

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

* * * * *		LEAD CASE NO. 06-10179
IN THE MATTER OF:	*	ADVERSARY NOS. 06-1142,
		06-1144, 06-1145, 06-1147,
OCA, INC.,	*	06-1167, 06-1171, 06-1176,
		06-1201, 06-1266, 06-1267,
DEBTOR.	*	and 06-1327
* * * * *		

Transcript of the proceedings taken in the above captioned matter on **Wednesday, January 10, 2007**, the Honorable Jerry A. Brown, United States Bankruptcy Judge, presiding.

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P R O C E E D I N G S

(Wednesday, January 10, 2007)

THE COURT: Good morning, ladies and gentlemen. Be seated. Court is in session for January 10, 2007. Call the first case.

THE CLERK: OCA, Inc., Lead Case Number 06-10179, Adversary Number 06-1142, Crosby v OrthAlliance, et al; Adversary Number 06-1144, Donald Doan v OCA, et al; Adversary Number 06-1145, Glenwood Jordan v OCA, et al; Adversary Number 06-1147, Elgin Wells v OCA, et al; Adversary 06-1167, OCA, Inc. v Hodgkins, et al; Adversary Number 06-1171, OCA, Inc. v Kerns, et al; Adversary Number 06-1176, OCA, Inc. v Terhune, et al; Adversary Number 06-1201, OCA, Inc. v Izzard, et al; Adversary Number 06-1266, Richard Woehrle v OCA, Inc., et al; Adversary Number 06-1267, Michael Dillingham v OCA, Inc., et al; Adversary Number 06-1327, Robert Buck v OCA, Inc., et al.

I think that's all of them.

THE COURT: All right.

MR. GAMBEL: Just to make our appearances, Bill Gambel for Drs. Doan, Crosby, Jordan, Wells, Izzard and Woodworth.

THE COURT: All right, well everybody signed the sign-in sheet?

All right, well I won't require individual

1 appearances, but each time you address the Court for the first
2 time, identify yourself and at least one of your clients.

3 All right, gentlemen, we're ready. Movers for
4 summary judgment or partial summary judgment will lead off.
5 Now, how many of you are going to be arguing motions for
6 summary judgment? There were some 11 filed, but we don't need
7 argument for all of them. Right now we have three -- four --
8 five -- well, we'll see the necessity for that. I may curtail
9 that. I don't need any "me too" arguments.

10 MR. HATHAWAY: Good morning, Your Honor. My name is
11 Ben Hathaway. My partner, Kell Mercer, and I are here from
12 Austin on behalf of Dr. Dudley Hodgkins. And the movants have
13 agreed among ourselves that I'll take the first stab at this
14 thing and we can kind of go from there.

15 THE COURT: All right.

16 MR. HATHAWAY: Dr. Hodgkins is a licensed dentist in
17 the State of Texas and is engaged in the full-time practice of
18 orthodontics as summary judgment evidence shows. He is also
19 the sole shareholder of his PC, both of which are defendants in
20 this adversary proceeding.

21 To set a couple of the critical time issues on this,
22 Your Honor, the summary evidence shows that in June of '97
23 Dr. Hodgkins and his PC entered into a standard form BSA and an
24 Asset Purchase Agreement with OCS. The summary judgment
25 evidence also shows in April of 2005, Dr. Hodgkins sent a

1 notice letter to OCA and OCS in which he raised several issues
2 of alleged material default under the BSA and under which,
3 Your Honor, he also raised the illegality of the contract. And
4 that was in April of 2005.

5 In May of 2005, the summary judgment evidence shows
6 that Dr. Hodgkins terminated his contract. The summary
7 judgment evidence also shows that after May of 2005, OCA didn't
8 provide any services to Dr. Hodgkins. The Debtors, of course,
9 don't agree or stipulate that Dr. Hodgkins rightfully
10 terminated his contract, but they don't dispute that after May
11 of 2005 there were no services provided to Dr. Hodgkins.

12 As the Court knows, the issue to be decided today is
13 an issue of Texas law. It involves and turns on the
14 interpretation of a Texas statute. The Debtors in their
15 briefing have spent a lot of pages talking about what the
16 legislatures in California, and Indiana, and New Jersey, and
17 Connecticut and places like that have done and what the courts
18 in those states have said about those states' statutes. But
19 those state court statutes and decisions outside of Texas are
20 simply irrelevant to the Court's determination today, because
21 there is a Texas state statute that has been interpreted by a
22 number of Texas Federal Courts that is directly on point and
23 directly applicable. That statute is the Texas Dental
24 Practices Act. And, Your Honor, I have brought for the Court
25 today, if I may hand up to it, copies of those relative

1 statutes and also given a copy to Debtor's Counsel.

2 The Dental Practices Act, as the courts that have
3 interpreted it have noted, is clear, unambiguous, and broad.
4 Section 256.001 of the statute says that a person may not
5 practice dentistry in the State of Texas without a valid
6 license issued by the Texas State Board of Dental Examiners.

7 The relevant statute for the Court today is Section
8 251.003(a)(4), which says that a person practices dentistry if
9 that person owns, maintains, or operates an office or place of
10 business in which the person employs or engages under any type
11 of contract another person to practice dentistry.

12 So, under the Texas statutory scheme a person without
13 a valid license from the State Board of Dental Examiners cannot
14 own, or maintain, or operate an office in which that person
15 employs or engages under any type of contract another person to
16 practice dentistry.

17 The Debtor spends a lot of time in its brief talking
18 about another provision of the Dental Practices Act which is
19 251.003(a)(9), which deals with the interference with the
20 exercise of the dentist's professional judgment. And the
21 Debtor talks about a bunch of safe harbor provisions that are
22 applicable to (a)(9), again irrelevant, Your Honor. Those safe
23 harbor provisions are not applicable to (a)(4), which is the
24 statute that the Texas decisions have all analyzed and found to
25 be violated by the OCA contracts.

1 The Texas Legislature, as the courts out of Texas
2 have noted, had the goal broadly prohibiting any kind of
3 practice of dentistry by a non-licensed person. Every Texas
4 court that has considered the issue of whether the OCA
5 contracts are illegal under the Dental Practices Act has found
6 that those contracts are illegal.

7 And I've attached for the Court's information the
8 three leading cases which are the Turner v OCA case by
9 Judge Junell out of the Western District of Texas, and that's
10 Exhibit I in our summary judgment motion -- and the Turner
11 decision was one handed down last month by Judge Junell -- the
12 Penny case out of the Northern District of Texas, which is
13 Exhibit D, and the Becca case out of the Eastern District of
14 Texas, which is Exhibit G. I'll focus on the Turner case since
15 that's the most recent.

16 THE COURT: All right, was your brief the one that
17 was blue bound with the attachment?

18 MR. HATHAWAY: Yes, sir.

19 THE COURT: All right, yes.

20 MR. HATHAWAY: I have another copy.

21 THE COURT: Well, that's all right, we have it. I've
22 got too many papers here; I don't need another.

23 All right, go ahead. I have some of the cases before
24 me, --

25 MR. HATHAWAY: Right.

1 THE COURT: -- but I want to have them in the same
2 form that you're referring to just for convenience.

3 All right, go ahead.

4 MR. HATHAWAY: And I'm going to focus on the Turner
5 case, Your Honor, since that's the most recent and the one that
6 deals directly with the standard BSA form used by OCA.

7 Judge Junell in the Turner decision was faced with
8 the issue, the same issue that's before this Court, whether the
9 standard form BSA that's used by OCA was illegal under
10 251.003(a)(4). And Judge Junell in that decision dealt with
11 the same issue that's been raised by Debtors in this case which
12 is that provision of the statute doesn't apply to corporations.
13 He correctly held that the definition of person under the
14 Dental Practices Act includes corporations, because that's how
15 it's used in all Texas civil statutes. And he specifically
16 held, as Judge Godbey had and as Judge Brown had in the other
17 decisions that the Dental Practices Act does apply to
18 corporations. And that makes sense, Your Honor.

19 The express language of the statute shows that the
20 Dental Practices Act applies to corporations, because if you
21 look at 251.004, which is the statutory exemptions from the
22 practice of dentistry, Subsection (a)(8) of that statute
23 specifically exempts certain non-profit corporations from the
24 coverage of the practice of dentistry under 251.003. There
25 would be no need to exempt certain corporations from the

1 coverage of the statute if the statute didn't apply broadly
2 to all corporations.

3 So, Judge Junell's decision that the Act applies to
4 corporations, Judge Godbey's decision that the Act applies to
5 corporations, and Judge Brown's decision that the Act applies
6 to corporations is in fact supported by the plain language of
7 the statute itself.

8 Judge Junell in Turner looked at the standard form
9 BSA and had to determine whether under that agreement OCA
10 either owned, or operated, or maintained an office out of which
11 a dentist practiced. He looked at that standard form BSA,
12 which is attached as Exhibit I to the packet, and found that
13 there were 14 provisions of that standard form agreement
14 that --

15 THE COURT: All right, how does the BSA in the Turner
16 case differ from the BSA that your doctor or dentist had?

17 MR. HATHAWAY: It doesn't at all, Your Honor, and
18 we've attached both of them for your information.

19 THE COURT: Okay.

20 MR. HATHAWAY: The Turner BSA is Exhibit B in the
21 exhibit volume -- I'm sorry, the Turner BSA is Exhibit I in the
22 exhibit volume.

23 My partner is right, Turner is Exhibit B in the
24 exhibit volume, and the Hodgkins' BSA is Exhibit A1. And when
25 you go through the items that Judge Junell relied on, the

1 language in the 14 points is exactly the same comma for comma
2 through the first seven or eight, and then some of the commas
3 are different for the last six or seven.

