B 104
(Rev. 2/92)

ADVERSARY PROCEEDING COVER SHEET

Instructions on Reverse

ADVERSARY PROCEEDING NUMBER (Court Use Only)

PLAINTIFFS
OCA, INC., a Delaware Corporation, and ORTHODONTIC CENTERS OF GEORGIA, INC., a Delaware Corporation

DEFENDANTS
KEVIN EATMON, D.D.S., and KEVIN EATMON, D.D.S., LLC, a Georgia Limited Liability Company

Attorneys (Firm Name, Address, and Telephone No.)
Drew R. Ballina 504/568-1888
Heller, Draper, Hayden, Patrick & Horn, LLC
650 Poydras St., Suite 2500
New Orleans, LA 70130

Attorneys (If Known)

PARTY (Check one box only) ☐ 1. U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☒ 3. U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)
Complaint for Breach of Contract, Specific Performance, Conversion, Unjust Enrichment, Quantum Meruit, Promissory Estoppel, Breach of Promissory Note, Declaratory Relief, and Attorneys' Fees and Costs

NATURE OF SUIT
(Check the one most appropiate box only.)

- ☒ 454 To Recover Money or Property
- ☐ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property
- ☐ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in the property
- ☐ 424 To object or revoke a discharge 11 U.S.C. §727
- ☐ 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan
- ☐ 426 To determine the dischargeability of a debt 11 U.S.C. §523
- ☐ 434 To obtain an injunction or other equitable relief
- ☐ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan
- ☐ 456 To obtain a declaratory judgment relating to any of foregoing causes of action
- ☐ 459 To determine a claim or cause of action removed to a bankruptcy court
- ☐ 498 Other (specify)

ORIGIN OF PROCEEDINGS (Check one box only.) ☒ 1 Original Proceeding ☐ 2 Removed Proceeding ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another Bankruptcy Court

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND	NEAREST THOUSAND	OTHER RELIEF SOUGHT	JURY DEMAND
	$ $75,000.00	Specific Performance	☐

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES

NAME OF DEBTOR	BANKRUPTCY CASE NO.
OCA, Inc.	06-10179 (B)

DISTRICT IN WHICH CASE IS PENDING	DIVISIONAL OFFICE	NAME OF JUDGE
Eastern District of Louisiana		Jerry A. Brown

RELATED ADVERSARY PROCEEDING (IF ANY)

PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.

DISTRICT	DIVISIONAL OFFICE	NAME OF JUDGE
Eastern District of Louisian		

FILING FEE (Check one box only.) ☒ FEE ATTACHED ☐ FEE NOT REQUIRED ☐ FEE IS DEFERRED

DATE	PRINT NAME	SIGNATURE OF ATTORNEY (OR PLAINTIFF)
5/23/2006	Drew R. Ballina	

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: OCA, INC., ET AL. Debtors ********** OCA, INC., a Delaware Corporation, and ORTHDONTIC CENTERS OF GEORGIA, INC, a Delaware Corporation Plaintiffs v. KEVIN EATMON, D.D.S., and KEVIN EATMON, D.D.S., LLC a Georgia Limited Liability Company, Defendants	Chapter 11 Case No. 06-10179 (B) (Jointly Administered) Adversary Proceeding No.

VERIFIED COMPLAINT FOR BREACH OF CONTRACT, SPECIFIC PERFORMANCE, CONVERSION, UNJUST ENRICHMENT, QUANTUM MERUIT, PROMISSORY ESTOPPEL, BREACH OF PROMISSORY NOTE, DECLARATORY RELIEF, AND ATTORNEYS' FEES AND COSTS

OCA, Inc., (formerly Orthodontic Centers of America, Inc.) and Orthodontic Centers of Georgia Inc., ("OCS"), its affiliated debtor and debtor-in-possession (hereinafter collectively, "OCA" or "Plaintiffs") in the above-captioned jointly administered Chapter 11 cases and the Plaintiffs in the above-captioned adversary proceeding, by and through their undersigned attorneys, allege for their complaint, upon knowledge as to their own acts and upon information and belief as to all other matters, as follows:

Jurisdiction

1. This honorable court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and (e) and 157(b)(1).

2. This adversary proceeding has been brought in accordance with Rule 9020, Rule 7001(7) and Rule 7065 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules").

3. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Venue

4. Venue of this adversary proceeding in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

The Parties

5. Plaintiff, OCA, Inc., is a Delaware corporation and the parent company of numerous wholly owned subsidiaries, including Plaintiff, OCS, a Delaware corporation.

6. Defendant, Kevin Eatmon, D.D.S., ("Dr. Eatmon"), is a resident and citizen of the State of Georgia and is a licensed dentist in the State of Georgia, where he is engaged in the practice of orthodontics.

7. Defendant Kevin Eatmon, D.D.S, LLC, ("Eatmon LLC") is a Georgia limited liability corporation, wholly owned and operated by Dr. Eatmon.

Background of the Case

8. On March 14, 2006 (the "Petition Date"), each of the Plaintiffs filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Contemporaneously therewith, the Plaintiffs filed a motion seeking to procedurally consolidate their Chapter 11 cases for administrative purposes only. Plaintiffs have continued to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

9. OCA provides non-clinical business and administrative support and services to affiliated orthodontic and dental practices ("Affiliated Practices") to assist with the practices'

day-to-day operations. These services include, but are not limited to: employment, scheduling, and training of non-licensed office staff; the provision and maintenance of office space, telephones, and utilities; the provision and maintenance of office equipment, furniture, and fixtures; the performance of certain bookkeeping, accounting, and related financial services; the performance of patient billings and collections; the administration of the practices' bank accounts; the installation of computer hardware and software and computer training; the ordering and management of supplies and inventory; the preparation of statistical data and analyses; the provision of certain legal services; the provision of requested consulting advice on practice efficiency and productivity, marketing, office location and layouts, and staff salaries, benefits, and performance and incentive plans; the provision of marketing and advertising services; and other non-clinical business and administrative services reasonably required by the practices' routine business operations.

10. During and before July 2003, Dr. Eatmon, a licensed dentist in the State of Georgia, was engaged in the solo, full time practice of orthodontics in Georgia. On or about July 11, 2003, (the "Effective Date"), Dr. Eatmon became affiliated with Plaintiffs when he entered into a Business Services Agreement ("BSA") with OCS, a wholly owned subsidiary of OCA, Inc. (formerly known as Orthodontic Centers of America, Inc.). A copy of the BSA is attached hereto as Exhibit 1, and by reference made a part hereof.

11. Under the BSA, OCA agreed, among other things, to provide the non-clinical business and administrative services described, in a general way, in paragraph 9 of this Adversary Complaint and set forth with specificity in sections 1.1 through 1.14 of the BSA.

12. The BSA provides for OCA to perform, for example, certain patient billing and collection services for the practice should Defendants request such services, and to deposit all

funds collected into a bank account administered by OCA. At their option, OCA has the authority to transfer such funds to a central bank account maintained by OCA. At Defendants' direction, OCA prepared and transmitted monthly bills for services Defendants provided to their patients. Defendants unilaterally elected to collect payment directly from the patients and instructed OCA not to engage in the collection of payment process, which directive OCA followed. Defendants then regularly deposited those collections into the bank account administered by OCA. However, since on or about March 9, 2006, Defendants have failed and refused to deposit the payments received from and on behalf of their patients into the bank account created for that purpose between OCA and Defendants, thus preventing OCA from paying the expenses of Defendants' practice, collecting reimbursement for advances made on behalf of Defendants to vendors in the ordinary course of Defendants' business, and receiving their Monthly Service Fee (as set forth below), all of which constitute material breaches of Defendants' obligations under the BSA.

13. Pursuant to Section 8.1 of the BSA, and with the knowledge and consent of Defendants, OCS assigned its rights and obligations under the BSA to OCA, Inc. The BSA provides for a term of 25 years.

