UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

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IN THE MATTER OF:	*	**NO. 06-10179**
OCA, INC.	*	
DEBTOR.	*	

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Transcript of the proceedings taken in the above captioned matter on **Wednesday, April 5, 2006,** the Honorable Jerry A. Brown, United States Bankruptcy Judge, presiding.

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I N D E X

EXHIBITS		MARKED	RECEIVED
Debtor 1	Paternostro Affidavit	8	40
Rocke 1	Rocke Affidavit	14	14

P R O C E E D I N G S

(Wednesday, April 5, 2006)

THE CLERK: Case Number 06-10179, OCA, Inc.

MR. MANTHEY: Good afternoon, Your Honor; Tristan Manthey on behalf of the Debtor entities.

Your Honor, the first matter on the docket is the utilities motion. As Your Honor may recall, on the first day we filed a utilities motion that requested an interim order and that interim order requested that a final hearing be set on the relief provided in that interim order. It provided the utility companies an avenue to which they could object to the adequate assurance procedures that were set forth in the motion.

The Debtors have not received any objections, and for those reasons and for the reasons set forth in the motion, Your Honor, we'd request that the Court enter a final order on this motion.

THE COURT: All right, have you submitted the final order?

MR. MANTHEY: No, not yet, Your Honor. We'll do it this afternoon.

THE COURT: All right, I've reviewed this and there are no objections, and I'll grant this motion and will sign the final order when you submit it.

MR. MANTHEY: Thank you, Your Honor.

MR. HORN: Good afternoon, Your Honor; Warren Horn on

behalf of the Debtors.

Your Honor, the other matter that was on the docket for today is the objections that were filed to the first day orders referred to the First Order and the Second Order. I believe it would be appropriate to allow the objectors, of course, to go forward and present their objections and I'll respond; however, just some housekeeping matters before we start.

With regard to two of the objectors, we have reached a stipulation. We have submitted one stipulation to the Court already. Those are the responses from the doctors referred to as the "Certain Dentists," and that will be found at P-108, P-131, and P-135. The stipulation basically states that the First and Second Order from the first day, I believe they're P-45 and P-46, do not apply to those dentists that are referred to as the "Certain Dentists."

We have also reached a similar stipulation with respect to Dr. Turner, which his objection is found at P-146. The language is a little different, but basically the substance is the same, that the orders do not apply and any subsequent order that is rendered by the Court with regard to the first day motion that those orders relate to, the 105(a) motion, any subsequent orders as well will not apply to Dr. Turner. And we would offer the same additional proviso to the Certain Dentists represented by Mr. Forsyth if he finds that to be necessary as

well.

We have offered to Dr. Sexson, represented by Mr. Smith, the same stipulation and he is considering it and I just wanted to bring that to the Court's attention. We will stipulate, however, for purposes of the hearing today that those two orders -- neither of those two orders apply to Dr. Sexson and his professional association.

With respect to the Debtors' response, the omnibus response, we have submitted to the Court and have provided to all parties in interest, Your Honor, the affidavit of Tony Paternostro. I would like to offer now the original to you to make it a part of the record, if I could approach.

THE COURT: You want to offer it into evidence?

MR. HORN: Yes, sir.

THE COURT: Okay. All right, any objections?

MR. FORSYTH: Your Honor, David Forsyth. I don't have any objection at this time. I understand that Mr. Paternostro might be available if it turns out that someone does want to ask him some questions, I understand he would be made available, depending on how the hearing goes. I don't know that it will be necessary at all, but I just wanted to make that reservation.

THE COURT: All right. Is that correct he'll be available --

MR. HORN: Yes, sir.

THE COURT: -- for cross-examination?

MR. HORN: Yes, sir, Your Honor.

THE COURT: All right, then --

MS. THOMPSON: Excuse me, Your Honor. Excuse me. Marvic Thompson for Dr. Jason Parker. I'm here for Mr. Turner today, who's out of town, and I have a copy of the omnibus response that was filed, but I don't have a copy of the affidavit.

Would you happen to have an extra one --

MR. HORN: Yes, right here.

MS. THOMPSON: -- so I can look at it?

Thank you.

THE COURT: All right, do you wish to take a look at it and reserve your right to object to its being offered in evidence?

MS. THOMPSON: Thank you.

THE COURT: All right, we'll proceed if she wants to object to its being offered into evidence I'll hear the objection.

MR. HORN: Thank you. And, Your Honor, with respect to the show cause motion, the show cause hearing today, in light of the fact that of the 180 affiliated practices affected by the two orders that are before the Court today, in light of the fact that 165 of the affiliated practices after proper notice and advice of the ruling of the Court have not chosen to

file oppositions or objections, I would ask that the Court order that those two orders be maintained as to those affiliated practices who have not chosen to file any objection or response timely.

THE COURT: All right. As to any of those that were served and did not file an objection, what do you need, do you need -- you need another order saying this?

MR. HORN: I'll probably submit a continuing order that the matter came on for hearing just like you do on a usual show cause. I'll submit it to all other parties in interest.

THE COURT: All right.

MR. HORN: Thank you, Your Honor.

