UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

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

DEBTORS' LIMITED OBJECTION TO APPLICATION BY EQUITY SECURITY HOLDERS COMMITTEE FOR AUTHORITY TO RETAIN FINANCIAL ADVISOR

Orthodontic Centers of America, Inc. ("OCA") and its subsidiaries[1] whose petitions for chapter 11 relief have been procedurally consolidated with and are jointly administered hereunder (collectively, "Debtors") submit this limited objection to the application of the Equity Security Holders Committee (the "Committee") for authority to retain Imperial Capital LLC ("Imperial") as the Committee's financial advisor, and Debtors with respect represent as follows:

[1] Orthodontic Centers of Alabama, Inc. (06-10180); Orthodontic Centers of Arizona, Inc. (06-10181); Orthodontic Centers of Arkansas, Inc. (06-10182); Orthodontic Centers of California, Inc. (06-10183); Orthodontic Centers of Colorado, Inc. (06-10184); Orthodontic Centers of Connecticut, Inc. (06-10185); Orthodontic Centers of Florida, Inc. (06-10186); Orthodontic Centers of Georgia, Inc. (06-10187); Orthodontic Centers of Illinois, Inc. (06-10188); Orthodontic Centers of Indiana, Inc. (06-10189); Orthodontic Centers of Kansas, Inc. (06-10190); Orthodontic Centers of Kentucky, Inc. (06-10191); Orthodontic Centers of Louisiana, Inc. (06-10192); Orthodontic Centers of Maine, Inc. (06-10193); Orthodontic Centers of Maryland, Inc. (06-10194); Orthodontic Centers of Massachusetts, Inc. (06-10195); Orthodontic Centers of Michigan, Inc. (06-10196); Orthodontic Centers of Minnesota, Inc. (06-10197);Orthodontic Centers of Mississippi, Inc. (06-10198); Orthodontic Centers of Missouri, Inc. (06-10199); Orthodontic Centers of Nebraska, Inc. (06-10200);Orthodontic Centers of Nevada, Inc. (06-10201); Orthodontic Centers of New Hampshire, Inc. (06-10202); Orthodontic Centers of New Jersey, Inc. (06-10203); Orthodontic Centers of New Mexico, Inc. (06-10204); Orthodontic Center s of New York (06-10205); Orthodontic Centers of North Carolina, Inc. (06-10206); Orthodontic Centers of North Dakota, Inc. (06-10207); Orthodontic Centers of Ohio, Inc. (06-10208); Orthodontic Centers of Oklahoma, Inc. (06-10209); Orthodontic Centers of Oregon, Inc. (06-10210); Orthodontic Centers of Pennsylvania, Inc. (06-10211); Orthodontic Centers of Puerto Rico, Inc. (06-10212); Orthodontic Centers of Rhode Island, Inc. (06-10213); Orthodontic Centers of South Carolina, Inc. (06-10214); Orthodontic Centers of Tennessee, Inc. (06-10215); Orthodontic Centers of Texas, Inc. (06-10216); Orthodontic Centers of Utah, Inc. (06-10217); Orthodontic Centers of Virginia, Inc. (06-10218); Orthodontic Centers of Washington, Inc. (06-10219); Orthodontic Centers of Washington, D.C., Inc. (06-10220); Orthodontic Centers of West Virginia, Inc. (06-10221); Orthodontic Centers of Wisconsin, Inc. (06-10222); Orthodontic Centers of Wyoming, Inc. (06-10223); OrthAlliance, Inc. (06-10229); OrthAlliance New Image, Inc. (06-10230); OCA Outsource, Inc. (06-10231); PedoAlliance, Inc. (06-10232); Orthodontic Centers of Hawaii, Inc. (06-10503); Orthodontic Centers of Idaho, Inc. (06-10505);and Orthodontic Centers of Iowa, Inc. (06-10504).

Background

The Debtors, whose separate petitions for relief were approved for procedural consolidation and joint administration by orders entered herein on March 16th, March 24th, and June 15th, 2006, continue to operate their businesses and to manage their properties as debtors-in-possession pursuant to §§ 1107 and 1108 of the United States Bankruptcy Code.

On June 13, 2006, by notices filed, the United States Trustee announced the appointment of the Equity Security Holders Committee (the "Committee"). On June 19, 2006, pursuant to Committee applications, the Court granted authority to the Committee employ as its counsel, effective June 14, 2006, the law firms of Bell Boyd & Lloyd LLC of Chicago, Illinois ("BBL"), and Robin B. Cheatham and the law firm of Adams and Reese LLP ("Adams and Reese").