4 For instance, Your Honor, Judge Junell found that the
5 first thing that supported a finding that OCS owned and
6 operated Dr. Turner's PC on Page 10 of Exhibit I was that OCS
7 agreed to act as the sole and exclusive agent in charge of
8 providing Dr. Turner with the business and administrative
9 support and services, non-orthodontic staffing, offices and
10 equipment, and financial services. That language tracks word
11 for word, comma for comma, space for space in the Hodgkins BSA.

12 When you go to Item 2 on the Turner decision on Page
13 10 of Exhibit I, Judge Junell found that OCS agreed to acquire
14 all the furniture, fixtures, and equipment required by
15 Dr. Turner. When you compare the Turner BSA to the Hodgkins
16 BSA the language is word for word, comma for comma, space for
17 space, exactly the same.

18 Item 3, OCS agreed to enter into a lease or leases
19 for Dr. Turner. Compare Turner's BSA to Hodgkins' BSA, comma
20 for comma, space for space, word for word. And it goes down
21 the line, Your Honor. More importantly I think, or at least
22 equally as important, Judge Junell looked at these 14 items
23 that he said supported his determination that OCA owned and
24 operated the Turner practice. The same kind of disclaimers of
25 responsibility, the same kind of disclaimers that OCA says in

1 this case show that Dr. Hodgkins had some kind of input into
2 the decision making process, Those same disclaimers exist in
3 the Turner BSA as they do in the Hodgkins BSA.

4 If you look at Paragraph 2.2 -- and again,
5 Your Honor, the paragraph numbers are the same in these BSAs.
6 So, if you go to Paragraph 2.2 of the Turner BSA, I believe
7 this has a disclaimer in there about the kind of
8 responsibilities that OCA is taking on in Dr. Turner's case, if
9 you go to Paragraph 2.2 in the Hodgkins BSA, it's exactly the
10 same language. If you go to Paragraph 2.5, if you go to
11 Paragraph 3.2, each one of the disclaimers that OCA says show
12 that Dr. Hodgkins controlled his practice were considered and
13 rejected by Judge Junell in the Turner decision. He saw
14 through the subterfuge. He saw through these kind of word
15 disclaimers and found that the reality was under BSA is that
16 OCA was vested with the ownership and the operation of the
17 Turner practice. Same situation in this case, Your Honor,
18 exactly the same situation.

19 And again, you look at Judge Godbey's decision in
20 Penny and Judge Brown's decision in Becca, it tracks the same
21 kind of findings. The analysis used by all of those courts is
22 exactly the same. The statute is broad; it's unambiguous; it's
23 clear, and it applies directly to the OCA situation to show
24 that OCA did own and operate the business.

25 So, Judge Junell in Turner found -- and again,

1 Your Honor, another important decision is all these cases
2 were decided on summary judgment as well. They didn't turn on
3 the full trial. They were all decided as a matter of law by
4 the trial courts.

5 So, each of those courts has found that OCA owned and
6 operated the dental practice. Judge Junell also found the BSA
7 maintained Dr. Turner's orthodontic practice. He saw that
8 because the BSA in Turner was for a term of 40 years that meant
9 that OCS was required to keep up or continue its services for
10 an extended period of time which he found to fit within the
11 dictionary definition of maintain. The Hodgkins BSA, as Turner
12 BSA, was for a term of 40 years. So, exactly the same
13 considerations are at play in Hodgkins, in my doctor's case, as
14 were present in Turner.

15 Judge Godbey also found, as did Judge Brown in the
16 Penny and the Becca cases that the OCA entities was required to
17 maintain the orthodontic services for a period of time. Both
18 of them looked at the dictionary definition of maintain. Both
19 of them found that the requirement that OCA continue its
20 services under the contract for a period of 25 to 40 years was
21 enough to show that the company was required to maintain the
22 dental practices.

23 So each one of these courts, the Turner decision, the
24 Becca decision, the Penny decision found that OCA fell within
25 the first portion of the Dental Practices Act which is that the

1 company either owned, or operated, or maintained the dental
2 practice. In fact each of those courts found that OCA did all
3 three. You don't have to find that OCA does all three. You
4 can find that if OCA does any one of those three that's
5 sufficient to bring it within the statute. But I think the
6 Court will find and should find that OCA both owns, and
7 operates, and maintains Dr. Hodgkins' practice, as it did the
8 Turner practice, as it did the Becca practice, and as it did
9 the Penny practice.

10 So, Judge Junell in Turner after making that decision
11 that OCA owned and operated and maintained the dental practice
12 was required to determine whether OCA either employed or
13 contracted to engage a dentist at that location. And it's
14 interesting, Your Honor, in each one of those cases as in our
15 case there was no written employment agreement between OCA and
16 the dentist. It didn't exist. OCA wasn't that silly. But
17 each one of these cases held specifically, Your Honor, that the
18 Texas Dental Practices Act was written expressly to exclude
19 more than just a direct employment relationship. The statute
20 prohibits a person from engaging "under any type of contract"
21 another person to practice dentistry.

22 The Penny court held that the Act was expressly
23 constructed to prevent parties from circumventing the
24 prohibition against the corporate practice of dentistry through
25 an indirect business relationship. What Judge Godbey said was

1 because the service agreement in that case required the
2 practice group to enter into a separate employment agreement
3 with the dentist and contained a non-compete provision that OCA
4 in that case was effectively attempting to accomplish in a
5 trilateral contract what it couldn't accomplish in a bilateral
6 contract. And the court in Turner, the court in Becca, and the
7 court in Penny found that that effort to circumvent the statute
8 by going through this trilateral contract situation still ran
9 afoul of the statute.

10 We have the same situation in this case. The BSA in
11 the Hodgkins case requires that Dr. Hodgkins be employed by his
12 PC. And the same issues that Judge Junell found in Turner that
13 in his mind led him to believe that Dr. Turner was effectively
14 employed through an indirect relationship by OCA are present in
15 our case. When you look at Page 13 of the Turner decision, he
16 lists seven different factors that he finds indicate that
17 Dr. Turner was actually employed indirectly by OCA. Number one
18 for instance, Dr. Turner had to be employed at the orthodontic
19 office for an initial term of seven years. Well, Dr. Hodgkins
20 was required to be employed at his orthodontic office. He
21 didn't have a limitation of seven years; he had to be employed
22 the whole time. So, he had a 40-year contract that was in
23 place that required him to devote his full time and attention
24 and orthodontic practice to those locations while he was --
25 while the BSA was in place.

1 You go through the seven points on Page 13 of the
2 Turner decision and all the provisions about the non-competes
3 Dr. Turner and OCA had a series of non-compete provisions that
4 dictated that Dr. Turner could not engage in opening up another
5 practice within his practice area during the term of the
6 agreement and for a period thereafter. He also was not allowed
7 to solicit patients, was also not allowed to solicit staff.
8 Those same provisions are in place in the Hodgkins agreement.

9 The Hodgkins agreement had the same non-compete. It
10 had the same non-solicitation. It had the same non-
11 solicitation of staff and non-solicitation of patients
12 provisions that the Turner agreement did.

13 So, what OCA did with Dr. Hodgkins, as what it did
14 for Dr. Turner, was to lock the man into an employment contract
15 for 40 years. It wasn't bold enough to enter into a direct
16 employment contract; it simply required his PC under the BSA to
17 employ him for that term and then it locked him into non-
18 competes saying he couldn't sell his practice without certain
19 conditions being met, couldn't compete for a certain period of
20 time, couldn't solicit patients for a certain period of time,
21 and couldn't solicit staff for a certain period of time, both
22 during the term of the agreement and for a period of two years
23 thereafter.

24 Judge Junell, Judge Godbey, and Judge Brown all
25 determined that those agreements effectively resulted in the

1 employment of their orthodontists by OCA and it is that
2 employment, that forced employment at the offices that OCA
3 owned and operated and maintained that brought the contracts
4 afoul of the statute.

5 So, Your Honor, this is not a case where the Court
6 has to guess what Texas courts would do. It's not a case where
7 the Court has to guess what a vague statute says. This is a
8 case where -- and I was saying this morning I've been doing
9 this for a long time and this may be the first time where I've
10 got every single decision that's directly on point in my favor,
11 and it doesn't happen very often. But every single decision
12 out of the Texas courts has been unanimous in their analysis
13 and has been unanimous in their conclusions that the OCA
14 agreements, which are identical in all material respects to the
15 one for Dr. Hodgkins, are illegal and unenforceable under Texas
16 law.

17 THE COURT: How do you answer the Defendant motion's
18 argument that Turner is not a final judgment?

19 MR. HATHAWAY: I don't have an argument to that,
20 Your Honor.

21 THE COURT: I note for the record that it was issued
22 December 5 of 2006.

23 MR. HATHAWAY: It was.

24 THE COURT: And I assume that they've taken an
25 appeal.

1 MR. HATHAWAY: I frankly don't know what the
2 procedural history on that is.

3 THE COURT: I believe that they've argued in one of
4 the briefs that they have taken an appeal, or will take an
5 appeal, or have filed a motion for an interlocutory appeal, or
6 a motion for certification. I'm not quite sure, but they
7 intend to take an appeal.

8 MR. HATHAWAY: It may very well be. And I guess my
9 response to that issue is it's not like Turner is an
10 aberration. It follows exactly the same analysis and exactly
11 the same rationale as every other Texas Federal Court that's
12 considered the issue has.

13 THE COURT: Particularly Penny.

14 MR. HATHAWAY: Yes, Penny, Becca, exactly. It goes
15 all the way back. And it may not be a final decision, but it's
16 the analysis and the holding that I think are persuasive.