14. Since affiliating with OCA in July 2003, the orthodontic practice operated by Defendants, with the assistance of the services provided by OCA as set forth above, through December 2005, increased its annual gross receipts such that it would not have been able to attain without the benefits it received as a result of its affiliation with OCA.

15. At the request of Dr. Eatmon, OCS loaned Defendants the sum of $51,888 evidenced by a promissory note dated January 1, 2004, and executed by both Defendants. A copy of the promissory note is attached hereto, marked Exhibit 2, and by reference made a part

hereof. The promissory note provides that a default will occur, thus making the promissory note all immediately due and payable without notice or demand, for, among other events, default in payment on any payment when due, or upon breach of any obligation under the BSA. Defendants have both failed to make timely payment under the promissory note and breached the BSA as set forth herein. As of December 31, 2005, the amount of principal and interest owed by Defendants to OCS pursuant to the terms of the promissory note was $33,882.39.

16. In exchange for OCA's provision of the specified non-clinical business and administrative services, Defendants agreed, among other things, to pay a Monthly Service Fee to OCA according to a predetermined formula which is set forth in Section III of the BSA.

17. Following the BSA's Effective Date, OCA provided Defendants with access to certain proprietary information, materials, software, and systems, including, but not limited to:

(a) Penny Lane, a centralized internet-based program that enables users to take advantage of OCA's contracted per-item pricing on supplies (ranging from dental floss to fax machines). The purchasing system contains nearly 40,000 items from hundreds of suppliers and is accessible 24 hours a day, seven days a week. Purchases by OCA's affiliates on the Penny Lane system are billed directly to and paid by OCA for the benefit of those affiliates.

(b) Abbey Road, an internet-based accounting software package that provides users immediate access to the practice accounts from their inception as an Affiliated Practice.

(c) WALRUS, a software system with numerous features useful to OCA affiliated orthodontic practices, including, but not limited to, patient management features, scheduling features, and financial accounting features.

18. The BSA requires Defendants to maintain the confidentiality of the commercially valuable and proprietary information and materials provided by OCA, including, but not limited

to, the Penny Lane, Abbey Road, and WALRUS systems, as well as financial and operational data regarding practice management, non-clinical forms, advertising, and marketing strategies.

19. Section 4.4(b) of the BSA permits Defendants to terminate the BSA in the event OCA defaulted in the performance of any material duty or obligation imposed upon it by the BSA and so long as such default continues for a period of 30 days after written notice thereof has been given to OCA by Defendants.

20. By letter dated March 10, 2006, Defendants, utilizing a form letter employed by other OCA doctors represented by the same law firm as Defendants, and which Plaintiffs are informed and believe, and thereon allege was authored by said law firm, wrote to Mr. Bart Palmisano, Sr., Orthodontic Centers of Georgia, Inc., and asserted that OCA, Inc., was in breach of the BSA. Defendants also asserted that the BSA was illegal in the State of Georgia. Among other things, the letter stated that the Defendants would immediately cease making deposits of patient payment receipts, even though Defendants had actually stopped depositing prior to the date of the letter. Defendants' actions were unilateral and without just cause. Withholding deposits constitutes a material breach of the BSA, and it continues to the present. A copy of said letter is attached hereto as Exhibit 3, and by reference made a part hereof.

21. Since at least from on or about March 9, 2006, Defendants have failed and refused to pay monthly service fees to OCA, which constitutes a material breach of the BSA, continues to the present, and has resulted in OCA suffering damages in an amount to be proved at trial.

22. By letter dated March 14, 2006, just four days after sending Exhibit 3 above, Defendants wrote to Mr. Palmisano, Sr., purporting to terminate the BSA, alleging that "...OCA has repudiated the BSA...." A copy of the March 14, 2006, letter is attached hereto as Exhibit 4, and by reference made a part hereof.

