U.S. COURTS

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CAMERON S. BURKE,
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C.,	)	
Plaintiff,	)	Case No. CV 03-450-E-LMB
v.	)	ORDER
INTERDENT SERVICE CORPORATION,	)	
Defendant.	)	
INTERDENT SERVICE CORPORATION,	)	
Third-Party Plaintiff,	)	
v.	)	
POCATELLO DENTAL GROUP, P.C., *et al.*,	)	
Third-Party Defendants.	)	

In a hearing held in Pocatello on August 9, 2004, the Court took under advisement the following motions: Counterdefendant Misner's Motion to Dismiss Counterclaim (Docket No. 58), Group's Motion to Compel Payment of Attorney Fees (Docket No. 79), Group's Motion to Strike Amended Counterclaims (Docket No. 120), Counterdefendant Misner's Motion to Strike Amended Counterclaims (Docket No. 122), ISC's Motion to Dismiss Third Party Defendants

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(Docket No. 130), Group's Motion to Compel Discovery (Docket No. 137), Group's Motion to Extend Expert Disclosure Deadline (Docket No. 139), Counterdefendant Misner's Motion to Quash Bybee Subpoena (Docket No. 144), Counterdefendant Misner's Motion to Quash Valley Dental Subpoena (Docket No. 145), ISC's Motion for Protective Order (Docket No. 146), and Orthodontic Centers of Idaho's Motion to Quash Subpoena (Docket No. 151).

Having carefully reviewed the record, considered legal memoranda and oral arguments of counsel, and otherwise being fully advised, the Court enters the following Order.

I.

PENDING MOTIONS

A. Misner's Motion to Dismiss ISC's Counterclaim (Docket No. 58)

In response to the Group's Complaint, ISC filed a counterclaim on November 6, 2003 which, in its sixth and seventh claims for relief, includes as counterdefendants, *inter alia*, Larry Misner ("Misner"), Ernest Sutton, and Porter Sutton (collectively referred to herein as "the Counterdefendants"). *Answer* (Docket No. 21). As a result, these three counterdefendants filed individual motions to dismiss ISC's counterclaim. All three motions to dismiss are intertwined and essentially raise identical issues. On July 13, 2004, the Court approved a Stipulation and Order dismissing Ernest and Porter Sutton, rendering their Motions to Dismiss ISC's counterclaims moot (Docket Nos. 68, 70). *Order* (Docket No. 135). Accordingly, only Misner's Motion to Dismiss ISC's Counterclaim (Docket No. 58) remains before the Court.

ISC's sixth claim for relief alleges that ISC was fraudulently induced, by the actions of the Counterdefendants, including Misner, to enter into the Agreement with the Group. *Answer* (Docket No. 21). ISC states that it "relied upon representations by Group, including

representations by [Misner] regarding their willingness and ability to abide by the terms in the Management Agreement . . ." *Id.* at ¶ 92. ISC claims that they have "suffered detriment as a proximate result of its reliance on the representations and concealment of facts" made by the Counterdefendants, and that ISC would not have entered into the Agreement "but for the misrepresentations and concealment of material facts" made by the Counterdefendants, including Misner. *Id.* at ¶¶ 95-96. ISC asserts that it was damaged in an amount exceeding $2.8 million as a direct and proximate result of the Counterdefendants' fraud. *Id.* at 97. ISC's seventh claim is an alternative claim for relief seeking restitution of the $2.8 million ISC paid the Counterdefendants pursuant to the Agreement. *Id.* at 99-100.

Misner seeks dismissal of ISC's sixth and seventh claims for relief, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the following grounds: (1) ISC failed to plead the alleged fraudulent conduct with the particularity required by Fed. R. Civ. P. 9(b), (2) ISC's allegations neither state a claim for "fraud in the inducement," nor any other claim upon which relief may be granted, and (3) ISC's claims as pled are barred by the applicable statute of limitations. *Misner's Memorandum in Support*, p. 3 (Docket No. 59).

i. ISC Adequately Pled its Fraud Claim in Compliance with Rule 9(b)

"When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). Federal Rule of Civil Procedure 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."