17 THE COURT: But whether it's a final opinion or not
18 really doesn't make any difference because it's not binding on
19 me, but it's just as persuasive --

20 MR. HATHAWAY: I think --

21 THE COURT: -- whether it's a final opinion or not I
22 guess is your argument.

23 MR. HATHAWAY: That's exactly my point, Your Honor.
24 Again, it's consistent with a whole line of thought out of
25 Texas and I think this Court ought to give and will give due

1 deference to what the Texas judges have said about their
2 statute. And again, it's not like it's an aberration. It's
3 consistent with a whole line of cases and it's consistent with
4 what the statute says. It's very clear and it's a very broad
5 statute that the Texas Legislature in its infinite wisdom has
6 enacted for sound policy purposes.

7 THE COURT: All right.

8 MR. GAMBEL: Good morning, Your Honor; Bill Gambel
9 for Wells and others as I'll mention in the course of my
10 comments.

11 I won't reargue Turner. The case was decided
12 December 5th and I think Counsel has done a good job with the
13 analysis of Turner's opinion in his view and I share those
14 views.

15 I might also add that we also have a decision of
16 November 20th in Buck where the court similarly held the
17 contract to be illegal, which was not mentioned. In addition
18 to that we also had not just one Penny case, we had two Penny
19 decisions.

20 THE COURT: Well, in the Buck decision -- it was Buck
21 you referred to?

22 MR. GAMBEL: Yes, sir.

23 THE COURT: That involved parties that are actually
24 involved in this, right?

25 MR. GAMBEL: Yes.

1 THE COURT: Okay.

2 MR. GAMBEL: So, we had that -- we had Buck and we
3 had the decision of December 5th. Incidentally, the
4 December 5th decision in Turner was entered only after this
5 Court granted the lift stay to allow Turner to proceed in the
6 Middle District -- the Western District for an adjudication of
7 the illegality of those issues. In addition to that -- to
8 Turner -- and we might add that Judge Junell was a member of
9 the Texas Legislature for ten years and in the course of his
10 opinion relied on that experience in addressing the arguments
11 which were made in Turner, which incidentally are the arguments
12 which were made here.

13 In addition, as I mentioned there was not only
14 Penny 1, but Penny 2 and Penny 2 involved the consolidation of
15 a great number of other Texas cases which were all adjudicated
16 prior to the bankruptcy which all held that the contracts were
17 illegal as well. And then finally there's Perkins, which was
18 not mentioned, which is another Federal Texas case from the
19 Northern District which held the contracts to be illegal.

20 I'm here, therefore, on six cases. One of my cases
21 is like Hodgkins, that is the Izzard case is a case in which
22 the contract was terminated on February 10th, 2004. So, in
23 addition to illegality we have the question of whether or not
24 the contract is executory. In any event both in that case and
25 in Izzard, because of course there was no operation under the

1 agreement from November 10th, 2004 until March 15th, 2006, 25
2 months by my count when the bankruptcy was filed. And of
3 course OCA had not performed under the Izzard contract during
4 that period of time the summary judgment evidence reflects.

5 In addition to that I might add that our package in
6 each of our six cases involves a motion for summary judgment,
7 an affidavit of the practitioner given in support of that,
8 together with the exhibits which he authenticates which
9 includes his BSA or his Management Service Agreement as I call
10 it, in addition to that, a Rule 201 submission, evidence
11 resubmission for judicial notice which includes both the
12 securities filings and the Turner BSA and Turner contract.

13 Again, I don't know there's a lot to argue. I would
14 note that our summary judgment evidence is not opposed by any
15 contrary affidavits and we provided a statement of uncontested
16 facts in each of our six cases, which Debtors to their credit
17 have given responses to, but those responses are not supported
18 by any motion for summary judgment qualified evidence in
19 opposition.

20 While I say that and the Court can refer to those
21 responses, in most instances the Debtors admit the statements
22 of uncontested facts with some exceptions that I'll mention.
23 And let me now distinguish among my six cases. Three of my
24 cases, Wells, Doan, and Jordan -- no, Wells, Doan and Crosby
25 are OCA forms of contracts, whereas Crosby --

1 THE COURT: Wait, give me the first three, Wells,
2 Doan --

3 MR. GAMBEL: Wells, Doan and Crosby --

4 THE COURT: Okay.

5 MR. GAMBEL: -- are OCA forms of contracts, like
6 Turner, like Hodgkins.

7 THE COURT: All right, do you contend that you can
8 take the BSAs that were executed by Drs. Wells, Doan, and
9 Crosby and show that they coincide with the paragraphs set
10 forth in the Turner opinion as to the language as Mr. Hathaway
11 has done?

12 MR. GAMBEL: You know, I haven't done I think he said
13 line by line, space by space, comma by comma. I didn't do
14 that.

15 THE COURT: Well, I think he said paragraph by --

16 MR. GAMBEL: But in any event --

17 THE COURT: Whatever.

18 MR. GAMBEL: But in any event, to the best of my
19 representation to the Court they are the same with one
20 exception.

21 THE COURT: Okay.

22 MR. GAMBEL: The Doan contract has a unique provision
23 in it that is not present in any of the other six contracts, or
24 any of the other OCA contracts. And under the Doan provision
25 automatically on the first day of the month OCA automatically

1 acquires the outstanding receivables.

2 THE COURT: Acquired ownership of it?

3 MR. GAMBEL: Ownership of them. Now, that's
4 different than Crosby or Wells where they acquire the cash and
5 can sweep the cash. In Doan they actually acquire legal title
6 to the receivables before they are even collected by a
7 transaction that automatically occurs on the first day of the
8 month of each an every month. But that's the only place that I
9 found that among my six contracts, and that's the only
10 difference that I know of in comparison to the Turner
11 contracts.

12 When I say OCA form of contract, by in large I mean
13 all of the other trappings of control that were referred to in
14 Turner and all the other trappings of the lease, the ownership
15 of the equipment, et cetera. But what distinguishes the OCA
16 form of contract in my mind from the other forms is it calls
17 for a 40 percent net profits interest, that the fees which are
18 to be paid to OCA is 40 percent of the net profits from the
19 practice.

20 Now, in the OrthAlliance or PDOAlliance forms of
21 contracts which were the forms of contracts which the court
22 looked at in Penny and Perkins and the recent decision in Buck
23 which is not the Hodgkins contract, but is the Woodworth
24 contract, the Izzard contract, and the Jordan contract, those
25 call for a percentage of gross, so that for instance in

1 Izzard's case --

2 THE COURT: All right, Woodworth, Izzard and give me
3 the other one?

4 MR. GAMBEL: Woodworth, Izzard, and Crosby.

5 THE COURT: Okay.

6 MR. GAMBEL: Wait a minute, hold on.

7 THE COURT: All right, you've got --

8 MR. GAMBEL: Jordan is an OCA and Crosby is MSA.

9 Now, I refer to the ones -- in my briefs I refer to the ones
10 that are with OrthAlliance as Management Service Agreements,
11 whereas the ones that are with OCA are called BSA, or Business
12 Service Agreements, and that's the way those documents are
13 titled.

14 The differences in the OrthAlliance form of contract
15 is it calls for a percentage of the gross which is 17 percent
16 in Izzard's case, 11 percent in Crosby's case, and 10 percent
17 in Woodworth's case. But otherwise the control indicia or the
18 ownership of the equipment, the collection of the accounts, the
19 hiring of the staff, the setting of the dress code, the setting
20 of office hours, you know, all of the things, all of the Turner
21 factors are all present under both forms of contracts.

22 Now, as the Court knows, we waited to file our
23 summary judgments until Turner was decided. Turner was decided
24 on the 5th and I think the first of our summary judgments were
25 filed on the 7th or 8th in this case. We waited for that to

1 give the Debtors an opportunity to raise whatever arguments
2 it wanted to raise about those cases since we didn't have a BSA
3 form of contract decision that was final other than Becca, and
4 I think Becca is extremely persuasive and a well written
5 opinion. As a matter of fact in our motion for summary
6 judgment we spent a lot of time discussing the Becca factors
7 which of course we submit is persuasive and should be taken
8 into account.

9 Now, finally I think there are two points that I'd
10 like to make --

11 THE COURT: On Becca, what was the date of that?
12 Somehow I got the last page cut off. I don't have a Page 12.

13 MS. KINGSMILL: Becca is 2005.

14 THE COURT: Becca is 2005?

15 MR. GAMBEL: Okay, I'd like to make two points where
16 I think there is some tension in the statement of uncontested
17 facts and disagreement between the Debtor and the movers.

18 The BSAs in all of these cases are for a length of
19 time which is greater than the work life expectancy of the
20 physicians I'll call them. For instance, Dr. Wells is 65 years
21 old and he has 36 years remaining on his BSA. Jordan is 59
22 years old and he has 40 years remaining on his BSA and I think
23 Crosby had -- is 50 years old and has 80 years left on his BSA,
24 although Marguerite points out that she believes the agreement
25 was amended to make it only 40 years not 80 years.

1 The fact of the matter --

2 THE COURT: He might make it then. He'd only have to
3 be 90.

4 MR. GAMBEL: But the fact of the matter is by reason
5 of the BSA and by reason of the fact that the doctor was
6 obligated to practice with his PLC I'll call it, his
7 professional company signatory to the BSA for the entire time
8 of this BSA and because it extended beyond the length of his
9 service, OCA obtained an equitable interest in the practice of
10 dentistry in each of these cases. Because it is only by a
11 termination of the contract that the doctor gets relieved from
12 his obligation to continue to work for the practice for a
13 period of time which is beyond his work life expectancy. So,
14 his only way out in Dr. Doan's case since we've laughed about
15 him for his 80 year contract when he's 50 years old, his only
16 way out of that is to sell the practice to another qualified
17 orthodontist who agrees to become signatory to the BSA and
18 becomes bound for the remaining period of 80 years.