23. OCA, however, has never repudiated or defaulted on any material duty or obligation imposed by the BSA and, therefore, Defendants have never had any basis or legal justification for invoking the BSA's termination provisions. At all times, OCA has been ready, willing, and able to perform all of its obligations under the BSA.

24. Plaintiffs are informed and believe and thereon allege that since on or about March 14, 2006, Defendants have wrongfully retained the use of furniture, fixtures and equipment in their practice that was purchased by OCA and leased to Defendants pursuant to the terms of the BSA. They have neither paid for said furniture, fixtures and equipment, nor tendered possession of it to OCA. Plaintiffs have suffered damage as a result of this conduct by Defendants in an amount to be proven at trial.

25. In addition to that set forth herein, Plaintiffs are informed and believe and thereon allege that since on or about March 14, 2006, Defendants have wrongfully retained confidential and proprietary intellectual property owned by OCA. Notwithstanding Defendants assertion that it possesses no such property, it knows full well that it does, as it made use of that property daily in its practice. Plaintiffs have suffered damage as a result of this conduct by Defendants in an amount to be proven at trial.

26. Section 5.2 of the BSA prohibits Defendants from engaging in certain competitive activities during and following the termination or expiration of the BSA, including, but not limited to, specific restrictions relating to the solicitation of professional and office staff and to the management, ownership, and operation of an orthodontic practice. Plaintiffs are informed and believe and thereon allege that Defendants have, since on or about March 14, 2006, if not before, been violating these covenants by, among other things, soliciting and hiring staff employed by OCA and by managing, owning, and operating an orthodontic practice that has

improperly ceased performance under the BSA, and by soliciting referral sources and patients, and engaging in other wrongful and prohibited conduct in material breach of said Section. Plaintiffs have been damaged as a result of this conduct by Defendants in an amount to proven at trial.

27. Pursuant to the BSA, in the event of the termination of the BSA for any reason, Defendants have certain contractual obligations, including, but not limited to, the prompt return to OCA of all OCA's proprietary information, and the prompt payment of all amounts due and owing but unpaid to OCA as of the termination date. Although it has purported to terminate the BSA, Defendants have fulfilled neither of these obligations.

COUNT I

Breach of Contract

28. OCA reavers and realleges paragraphs 1 through 27 as if plead herein *in extenso*.

29. Defendants have breached their material contractual duties and obligations to OCA by, among other things: (a) refusing to deposit collections into the account administered by OCA, as required under the BSA, and as they did from the inception of the BSA until on or about March 9, 2006, and otherwise failing to remit payments due to OCA; (b) failing to pay monthly service fees and other amounts due to OCA as required under the BSA; (c) engaging in acts violative of restrictive covenants in the BSA; (d) retaining and using equipment and other tangible property belonging to OCA without their consent or paying the agreed remuneration; (e) retaining, using, and/or disclosing OCA's proprietary information without its consent or paying the agreed remuneration; and (f) refusing to repay the sum of at least $33,882.39, plus accrued interest, that Defendants borrowed from OCA, and which amount was due and owing by Defendants to OCA on or before March 14, 2006.

30. As a direct and proximate result of Defendants' breaches of their material duties and obligations under the BSA, OCA has suffered damages in an amount to be proven at trial, and will continue to suffer damages.

31. Under the express terms of the BSA, namely Section 8.10, Plaintiffs are entitled to recover their attorneys' fees and costs incurred in enforcing their rights under the BSA.

COUNT II

Promissory Estoppel

32. OCA reavers and realleges paragraphs 1 through 31 as if plead herein *in extenso*.

33. In performance of its obligations under the BSA, OCA made a substantial initial outlay of cash and other consideration, and dedicated other resources to Defendants. As all parties understood, Defendants could derive meaningful benefits and returns from its contractual relationship with OCA only if the BSA remained in effect for a long period of time and only if Defendants performed their obligations and utilized the services and other benefits for the duration of the BSA.

34. At all times, OCA has performed, or has been ready, willing, and able to perform, all of their obligations under the BSA. As a result, Defendants have derived substantial benefits from the numerous cash advances by OCA as well as the services, equipment, and facilities provided by OCA.