And after that I'll turn it over to the objecting parties and I'll reserve the right on behalf of the Debtors to response.

THE COURT: All right, now if I understand correctly what you've represented to me there will be no objection by the Certain Dentists stated in Pleading 108, or Mr. Parson's who filed Pleading 131, or Mr. Burnheimer filed Pleading 135, and Mr. Turner, who filed Pleading 146.

MR. HORN: That's correct, Your Honor.

THE COURT: And there are a couple of others that may or may not be heard from today because you've offered them a stipulation, but they have not yet accepted.

MR. HORN: There's only one other who falls into the

category of doctors who really weren't covered by the two orders. If you recall, we stipulated -- we carved out only those who were performing and had not filed a Notice of Termination or a default letter. Doctors who did not fall under the orders nonetheless because of some confusion or to protect their rights filed pleadings. We have advised them and stipulated on two. The third we've offered the same stipulation. Mr. Smith may choose to argue it. I think he represents one party who may be involved; I don't know, but we offered the stipulation and he's going to talk to his client about that.

MR. SMITH: Your Honor, as to Dr. Sexson, we will accept the stipulation. I just need to give the courtesy to my referring Counsel the opportunity to review the order before agreeing on the final language.

THE COURT: All right.

MR. SMITH: But only as to Dr. Sexson.

MR. HORN: Thank you.

THE COURT: Who else would like to be heard?

MR. FORSYTH: We would, Your Honor.

THE COURT: Perhaps it would be worthwhile for each of you that is still left with an objection to identify yourself for the record as to name, where you're from if you're not from here, and whom you represent, and then I can hear from one of you and those wish to join in would be fine, or those

that wish to be heard separately can do so. But, let's get everyone on the record that's still objecting first.

MR. FORSYTH: Your Honor, David Forsyth. The one objector that I still have is Dr. Paul Rocke, and I'm here to speak on his behalf.

MR. GOLDSTEIN: Good afternoon, Your Honor; Richard Goldstein, Arthur Rice, and Bob Burvant on behalf of Drs. Amason, Appelan, Hamilton, Whitebrown (phonetic) and Wycus (phonetic). It's Pleading 139, Your Honor.

THE COURT: All right.

MR. GOLDSTEIN: Thank you.

MR. STROUD: Good afternoon, Your Honor; Allyn Stroud from the firm of Wiener, Weiss & Madison objecting on behalf of Dr. Nelson and Dr. Risinger.

MR. SMITH: Dan Smith, Your Honor, on behalf of Dr. Litowitz.

THE COURT: All right, just a moment. Which pleading is that? I can't seem to find that one.

MR. MANTHEY: It's 136, Your Honor.

THE COURT: All right. I don't think we have that. That's why I was having difficulty locating it. Maybe it's filed and it just wasn't printed out.

MR. SMITH: I have a copy, Your Honor, and I'll make sure everyone gets one.

THE COURT: All right.

MS. CROUCH: Good afternoon, Your Honor; Svetlana Crouch on behalf of Dr. Marse.

MR. SUNSERI: Doug Sunseri, also co-counsel on behalf of Dr. Marse, George Marse.

THE COURT: All right.

MR. GAMBLE: Judge, Bill Gamble on behalf of Dr. Scortise, Dr. Crosby, Dr. Jordan, and Dr. Bonney.

THE COURT: All right, is that 145?

MR. HORN: It's 145.

THE COURT: All right.

MS. THOMPSON: Your Honor, Marvic Thompson again for Dr. Jason Parker; it's Pleading Number 148.

MR. SMITH: Your Honor, just to clarify, it's 136 for Dr. Litowitz. I've got the receipt filed.

THE COURT: All right. Go ahead.

MR. FORSYTH: Your Honor, David Forsyth.

First, the stipulation that we had entered into on behalf of Certain Dentists covers a group of about a dozen or so of the orthodontists who had terminated before and/or in litigation before. There is one other person who had not filed anything who is also covered by that stipulation and that's a Dr. Nicholas. I just wanted to point that out, Your Honor, agreement with the Debtors. We did not file anything, but he was covered in the stipulation as not being affected by the Second Order.

As to Dr. Rocke, Your Honor, I would like to at this point offer, file, and introduce into evidence an affidavit. A copy has been submitted to the Debtors before that essentially outlines his contentions of default, and I have that marked as Exhibit Rocke 1, if I could submit that to the Court.

MR. HORN: I have no objection, Your Honor. I suppose Dr. Rocke isn't available for testimony however?

MR. FORSYTH: He's not today, because you had said you didn't think it was necessary, but I don't think there would be anything you'd need to ask him today.

MR. HORN: All right.

MR. FORSYTH: But if we get to that we can certainly work something out.

MR. HORN: And we reserve our right to.

MR. FORSYTH: Okay.

THE COURT: All right, I'm going to admit that subject to your right to cross-examine him at a later date if you feel it necessary.

MR. HORN: Thank you, Your Honor.

MR. FORSYTH: And, Your Honor, I might point out that Dr. Rocke is in Colorado, which is one of the states where the Court has decided that the BSA is illegal. But we don't have to get into the merits of that today.