19 So, what I'm saying is it is by this contractual
20 arrangement that this Debtor actually gets an equitable
21 interest in the practice and that these Debtors cannot do
22 anything about it. In these cases all of -- I mean these
23 doctors who are 65 and 59 and 63, they're getting to the end of
24 the line and they're interested in disposing of their practice,
25 having another doctor come in and become -- take over their

1 practice and exit, maybe supplement their retirement by being
2 able to dispose of their practice interest. But OCA's current
3 condition makes that impractical. I mean it's in bankruptcy.
4 It's accused of default. It's in violation of the Texas law.
5 I know these are not summary judgment facts, but in the same
6 sense that Marguerite has given a discussion of why these
7 doctors should be held to these contracts, I suggest to the
8 Court that there's substantial reason to suggest that the Texas
9 decisions which have been entered should be applied, that this
10 Court should follow those.

11 THE COURT: Well, that's your answer to her equitable
12 argument, but what do you say in response to her equitable
13 argument that it would be grossly unfair to let these dentists
14 out of these contracts because they got all the benefit
15 frontloaded on this?

16 MR. GAMBEL: You know, I'm impressed by her argument
17 to say that a lender ought to be able to lend money to the
18 practice and you ought to be able to get it paid. And I'm
19 impressed by her argument that a lessor ought to be able to
20 lease to a practice and ought to be able to get the rent paid,
21 and he ought to be able to provide business services, but
22 that's not being done here. They didn't do this for exchange
23 for notes. None of my cases involve notes. We don't have any
24 obligations to owe any of these in my six, and I don't believe
25 any of the 12 involve promissory notes where we were loaned

1 money by OCA. I mean if they had made loans then I would
2 suggest that just as Michaels, the court in Michaels suggested,
3 well, if you signed a note then we're going to have to look at
4 the question of whether or not those notes ought to be repaid.
5 So, I think that's right.

6 And you know what? I think if we were talking about
7 law -- we are all lawyers. If we were talking about lawyers
8 and we talked about a deposition firm signing a contract with
9 my firm, or you old firm for 80 years to do all the deposition
10 work in exchange for a percentage of the gross or a percentage
11 of the net that was not reasonably related to the value of the
12 services being rendered on a contemporary basis, I don't think
13 we'd blink at the idea that that was illegal.

14 If this was a loan and if we did have notes, then I
15 think Marguerite's argument would make sense. If this was a
16 lease and we did have rent -- even if we had an earn-out I
17 would say -- but we don't have that here.

18 THE COURT: All right.

19 MR. GAMBEL: Thank you.

20 MR. HATHAWAY: Your Honor, can I make just one quick
21 clarification?

22 THE COURT: No, I've heard from you. I'll hear from
23 you in rebuttal, but I'm not going to hear from you again
24 because if we let everybody pop up and add something we're
25 going to be here all day and that's not my intention.

1 All right, Mr. Pinkerton.

2 MR. PINKERTON: Good morning, Your Honor; Mike
3 Pinkerton for Drs. Buck and Cole.

4 I just wanted to point out one important procedural
5 distinction that Drs. Buck and Cole have is that they have a
6 decision of illegality in this particular adversary proceeding
7 in their favor. The Court -- Your Honor, if you'll recall, you
8 lifted the stay last summer so that the Texas court could rule
9 on this very illegality issue, and the Texas court did so. It
10 ruled that the contract for Dr. Cole was illegal, and if you'll
11 recall, it had already ruled that Dr. Buck's contract was
12 illegal. In conjunction with that ruling the Texas court
13 transferred the case to this Court on the Debtor's own motion,
14 transferred it to this Court where it's now pending as an
15 adversary proceeding.

16 So, the point is that we're not asking you to rely on
17 precedent of other Texas cases, Your Honor; we're asking you to
18 simply not reverse the decision that is in this particular case
19 that the contracts of Dr. Buck and Dr. Cole are illegal.
20 Presumably, taking that by extension, Your Honor; if the
21 contracts are illegal then they can't be assumed. If they're
22 illegal, then the terminations that Dr. Buck and Cole gave a
23 few years ago were valid and if it's a terminated contract then
24 it can't be assumed.

25 So, Your Honor, we would ask that Drs. Buck and

1 Cole's contracts be deemed unassumable and, therefore,
2 rejected.

3 And with regard to the Debtor's point that the Fifth
4 Circuit hasn't had a chance to rule on that, Your Honor, we
5 suggest that they may at some point. The Debtors can ask that
6 the rulings that the contracts are rejected be deemed a final
7 and certified judgment and they can appeal it then, or we can
8 have the litigation on the unjust enrichment issue and we'll
9 appeal everything at the same time.

10 MR. FORSYTH: Good morning, Your Honor; David Forsyth
11 for four of the doctors, Drs. Kerns, Terhune, Woehrle, and
12 Dillingham. And I'm not going to repeat everything; I just
13 want to make a few points. I may have some other things after
14 I hear from the other side, but the only points I want to make
15 in addition to those that I think have already been covered are
16 the following.

17 First, Your Honor, we filed yesterday a short reply
18 brief with copies of some briefs that were already filed that
19 addressed two of the issues. We didn't have time to regenerate
20 them, but on the issue of the corporation versus persons thing
21 I think that's been covered, but that was briefed extensively
22 in the Packard case in Texas and we've attached the excerpts
23 from that which give further explanation as to why the argument
24 on the person versus corporation thing does not hold water.

25 Secondly, on the issue of the (a)(4) versus (a)(9)

1 provisions of the Texas law, as has been pointed out, the
2 (a)(4) provision which is the one own, or maintain, or operate,
3 that is really an anti-proprietorship statute. And if you look
4 at that, that is there because the Legislature in Texas
5 essentially found that it's inimical to the integrity to the
6 dental patient relationship to have a dental proprietorship.
7 That is different from the (a)(9) which is specific instances
8 of control which is a different item. To take their argument,
9 Your Honor, they would say that in effect (a)(9) weeds out or
10 negates (a)(4), which is not the case under any rule of
11 statutory construction. So, I want to make that note,
12 Your Honor.

13 Also, the issue that they have raised on this, the
14 (a)(9) versus (a)(4), that was briefed extensively before the
15 court in Becca. Indeed, the legislative history was all
16 presented there and on Page 11 of the Becca decision the court
17 rejected that. So, this is not anything new. This was brought
18 up in the Becca case. And my co-counsel and colleague,
19 Mr. Forbes, who had handled the Becca case, indeed had briefed
20 all of that. And we've also attached, Your Honor, to our reply
21 brief excerpts from the brief that go into that issue if the
22 Court wants to look at that in more detail.

23 The next point, Your Honor, is that the way I read
24 their papers they're really not making real distinctions,
25 substantive distinctions case by case. It's not a question of

1 this one or that one. I don't see anything in the documents
2 that essentially are in effect separating these out in the
3 sense that they think some are better than others or whatever.
4 I think that in all material cases and material instances the
5 provisions are basically the same. The four that I have are
6 all OCA versions, not OrthAlliance versions. And in our
7 statement of uncontested fact we go through and we match up the
8 items and the sections. I don't know whether its word for word
9 or paragraph for paragraph, but those are all outlined and I
10 think the Court can see from that that all of the factors are
11 there that would go to the same result as was reached in Turner
12 and in Penny and in Becca and these other decisions.

13 THE COURT: As I understand it, your four doctors are
14 all OrthAlliance?

15 MR. FORSYTH: No, OCA. OCA.

16 THE COURT: OCA.

17 MR. FORSYTH: Yes. Yes, Your Honor.

18 THE COURT: When you say OCA, you mean the BSAs?

19 MR. FORSYTH: Right, right.

20 THE COURT: Oh, okay.

21 MR. FORSYTH: Also, Your Honor, I don't really see
22 that any material issue of fact is really raised at all so that
23 really the Court is not faced with anything that would be left
24 to be tried on this. Indeed, and I think it's very
25 significant, in all of these other Texas cases where it's been

1 decided, they have all been decided on summary judgments.
2 None have had to go to trial. In each one of those cases the
3 courts found that they could look at this and rule on summary
4 judgment without trial. We've attached a copy of the Perkins
5 case for example where the court at the very end made it clear
6 that facially they can look at this. So, it's not a question
7 that there would be anything left to be tried on this, and I
8 don't really see anything that's urged by the Debtors to really
9 try to create significant issues of fact.

10 The only other issue and I put in our reply brief and
11 I think Mr. Pinkerton just raised it too, we also agree,
12 Your Honor, that whatever the Court does should be certified as
13 final under Rule 54(b) so that this can proceed. The Debtors
14 have raised that issue themselves and we believe that rather
15 than have this issue dangling that any ruling by the Court
16 should be certified as final so that it is appealable under
17 Rule 54(b).

18 I'm happy to answer questions, Your Honor, and I may
19 have again comments in rebuttal, but that's all I have to add
20 right now.

21 THE COURT: All right, the analysis of Paragraph --
22 of the OrthAlliance contracts that was done as compared to
23 the --

24 MR. FORSYTH: OCA --

25 THE COURT: -- OrthAlliances in the Penny case, that

1 was Mr. Hathaway's argument, do you argue that -- Mr. Gambel
2 touched on that but said he had not really done a paragraph by
3 paragraph, or as he said a line by sentence, do you contend or
4 is it part of your argument that the BSA contracts can be
5 fitted within the exact paragraphs containing findings of fact
6 of the OrthAlliance contracts in the Penny case?

7 MR. FORSYTH: No, we have not -- first of all, no,
8 these are OCA contracts, not OrthAlliance contracts and I think
9 that in the Hodgkins case it was OCA. So, we don't have any
10 OrthAlliance.