35. At the time Defendants executed the BSA, they represented to OCA that they would fully perform their obligations for the duration of the BSA and that they were committed to a long-term relationship with OCA. At that time, Defendants expected and could foresee that OCA would rely on these representations, and, in fact, OCA did reasonably and justifiably rely on these representations in deciding to enter into the business relationship with Defendants.

36. Defendants, however, have failed to perform as they represented they would by, among other things, ceasing to pay monthly service fees, ceasing to deposit collections into the bank account administered by OCA, and making it impossible for OCA to perform their obligations under the BSA.

37. As a direct and proximate result of Defendants' failures to live up to their promises to perform, upon which promises OCA reasonably relied to their detriment, OCA has incurred and will continue to incur significant damages in an amount to be proven at trial. It is necessary to enforce the promises made by Defendants in order to do substantial justice between the parties and to avoid injustice.

COUNT III

Specific Performance

38. OCA reavers and realleges paragraphs 1 through 37 as if plead herein *in extenso*.

39. Unless the Defendants are required to perform under the BSA, the full extent of the damage and injury to OCA may be difficult to measure. As a result, OCA may not be made whole by the legal remedy of damages prayed for hereinabove. Accordingly, in addition to all other remedies and causes of action, OCA seeks an order compelling Defendants to perform their obligations under the BSA.

COUNT IV

Breach and Default on Promissory Note

40. OCA reavers and realleges paragraphs 1 through 39 as if plead herein *in extenso*.

41. Under the promissory note identified in paragraph 15 of this Adversary Complaint, Defendants agreed to pay the principal and interest accrued on the promissory note.

Defendants are in default of their obligations to pay the principal and interest due under the promissory note, and the amount of $33,882.39 is all immediately due and payable

42. Under the express terms of said promissory note OCA is entitled to recover its attorneys' fees and costs incurred in enforcing its rights under the promissory note.

COUNT V

Conversion

43. OCA reavers and realleges paragraphs 1 through 42 as if plead herein *in extenso*.

44. In accordance with the BSA, OCA purchased or otherwise acquired numerous pieces of equipment, furniture, and other items of personal property during the course of the parties' business relationship and, as owner of such property, made it available to Defendants for use in their orthodontic practice.

45. After purporting to terminate the BSA on March 14, 2006, Defendants have, without authority or consent from OCA, wrongfully exercised control, dominion, or ownership over OCA's personal property by retaining possession of such personal property and using it in their practice.

46. OCA is the owner of such personal property, and has both a right to such property, and a right of immediate possession of such property.

47 Notwithstanding that Defendants have purported to terminate the BSA, they have not returned or offered to purchase the personal property owned by OCA.

COUNT VI

Unjust Enrichment

48 OCA reavers and realleges paragraphs 1 through 47 as if plead herein *in extenso*.

49. As a result of the services and other consideration provided by OCA, Defendants have greatly benefited from their affiliation with OCA. These benefits enabled Defendants to expand, and substantially increase the productivity of their orthodontic practice in excess of that when they entered into the business relationship with OCA in or about July 2003.

50. Defendants knowingly accepted all of the benefits provided by OCA under the BSA. In exchange for such benefits, OCA reasonably expected to have a long-term contractual relationship with Defendants in order to recoup their investment.

51. Defendants are entitled to, but have not received full and fair compensation from Defendants for the services, equipment, facilities, and other benefits provided them. By receiving and retaining the services, equipment, facilities, and other benefits provided by OCA, and yet failing to compensate OCA fully and fairly for them, Defendants have been unjustly enriched. In order to rectify the unjust enrichment, and balance the uneven position of the parties, Defendants must compensate OCA in full, in an amount to be proven at trial, and must return all consideration and benefits received by them from OCA.

