal contract is for the court to leave
26 the parties to an illegal contract where it finds them. *See, Del Rey Realty Co. v. Fourl* (1941) 44 Cal.
27 App. 2d 399, 403; *see, also, Holt v. Morgan* (1954) 128 Cal. App. 2d 113, 116 ("No illegal contract
28 or right arising out of an illegal transaction can be enforced by court action").

1 The law deems that parties to an illegal contract are *in pari delicto* if they both voluntarily
2 entered into the illegal bargain and the turpitude of the parties was mutual. See, Colby 160 Cal. at
3 640. “Where, however, the party seeking the relief is not a free moral agent, and his consent to the
4 illegal transaction is obtained through duress, menace, or undue influence, he is not regarded as *in*
5 *pari delicto* with the party obtaining his consent by the employment of such means ...” Id. at 640-41.
6 In this case, OCA and its attorneys drafted the BSA and its entire business model is premised on the
7 illegal relationship. Therefore, OCA cannot claim to be an innocent party to the transaction whose
8 fault is lesser. At most, the parties share responsibility for entering into the BSA which authorizes
9 OCA to engage in the illegal corporate practice of dentistry.

10 Assuming the parties believed what they were doing was legal, that would not establish a
11 defense to the illegality or reform the illegal BSA. See, Murphy v. San Gabriel Mfg. Co. (1950) 99
12 Cal. App. 2d 365, 368 (“[Defendant] could not plead ignorance of the illegality of the contract under
13 which they were marketing the lots”); Stevens v. Boyes Hot Springs Co. (1931) 113 Cal. App. 479,
14 483 (“Appellants were charged with knowledge of the law when they entered into the illegal
15 contract. It was the right and duty of the court to declare the contract illegal and place the parties *in*
16 *status quo*”). Accordingly, California law dictates that the parties are to be left in their current
17 positions, and OCA’s claims for breach of contract and specific performance fail as a matter of law.

18 OCA’s equitable theories of recovery (promissory estoppel, unjust enrichment, and quantum
19 meruit) cannot be used to upset this principle. Since California law provides that illegal contracts
20 are a nullity, such contracts have no legal existence for any purpose and cannot be the basis for a
21 cause of action either at law *or in equity*. See, R. M. Sherman Co. v. W. R. Thomason, Inc. (1987)
22 191 Cal. App. 3d 559, 563 (citing First National Bank v. Thompson (1931) 212 Cal. 388, 405-06);
23 Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 453-54 (“a party to an illegal contract
24 can neither recover damages for breach nor, by rescinding, recover the performance that he has
25 rendered or its value A contract made contrary to public policy or against the express mandate
26 of a state may not serve as the foundation of any action, *either in law or in equity*, ... and the parties
27 will be left, therefore, where they are found when they come to a court for relief.”)(emphasis added);
28 Int’l Ass’n of Fire Fighters v. City of San Leandro (1986) 181 Cal. App. 3d 179, 182-83; Prime v.

1 Hyne (1968) 260 Cal. App. 2d 397, 402-03 (“[a] party to an illegal contract ... cannot be estopped
2 from relying on the illegality, and cannot waive his right to urge that defense”)(quoting City Lincoln-
3 Mercury Co. v. Lindsey (1959) 52 Cal. 2d 267, 274). As a result, OCA’s “equitable” claims fail as
4 a matter of law.

5 OCA’s claim for fraudulent misrepresentation must also fail. Specifically, OCA claims that
6 the terms of the illegal BSA constitute promises and representations that OCA relied on to its
7 detriment which, according to OCA, justifies its claim for fraud. As set forth above, however, the
8 illegal terms of the parties’ agreements are null, have no effect under California law, and cannot
9 serve as the basis for any cause of action at law or in equity. *See, Fong v. Miller* (1951) 105 Cal.
10 App. 2d 411; Domenigoni v. Imperial Live Stock & Mortgage Co. (1922) 189 Cal. 467, 475 (“A
11 court of equity will not allow itself to become a handmaid of inquiry”)(quoting Kreamer v. Earl
12 (1891) 91 Cal. 112, 118. *See, also, Holm v. Bramwell* (1937) 20 Cal. App. 2d 332, 335-36.
13 Accordingly, OCA cannot circumvent the illegality and unenforceability of the BSA by claiming that
14 the terms of the BSA are actionable misrepresentations.

15 Moreover, the terms of the BSA are not promises or representations that can support tort
16 actions for fraudulent misrepresentation. Any failure to perform the alleged contractual promises
17 or terms in the BSA sounds in contract only, not tort. *See, e.g., Arthur L. Sachs, Inc. v. City of*
18 Oceanside (1984) 151 Cal. App. 3d 315, 322 (“Whether an action is based on contract or tort
19 depends upon the nature of the right sued upon ***If based on breach of promise it is contractual;***
20 ***if based on breach of a noncontractual duty it is tortious If unclear the action will be considered***
21 ***based on contract rather than tort***”)(emphasis added). The crux of OCA’s allegations is that Dr.
22 Callender did not perform obligations defined by the BSA. As a result, OCA’s fraud claim is
23 actionable in contract only. *See, N. Am. Chem. Co. v. Superior Court* (1997) 59 Cal. App. 4th 764,
24 774 (“where the ‘negligent’ performance of a contract amounts to nothing more than a failure to
25 perform the express terms of the contract, the claim is one for contract breach, not negligence”).
26 Therefore, OCA’s fraud claim, like the remainder of OCA’s claims, fails as a matter of law.

1 **VI. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully pray that the Court grant this Motion for
3 Summary Judgment and enter judgment in favor of Defendants or, alternatively, Summarily
4 Adjudicate: (1) the validity of Defendants' affirmative defense based upon illegality, and (2) dismiss
5 Plaintiff's Complaint.

6 Dated: March 14th, 2006

7 Respectfully submitted,

8 PHILIP A. METSON, ESQUIRE

9 and

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12
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