The Ninth Circuit Court of Appeals has interpreted Rule 9(b) to "mean that the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Snowbird Construction Co. v. U.S. Dept. of Housing and Urban Development*, 666 F.Supp. 1437, 1442 (D. Idaho 1987) citing *Schreiber Distributing Co. v. Serve-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

ISC contends that:

> The fraudulent representation was that Misner and the Group would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶ 92.) This representation occurred "[w]hen entering into the Management Agreement", which was in October 1996. (*Id.* and *Id.* ¶ 14.) The Management Agreement and Article 5.2 are material. (*Id.* ¶¶ 15, 91, 93). ISC relied on the representation and did so to its detriment. (*Id.* ¶¶ 92, 95.) As a Group shareholder and one-time Group president, Misner was a party to and beneficiary of the transaction between ISC and the Group. (*Id.* ¶ ¶ 14, 45, 93).
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> ***
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> Although ISC's allegation that Misner "never intended to honor his agreement in, or abide by the terms of, Article 5.2" is "[b]ased upon information and belief," it is sufficient to survive a motion to dismiss. (ISC's Counterclaim ¶ 94.) Because this allegation goes to Misner's intent in October 1996, it is entirely consistent with Fed. R. Civ. P. 9(b)'s language that "intent *** and other condition of mind of a person may be averred generally." This is precisely what ISC has done.

ISC's Response in Opposition to Motion to Dismiss, pp. 4-5 (Docket No. 73).

It is well-established that "intent, knowledge, and other conditions of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). The Supreme Court of Idaho has identified the nine elements of fraud under Idaho law: (1) a representation, (2) its falsity, (3) its materiality, (4) speaker knew of falsity and (5) intended that representation be acted on, (6) the hearer's ignorance of falsity, (7-8) reliance on the right to rely on truth of representation, and (9) speaker's consequent injury. *See Aspiazu v. Mortimer*, 82 P.3d 830, 832 (2003). Further, the Supreme Court of Idaho has held that "a cause of action for fraud [may be pled] using

circumstantial evidence to show intent to defraud . . ." *DBSI/TRI V v. Fred H. Bender*, 130 Idaho 796, 807 (1997).

The Court has carefully reviewed and studied the pleading in question and is satisfied that ISC adequately alleged fraud relating to intent, as required by Rule 9(b), and recognizes that it is not entirely possible for ISC to ascertain before completing discovery precisely what the Counterdefendants thought or intended in October 1996. Inasmuch as "intent" may be averred generally, the pleading is adequate at this stage of the proceedings.

ii. ISC States a Claim Upon Which Relief May be Granted

Misner argues that ISC cannot establish a fraud claim against him because he did not sign the Agreement in 1996 and had no responsibilities under the Agreement. "The Counterdefendants [including Misner] as individuals are not parties to the Management Agreement and therefore have no agreement with ISC to 'honor' or 'abide by the terms of Article 5.2.'" *Misner's Memorandum in Support*, p. 11 (Docket No. 59).

The Ninth Circuit Court of Appeals has held that separate minority shareholders can be held liable for fraudulent representations by the corporate president, provided that they "specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers." *L.B. Industries, Inc. v. Smith*, 817 F.2d 69 (9th Cir. 1987).

The Court is satisfied, for purposes of the pending motion, that ISC has adequately alleged a claim upon which relief may be granted.

iii. ISC's Claims Are Not Barred by the Statute of Limitations

The Idaho statute of limitations for fraud is three years from "the discovery, by the

aggrieved party, of the facts constituting fraud." Idaho Code § 5-218. ISC pled that it did not discover the fraud until October 2003 in connection with the Group's filing of its Complaint, the Group's application for a temporary restraining order, and the Group's negotiations with ISC president Ivar Chhina. *Answer*, ¶¶ 45-50 (Docket No. 21).

The Court concludes, for purposes of the pending motion, that ISC's claims were filed within the three-year limitation, and thus, are not time-barred.

iv. Summary

After carefully reviewing the record, the Court concludes that ISC adequately pled a fraud claim in compliance with Rule 9(b), stated a claim upon which relief can be granted, and brought its claim within the three-year limitation period.

Accordingly, the Court denies Counterdefendant Misner's Motion to Dismiss ISC's Counterclaim (Docket No. 58).