Your Honor, I think focusing on what's there today if

you look at what the Debtors have alleged, it shows why they really aren't entitled to any further relief today, because in effect now that they have gotten 165 people out of the way their whole argument as to why they want to be here, this threatened, I'd guess you'd say run on the back, or voting with their feet has really gone away at this point. They now have 92 percent of the doctors who they have apparently now gotten tied into this at least for the time being, so all they're left with is eight percent. And I think that if you look at what they have asked for under Rule 105 is effectively what they've asked for is injunctive relief which requires a showing of irreparable injury.

Whether or not there was any irreparable injury before to entitle them to this injunctive relief we don't have to get to, because right now these 15 or so, certainly the one I'm talking about and the others today, couldn't possibly fall into that, nor have they shown any basis for it. If you look at the affidavit, in fact, of Mr. Paternostro all it really says about these 15 is that they owe $4.7 million. It doesn't say what the effect would be if any one of these might decide to do something later, but I think that the whole basis for their motion and order has kind of disappeared as to the ones that are left.

They also by their own papers say that they think they're protected, because they have alleged that under 362 or

365 the doctors couldn't do what it is they're afraid to do anyway. So, either they don't believe that or they do believe it and they're doing this totally unnecessarily.

The other thing they say, which I think explains why we shouldn't make these kinds of decisions as they ask today in a vacuum, is that all of these situations are not identical. All of these agreements are a little different. The facts are a little different. The states involved are different. And in effect what they're asking is for you to issue the effect of an injunction in a vacuum without any factual context as to what's being done and why. If, as in when, any of these people decide they want to take some action, based on what the Debtors are saying they'd have to come in and get the stay lifted. That has not happened yet. So, in effect you have before you something -- a controversy where none yet exists. And I think it's not proper for the Court to in effect issue this protective injunction, let's say, without the proper showing and without the showing of the need as to why today the effect of these few people that are left will or will not affect the reorganization; and that's really what's before you, Your Honor.

They're attempting to bypass and sweep away the normal procedures, in many cases adversary proceedings. They're asking for a specific performance in effect of a contract without having the proper predicate for the Court to

determine each one separately. And our point, Your Honor, is that you should look at each one of these on a case-by-case basis if, as, and when it arises and they may arise in different context. They may arise in the context of a lift-stay to proceed with litigation. They may arise with a lift-stay to send default notices. They may arise in the context of assumption or rejection, whatever. But the point is that right now you're asked to decide something in a vacuum where presently, Your Honor, there's no showing as to why it's needed. And we believe that the procedure is improper in any event, because it really is a request for an injunction which requires all of the four factors that normally go into granting a preliminary injunction, which is effectively what we have, getting into likelihood of success and all the other factors.

So, we believe, Your Honor, that at least as to the ones -- at least as to Dr. Rocke, and I assume the other 15, that the Court should in effect set aside that order, the Second Order as to those individuals. They've got what they wanted. They've gotten the protection of 92 percent of these doctors, so they're not going to be faced with this run on the bank for the time being, and for that reason, Your Honor, we believe that the Second Order should be set aside as to these individuals.

THE COURT: Well, let me make sure I understand you. When you said the Debtor is left with only eight percent, you

mean only eight percent have come in here and objected that they're not subject to -- they're not affected by the order?

MR. FORSYTH: Your Honor, they've said -- you have just ruled that 165 of the 180 are now affected by the order.

THE COURT: Okay.

MR. FORSYTH: So, unless those people come in, then they can't do anything. They are now subject to your order by which Your Honor ruled previously. That's 92 percent of all of the dentists that are involved in this. And, again, their stated reason was not the effect of one, or two, or a couple of individual ones, they were concerned about all of these people bolting at the same time and that now can't happen.

THE COURT: But my overruling the objections to the First and Second Order as I see it does not have the effect of an order lifting the stay or refusing to lift the stay, or an order that these contracts are valid or invalid, or can or cannot be rejected or assumed. It simply says that for right now the order is outstanding and people have not objected to it, but that does not preclude any of them from filing a Motion to Lift Stay, or a Motion to Compel Rejection of a Contract, or whatever other motion they wish to bring before to the Court to have an adjudication of the rights of that particular dentist or group of dentists. So, I don't see that it has a far-reaching effect of a temporary restraining order or a preliminary injunction and I don't see that it has to satisfy

that four-point requirement, immediate harm, and --

MR. FORSYTH: Well --

THE COURT: -- the likelihood of success on the merits, and whatever the other two factors are that won't come to mind.

MR. FORSYTH: Public interest --

THE COURT: Yeah.

MR. FORSYTH: -- and the weighing of the -- the balance of the harms.

THE COURT: Yeah.

MR. FORSYTH: Our point, Your Honor, is that this order then really, it's really a meaningless thing. They're asking for an unnecessary -- they're asking --

THE COURT: It may be. It may be and it may be that I don't have to issue any further order.

MR. FORSYTH: Well, but, Your Honor, the point is that we don't know how these things will come up. And if they're saying -- if they're saying that there is in effect a stay that would prohibit anything, there's just no procedural basis, Your Honor, for the relief requested.