11 THE COURT: It wasn't the Penny, it was the Turner
12 case, the Turner case that had the 14 --

13 MR. FORSYTH: No, but the answer is, Your Honor,
14 we've not done it that way. We can go back and present
15 something later if the Court wants that. What we have done,
16 Your Honor, though is to go through in the statement of fact
17 all of the substantive factors that were treated that way with
18 the reference to the specific paragraph numbers that show that
19 in all material respects those factors that led the courts to
20 find ownership and control -- I'm sorry, ownership,
21 maintenance, and operation are all here.

22 If the Court would like us to submit something
23 afterwards that really lines those things up, we can certainly
24 do that, but I think that the information is all contained in
25 our statement of uncontested fact with references to each of

1 the paragraph numbers where the provisions are contained.

2 THE COURT: All right, so it's your contention that
3 from your statement of material facts that one can take that
4 and bring it within the findings of fact from Turner on two
5 different aspects of this one paragraph -- two different things
6 that are contained in Paragraph 4, one that owns --

7 MR. FORSYTH: Right.

8 THE COURT: -- maintains, or operates an office or a
9 place of business --

10 MR. FORSYTH: And then the employees are --

11 THE COURT: -- and the other person employs or
12 engages --

13 MR. FORSYTH: Under any contract. And I think --

14 THE COURT: -- under any type of contract.

15 MR. FORSYTH: Yeah. And I think it's important, I
16 think that Mr. Hathaway touched on it, but that's read very
17 broadly. It's not just employing. It says "Engages under any
18 contract," so it's clearly not intended to limit it to an
19 employment agreement.

20 THE COURT: So, it's your argument that "Engages
21 under any type of contract" is a much broader --

22 MR. FORSYTH: Yes.

23 THE COURT: -- concept than the typical employment
24 agreement?

25 MR. FORSYTH: And that's been found in those courts.

1 THE COURT: Under any employment agreement.

2 MR. FORSYTH: And that's found in the decisions,
3 Your Honor.

4 THE COURT: Yeah. All right.

5 MR. FORSYTH: Thank you, Your Honor.

6 MR. NAUS: Judge, Chip Naus for Dr. Risinger.

7 THE COURT: I'm sorry, I didn't catch your last name.

8 MR. NAUS: Chip Naus for Dr. Risinger and his PC.

9 I just wanted to make clear for the record that he
10 also has virtually an identical contract and following on that
11 line of questioning, he also says that you can take the
12 contract and on both elements of the Turner decision you can
13 match it up. And I just wanted to make that clear for the
14 record.

15 THE COURT: All right, that's Dr. Risinger.

16 MR. NAUS: Risinger, yes, sir.

17 THE COURT: Risinger.

18 MR. NAUS: Thank you.

19 THE COURT: All right. Now is there anyone else that
20 wishes to be heard that can add anything to the motions for
21 partial summary judgment?

22 All right, then I'll hear from the opposition.

23 MS. KINGSMILL: Good morning, Your Honor; Marguerite
24 Kingsmill on behalf of OCA.

25 First I'd like to point out, Your Honor, I think an

1 observation that you made, and indeed all the doctors concede
2 this in their briefs, that the Penny decision, which was the
3 first decision in Texas and it was in 2003, that then in turn
4 all the other cases followed is not binding on this Court. We
5 believe, as set forth in our brief, that considering all the
6 other jurisdictions that have weighed in contrary to Penny
7 that --

8 THE COURT: Let me interject something right now so
9 you don't waste a lot of time.

10 MS. KINGSMILL: Okay.

11 THE COURT: This hearing was specially set to
12 determine Texas law. So, your brief and your argument I think
13 you're about to make about what the law is in Illinois,
14 Indiana, or God knows whichever state doesn't help me one iota
15 and I'm frankly not going to pay any attention to it.

16 MS. KINGSMILL: All right.

17 THE COURT: So, don't waste your time on that. We'll
18 hear Illinois law when we hear that motion and if we have to
19 have another hearing on the other law involved that's for
20 another day. But I don't care what Illinois says about -- that
21 you translate into what I should hold Texas law is. It doesn't
22 matter to me.

23 MS. KINGSMILL: All right, with --

24 THE COURT: And let me say one other thing.

25 MS. KINGSMILL: Okay.

1 THE COURT: Your point that the Penny case -- no,
2 your point that some of these other cases are not final
3 judgments and, therefore, less weight should be given to them I
4 don't really prescribe much weight to that, because they're not
5 binding on me in any event even if they are a final judgment.
6 They're not binding on me, but the fact that they're not
7 binding doesn't take away from the persuasive effect of them I
8 don't think at all.

9 MS. KINGSMILL: Well, in that regard too let me point
10 out, Judge, that the Penny case that all the other cases
11 followed --

12 THE COURT: Right.

13 MS. KINGSMILL: -- and sort of rubberstamped, the
14 Penny case was an OrthAlliance case. The Penny case unlike I
15 think virtually all the OCA BSAs in this case did not have a
16 reformation clause. And in the BSAs --

17 THE COURT: Excuse me for interrupting you. You're
18 arguing that none of the OrthAlliance forms of contracts had a
19 reformation clause?

20 MS. KINGSMILL: I think that's the case. I know that
21 Penny did not.

22 THE COURT: Okay.

23 MS. KINGSMILL: I know that the OCS/OCA BSAs in this
24 case presented here on motion for summary judgment all had
25 contract modification for perspective legal events, a contract

1 reformation clause which says that in the event any state or
2 federal law or regulation now existing, or enacted, or
3 promulgated after the effect date are interpreted by judicial
4 decision, or regulatory agency, or legal counsel for both OCS
5 and the orthodontists in such a manner as to indicate that the
6 structure of this agreement may be in violation of such laws or
7 regulations, the parties hereto shall amend this agreement as
8 necessary to the maximum extent possible. Any such amendment
9 shall preserve the underlying economic and financial
10 arrangements between the parties.

11 I say that recognizing that the motions for partial
12 summary judgment that are at issue today are on -- are
13 predicated on the argument that the contract is illegal on its
14 face. We haven't really briefed the reformation argument, but
15 that reformation argument would be a matter of an evidentiary
16 -- I think an additional hearing that's not before the Court.
17 So, I'm going to address their arguments under Texas law. But
18 even if this Court were to find that the contract, certain
19 provisions were unenforceable, then there is the reformation
20 argument that I don't think was at issue at Penny. The Turner
21 case in its ruling did not address it, and the one appellate
22 court, just indulge me for a minute, it is a California case
23 but it's an appellate court decision that ruled that the BSA
24 was in fact legal, did so and said that the court would have to
25 consider illegality or determine illegality and consider

1 evidence related to the performance of the contract, I think
2 which we heard a lot today from Mr. Hathaway and others about
3 the performance and the terms of the contract. We have to
4 consider evidence related to the performance of the contracts
5 as well as the expressed terms. And the appellate court in
6 that case then conducted a full evidentiary hearing and
7 reformed the contract reading out the unenforceable provisions.

8 I'll also add that I think Mr. Gambel cited to the
9 Penny 2 decision. And in Penny 1 the court ruled on the
10 illegality issue. Penny 2 then was a separate summary judgment
11 that took up the issue of whether or not as a matter of law the
12 claims for unjust enrichment would be similarly barred. And
13 the court in Penny 2 -- again, I don't think the reformation
14 issue was before the court, but even that court said they don't
15 find any wrongdoing on the part of OrthAlliance, and the
16 recognized the benefit that would be reaped, the unjust
17 enrichment that would be reaped by the doctor. And so the
18 motion for summary judgment on that issue was denied, so it did
19 not resolve the case on the merits in total. And those are two
20 separate decisions.

21 Here we believe --

22 THE COURT: All right, the California appellate case
23 that you refer to that's in your brief, did that involve
24 language similar to the reformation clause, what we call the
25 reformation clause that's in the BSAs in this case?

1 MS. KINGSMILL: Yes, Your Honor.

2 THE COURT: But we're assuming that it did not --

3 MS. KINGSMILL: Wait, wait --

4 THE COURT: -- involve language that was in the
5 OrthAlliance case.

6 MS. KINGSMILL: The decision -- may I hand this up?

7 The case in Moore, which is the appellate court
8 decision, was an OCA case and had the similar provisions at
9 issue in the BSAs before this Court including I believe a
10 reformation clause.

11 THE COURT: Where?

12 MS. KINGSMILL: Yeah, it says in the decision at
13 Page 19, "These provisions, i.e., of the contract make clear
14 that the parties intend that any illegal provision would be
15 severable from the remaining portions of the agreement. And I
16 do think that principals of Texas law allow for reformation.
17 But again that speaks to the issue of even if the Court were to
18 consider some portions of the contract unenforceable, it could
19 be reformed pursuant to the agreement of the parties and under
20 principles of law and equity to make it enforceable.

21 Now, do the equities of it mitigate in favor of it,
22 and I think they do, and that is what is outlined in our
23 pleadings. Most of --

24 THE COURT: Excuse me for interrupting you --

25 MS. KINGSMILL: Yeah, I'm sorry.

1 THE COURT: -- but that -- I'm looking at this
2 opinion in the Moore case, that's the California case you're
3 referring to which someone was kind enough to hand to me, I see
4 it's an unpublished opinion.

5 MS. KINGSMILL: It is unpublished. It's unpublished.

6 THE COURT: I mean in the first place I don't know
7 that I can give any weight to a California appellate decision
8 when I'm interpreting Texas law and Texas contracts to be
9 performed in Texas even if it were a published opinion. But a
10 non-published opinion, that really --

11 MS. KINGSMILL: It is a non-published opinion.

12 THE COURT: Well, there's Fifth Circuit law on how
13 much weight if any should be given to an unpublished opinion of
14 the Fifth Circuit, which I'm bound by, except I'm not sure what
15 I'm bound by if it's an unpublished opinion, but I don't see
16 that I should give any to an unpublished opinion in California
17 dealing with California law.