B. <u>Group's Motion to Compel Payment of Attorney Fees (Docket No. 79)</u>

On March 17, 2003, the Group filed a Motion to Compel Payment of Attorney Fees and Costs requesting the Court to enter an order directing and compelling ISC to pay, from the Group's accounts receivable and revenues, the Group's attorney fees and litigation costs associated with ISC's bankruptcy proceeding, the Group's prosecution of its complaint against ISC, and the Group's defense of ISC's counterclaims. *Motion to Compel Payment of Attorney Fees*, p. 5 (Docket No. 79). The Group makes clear that "[t]his is not the typical claim for attorney fees customarily brought at the end of litigation when the prevailing party seeks an award of attorney fees and litigation costs from the losing party. *The Group wants to use its own*

*money to pay its **own** attorney fees and litigation costs*." *Memorandum in Support of Motion to Compel Attorney Fees*, p. 8 (Docket No. 80) (emphasis in the original).

The Group bases its motion to compel on language in the Agreement allegedly compelling ISC to use the Group's revenues to pay "all claims and obligations associated with the operation of the Group." *Affidavit of Chhina*, Ex. A, ¶ 2.6(b) (Docket No. 15). The Group concludes that it has incurred, and will continue to incur, attorney fees and costs it would not have otherwise incurred had ISC actually performed its obligations under the Agreement and not forced the commencement of this action. *Motion to Compel Payment of Attorney Fees*, p. 3 (Docket No. 79).

ISC disputes that the express terms of the Agreement contemplate the relief which the Group is seeking. *Response in Opposition to Motion to Compel Attorney Fees*, p. 5 (Docket No. 103). ISC contends that in exchange for the payment of millions of dollars, the Group sold the disputed revenue stream to ISC. *Id.* at 6. Section 2.6(a) of the Agreement expressly provides:

> Group hereby assigns, sells, conveys, transfers and delivers to Manager, and Manager hereby accepts from the Group, all of the assets and properties of Group of every kind, character and description, whether tangible, intangible, real, personal, or mixed, and wherever located, including, but not limited to, all Revenues, cash, accounts receivable, advances, prepaid expenses, deposits, equipment and improvements.

Affidavit of Chhina, Ex. A, § 2.6(a) (Docket No. 15). ISC argues, "[t]hus it is ISC's revenue, not plaintiff's, that plaintiff is seeking to use to pay attorneys to sue ISC . . . [a]nd it is doing so under an agreement that expressly delegates to ISC, not to plaintiff, the authority for administrative decisions. (Management Agreement § 3.4(a)(2)." *Response in Opposition to*

Motion to Compel Attorney Fees, p. 6 (Docket No. 103). The Court notes that nothing in the record evidences a past practice by ISC of paying the Group's legal fees.

The Group is correct in asserting that this is not a typical claim for attorney fees. As evidence of such, the Court notes that the Group does not clarify which Federal Rule of Civil Procedure, or other legal authority, it wishes the Court to rely upon in granting the Group's Motion to Compel Payment of Attorney Fees (Docket No. 79). Entering an order directing ISC to comply with an alleged contractual obligation to pay the legal expenses of the Group, including those expense incurred in filing the instant action which alleges that the very contract which extends said obligation upon ISC, is in fact invalid, would exceed the judicial prudence this Court desires to exercise at this stage of the proceedings. A key factor in the Court's consideration is that the Group commenced this action against ISC and is not defending itself from an action commenced against it at the outset of this litigation. True, the Group is now defending a counterclaim, however where it initiated this action, granting its motion is not warranted under all the existing circumstances presented in the record.

Section 2.6(a) of the Agreement provides that the Group expressly conveys to ISC all revenues, cash, accounts receivable, and deposits. This is undisputed for the purposes of the instant motion. As such, the Court concludes that the Group's Motion to Compel Attorney Fees (Docket No. 79) is not warranted at this stage of the proceedings and is premature. After judgment has been entered, the prevailing party may petition this Court for an award of attorney fees and related costs as contemplated by Federal Rule of Civil Procedure 54(d)(2). Accordingly, the Court denies the Group's Motion to Compel Attorney Fees (Docket No. 79) at this time.

