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U.S. COURTS
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 POCATELLO, IDAHO

**IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF IDAHO**
The Honorable Larry M. Boyle

POCATELLO DENTAL GROUP, P.C.,)
 an Idaho Professional Corporation,)

Plaintiff,)

vs.)

INTERDENT SERVICE)
 CORPORATION, a Washington)
 Corporation,)

Defendant,)

vs.)

POCATELLO DENTAL GROUP, P.C.,)
 an Idaho Professional Corporation;)
 DWIGHT G. ROMRIELL, individually;)
 LARRY R. MISNER, JR., individually;)
 PORTER SUTTON; individually;)
 ERNEST SUTTON; individually;)
 GREGORY ROMRIELL; individually;)
 ERROL ORMOND; individually; and)
 ARNOLD GOODLIFFE; individually;)

*Counterdefendant and)
 Third-party Defendants.*)

Case No. CV-03-450-E-LMB

**RESPONSE OF
 DWIGHT G. ROMRIELL,
 GREGORY ROMRIELL,
 ERROL ORMOND, and
 ARNOLD GOODLIFFE
 TO
 INTERDENT MOTION FOR
 PROTECTIVE ORDER**

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Procedural Context

Defendant InterDent has moved the Court for a Protective Order including terms and a procedural process that reverses the normal order and burden of proof for parties seeking the protection of Rule 26(c), Federal Rules of Civil Procedure. This Response explains the problems and potential problems with the proposed Order and why it is not needed and objectionable.

ARGUMENT

THE PROPOSED PROTECTIVE ORDER IS UNREASONABLE, EASILY SUBJECT TO ABUSE, SHIFTS THE BURDEN OF PROVING LEGITIMACY, AND IS NOT NEEDED

The law is clear that “there is no absolute privilege for trade secrets and similar confidential information.” *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 362 (1979), citing 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2043, p. 300 (1970); 4 J. Moore, *Federal Practice* ¶ 26.60[4], p. 26-242 (1970), and *United States v. Nixon*, 418 U.S. 683 (1974).

Counsel has declined to stipulate to the proposed Protective Order for these reasons:

1. **No Basis for Legitimate Confidentiality.** The *proposed* Protective Order allows any document to be “designated as confidential” without even requiring a showing of good faith proffer as the basis for confidentiality other than the arbitrary

designation by counsel. It is thus subject to abuse and tactical discovery limiting. *See*, paragraph 3.

2. **Shifting of Burden from Proponent.** The *proposed* Protective Order after allowing for arbitrary confidentiality designations shifts the burden of establishing confidentiality away from the *proponent* of confidentiality to the party entitled to the discovery. That places a disproportionate workload on the party entitled to discovery. For example, a confidentiality designation takes essentially no significant time to make. By contrast, once the designation is made, to challenge by motion such a designation results in the party entitled to discovery being saddled with a huge and disproportionate expense in bringing the motion, preparing and reviewing memoranda, and attending a hearing. That shifts the workload and burden of establishing confidentiality away from the proponent and on the discovery recipient. *See*, paragraph 10 requiring the “objecting party” to file the motion to *undo* the designation.

3. **Precludes Post-case Needs.** The *proposed* Protective Order would prevent use of any so-designated document beyond this case even though it was information a client had a legitimate use for later. *See*, paragraph 4.

4. **Beyond Scope of Rules.** The *proposed* Protective Order goes beyond the permissible scope of Rule 26(c), *Federal Rules of Civil Procedure*, by allowing many types of documents not in their nature covered by Rule 26(c)(7), limiting the scope of a protective order to trade secrets, confidential research, development, or commercial

information to be “locked-up” as confidential. For example, the *proposed* Protective Order would permit the making of a “confidential” designation under paragraph 1 for:

- (a) **public documents** such as “licenses, permits;”
- (b) “**conversations**” never intended to be, nor designated at the time as, confidential thus creating *after-the-fact* potential liability;
- (c) **common commercial papers** as “invoices, purchase orders, delivery receipts, bills of lading, estimates;”
- (d) documents clients and parties are customarily absolutely entitled to and to use freely for their own purposes such as “**accounting records and worksheets;**”
- (e) **nebulous and undefined documents** “of any kind or description.”