THE COURT: Well, wait a minute, wait a minute, there was a stay from the moment the case was filed, --

MR. FORSYTH: That's correct.

THE COURT: -- an automatic stay.

MR. FORSYTH: That's correct. So, why are they

coming in under 105 now to ask you to basically say there's a 105 stay?

THE COURT: I think part of it was that they wanted authority to continue to pay.

MR. FORSYTH: Well, that's under the separate order, Your Honor. Your First Order dealt with that.

THE COURT: Well, no, it was all part of one motion and the only thing the Second Order did, as I saw it, was to make clear that those who had already given a Notice of Termination or Notice of Default were not affected by the First Order. That's the way I read it. That's what I though it was.

MR. FORSYTH: Well, if that's all it -- I don't think that that's the way that it was intended.

MR. HORN: If I could comment if you --

MR. FORSYTH: No --

THE COURT: No, just get 145 and 146 before us.

MR. HORN: Let me -- if I could just comment.

Your Honor, first of all it was not injunctive relief and 105(a) was only one part of the basis for our motion. If you look at the motion in its totality we also relied on 365. And if you recall, Your Honor, what we argued is we are coming in and affirmatively asking for the Court to order us, the Debtors, to continue to perform. As you well know, we don't have to perform and yet in an executory contract context the party does have to. But we came affirmatively and said we're

making it a two-way street. We're not asking for injunctive relief against the other parties. What we're saying is we're telling the Court and telling all parties in this creditor body that we're going to make affirmative steps to perform and all we wanted was a corresponding status quo.

We split the two orders, because what you did, Your Honor, is you were concerned about notice and an opportunity to be heard on the second part of that. The First Order takes care of 45, P-45. It takes care of the obligation of the Debtor to continue to perform.

The Second Order carved out the obligation of the affiliated practices to perform as well, and that's what you set up the show cause on. You set up a show cause -- in fact, you gave people -- you gave affiliated practices an opportunity to object to any of your orders, but the Second Order is the order that imposes on the affiliated practices the obligation to perform as well. But it was a two-way street and that's why we split it in two different orders.

Thank you.

MR. FORSYTH: Your Honor, actually if you look at our objection we did object actually to the extent that the First Order would allow the Debtors to make any payments or do anything that would indeed impose an obligation upon our particular clients.

THE COURT: All right.

MR. FORSYTH: The point is, Your Honor, that right now if someone needs to do anything, then based on what they're saying themselves is they have to come into Court and do it. And we shouldn't have this intermediate obstacle there that's imposed, in effect a comfort order for something where we don't know what the consequences of that might be. But I think that for them to just come in and say "We'd like this," without showing some extraordinary reason for it is improper and completely unnecessary at this point, because, again, the predicate was the concern about all of these people running off where they would have no income. They've gotten 92 percent of this and I don't think, Your Honor, that they have now before you in the current context a need for this order at all and we request that it be --

THE COURT: Well --

MR. FORSYTH: -- deemed to not apply to these individuals.

THE COURT: -- my only -- as I see it the only thing I'm called upon to do, I don't think I'm -- I retract what I said to Mr. Horn. I don't think I'm called upon or should issue an order affirming that order. I think the only thing I need to do is simply sustain or reject the various objections and then that's without any adjudicatory effect as whether the contracts are valid, whether the --

MR. FORSYTH: That's correct, Your Honor.

THE COURT: -- whether they're invalid under state law. It's up to the parties that want to raise that in a particularized factual context, which you made the point we have to have some facts before I start deciding it. It's up to somebody to bring that all before the Court, either the Debtor to accept -- to ratify executory contracts, or the doctors to call upon them to reject it, or a Motion to Lift Stay to lift the automatic stay and lift whatever effect this order may have. I don't think it has any on their right to proceed in state court or what have you.

MR. FORSYTH: Your Honor, the way the order reads it's not limited temporally or anything. It just says that the doctors shall continue to comply. And our point is that that order has no place. I don't know about the ones that didn't object, but we ought to have a level playing field and start from scratch, which is let them file what they want and we'll file what we want, and they can come up in the proper context.

THE COURT: Well, when you start from scratch in bankruptcy you really don't start from scratch. The creditors start on an uneven field because they start with the automatic stay order against them.

MR. FORSYTH: We understand that, and that's why they're asking for even more un-level. The point is it's there, the stay is there. This order is completely unnecessary, superfluous, and not justified. I know others

have things they want to add to this, Your Honor, but we just don't think it's appropriate.

THE COURT: I think that would further confuse people. If I say it's superfluous and should not have been entered, then the 92 percent is going to try to terminate, I think.

MR. FORSYTH: Well, Your Honor has already ruled I think as to them, but if anyone else has anything, that's our argument.

THE COURT: Well, I'll hear the other arguments. I think I can rule on them all at one time.

MR. GOLDSTEIN: Good afternoon, Your Honor; Richard Goldstein on behalf of Drs. Amason, Appelan, Hamilton, Whitebrown, and Wycus.