C. Group's Motion to Strike Amended Counterclaims (Docket No. 120); and Counterdefendant Misner's Motion to Strike Amended Counterclaims (Docket No. 122)

On April 7, 2004, the parties to this litigation entered into a Stipulated Litigation Plan which established May 15, 2004 as the "Joinder of Parties and Amendment of Pleadings Cut-off Date." *Stipulated Litigation Plan* (Docket No. 97). At this time the Court entered a Scheduling Order requiring that "Motions to join additional parties and/or amend the pleadings shall be filed by May 15, 2004." *Scheduling Order* (Docket No. 101). On April 7, 2004, ISC filed an Amended and Supplemental Counterclaim and Third Party Complaint (Docket No. 100). On April 19, 2004, the Group filed their Supplemental Answer (Docket No. 106) to ISC's supplemental counterclaim and third party complaint.

On May 17, 2004, the Group filed an Amended Complaint (Docket No. 113). On June 2, 2004, ISC filed an Amended (second) and Supplemental Counterclaims and Third Party Complaint (Docket No. 118). ISC acknowledges that its June 2, 2004 filing contains three entirely new claims for affirmative relief (Counterclaims Nos. 6, 7, and 8), as well as three other amended claims for affirmative relief (Counterclaims Nos. 9, 10, and 11). *Response in Opposition*, pp. 3-4 (Docket No. 128).

On June 11, 2004, the Group filed a motion to strike ISC's Amended (second) and Supplemental Counterclaims and Third Party Complaint (Docket No. 118) as being untimely. *Group's Motion to Strike* (Docket No. 120). On June 18, 2004, Misner joined the Group's motion submitting an almost identical Motion to Strike ISC's Amended (second) and

Supplemental Counterclaims and Third Party Complaint (Docket No. 118).[1] *Misner's Motion to Strike* (Docket No. 122). Because the motions to strike are intertwined and raise identical issues, the Court will consider both motions together.

The Group "acknowledges the Defendant InterDent's right to file a new *answer* raising *affirmative defenses* to the claims set out in the Plaintiff's amended complaint . . . InterDent's amended answer is not the basis of Plaintiff's motion to strike." *Reply*, p. 2 (Docket No. 136) (emphasis in the original). The Group seeks to strike the three new claims for affirmative relief, and the three amended claims for affirmative relief, contained in ISC's June 2, 2004 filing. *Id.*

The Court concludes that the unilateral amendment of ISC's claims for affirmative relief, without leave of the Court, is improper based upon the parties' litigation plan requiring the amendment of pleadings on or before May 15, 2004, as well as this Court's Scheduling Order adopting the parties' agreement that the amendment of pleadings needed to be filed by May 15, 2004. ISC's June 2, 2004 amendments, therefore, are untimely and in violation of both the parties stipulation and this Court's Scheduling Order.

Further, even without consideration of the litigation plan and the Scheduling Order, ISC's claims for amending to seek additional affirmative relief requires leave of the Court pursuant to Federal Rule of Civil Procedure 15, and Federal Local Rule 15.1. Such leave was never requested by ISC, nor was it granted by the Court. Accordingly, ISC's Amended (second) and Supplemental Counterclaims and Third Party Complaint (Docket No. 118), the amendments to

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[1]"By Misner's joining the Group's motion, Misner adopts in full the arguments as presented in said motion . . . ." *Misner's Motion to Strike*, p. 3 (Docket No. 122).

ISC's Counterclaims Nos. 9, 10, and 11, as well as ISC's Counterclaims Nos. 6, 7, and 8 in their entirety, are hereby stricken.

D. ISC's Motion to Dismiss Romriell Defendants (Docket No. 130)

On July 7, 2004, ISC filed the pending motion to dismiss the counterclaim of third-party defendants Dwight G. Romriell, Gregory Romriell, Errol Ormond and Arnold Goodliffe (collectively referred to herein as "Romriell Defendants"). *Motion to Dismiss Counterclaim* (Docket No. 130). ISC simply states that, "[t]he Romriell Defendants' counterclaim should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim." *Memorandum in Support of Motion to Dismiss*, p. 3 (Docket No. 131).

ISC seeks dismissal of the Romriell Defendants' entire counterclaim. A complaint should not be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In reviewing a case for dismissal, the Court is required to treat all allegations of material fact as true and to construe them in a light most favorable to the non-moving party. *Id.* (quoting *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986)).