On June 29, 2006, the Committee filed the *Application of the Official Committee of Equity Security Holders For An Order Authorizing The Retention of Imperial Capital LLC As Its Financial Advisor Pursuant To 11 U.S.C. §§328 And 1103(a)* (the "Application").

Limited Objection

For the following reasons, the Debtors submit this limited objection, asking that the Court clarify or alter certain terms in the Application proposed by the Committee relative to the employment and compensation of Imperial in these proceedings.[2]

1. This Court Has the Authority to Limit The Proposed Compensation.

The Committee seeks to employ Imperial pursuant to, *inter alia*, 11 U.S.C. §328(a). That statute provides, in pertinent part, that a committee may employ professional persons, subject to court approval, "on any reasonable terms and conditions of employment, including on a retainer, on

2 The Debtors note ongoing discussions with the Equity Committee to resolve the issues raised in this limited

an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis."[3]

However, "a Bankruptcy Court need not approve or reject an application as presented but may approve an application with modified terms that the Court finds necessary to render the proposed employment reasonable." *In re Federal Mogul-Global Inc.*, 348 F.3d 390, 398 (3rd Cir. 2003), pointing to *Zolfo, Cooper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253, 262 (3d Cir. 1995), for proposition that "a Bankruptcy Court may approve some of the terms and conditions proposed in an employment application while rejecting others." 348 F.3d at 398-399.

In particular, courts have recognized that the amount of a professional's compensation is "a term or condition of employment under Section 328(a)," 348 F.3d at 401, pointing to *In re Texas Securities, Inc.*, 218 F.3d 443, 445 (5th Cir. 2000)("Section 328 applies when the bankruptcy court approves a particular *rate* or means of payment")(emphasis added). Thus, "a Bankruptcy Court, in approving an application to employ a professional on an hourly basis, . . . may approve the application subject to a cap that the Court finds to be necessary in order to satisfy the statutory requirement of reasonableness." 348 F.3d at 401.

In the case at bar, the Debtors ask that the Court clarify or alter the Application with respect to the following particular proposed terms of Imperial's employment and compensation.

2. Certain Proposed Terms in the Application Require Clarification or Alteration.

a. Compensation Should Be Tied To Benefit Obtained for the Bankruptcy Estates.

The Application offers to cap compensation to Imperial *in its advisory capacity* at $75,000 per month (the "Monthly Advisory Fee"), but seeks approval of rates of compensation as high as

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objection.

3 The Committee proposes to employ Imperial pursuant to 11 U.S.C. §§328 and 1103.

$800 per hour,[4] far exceeding rates customary to this community. Moreover, that Monthly Advisory Fee would encompass only such services as Imperial's analysis of the Debtors and of potential Debtor divestitures; valuation of Debtor operations; assistance to the Committee with respect to "a *potential* Restructuring plan;" and such "other financial advisory services" as the Committee and Imperial might agree upon.[5]

Given the Committee's avowed mission -- based upon allegedly undervalued Debtor assets -- of furthering cash payment of all debt encumbering the bankruptcy estates to secure a better recovery for equity interest holders, Debtors submit that payment of the Monthly Advisory Fee under the terms proposed is inappropriate and unnecessary.

The Application does not define "Restructuring"; but if that term denotes anything other than a Committee-proposed transaction which, on implementation, achieves full cash payment of all pre- and post-petition debt burdening the estates, and a greater recovery for holders of equity securities than would occur under a Debtor-proposed Plan, then Imperial's intended services promise no benefit to the bankruptcy estates, the Committee, or the holders of equity securities. And in that event, payment of the proposed Monthly Advisory Fee, particularly at the rates and solely for the functions described, would unnecessarily deplete the bankruptcy estates with no commensurate benefit obtained.

Thus, the Debtors ask the Court to clarify or alter the terms and conditions of any employment of or compensation to Imperial as financial advisors to the Committee, such that any

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[4] The Application proposes the following hourly rates of compensation for Imperial personnel: for Managing Directors: $800; Senior Vice Presidents: $600; Vice Presidents: $550; Associates: $450; and Analysts: $350 [Pld. 852, Application at 4; Pld. 852A, Exhibit "B", Engagement Agreement at 1].

5 Pld. 852A, Exhibit "B", Engagement Agreement at 1 and 2; Sections 1 and 3

compensation awarded to Imperial will reflect whether or not services rendered by Imperial have yielded a Restructuring of the sort described in the preceding paragraph of this limited objection.

b. The Proposed Transaction Fee Should Depend Upon Success of Imperial's Efforts.