18 MS. KINGSMILL: Well, and I'm pointing it out though,
19 Judge, because of the decision in Penny, which they're relying
20 on, did not in fact have -- I mean the contract and the court
21 did not consider or rule on a reformation clause, and I'm
22 pointing this case out because it did. There are other cases,
23 there are published opinions that do deal with legality of BSAs
24 and the reformation of them and you don't want me to address
25 those, but there's some in other jurisdictions.

1 THE COURT: Okay, but did the other opinions from
2 the Texas Federal District Courts have a contract under
3 consideration that had a reformation clause?

4 MS. KINGSMILL: The Turner case.

5 THE COURT: All right.

6 MS. KINGSMILL: The Turner case and it was argued,
7 but the court did not address it in any form or fashion in
8 rendering the decision because the court looked primarily to
9 Penny, as do the other courts. And there are, to the extent
10 the Court is at all -- would be interested in looking at
11 another decision, albeit it out of Connecticut that we cited in
12 our briefs, out of the District Court of Connecticut it was a
13 rule and judgment on a motion for summary judgment --

14 THE COURT: A Federal District Court?

15 MS. KINGSMILL: It was a Federal District Court and
16 it is -- I bring this up --

17 THE COURT: A published opinion?

18 MS. KINGSMILL: It is the most recent decision by a
19 court and I believe it is published. It's cited in our papers.
20 But that case is helpful all -- well, it's helpful to me
21 because it ruled in favor of legality. But it's also helpful
22 in that it goes through a fairly exhaustive analysis of the
23 other decisions throughout the United States in dealing with
24 this issue, including Penny and other analyzing the statutes,
25 you know, and the decisions. And I don't want to belabor that

1 since the Court has indicated that it would not be --

2 THE COURT: Well, let me analyze that just a little
3 bit more. Assuming that I hold that the BSAs that are the
4 subject of the motions for partial summary judgment are
5 illegal, it's your position then that I should have another
6 hearing to see whether they can be reformed and if they cannot
7 be reformed whether there's some kind of equitable claim for
8 damages because assuming for a moment your argument that the
9 dentists got a big break on the front end of these contracts
10 and, therefore, should have to account for that in equity,
11 doesn't that indicate that I should either certify my ruling --
12 and we're talking about a hypothetical ruling, I have not yet
13 ruled -- that I should certify my hypothetical ruling of
14 illegality so that it can be taken to the Fifth Circuit and we
15 can get a definitive ruling on these type of contracts? In
16 other words, why should I go into a long hearing on reformation
17 and whether anything is due without knowing whether my decision
18 is correct that the contracts are illegal? Or on the other
19 hand maybe instead of a certification it's simply I'll await
20 the Fifth Circuit's action on the appeal that I think was taken
21 in --

22 MS. KINGSMILL: It will be taken. It's an
23 interlocutory order and one of the cases they judge I think has
24 indicated his willingness to certify, but I think that your
25 point is well taken. We do intend to appeal and ask for it to

1 be certified in order that we can bring it up and that
2 process may be quicker than --

3 THE COURT: The Turner case we're talking about.

4 MS. KINGSMILL: Right, the Turner or one of the
5 others, Packard --

6 THE COURT: It was Buck case.

7 MS. KINGSMILL: Right.

8 THE COURT: And other case that was recently --

9 MS. KINGSMILL: And that's true, Your Honor, which
10 would -- then my suggestion would be that this Court could I
11 guess defer on ruling because we do intend to appeal. They are
12 going up and you're not bound to follow, and they're not final
13 judgments in this Court right now.

14 THE COURT: Well, but if I defer ruling what does
15 that do to -- then I've got to defer the trial of this matter
16 which is set for trial on the merits in March or April.

17 MS. KINGSMILL: No, these are not. These are not.

18 THE COURT: None of these are?

19 MS. KINGSMILL: No, these are --

20 That's right, but the process here would require the
21 District Court to the Fifth Circuit --

22 THE COURT: Well, I know --

23 MS. KINGSMILL: -- right, and we're in the District
24 Court over there now and we could -- if the Judge has indicated
25 a willingness to certify and the parties I think are in

1 agreement, that's probably --

2 THE COURT: Well, see if I certify it -- well, wait a
3 minute, under the new -- under the 2005 Act isn't there a
4 procedure for this to go directly from me to the Fifth Circuit?

5 MR. FORSYTH: I believe it's by agreement,
6 Your Honor.

7 MR. HORN: Yeah, not without agreement. I believe it
8 -- Your Honor, I'm sorry, Warren Horn. I believe it has to be
9 by agreement of the parties for there to be a direct appeal
10 from this Court to the Fifth Circuit. I believe if there's not
11 agreement, your certification would just go to Judge Vance,
12 who's already had a portion of this case. That's my
13 appreciation of the procedures.

14 THE COURT: Well, with all due respect to
15 Judge Vance, that necessarily will involve delays, because
16 she's got to look at it and then she might very well decide to
17 wait on the Fifth Circuit to act in the Turner case.

18 All right, go ahead with your argument.

19 MS. KINGSMILL: All right. I'd also like to point
20 out that the doctors concede the Penny is not binding. And in
21 their briefs, and I think it was particularly one filed by
22 Mr. Forsyth, a large portion of the brief concentrates on a
23 1920 California case called Painless Parker.

24 THE COURT: You have to hesitate as I did to keep
25 from saying "Painless Potter," which was the subject of a movie

1 sometime ago starring Bob Hope.

2 MS. KINGSMILL: And so on that point I would again --

3 THE COURT: So, let the record show if any of us
4 refer to "Painless Potter" we're really mean Painless Parker,
5 all right?

6 MS. KINGSMILL: That's right. And that's a
7 California case and that gets into my argument on -- I would
8 just urge the Court, I know it's not before the Court, but to
9 consider this not just in the vacuum of these particular
10 doctors recognizing that all of these doctors with the
11 exception of a couple of them, Dr. Izzard, and I think Buck and
12 Cole, signed onto these SSAs -- I mean BSAs and have been in
13 the system for almost ten years. And when Penny came down --
14 when they signed the contracts they had lawyers, they had
15 accountants --

16 THE COURT: Well, that argument cuts both ways. If
17 they've been in the system ten years hasn't OCA recaptured to a
18 great extent it's upfront money that your equitable argument is
19 strongly depended upon as not fair and equitable for them to
20 get the benefits of the front end payments and not pay it out
21 over -- in other words, it would take OCA a period of time to
22 get a fair return on its up front money, for lack of a better
23 word. But if they've been in the system ten years and they've
24 been paying -- their practice has been paying to OCA, haven't
25 they gotten back most of their money? If they didn't get it

1 back in ten years it wasn't much of a deal that they struck.

2 MS. KINGSMILL: Well, no, I think actually the way
3 the BSAs work the doctors get a signing bonus and a lot of
4 upfront money and it does take awhile for the economics to tip
5 in favor of OCA. And that is the --

6 THE COURT: It takes 40 or 50 years according to some
7 of --

8 MS. KINGSMILL: I mean that's the nature of a long-
9 term contract and the Business Service Agreement means what it
10 says, it is a Business Service Agreement. There's nothing that
11 provides under the contract for a doctor to terminate
12 precipitously or early just because OCA's financially in
13 troubled, beleaguered. I mean they're raising the defense now,
14 but the issue before --

15 THE COURT: If you take that to its logical extreme
16 that means they can't die before 40 years or whatever it is.

17 MS. KINGSMILL: And in point of fact the doctors are
18 ignoring the realities of what OCA is out there doing. Because
19 with the doctors -- none of these doctors are in the system.
20 They're current BSAs. They are depositing and we are providing
21 services. And they have practices over there in Texas with
22 offices and with patients that we funded, that we set up, that
23 we marketed, and they've been operating. And they're not --
24 you know, Dr. Crosby is 50 years old. He's probably -- he made
25 \$2 million in 1997 dollars on this contract and now he wants

1 out. And from OCA's perspective, I mean we've provided all
2 these services on the front end. We've supported the doctor
3 and in fact we have -- we're leasing the properties. They're
4 practicing out of these properties. We over the course of the
5 bankruptcy have provided notice of our intent to assume.
6 They're on the assume list these leases. We've renewed the
7 leases. We continue to provide the leases and the services.
8 They continue to use our software. They've continued to have
9 their patient load that they have and now they want to bail.
10 Now, you know, --

11 THE COURT: You know that equitable argument on your
12 part reminds me the advice an old lawyer gave me when I started
13 practicing law some 40-some odd years ago. You've got a case,
14 try to get the facts and argue the facts. If you can't get the
15 facts on your side and win on the facts, well, argue the law.
16 And if you can't win on the law, well, argue equity. So,
17 that's about what I think of your equitable argument, with all
18 due respect.

19 MS. KINGSMILL: Well, what we've presented are the
20 facts, and the law and the equitable principals, but these
21 facts that I just recited are indeed the facts, that when they
22 negotiated the contract and they signed off on it they didn't
23 express their disclaim or concern about the illegality. When
24 Penny came out in 2003 they didn't say, oh, can't do this
25 contract anymore, I've got to stop, it's illegal. When Becca

1 came out in 2004 they didn't complain. In 2004 when Perkins
2 came out they didn't complain. And with the exception of I
3 believe Dr. Hodgkins who complained in May of '05, when Becca
4 came out no one complained. And so they continue to accept the
5 benefits of this and the contract does allow for reformation.
6 Now, that's not a principal of equity, that's a --

7 THE COURT: Well, let me ask you, has OCA or any of
8 the subsidiaries have they changed the form of the contract in
9 any substantial aspect since the 2003 Penny decision, which was
10 a clear signal that it was illegal and unenforceable under
11 Texas law?