ISC argues that, pursuant to Federal Rule of Civil of Procedure 12(b)(6), Romriell Defendants' counterclaim should be dismissed because "[t]hese third-party defendants make certain factual allegations against ISC but do not even attempt to assert or identify a legal theory." *Motion to Dismiss Counterclaim*, p. 2 (Docket No. 130). ISC fails to cite, however, any legal authority supporting their notion that a counterclaim, or complaint, must plead a legal

theory. In contrast, Romriell Defendants do cite to case law supporting their contention that a notice pleader is not required to set forth legal theories. *See Roe v. Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 683-84 (11th Cir. 2001).

Under "notice" pleading standards, Federal Rule of Civil Procedure 8(a) states that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim," simply requires, "a short and plain statement of the claim showing that the pleader is entitled to relief." After carefully reviewing and studying Romriell Defendants' amended counterclaim, the Court concludes that the counterclaim meets the required legal criteria.

In the alternative, ISC asks, pursuant to Federal Rule of Civil Procedure 12(e), that it be given notice of the legal theory on which the Romriell Defendants are proceeding. "If the counterclaim is not dismissed pursuant to Rule 12(b)(6), it should be made more definite and certain pursuant to Rule 12(e)." *Memorandum in Support of Motion to Dismiss*, p. 3 (Docket No. 131).

Motions for a more definite statement are highly disfavored, rarely granted, and granted only sparingly. *See Taylor v. Cox*, 912 F.Supp. 140, 143 (E.D. Pa. 1995) ("highly disfavored" and "rarely granted"); *Iacampo v. Hasbro, Inc.*, 929 F.Supp. 562, 571 (D. R.I.1996) ("rarely invoked"); *Young v. Warner-Jenkinson Co., Inc.*, 170 F.R.D. 164, 165-66 (E.D. Mo. 1996) ("generally disfavored"). Motions for a more definite statement are not a substitute for discovery and ordinarily will not be granted where the information sought could be obtained in discovery, and discovery is already underway. *Eisenach v. Miller-Dwan Med. Ctr.*, 162 F.R.D. 346 (D. Minn. 1995).

The Court concludes that the Romriell Defendants have sufficiently pled the mismanagement issues as alleged in their counterclaim. Accordingly, ISC's Motion to Dismiss Romriell Defendants (Docket No. 130) is denied.

E. Group's Motion to Compel Discovery (Docket No. 137)

The Group requests that the Court issue an order compelling ISC to more fully respond to certain discovery requests which the Group had propounded upon ISC. *Motion to Compel* (Docket No. 137).

ISC has stated that, upon entry of a protective order, it will provide the responsive documents for Interrogatories 2, 6, 12, and 15, as well as Requests for Production Nos. 2, 8, 11, 14, 17, 18, and 31. *Response in Opposition*, p. 5 (Docket No. 162). Concerning the remaining disputed discovery, ISC has clarified that, "the center of this discovery dispute is the question of whether *res judicata* precludes the [Group] from relitigating issues [which] were resolved by the confirmation of ISC's Plan of Reorganization on October 3, 2003." *Response in Opposition*, p. 2 (Docket No. 162).

i. Bankruptcy

Upon confirmation, a Chapter 11 plan has the effect of a final judgment and binds the prospective creditors as well as the debtor. 11 U.S.C.A. § 1141(a); *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996) (Chapter 11 plan, once confirmed, is accorded *res judicata* effect). *Res judicata* applies not only to claims that were raised in bankruptcy, but also to those claims that could have been raised in bankruptcy. *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (6th Cir. 1991); *Crown v. Klein Bros.*, 121 Idaho 942, 829 P.2d 532, 536-37

(Ct. App. 1991) ("a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the case or action arose").

All parties agree that claims for relief arising prior to the effective date of the bankruptcy plan are not sought nor recoverable in this action. The Group has clearly stated in its third cause of action and prayer for relief, that it is seeking damages for breaches of the Agreement only which occurred after the effective date of ISC's bankruptcy plan. *See Amended Complaint*, pp. 7-9 (Docket No. 113).