Given the Court's comments to Mr. Forsyth's arguments, we had filed this objection to avoid the request of OCA to confirm the first day order that it would preclude the doctors from raising these issues. And on behalf of these doctors we did raise the issues as to the impropriety as we saw it of this attempted injunctive relief, and we raised the issues of legality or illegality, the ability to -- the breaches of the contract both monetary and non-monetary to preserve them in the event that the order had the impact as we read that we thought it did. But given the Court's comments, we've raised the objections and if we're free to now file

appropriate pleadings and not be foreclosed from it, we're satisfied with that and we'll proceed to file those papers and bring the matter before the Court under the proper motion practice or pleading practice.

Thank you, Judge.

MR. GAMBLE: Your Honor, Bill Gamble for Drs. Scortise, et cetera.

The Court's comments has provided some context for our objection, but what I'm still concerned about is Mr. Horn's reference to 365 and this having 365 executory contract elements. And that is as I see the Court's order it has ordered my clients to comply with BSAs. The BSAs provide that the money that will be collected from the practice will be deposited into an account and then in one case swept into OCA's accounts, and in another case it will become the money of OCA. And all the BCAs that I've seen provide that OCA can grant a security interest in the monies that are generated under the BSAs.

THE COURT: It already has.

MR. GAMBLE: Well, I haven't seen --

THE COURT: There's a DIP order, isn't there?

MR. HORN: Well, we're still working on a final DIP order to present to the Court, but there is an agreement in place.

THE COURT: Okay.

MR. GAMBLE: Okay, well, that is the aspect that concerns me because if post-petition my clients' monies are going to not be held for the purposes provided in the executory contracts, but are rather going to become the property of OCA, the Debtor, and the Debtor can grant security -- has security interest in the pre-petitions and can grant security in the post-petitions, then I think we have a question as to whether or not this is a financial accommodation under 365(c) and not permitted.

THE COURT: That's not a change in the way it was done before, is it?

MR. GAMBLE: No, it's not.

THE COURT: I don't think there's any change.

MR. GAMBLE: But a financial accommodation can't be assumed. So, what I'm saying is that what in effect the Court's order says that requires that the monies continue to be in that position and security interest be granted in the receivables and revenues generated from my dentist's practice in favor the Debtor's other creditors creates a financial accommodation for the Debtor which it can't assume without providing adequate protection under 365(c).

So, I think we need to not allow the sweeps and not allow the money generated from these practice post-petition to become the property and to be the property of the Debtor. And when the Court says that the BCA shall be enforced and we shall

continue to perform, we create that situation that from the date that the petition was filed until such date as we can get this thing heard, we're going to lose the money that's created in the interim.

THE COURT: I think we're creating, I think we're just simply continuing a situation that already existed.

MR. GAMBLE: Which would be permissible but for 365(c); 365(c) doesn't allow the Debtor to assume a financial accommodation transaction. I think this case raises those questions that these -- my dentists --

THE COURT: All right. Let me hear from -- sorry, had you finished?

MR. GAMBLE: Yes, I had.

THE COURT: All right. Let me hear from Counsel.

MR. HORN: Thank you, Your Honor.

First of all, the order that Mr. Gamble complains of clearly states it's until further order of the Court. There is no preclusion or restriction of rights of any parties affected by either of these two orders. They have full opportunity, reservation, and indeed have been asked and have suggested in our response by Debtors that they file the appropriate pleadings to bring these issues before the Court.

With regard to his argument on the security interest of the secured lender, I would suggest that that's an argument more appropriate to be advanced in some reference to the DIP

financing and not in response to this motion.

And, lastly, I think Your Honor is absolutely correct, the secured lender had a priority interest on the same receivables pre-petition as they have post-petition. There's no accommodation. There's no greater right. There's no greater protection to the secured lender, and indeed there's no effect on the pre-petition affiliated practices or there's no effect on the monies pre-petition as opposed to post-petition as they relate to the affiliated practices. So, I would suggest that those arguments fail as they relate to the order that was put into place that this motion is subject to.

MR. GAMBLE: Your Honor, just to be clear, I don't quarrel with Mr. Horn's argument that pre-petition receivables or the cash generated from the collection of pre-petition receivables should be governed that way. What I'm worried about are post-petition receivables and the cash generated from post-petition receivables from that date until such time as we can get in here to vacate or get relief from the stay. Those are the ones -- that's the money that I don't think that this order should require and that's the portion that I have objected to that require that these dentists comply with, with respect to post-petition receivables.

MR. HORN: Your Honor, that was the purpose of the First Order. The First Order ordered payment of pre-petition debts and performance of the Debtor under the BSAs. What

Mr. Gamble is really arguing is some contest or some problem that he has with the DIP order. That's not with respect to our stay put status quo order under the BSAs. If he has some argument about the use of funds, accounts receivable, I would again argue these affiliated practices are in no worse shape, they're in no different shape post-petition as they were pre-petition, and he has more than ample opportunity to raise those issues in the context of any other motion before the Court. This order doesn't really have to deal with the issue of post-petition financing and the effect of the accounts receivables. It's nothing more than the status quo. We're going to perform; you perform. Now, issues on what happens with the funds, he can take that up with respect to the DIP order.

MR. SMITH: Your Honor, this is the same issue, but factually it's different for Dr. Litowitz.