In addition, the Application proposes to pay to Imperial, in cash, "a transaction fee of the greater of (a) $300,000 or (b) 1.0% of the new money contributed by the members of the Committee or their affiliates or any third parties introduced by Imperial pursuant to the Restructuring. . . . payable upon [its] closing. . . ."[6] A transaction fee in a reasonable amount, based upon and payable from cash or other consideration produced by a successful Restructuring (as defined above in this limited objection) that has been consummated by Imperial, and net of all debt owed by the Debtors as of the effective date, is certainly acceptable.

However, the reach of the Transaction Fee proposed in the Application is too great; and proposes to bind the Debtors to pay the Transaction Fee "in full" to Imperial "if at any time within twenty-four (24) months after the termination or expiration of this Agreement the [Debtors] complete[] a transaction similar to the Restructuring contemplated herein."[7] Again, absent any definition in the Application of what that contemplated Restructuring is, the provision as written could require payment of the Transaction Fee to Imperial on account of *any* restructuring accomplished within two years after the Committee and Imperial part company. For example, the provision as written could be read to bind the Debtors to pay the Transaction Fee to Imperial in full should the Debtors, once reorganized, effect a sale or refinancing within two years.

Thus, the Debtors ask that the Court clarify or alter all terms of compensation set forth in the Application, including the proposed Transaction Fee, to yield reasonable compensation to Imperial

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6 Pld. 852A, Exhibit "B", Engagement Agreement at 1, Section 2

without needlessly exposing the Debtors' heavily burdened bankruptcy estates to depletion without commensurate benefit realized.

3. **Employment and Compensation Should Fully Comply With Court Guidelines.**

In addition, certain terms proposed within the Application appear to conflict with others.

While the Application states that it seeks to employ Imperial "subject to orders of this Court," it immediately qualifies that submission by asserting that, "the terms set forth in the Engagement Agreement are controlling in all respects."[8] Among the terms stated in the Engagement Agreement between the Committee and Imperial (the "Engagement Agreement") are provisions requiring that -- regardless of the outcome of the case, and whether or not a "Restructuring" takes place -- "all fees, disbursements and out-of-pocket expenses" incurred "shall be reimbursed" to Imperial "*promptly as billed*;" yet Imperial "shall invoice the [Debtors] for fees and expenses under this Agreement in accordance with the fee procedures order entered by the Bankruptcy Court in the Chapter 11 bankruptcy cases," such fees and expenses to be "payable in cash via wire transfer."[9] The Engagement Agreement would further provide that upon termination of the Engagement Agreement by either party, Imperial "shall be entitled to receive *prompt* payment of all unpaid fees and expenses" through the date of termination. *Id.* at 2 (emphasis added).

Finally, the Application seeks to subject "[a]ny controversy, claim or dispute relating to" the Engagement Agreement to "binding arbitration. . . pursuant to an arbitration conducted in Los Angeles County, California" and applying the law of the State of California "without giving effect to

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7 Pld. 852A, Exhibit "B", Engagement Agreement at 2, Section 3, par. 2
8 Pld. 852, Application at 4 and fn. 1
9 Pld. 852A, Exhibit "B", Engagement Agreement at 2, Section 2 (emphasis added)

principles of conflicts of laws."[10] However, the Engagement Agreement seeks to bind the Debtors to certain of its provisions, and to obtain payment from the Debtors or from their bankruptcy estates.

Accordingly, the Debtors ask that the Court clarify or alter the Application and its incorporated Engagement Agreement to clearly retain to this Court jurisdiction and venue over all matters pertaining to or arising under the employment or compensation of Imperial in these proceedings.

In sum, to the extent that any terms stated in either the Engagement Agreement or the Application incorporating it suggest that Imperial is to be compensated by methods or at times other than those established by this Court as governing these cases, the Debtors ask that Court clarify or alter all such terms to ensure that any employment or compensation of Imperial fully complies with the Court's orders governing the employment or compensation of all professionals herein.

Conclusion

The Debtors ask that the Court clarify or alter all terms of the Application seeking to employ and compensate Imperial Capital LLC as financial advisors to the Equity Security Holders Committee herein, pursuant to the statutory requirement of 11 U.S.C. §328(a) that any such employment and compensation be had only on "reasonable terms and conditions," and seek all other just and equitable relief.