In essence, the parties generally agree that *res judicata* applies not only to claims that were raised in bankruptcy, but also to those claims that could have been raised in bankruptcy. Similarly, neither party disputes that liabilities which arose post-confirmation, "are liabilities of the reorganized debtors and are not affected at all by the plan or the order confirming the plan." *See In re Nuttall Equipment Co., Inc.*, 188 B.R. 732, 736 (Bankr.W.D.N.Y. 1995). What the parties do dispute, however, is whether those claims asserted in the Group's Amended Complaint arose after confirmation of the bankruptcy plan, or whether they arose, or encompass actions that took place, prior to confirmation. At this time, however, that issue is not directly before the Court, nor will it be until the Court rules on ISC's Motion for Summary Judgment (Docket No. 63). What the Court must determine now, is whether the scope of discovery should be limited only to documents and information that occurred or came into existence after October 3, 2003.

ii. <u>Relevancy</u>

As a general rule, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Federal Rule of Civil Procedure 26(b)(1). Although the information requested need not be admissible at trial, it must be

reasonably calculated to lead to the discovery of admissible evidence. *Id.* The Supreme Court of the United States has indicated that the definition of relevancy, for purposes of discovery, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised in the pleadings, for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (internal citations omitted).

The Supreme Court of the United States has also clarified that "discovery, like all matter of procedure, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). This Court is mindful that, "while the standard of relevancy [in discovery] is a liberal one, it is not so liberal to allow a party to 'roam in the shadows zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'" *Food Lion, Inc. v. United Food & Comm'l Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012-1013 (D.C. Cir. 1997) (internal citations omitted).

In the end, however, parties are afforded a liberal right to examine documents reasonably calculated to lead to the discovery of admissible evidence. *See e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (a broad right of discovery is based on the principle that wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for truth). It should be noted, however, that:

> Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for the purposes of trial.

1970 Amendment to Federal Rule of Civil Procedure 26(b)(1). With the aforementioned principles of law in mind, the Court will consider what is at the heart of the pending discovery dispute.

The Court concludes that the Group has not alleged causes of action, or requested damages for, events which occurred prior to pre-confirmation on October 3, 2003. That said, while the Group may be barred from pursuing damages and causes of action arising before October 3, 2003, the broad discovery allowed by both federal and local rules may extend to the discovery of ISC practices, procedures, policies, and customs–whether that information existed before or after October 3, 2003. The parties function under a liberal right to examine documents which are reasonably calculated to lead to the discovery of admissible evidence. *See Shoen*, 5 F.3d at 1292.

Accordingly, the Group's Motion to Compel is granted. The disputed discovery, Interrogatories Nos. 10, 11, 20, 21, 22; Requests for Production Nos. 15, 19, 21, 23, 25; and Requests for Admissions Nos. 4, 10, was objected to on grounds of relevancy. Having reviewed the Group's outstanding discovery requests, ISC's responses, and the parties' good faith efforts to resolve their differences, and because the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, the Court grants the Group's Motion to Compel as to the remaining discovery requests, with the exception of Request for Production No. 21 (information related to lease issues is not relevant or likely to

lead to admissible evidence), and Request for Admission No. 4 (ISC's denial was sufficiently responsive).

Accordingly, the Group's Motion to Compel (Docket No. 137), as to Interrogatories Nos. 1, 2, 3, 4, 6, 10, 11, 12, 15, 20, 21, 22, 16, 17, 18, 19; Requests for Production Nos. 1, 2, 5, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25, 31; and Requests for Admission Nos. 6, 8, 9, 10, is granted.

The Group's Motion to Compel (Docket No. 137), as to Requests for Production No. 21, and Request for Admission No. 4, is denied.

Responsive documents will not be required to be produced until a protective order is in place for answers to Interrogatories 2, 6, 12, and 15, and Requests for Production Nos. 2, 8, 11, 14, 17, 18, and 31.

F. Group's Motion to Extend Expert Disclosure Deadline (Docket No. 139)

On July 12, 2004, the Group filed a Motion to Extend Time to Disclose Expert Witnesses and Reports (Docket No. 139) due to delays caused by discovery disputes. No party has objected to the Group's request for an extension of its expert disclosure deadline. Further, at the August 9, 2004 hearing, ISC acknowledged the appropriateness of the Group's request in this regard. Accordingly, the Court will extend the Group's expert witness and reports deadline an additional sixty (60) days from the date of this Order.