THE COURT: Now, who are you representing?

MR. SMITH: Dr. Litowitz.

THE COURT: Litowitz, okay.

MR. SMITH: And in Dr. Litowitz's contract it provides that on a monthly basis the Debtor is to purchase his accounts receivable. Until the Debtor purchases his accounts receivable it acquires no rights to it. Yet the Debtor collects the accounts receivable, collects the cash before it acquires the rights. So, you're going to have an issue, and the concern I've got is that by entering DIP orders, or this

order directing us to comply, you're creating what is going to be argued is cash collateral, because I can see that coming, in something where the Debtor has no rights to collateral and under the UCC has no rights and no ability to create a security interest. And during that interim period until they perform their end, which under our contract is at the end of the month you cut a check for the receivables and you make your accounting adjustments, there's no adequate protection while that money is floating around in the system and it's not the Debtor's money under our contract just because the provisions are different. And there's no provision to protect -- as far as requesting adequate protection, we're here requesting.

THE COURT: Yeah, but you're not -- you can't request adequate protection or a Motion to Lift Stay --

MR. SMITH: We don't have a motion before you.

THE COURT: I know you don't, but somebody does, somebody does. All that other relief has to be raised by a proper motion. Bring it before the Court and you'll get a prompt hearing on it.

I think all of you are seeing a lot of phantoms here that I don't see by these two orders that were entered. I don't think these orders change anybody's basic rights, nor did they change the basic fact that your clients may be affected by the automatic stay. If you don't think they're affected by it, file a motion. I don't think they change any basic rights of

anybody. And I may be inviting a lot of problems here, but go back to your office and file whatever you want to file to get individual relief for your client or your group of clients.

MR. SMITH: So that the Debtor's rights are whatever the facts say they are as to money that comes into this checking account.

THE COURT: I'm sorry?

MR. SMITH: That the Debtor's rights as to money coming into this checking account --

THE COURT: Yeah.

MR. SMITH: -- are whatever the facts say they are.

THE COURT: Yeah.

MR. SMITH: Okay.

THE COURT: Whatever you want to file to clarify that, we'll notice it on a 20-day notice, unless you can show me some dire circumstances that it should be noticed before that.

I'm addressing 365(c) to deal with Mr. Gamble's comment that this may be a contract for financial accommodation. I don't see these orders constituting that at all. I think that objection directs itself to the -- well, it might direct itself to the Motion for DIP Financing, but I'm not even sure that that's applicable to that. That pertains to the assignment assuming you're assigning an executory contract that deals with the financial arrangement. I don't see the

order doing that at all.

MS. CROUCH: Okay, Your Honor, Svetlana Crouch on behalf Dr. Marse and Dr. Marse, Professional Corporation.

The reason we're objecting to the order is because Dr. Marse's agreement is not a Business Service Agreement. Dr. Marse operates under an Operating Outsource Agreement effective January 1st, 2005. Furthermore, we ask this Court to clarify whether the order actually applies to an Outsource Agreement just like it applies to the BC in the alternative. Additionally, we would like to assert that our client would like to terminate the Outsource Agreement.

By the way of background, Dr. Marse used to have a Business Service Agreement with OCA back from 1996. Unfortunately, OCA violated some of the provisions of the Business Service Agreement and back in February of 2004 Dr. Marse actually notified OCA of their violations and breach of contract.

After the negotiations the parties terminated the Business Service Agreement on January 1st, 2005, and entered into this new agreement, Outsource Agreement. The Outsource Agreement is completely distinguishable from the Business Service Agreement. First of all it's for a term. It's supposed to expire on January 1st, 2007, and making our client abide by the terms of the agreement would be disadvantageous and prejudiced, because we all know that there is a certain

stigma that applies to bankruptcy. And this orthodontist has been working very hard to accumulate referral basis, referral sources. In a sense to a layperson he's still an OCA affiliated orthodontist, so it would be prejudicial to him to make him abide by the Outsource Agreement right now. And --

THE COURT: I doubt that you or he could prove that stigma. You mean to tell me that somebody's going to go in to this dentist or orthodontist for dental work would be concerned by someone he has a business relationship with being in Chapter 11? That's pretty farfetched, I think.

MS. CROUCH: Well, again, in everybody's eyes he is an OCA physician still. And another thing is the Outsource Agreement --

THE COURT: They're still going to get the same service from him --

MS. CROUCH: -- is supposed to terminate anyway.

THE COURT: -- and they're still going to have to pay the same bills, so I don't see how it's going to affect him.

MS. CROUCH: Okay, but anyway, under the Outsource Agreement OCA provides strictly administrative services to Dr. Marse. OCA gets only a certain fee, which is $3,500 a month. Thus, the compensation is completely different from what BSAs provide.

THE COURT: All right, can you hold just where you are for just a moment?

MS. CROUCH: Sure.

THE COURT: Do the Debtors contend that this Outsource --

Is that the name, Outsource?

MS. CROUCH: Outsource Agreement.

THE COURT: -- that this Outsource Agreement constitutes this particular doctor as an affiliated services or not?

MR. HORN: Yes, sir. We contend it's an affiliated practice and we also contend --

THE COURT: Affiliated practice.