Dated: July 14, 2006

10 Pld. 852A, Exhibit "B", Engagement Agreement at 3 and 4, Section 9

Respectfully submitted,

/s/ William H. Patrick, III

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NOTICE ANNEX 1

Pursuant to 11 U.S.C. § 342, the address for each of the referenced Debtors is 3850 N. Causeway Blvd., Suite 800, Metairie, LA 70002

DEBTORS	CASE NO.	TAX I.D. NO.
OCA, Inc.	06-10179	xx-xxx8948
Orthodontic Centers of Alabama, Inc.	06-10180	xx-xxx7093
Orthodontic Centers of Arizona, Inc.	06-10181	xx-xxx1232
Orthodontic Centers of Arkansas, Inc.	06-10182	xx-xxx8907
Orthodontic Centers of California, Inc.	06-10183	xx-xxx9079
Orthodontic Centers of Colorado, Inc.	06-10184	xx-xxx7095
Orthodontic Centers of Connecticut, Inc.	06-10185	xx-xxx0411
Orthodontic Centers of Florida, Inc.	06-10186	xx-xxx7097
Orthodontic Centers of Georgia, Inc.	06-10187	xx-xxx7098
Orthodontic Centers of Hawaii, Inc.	06-10503	xx-xxx5963
Orthodontic Centers of Idaho, Inc.	06-10505	xx-xxx4277
Orthodontic Centers of Illinois, Inc.	06-10188	xx-xxx1230
Orthodontic Centers of Indiana, Inc.	06-10189	xx-xxx0663
Orthodontic Centers of Iowa, Inc.	06-10504	xx-xxx0342
Orthodontic Centers of Kansas, Inc.	06-10190	xx-xxx8908
Orthodontic Centers of Kentucky, Inc.	06-10191	xx-xxx0666
Orthodontic Centers of Louisiana, Inc.	06-10192	xx-xxx7100
Orthodontic Centers of Maine, Inc.	06-10193	xx-xxx4186
Orthodontic Centers of Maryland, Inc.	06-10194	xx-xxx1229
Orthodontic Centers of Massachusetts, Inc.	06-10195	xx-xxx5666
Orthodontic Centers of Michigan, Inc.	06-10196	xx-xxx6962
Orthodontic Centers of Minnesota, Inc.	06-10197	xx-xxx6453
Orthodontic Centers of Mississippi, Inc.	06-10198	xx-xxx7101
Orthodontic Centers of Missouri, Inc.	06-10199	xx-xxx6961
Orthodontic Centers of Nebraska, Inc.	06-10200	xx-xxx0483
Orthodontic Centers of Nevada, Inc.	06-10201	xx-xxx5665
Orthodontic Centers of New Hampshire, Inc.	06-10202	xx-xxx5495
Orthodontic Centers of New Jersey, Inc.	06-10203	xx-xxx2916
Orthodontic Centers of New Mexico, Inc.	06-10204	xx-xxx8906
Orthodontic Centers of New York, Inc.	06-10205	xx-xxx6960
Orthodontic Centers of North Carolina, Inc.	06-10206	xx-xxx7102
Orthodontic Centers of North Dakota, Inc.	06-10207	xx-xxx6959
Orthodontic Centers of Ohio, Inc.	06-10208	xx-xxx0361
Orthodontic Centers of Oklahoma, Inc.	06-10209	xx-xxx6958
Orthodontic Centers of Oregon, Inc.	06-10210	xx-xxx6342
Orthodontic Centers of Pennsylvania, Inc.	06-10211	xx-xxx2918
Orthodontic Centers of Puerto Rico, Inc.	06-10212	xx-xxx1568
Orthodontic Centers of Rhode Island, Inc.	06-10213	xx-xxx5667
Orthodontic Centers of South Carolina, Inc.	06-10214	xx-xxx7104
Orthodontic Centers of Tennessee, Inc.	06-10215	xx-xxx7106
Orthodontic Centers of Texas, Inc.	06-10216	xx-xxx8024
Orthodontic Centers of Utah, Inc.	06-10217	xx-xxx6957
Orthodontic Centers of Virginia, Inc.	06-10218	xx-xxx7107
Orthodontic Centers of Washington, Inc.	06-10219	xx-xxx1231
Orthodontic Centers of Washington, D.C., Inc.	06-10220	xx-xxx2484
Orthodontic Centers of West Virginia, Inc.	06-10221	xx-xxx4091
Orthodontic Centers of Wisconsin, Inc.	06-10222	xx-xxx6956
Orthodontic Centers of Wyoming, Inc.	06-10223	xx-xxx5961
OrthAlliance, Inc.	06-10229	xx-xxx2134
OrthAlliance New Image, Inc.	06-10230	xx-xxx0308
OCA Outsource, Inc.	06-10231	xx-xxx9255
PedoAlliance, Inc.	06-10232	xx-xxx0432

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