G. **Counterdefendant Misner's Motion to Quash Bybee Subpoena (Docket No. 144); Counterdefendant Misner's Motion to Quash Valley Dental Subpoena (Docket No. 145); Orthodontic Centers of Idaho's Motion to Quash Subpoena (Docket No. 151).**

At the August 9, 2004 hearing, counsel advised the Court that they were close to reaching an agreement which would resolve Counterdefendant Misner's Motion to Quash Bybee Subpoena (Docket No. 144), Counterdefendant Misner's Motion to Quash Valley Dental Subpoena (Docket No. 145), and Orthodontic Centers of Idaho's Motion to Quash Subpoena (Docket No. 151). Counsel advised the Court that the only impediment to their agreement was a document which they wished the Court to review *in camera*, in order to determine its relevancy. In light of their request, the Court will review that document upon its filing. Until then, the Court will defer ruling on the motions to quash.

H. **ISC's Motion for Protective Order (Docket No. 146).**

At the August 9, 2004 hearing, counsel for all parties advised the Court that they were close to reaching a stipulated protective order, which would render moot ISC's pending Motion for Protective Order (Docket No. 146). The Court will allow until August 27,2004, in which the parties may submit a stipulated protective order for the undersigned's consideration. If no stipulated protective order is received by the Court in the time frame delineated by the Court, the Court will rule on ISC's Motion for Protective Order (Docket No. 146).

II.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Counterdefendant Misner's Motion to Dismiss Counterclaim (Docket No. 58) is DENIED.

2. Group's Motion to Compel Payment of Attorney Fees (Docket No. 79) is DENIED.

3. Group's Motion to Strike Amended Counterclaims (Docket No. 120) is GRANTED. Regarding ISC's Amended (second) and Supplemental Counterclaims and Third Party Complaint (Docket No. 118), the amendments to Counterclaims Nos. 9, 10, and 11, as well as Counterclaims Nos. 6, 7, and 8 in their entirety are stricken.

4. Counterdefendant Misner's Motion to Strike Amended Counterclaims (Docket No. 122) is GRANTED. Regarding ISC's Amended (second) and Supplemental Counterclaims and Third Party Complaint (Docket No. 118), the amendments to Counterclaims Nos. 9, 10, and 11, as well as Counterclaims Nos. 6, 7, and 8 in their entirety are stricken.

5. ISC's Motion to Dismiss Romriell Defendants (Docket No. 130) is DENIED.

6. Group's Motion to Compel Discovery (Docket No. 137) is GRANTED in part and DENIED in part. Group's Motion to Compel as to Interrogatories Nos. 1, 2, 3, 4, 6, 10, 11, 12, 15, 20, 21, 22, 16, 17, 18, 19; Requests for Production Nos. 1, 2, 5, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25, 31; and Requests for Admission Nos. 6, 8, 9, 10, is granted. Group's Motion to Compel (Docket No. 137), as to Requests for Production No. 21, and Request for Admission No. 4, is denied. Responsive

documents will not be required until a protective order is in place for answers to Interrogatories 2, 6, 12, and 15, and Requests for Production Nos. 2, 8, 11, 14, 17, 18, and 31.

7. Group's Motion to Extend Expert Disclosure Deadline (Docket No. 139) is GRANTED. The Court will extend the Group's expert witness and reports deadline sixty (60) days from the date of this Order.

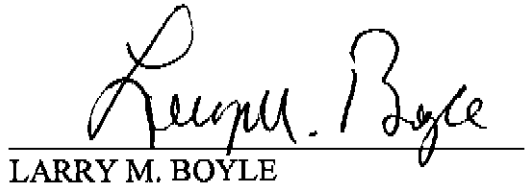
8. Counterdefendant Misner's Motion to Quash Bybee Subpoena (Docket No. 144) is DEFERRED.

9. Counterdefendant Misner's Motion to Quash Valley Dental Subpoena (Docket No. 145) is DEFERRED.

10. ISC's Motion for Protective Order (Docket No. 146) is DEFERRED.

11. Orthodontic Centers of Idaho's Motion to Quash Subpoena (Docket No. 151) is DEFERRED.

DATED this 16th day of August, 2004.



LARRY M. BOYLE
UNITED STATES DISTRICT COURT

ja

United States District Court
for the
District of Idaho
August 16, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:03-cv-00450

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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✓ Chief Magistrate Judge Larry M. Boyle
_____Magistrate Judge Mikel H. Williams

Visiting Judges:
_____Judge David O. Carter
_____Judge John C. Coughenour
_____Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 8-16-04

BY: Jill Angelo
(Deputy Clerk)