12 MS. KINGSMILL: Well, I think as we presented in the
13 confirmation hearing before Your Honor, the new Support
14 Services Agreements, which OCA has presented to several doctors
15 and are being signed, do try to address the nuances of some of
16 those issues. And the answer to that is yes, and we have
17 continued to do it and tighten it up some, but also understand
18 that their arguments on the way the prior BSA operated, and I
19 think we laid that out in our brief, are taken out of context.

20 We did provide services. We did do things in terms
21 of marketing for the doctors. It required their approval. We
22 did not employ any of these doctors. We didn't employ
23 Dr. Hodgkins.

24 Every single one of these BSAs provides that the
25 affiliates practice, which is the doctor, has complete and sole

1 responsibility for the professional aspects of the practice
2 including the employment of all orthodontists, the rendering of
3 all professional orthodontic services, and any dental services
4 incidental thereto, the professional supervision of all
5 orthodontists and office staff, and all decisions concerning
6 the scheduling of patients, the type of orthodontic and dental
7 services to be provided to patients and the drug supplies and
8 equipment to be used in the rendering of orthodontic services
9 to patients. Although the BSAs also typically provide that the
10 affiliate practice, that's the doctor, is solely responsible
11 for who they select and employ as orthodontists.

12 THE COURT: Yeah, but the District Judge in the
13 Turner case squarely held that that was violative of the
14 provision of the Texas Dental Practices Act that said you could
15 not employ or engage and he went on to hold in a well written
16 opinion that what you couldn't do directly by an employment
17 agreement you could not accomplish indirectly by the
18 combination of these three agreements because it had the same
19 legal effect, and that the phraseology of the statute "employ
20 or engage" was to be broadly interpreted and it was violative
21 by these three contracts, which according to Mr. Hathaway
22 contain exactly the same language that's in his doctor's
23 contract.

24 MS. KINGSMILL: And that's why we're going to take an
25 appeal on Penny. We think Penny -- I mean, excuse me, Turner.

1 Turner is wrong as the facts in the BSAs presented do not
2 show that OCA owned, or operated, or actually practiced
3 dentistry. And the obligations undertaken by OCA, they are no
4 different than any other kind of services that dentists
5 typically assist with. There's nothing that distinguishes OCA
6 from traditional providers of office management services, that
7 OCA provides complete -- other than the fact that they provide
8 a complete range of business services with the result being
9 that the dentist can contract with just one company rather than
10 separate contracts with providers on a piecemeal basis. And
11 none of these services when performed by OCA in isolation would
12 contravene law and it's kind of hard to imagine that the mere
13 fact that one company provides all services at issue would
14 render the arrangement illegal.

15 In the other cases that have looked at Penny,
16 although they may not be, you know, binding precedent have said
17 that Penny is not Penny and therefore the Turner case which
18 relies on it will not withhold scrutiny because if courts were
19 to follow Penny, then such a ruling would virtually make every
20 single contract that a dentist has with landlords who provide
21 lease spaces, with accounting firms that provide comprehensive
22 accounting services illegal. And the modern realities of
23 medical dentist practices require that health care
24 professionals have to obtain business assistance in today's
25 increasingly competitive medical environment. And that's what

1 the doctors sought and that's how the contracts were formed
2 and implemented.

3 And we disagree with the analysis by the Turner,
4 which is again rubberstamping Penny, analysis of the Texas
5 Occupational Code. We do believe that a court when looking at
6 the scope of that statute would necessarily have to look at the
7 portion of the statute that they want to say is irrelevant that
8 was briefed to the Turner court, but the Turner court didn't
9 rule on it, there's a whole section that says these are
10 services which are presumptively legal. They do not fall
11 within the scope of the unauthorized practice of dentistry and
12 it includes management and financial services, much akin --

13 THE COURT: Yeah, but then Mr. Forsyth's argument is
14 that list of what is not illegal pertains to Section 9 --
15 Subsection (a)(9) rather than Subsection (a)(4), which is the
16 subsection we're really looking at.

17 MS. KINGSMILL: Right, and we disagree with that.
18 And there's another section that lists, it has a more
19 exhaustive list of the type of services that are presumed to be
20 illegal and that presumption is rebuttable.

21 THE COURT: Yeah, but the list that you contend
22 applies that lists the services that are presumably legal, much
23 of that that applies to this is only applied when the contract
24 in question does not provide for a percentage of the earnings,
25 or net profits, or whatever you want to call it from the dental

1 practice. I can point out those particular sections to you,
2 but I know that they only crank in with the contract in
3 question has nothing to do with a percentage of the earnings or
4 the profits.

5 MS. KINGSMILL: Okay. Give me a second.

6 THE COURT: Let me ask you a question, and I realize
7 it's not very fair to you to ask you this question because it
8 presumes that you and your co-counsel would have done research
9 on the basis that you were going to lose today, but you made
10 the statement to me that you believe that Texas law would
11 provide for reformation of these BSAs to remove the illegal --
12 the portions that Texas District Courts have held are illegal
13 under Texas law. I know you didn't brief that, because of the
14 reasons I just stated, but I have some real difficulty with
15 accepting the proposition that under Texas law you can reform a
16 contract that's been held illegal and void as violative of a
17 Texas state statute. There's nothing in any of these cases
18 that have been referred to me that deal with that and your
19 answer to that is, well, they didn't discuss reformation in
20 these cases and that there's a California unpublished opinion
21 that says you're entitled to reformation. Do you have any
22 basis for arguing to me that there's a possibility of
23 reformation under Texas state law?

24 MS. KINGSMILL: I would have to reserve the right to
25 brief it.

1 THE COURT: Yeah, I understand.

2 MS. KINGSMILL: I know that other courts have in
3 these very circumstances reformed the contract and that Texas
4 in general, I believe, provides that if parties enter into
5 contracts and portions of them are later ruled to be
6 unenforceable and there was a mutual mistake in thinking that
7 they were legal or were enforceable, the courts will reform it.
8 But I would have to brief it.

9 THE COURT: All right, but those are cases where you
10 go in with the presumption that the contract in question is
11 illegal, because generally speaking courts try to enforce a
12 contract reached freely between the parties if there's any way
13 to interpret it as legal rather than illegal. But you don't go
14 in with that presumption here, I don't think, because you've
15 already had at least three District Judges hold that it is
16 illegal, basically the same contract is illegal.

17 MS. KINGSMILL: That's right, but the rulings were
18 not there when they signed the contracts. These contracts were
19 entered into for the large part in 1997 and 1996, and so both
20 parties entered into them with the belief and the understanding
21 that they were legal, and the doctors, again, with the
22 financial benefit of that. And there weren't any complaints on
23 the front end and there weren't any complaints after the
24 decision, but the decisions were not on the books, they were
25 not there when the contracts were signed. And so we want to

1 fully brief that issue.

2 For today's purposes if the Court is inclined to rule
3 that the contracts are illegal prior to ruling on the motion
4 for summary judgment, then we would ask for an evidentiary
5 hearing on the issue of reforming the contract so it can be
6 legal as to be reformed to sever any unenforceable provisions
7 to make it conform to Texas law.

8 THE COURT: All right, have you finished your
9 argument?

10 All right, I'm going to do something that I don't
11 usually do. I'll permit anyone else to argue very briefly in
12 opposition to the motion for partial summary judgment. As I
13 said, I usually don't do that, but I'm doing it in this case
14 because I did hear from four, maybe five different lawyers in
15 support of the motion for partial summary judgment. So, I'll
16 give any of you an opportunity to make a brief argument, if you
17 wish to do so. Just note from my comments you're swimming
18 upstream anyhow, but if one of you wants to take the
19 opportunity to perhaps with a grand and eloquent argument save
20 the day, I'll give you five minutes to do so.

21 All right, I don't have any takers.

22 Do you wish to respond on behalf of the movers? And
23 I'm only going to permit one, perhaps two responses at the
24 most. I'm not going to let all of you.

25 MR. HATHAWAY: Yes, Your Honor. Just very briefly

1 there are a couple of points of clarification.

2 The primary point I want to make sure the Court
3 understands is when you look at the paragraph by paragraph,
4 comma by comma, word by word, space by space analysis of the
5 Turner agreement versus the Hodgkins agreement, when I was
6 going through this you'll notice I was referring to
7 Judge Junell's 14 points on the ownership and operation factors
8 that he found on Pages 10 through 12 of his opinion. The first
9 seven paragraph by paragraph, comma by comma, word by word, et
10 cetera, et cetera, when you get down into the areas where he
11 deals with for instance the non-competes, the fees that were
12 charged and that kind of thing, they're the same provisions,
13 but for instance it's not word for word, because Turner deals
14 with you can't compete in Houston, whereas in Hodgkins you
15 can't do things in Austin. Dr. Turner had a 50 --

16 THE COURT: Yeah, but other than geographical area
17 it's the same.

18 MR. HATHAWAY: Right, the fees --

19 THE COURT: I'm not too concerned about it. You've
20 convinced me on that and I may be asking the question of the
21 wrong person, because I'm not sure you're the right spokesman,
22 because your situation I think deals only with the
23 OrthAlliance.

24 MR. HATHAWAY: Only with the OCA. Turner was an OCA
25 agreement, Hodgkins is an OCA agreement. So, we have exactly

1 those same contracts.

2 THE COURT: You have the same BSA?

3 MR. HATHAWAY: Same BSA, yes, Your Honor.

4 THE COURT: And Turner dealt with OrthAlliance?

5 MR. HATHAWAY: Turner dealt with OCA with the BSAs.

6 THE COURT: All right. Well, who's the best person
7 to speak for -- in your case I can take the opinion and your
8 statement of facts, or I can make you do it in a proposed
9 findings of fact, and show the facts fit right in with these 14
10 points --

11 MR. HATHAWAY: Yes, sir.

12 THE COURT: -- in the Turner decision.

13 MR. HATHAWAY: Yes, sir.

14 THE COURT: All right. Now, whose client has an
15 OrthAlliance?

16 MR. GAMBEL: I may be the only one here today with
17 OrthAlliance. Crosby, Izzard, and Woodworth are the three of
18 the 12 that I believe are only OrthAlliance, PDOAlliance
19 contracts.