MR. HORN: Yes, sir. And with respect to the Outsource as opposed to a Business Service Agreement, if you look in our memo and in our motion on the first day we defined the management services contracts. We said there was a litany, there were several different, and we said they're generally known as Business Services Agreement and then defined that term globally. But we certainly believe that an Outsource Agreement is the same as an executory contract and is defined in our motion and we respond in that way. So, yes, we believe Dr. Marse is subject to this order.

MR. SUNSERI: Your Honor, I'm sorry, I'm co-counsel with Ms. Crouch.

Your Honor, the Business Service Agreement was terminated and the character of the contract is totally

different. The Outsource Agreement is basically paychecks. I mean that's the extent of it. So, it was actually terminated. He is not affiliated per se. He just has the same type of association that Paychex would have with any other type of entity. And it has a definite --

THE COURT: All right.

MR. SUNSERI: And so --

THE COURT: File a motion for relief from the stay or a motion that the automatic stay doesn't apply to you.

MR. SUNSERI: Well, okay, and I --

THE COURT: I'm not going to give you on no evidentiary record on a general representation of Counsel in a half an hour any relief that your client is not subject to this order --

MR. SUNSERI: Your Honor --

THE COURT: -- absent proof. Now, if you want to bring on some proof today and try to try it out today, I guess I'd let you, because I assume you're not from here. You came in town for this?

MR. SUNSERI: No, sir, we're local.

THE COURT: Okay.

MR. SUNSERI: But I might as well have been out of town.

THE COURT: I don't know whether that's good or bad.

MR. SUNSERI: Your Honor, I think the biggest -- I

mean we just -- our clarification was does the order apply to the --

THE COURT: Maybe I should ask where your client is.

MR. SUNSERI: Yeah, he's here. He's here.

MR. HORN: He's local.

MR. SUNSERI: He's local.

As to whether the BSA -- the wording of your agreement applies to Outsourcing Agreement and that's why we're here today, because it doesn't specify that it was --

THE COURT: Yeah, well --

MR. SUNSERI: -- and it's not an affiliated practice and it's really not a management; it's just basically an administrative service.

THE COURT: Well, according to Mr. Horn they have defined affiliated practices to cover not only these BSA, but also the kind of agreement that your client has.

MR. HORN: Let me make it a little clearer, Your Honor, because I think I might have confused you.

What we did was we defined all of the management contracts and we said "generally known as," and then for the purposes of the rest of the motion we called them Business Service Agreements. But we clearly in a string reference we talked about other management contracts and that's what this is. And, again, as you said if they want to file a motion --

THE COURT: All right. I think their point is they

don’t have a -- their client doesn’t have a management agreement.

MR. HORN: Well --

THE COURT: The only thing he’s got is a --

What did you say your --

MR. SUNSERI: It’s an administrative --

THE COURT: Check cashing service.

MR. SUNSERI: It’s paychecks.

MR. HORN: I think it is. It’s still the Debtor providing affirmative services in the form of management services. Now, if we want to quibble about what they are, I think you’re right; let them file a motion, we can have an evidentiary hearing. And if you find the services that we provide under the Outsource Agreement are substantially different than the services we provide under the Business Services to affiliated practices, then you may make a finding that the Outsource Agreement is different.

I would beg to suggest that you’ll find they are one in the same, but we should have an evidentiary hearing on that as well. Let them bring the doctor in and I’ll cross-examine him and we’ll see what he gets.

MR. SUNSERI: Your Honor, my point is we terminated the Business Service Agreement and the order says “Business Service Agreements.” So that’s where we are and we don’t think it reaches that. It’s just basically it was an alternative

compromise. It was basically a way to end the marriage and it was an interim --

THE COURT: All right, you can do one of two things.

MR. SUNSERI: Okay.

THE COURT: You can go right ahead and ignore it completely and run the risk that they'll bring you in on a violation, a Motion to Violate the Automatic Stay, or you can come in and file a motion that the automatic stay does not apply to you.

MR. SUNSERI: Okay.

THE COURT: Or that the agreement that you have, the out -- whatever --

MR. SUNSERI: Outsource Agreement.

THE COURT: -- the Outsource Agreement is not an executory contract and you shouldn't be bound by it.

MR. SUNSERI: That was my argument.

THE COURT: You can -- any kind of relief you want to that they can respond to that we can have an orderly hearing you're free to do so.

MR. SUNSERI: Okay.

THE COURT: But in the meantime I would suggest you probably don't want to run the risk of ignoring the stay.

MR. SUNSERI: I understand. So, we're stuck with it until --

THE COURT: Well, for a while.

MR. SUNSERI: All right. Thank you.

MR. STROUD: Your Honor, Allyn Stroud for Drs. Nelson and Risinger, and I don't have anything extensive to add. I'm joining the arguments of the other objectors. I was just going to suggest if Debtor's Counsel agrees for anyone who doesn't have the benefit of a transcript of today's proceeding and is looking at the Code record, if it is in fact the Court's intent to overrule the objections that there be a phrase, something to the effect that the ruling is without prejudice to the right of the movant to bring any challenge to the Business Service Agreements under the appropriate procedural mechanism.