COUNT VII

Quantum Meruit

52. OCA reavers and realleges paragraphs 1 through 51 as if plead herein *in extenso*.

53. As a result of the services, initial cash outlay, substantial cash advances, and other goods, services and consideration provided by OCA, Defendants have greatly benefited from their affiliation with OCA. These benefits enabled Defendants to expand, and substantially increase the productivity of their orthodontic practice in excess of that when they entered into the business relationship with OCA in or about July 2003.

54. Defendants knowingly accepted all of the benefits provided by OCA under the BSA. In exchange for such benefits, OCA reasonably expected to have a long-term contractual relationship with Defendants in order to recoup their investment.

55. Defendants are entitled to, but have not received, full and fair value from Defendants for the substantial initial cash outlay and subsequent cash advances, services, equipment, facilities, and other benefits provided them. By receiving and retaining the services, equipment, facilities, and other benefits provided by OCA, and yet failing to compensate OCA fully and fairly for them, Defendants have been unjustly enriched. In order to rectify the unjust enrichment, Defendants must compensate OCA in full, and pay the fair value of the benefits of goods and services they received in an amount to be proven at trial, and must return all consideration and benefits received by them from OCA.

COUNT VIII

Declaratory Judgment

56. OCA reavers and realleges paragraphs 1 through 55 as if plead herein *in extenso*.

57. Declaratory relief under the Georgia declaratory judgment act or the federal declaratory judgment act is appropriate in this action because there is a real, actual, and substantial controversy between the parties regarding the validity and enforceability of the BSA. Defendants have asserted that the BSA is illegal and violative of Georgia law, regulation and public policy, and that certain terms or provisions may be unenforceable. OCA denies that any term or provision of the BSA is illegal, void, or unenforceable.

58. This controversy is ripe for adjudication, and declaratory relief would eliminate the legal uncertainty surrounding this controversy.

59. OCA seeks a declaration that the terms and provisions of the BSA are valid, legal, and enforceable under applicable law.

COUNT IX

Attorneys' Fees and Court Costs

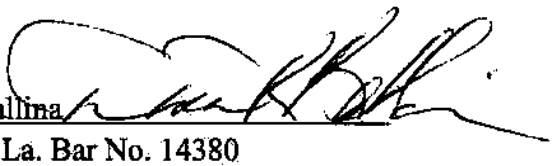
60. OCA reavers and realleges paragraphs 1 through 59 as if plead herein *in extenso*

61. OCA is entitled to recover their attorneys' fees and court costs in connection with this matter under the terms of Section 8.10 of the BSA and Georgia law.

WHEREFORE, OCA prays that judgment be entered in their favor and against Defendants in the form of: (1) damages for breach of the BSA, in an amount to be determined by the Court or at trial; (2) damages for the conversion of its personal property in an amount to be determined by the Court or at trial; (3) restitutionary relief; (4) an order enforcing the promises made by Defendants upon which OCA relied to their detriment to the extent necessary to avoid injustice; (5) equitable relief in the form of an order restoring all money and property received by Defendants from Plaintiffs that, in equity and good conscious, belongs to OCA; (6) damages representing the amount of Defendants indebtedness to OCA; (7) an order requiring Defendants to perform their obligations under the BSA; (8) a declaration that the BSA is valid, legal, and enforceable and that OCA's performance of its obligations under the BSA does not violate Georgia law, regulation, or public policy; (9) reasonable attorneys' fees and costs; (10) pre- and post-judgment interest; and, (11) such other and further relief as the Court deems just and proper.

New Orleans, Louisiana, this 23rd day of May 2006.

Respectfully submitted,



/s/ Drew R. Ballina

Warren Horn, La. Bar No. 14380
Drew R. Ballina, La. Bar No. 01704
Tristan Manthey, La. Bar No. 24539
HELLER, DRAPER, HAYDEN,
PATRICK & HORN, L.L.C.
650 Poydras Street, Suite 2500
New Orleans, LA 70130-6103
Telephone: 504-568-1888
Fax: 504-522-0949
Counsel for the Debtors
and Debtors-in-Possession