20 THE COURT: All right.

21 MR. GAMBEL: And they are like Penny with no
22 reformation. They have different percentages, because one is
23 17, one is 11, one is 10 --

24 THE COURT: Yeah, I know, but --

25 MR. GAMBEL: -- but other than that they're all like

1 Penny.

2 THE COURT: -- I don't think that makes a lot of
3 difference whether it's seven, 14, or what have you.

4 MR. PINKERTON: The same with Dr. Cole, Your Honor,
5 with regard to what Mr. Gambel said.

6 * * * * *

7 **RULING**

8 * * * * *

9 THE COURT: All right. Well, I'm prepared to rule.

10 On the basis of the Penny decision and the Turner
11 decision, I am holding that the contracts in this case that are
12 involved in the some 11 -- how many have we got -- 11 motions
13 for summary judgment are illegal under Texas law. That takes
14 me to the question of where do I go from there and how is the
15 best way to handle this?

16 Generally speaking, when I rule from the bench I
17 don't write anything, and if I'm going to write anything it's
18 going to take me some time even with the attorneys' assistance.
19 But if I don't write anything -- I'm sure an appeal is going to
20 be taken and you're going to appeal I guess to the District
21 Court. I'm not sure that the District Court would benefit
22 enough from my ruling to justify the time delay involved in my
23 issuing a written opinion. And you have advised me that these
24 parties involved in the motion for partial summary judgment are
25 not set for trial in March or April.

1 Is that correct, Mr. Patrick?

2 So, I don't see any detriment to anybody. None of
3 these parties are going to have to prepare for a trial. On the
4 other hand, the Debtors are not going to have to prepare for a
5 trial as to these particular doctors.

6 All right, so I'll hear from anybody as to whether I
7 should handle it in a different fashion. Right now my
8 inclination is simply to grant the motion for partial summary
9 judgment for the reasons stated and for the reasons that are
10 evident in my questions to Counsel, and on the basis of the
11 statements of uncontroverted material fact. I find that there
12 are no factual issues here and that the parties moving for the
13 partial summary judgment are entitled to such judgment as a
14 matter of law based on the reasoning set forth by the Federal
15 District Judges in Penny, Turner, Buck, and there was one other
16 opinion.

17 MR. FORSYTH: That was Becca, Your Honor. Becca.

18 THE COURT: Becca, yes. And two of those rulings
19 involve parties that are involved in this case who are movers
20 for the partial summary judgment.

21 MR. FORSYTH: One question, on the Rule 54(b)
22 certification will Your Honor direct the entry of judgment on
23 that so that it would become appealable? I think you just have
24 to determine there's no just cause for delay in entering the
25 judgment.

1 THE COURT: All right, well, I'm inclined to do
2 that. Does the other side -- does OCA wish to be heard on
3 that?

4 MR. PATRICK: Judge, let us -- William Patrick for
5 OCA.

6 Let us think about the significance of this. We
7 still have the reformation issue that we're going to --

8 THE COURT: Well, I'm not going to hear the
9 reformation issue --

10 MR. PATRICK: Right, I'm just saying before we see
11 what happens with this ruling we all need to figure out whether
12 we should bring a hearing on a motion for reformation or not
13 and the consequence of that.

14 THE COURT: All right.

15 MR. PATRICK: So, if we can advise the Court of our
16 position on that.

17 THE COURT: Well, I'm telling you right now I'm not
18 going to have a reformation hearing until some higher court
19 decides whether they're illegal or not. To me it's a waste of
20 time. If I'm wrong it would be a complete waste of time to --

21 MR. PATRICK: Right.

22 THE COURT: -- to have the reformation hearing. If I
23 am right, it's going to take a lot of convincing for you all
24 seeking reformation to show me that you're entitled to
25 reformation under Texas law.

1 MR. PATRICK: We understand that and we just want
2 that opportunity if it turns out that you're right.

3 THE COURT: I don't want to do anything to delay
4 this. I'm afraid what you're suggesting is going to delay it.

5 Let's do it this way. I'm issuing my order or
6 judgment today granting the motions for partial summary
7 judgment on the basis that I just stated that I need not
8 repeat. I will entertain a motion to certify this ruling as a
9 final ruling so that an immediate appeal can be taken. I think
10 we'd best do that by motion on your part pointing to the
11 mover's attorney, no one in particular, but anyone or all, and
12 that will give you an opportunity to as you say think about
13 this and respond.

14 MR. PATRICK: That's fine.

15 THE COURT: All right, does anybody have any
16 disagreement or want to be heard?

17 MR. FORSYTH: You want us to basically file it and
18 just notice it for a regular hearing date, Your Honor, or -- I
19 mean it may be if they conclude --

20 THE COURT: It may be -- why don't you just file it
21 and let's see what their response is. We may not have to have
22 a hearing.

23 MR. FORSYTH: Well, I'll wait, because after they
24 think about it if they tell us --

25 THE COURT: Refresh my recollection, it's been a long

1 time since I've practiced, but --

2 MR. FORSYTH: Not that long.

3 THE COURT: Some of my partners would probably argue
4 it's been longer than the 14 years I've been on the bench. But
5 anyhow, aren't motions for certification usually handled on the
6 briefs or on the papers?

7 MR. FORSYTH: I usually put -- you know, just handle
8 it as kind of part of -- let me suggest this. They may
9 conclude that they don't object to that, in which case it can
10 be done. If they say they don't want to have it, then we
11 can --

12 THE COURT: We can have it --

13 MR. FORSYTH: -- we're going to be here on the 22nd,
14 I believe, Your Honor, for another status conference. Why
15 don't we wait and see and we'll either file a motion if they
16 don't want to have it done, and if they do we can advise the
17 Court and it can go in your ruling.

18 THE COURT: All right.

19 MR. FORSYTH: Is that okay?

20 MR. GAMBEL: But you're entering the judgment.

21 MR. FORSYTH: Yeah.

22 THE COURT: I'm entering the judgment today.

23 MR. FORSYTH: Okay, well we can do a supplemental,
24 because we don't want to hold that up, Your Honor. Why don't
25 we enter than and then we'll talk --

1 THE COURT: All right, now -- all right, that's the
2 way we'll handle it.

3 Something has come up that will prevent my hearing
4 the Illinois -- the motions for summary judgment on the
5 Illinois law on the 19th. Do you want to try to get another
6 date now?

7 MR. FORSYTH: The 22nd is a conference date if you
8 want to just have it.

9 THE COURT: How many motions are there on the
10 Illinois law, two, three?

11 UNIDENTIFIED SPEAKER: I believe there's only two,
12 Your Honor.

13 MR. BALLINA: Two for the 19th, Judge, two, Schnibben
14 and Sexson.

15 THE COURT: Okay. Well, how would it sound to hear
16 those on Monday, January 22nd? I can give you a half a day
17 then. It shouldn't take a half a day.

18 All right, then the motions for partial summary
19 judgment on Illinois law that are now set for the 19th will be
20 continued and reset for Monday, January 22 at ten o'clock. All
21 right?

22 MS. KINGSMILL: Judge, when would our responses --
23 could we have some additional time on responding?

24 THE COURT: The motion for --

25 MS. KINGSMILL: On Illinois, when -- it was due

1 Tuesday. Could we have until Friday since the hearing has
2 been continued?

3 THE COURT: You're talking about the motion on
4 Illinois law?

5 MS. KINGSMILL: Right, in Illinois.

6 THE COURT: Well, I've continued it three days, so I
7 guess -- when was your reply due?

8 MS. KINGSMILL: Our responses were due on this coming
9 Tuesday, next Tuesday.

10 THE COURT: Well, if I extend it --

11 MS. KINGSMILL: So if we could have until Friday?
12 Could we have until Friday?

13 THE COURT: Yeah, it's three days extension.

14 MS. KINGSMILL: Okay.

15 THE COURT: You're going to have to make it Thursday,
16 because otherwise I can't read them before, unless I take them
17 home over the weekend.

18 MS. KINGSMILL: That's fine.

19 THE COURT: Close of business Thursday.

20 MS. KINGSMILL: Thanks.

21 THE COURT: That way I can read them Friday.

22 All right, Court is adjourned.

23 And we have a conference -- let's set the conference
24 back. If we set it at two o'clock will that interfere with
25 anybody's flight schedules?

1 UNIDENTIFIED SPEAKER: Your Honor --

2 THE COURT: Where are you flying? I thought you were
3 from New Orleans.

4 UNIDENTIFIED SPEAKER: Yeah, but I'm on a plane to
5 Houston at two o'clock.

6 THE COURT: When?

7 UNIDENTIFIED SPEAKER: I'm supposed to be going to
8 Houston at two o'clock.

9 THE COURT: Well, I don't think we can accommodate
10 you because the earliest I could fix it would be one o'clock
11 and you're not going to make it to the airport before 2:00
12 anyhow. You'll have to live with it.

13 MR. MERCER: Your Honor, just quickly, we're flying
14 back to Austin at 3:50, but I understand that we're not now
15 going to be set for trial in March, so I don't think we need to
16 be here.

17 MR. BALLINA: If we're not going to be set for trial
18 in March, I wouldn't think you really need to be here.

19 THE COURT: Court is adjourned.

20 * * * * *

21 (Hearing is Concluded)

22

23

24

25

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
DOROTHY M. BOURGEOIS

1/12/07
Date