THE COURT: All right. I'd intended to do that, but I nevertheless appreciate your suggestion.

All right, is there anyone else that wishes to be heard?

MR. FORSYTH: Your Honor, just very briefly. There was a comment that the order had said "Until further notice," and it does not say that at all. Right now it is unlimited in scope. So, I guess what I was going to say is something similar to what was just said that it ought to be made clear that whatever relief should be -- until further order of the Court or except as otherwise -- it seems to me "except as otherwise allowed by applicable law," will clearly put it on a playing field of not changing. Whatever the law is it is as to their ability, their rights to perform or not perform. So, I

think that a lot of this, Your Honor, is because of the confusion of the way the orders were done and the fact that this did not even say “Until further order of Court,” and we think that needs to be clarified.

THE COURT: Well, I think a lot of the confusion maybe arising from the fact that in the past we have not made great use of these show cause orders for affirmative relief. The way they do it over in Texas, I understand they do a lot over there by this same method, but we have not done that and I don’t think I’m going to do it much in the future, because it seems to create a hell of a lot of confusion as to exactly what I did or didn’t do.

You wish to be heard?

MS. THOMPSON: Yes, Your Honor, just a couple of comments on behalf of Dr. Jason Parker.

First of all, regarding the affidavit of Tony Paternostro, we do not have any objection to the admission.

THE COURT: All right.

MS. THOMPSON: Reserving our rights of course to be able to question him at a future date and time if that is necessary. I don’t foresee it being necessary at this point.

THE COURT: All right, then I’ll admit the affidavit subject to the right of any party to cross-examine him as to any of the contents of the affidavit at any later date. All right.

MS. THOMPSON: Thank you, Judge.

Also, regarding our objection, certainly we share the same comments that the other objectors have raised. Our particular problem was the lack of notice.

Dr. Parker only received notice last Thursday, March 30th, and that's why we filed a Motion for Leave to File a Late Opposition. Now that we've filed a Notice of Appearance I don't anticipate any further notice problems, but I did want to make a note into the record that he did not receive any pleadings or anything from Counsel for the Debtor until last Thursday. I brought the envelopes with me. The address that was being used was his home address, which he had already notified the Debtor to use his office address because he had lost his home in the hurricane. So, you know, mailings had been going to his office and then all of the sudden they started going to his home address and with the rerouting and everything he just wasn't getting anything.

But back to the objection, we do share the same objection as the others. I feel a little more comfortable with your comments today and as long as this order does not impinge on his rights to bring any claims in the future, you know, at this point our objection is basically the same as the others.

THE COURT: All right.

MS. THOMPSON: Thank you, Judge.

THE COURT: Thank you.

MR. HORN: Your Honor, there's one other matter of housekeeping. We received a call yesterday and I want to say on the record, Dr. Richard Herrsher, PC, called and asked that we make an affirmative statement on the record and I have no objection to doing that, and if I can impose on the Court, we intend to perform, the Debtors intend to perform under the Business Service Agreement with Dr. Herrsher. He did not file an opposition, but since there was some lack of clarity he believed, he asked if we would state that on the record. I saw there was no opposition to that, so we're stating that we're going to perform with Dr. Herrsher.

THE COURT: You're stating that the Debtors are going to perform.

MR. HORN: The Debtors are going to perform with Dr. Herrsher. He wanted that on the record.

THE COURT: Well, has he stated whether he's going to perform?

MR. HORN: I hope so, because in light of what's happened today I think he's admonished to do so.

THE COURT: All right.

MR. HORN: Thank you.

THE COURT: All right. Well, I've heard all of the objections and I've heard the stipulations and the stipulation that's available to other objectors and the stipulation removes a number of the objections that were filed because of some

confusion as to whether it applied to persons who had given written notice of default or termination of the contracts. I'm going to overrule all of the other objections to the orders, the interim orders of Pleadings 45 and 46, and make those orders permanent orders unless and until they are modified by further orders of the Court. That's all I'm going to rule today and that ruling does not contain any adjudicatory effects, any res judicata, collateral estoppel, or other preclusive effect as to the validity of any of the agreements between the Debtor and the dentists whether they be denominated as BSA Agreements or --

MR. SUNSERI: Outsource.

THE COURT: -- Outsource Agreements, or whatever other type of management or contractual agreement. So, the rights of all parties, including the Debtor, are specifically reserved to them to file whatever motions, or applications, or complaints that they may choose to file that deal with the validity of any of those contracts or the affects of the relationship of the orders in P-45 and P-46 and the so-called permanent order today on that relationship. So, all of you are free to file whatever Motions for Relief From Stay, Motions to Compel, rejection of executory contracts, or whatever other motions you wish to file that would raise the validity of the contracts that exist between the doctors, and the Debtors, and/or anything concerning the relationship between the Debtor

and the doctors. All right.

MR. HORN: Thank you, Your Honor.

THE COURT: Court is adjourned.

* * * * *

(Hearing is Concluded)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/S/Dorothy M. Bourgeois **4/27/06**
DOROTHY M. BOURGEOIS **Date**