4. **Creates After-the-fact Liabilities.** The *proposed* Protective Order makes no provision to preclude any confidentiality designation for documents which the parties or counsel already have in their possession or may receive from appropriate sources other than InterDent. It, thus, allows for creation of an after-the-fact confidentiality with the potential for abusive and expensive future legal disputes that never could have arisen over such documents but for the after-the-fact designation.

5. **Duplication of Law.** No protective order is needed to *duplicate* and overlay obligations of confidentiality already established by ethical provisions or law such as HIPAA regulations.

6. **Alters Attorney Work Product Rights.** It precludes use of a document except for depositions or trial preparation thus eliminating the whole area of attorney work product usage. See paragraph 5d.

POINT TWO

ENTITLEMENT TO A PROTECTIVE ORDER SHOULD BE ON A CASE-BY-CASE BASIS WITH THE BURDEN ON THE PROPONENT OF PROTECTION

As the Supreme Court said in *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 363 (1979)fn 24, “orders forbidding any disclosure of trade secrets or confidential commercial information *are rare.*” That really applies here. The procedure decided in *Federal Open Market* is the one that should control in these proceedings: If InterDent, or any other party, legitimately claims trade secrets will be disclosed by responding to discovery, the proponent of a need for confidentiality protection should have to come forth with a foundational showing. The necessity of having the burden to make such a showing is an effective deterrent to discovery abuse and such is needed herein.

To date, InterDent has not provided any basis, or exemplary documents, to suggest that it even has any *legitimate* “trade secrets” that could pass muster of a commercial right to be protected. The public record fact of this case is that InterDent is a company apparently incapable of state-of-the-art professional or fiscal management; it is in bankruptcy. There is no current basis to believe that any person or entity could

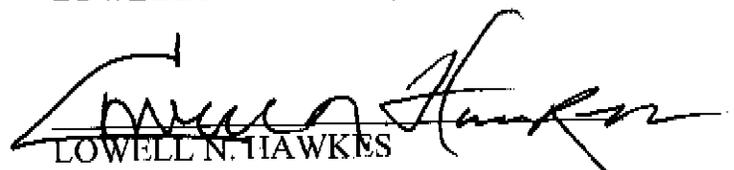
possibly glean any *genuinely* beneficial commercial information from learning anything of the internal workings of InterDent.

By contrast there is substantial evidence that InterDent has a high interest in protecting others from knowing the truth of its many failings and suppressing evidence of that. InterDent is not entitled to be protected from the facts of its failings, mismanagement, wrongs, threats, or defaults. Nor the embarrassment that may come from proof of such.¹ But the order they seek would accomplish just that while imposing unjustified burdens on parties entitled to legitimate discovery.

Ethical provisions and HIPAA regulations already provide the protections that patient information would relate to; another layer of law is not needed. The motion for protective order is an impermissible “muzzle” that should be denied absent *affirmative* evidence and proof that InterDent has something legitimately entitled to protection.

RESPECTFULLY SUBMITTED this 5th day of August, 2004

LOWELL N. HAWKES, CHARTERED


LOWELL N. HAWKES

¹ This Court has before it in pending motions, for example, deposition testimony of Dr. Larry Bybee of InterDent’s repeated purchasing of cheap and unreliable pediatric dental burrs that kept breaking: Cheap pediatric dental burrs were “snapping and breaking all the time right on the shaft” presenting a “safety issue” for pediatric patients. **Bybee Depo. 59:1-7.** Dr. Bybee complained of the cheap pediatric dental burrs and told InterDent “several times that we need to stop ordering these burrs that are breaking , and than she would do it for a while and then pretty soon we are back with the breaking burrs again.” **Bybee Depo. 68:3-6.**

The inclusion of “invoices” and “purchase orders” within the definition of documents that could be protected by the proposed Protective Order has no apparent legitimate purpose except to raise time and financial barriers to evidence.

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 2004, I sent by fax a copy of the foregoing to counsel for the parties as shown below:

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