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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an  
Idaho professional corporation,  
  
Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a  
Washington corporation,  
  
Defendant.

INTERDENT SERVICE CORPORATION, a  
Washington corporation,  
  
Third-Party Plaintiff,

v.

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

DEFENDANT/THIRD-PARTY  
PLAINTIFF'S SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION AND APPLICATION FOR A  
TEMPORARY RESTRAINING ORDER  
(Misner Noncompete)

DEFENDANT/THIRD-PARTY PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING  
ORDER (Misner Noncompete) - 1

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,

Third-Party Defendants.

## I. INTRODUCTION

InterDent Service Corporation ("ISC") files this supplemental memorandum in response to the arguments raised by third-party defendant Larry Misner, Jr. ("Misner") and Gregory Romriell, Dwight Romriell, Errol Ormond and Arnold Goodliffe ("Romriell defendants") in their July 8, 2004 filings opposing enforcement of the plain language of Misner's Noncompete Agreement with ISC. In their filings, Misner and the Romriell defendants agree with ISC on the two points that are dispositive of ISC's motion:

- Misner, by practicing approximately two miles and three minutes from the Pocatello office of ISC and plaintiff Pocatello Dental Group ("PDG"), is violating the plain language of his Noncompete Agreement;
- Misner received \$400,000 in 1996 from ISC's predecessor in consideration for, among other things, the Noncompete Agreement he is breaching. The Romriell defendants' interest in this issue stems from the fact that they received similar sums and entered into almost identical agreements.<sup>1</sup> As further explained below, this proves ISC's point that it will suffer irreparable injury if the TRO is not

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<sup>1</sup> Third-party defendant Dwight Romriell is the exception. His direct Noncompete Agreement with ISC expired in 2003.

granted. (*See generally* Supplemental Affidavit of Kevin Webb in Support of Defendant/Third-Party Plaintiff's Motion for Temporary Restraining Order (Misner Noncompete) ("Webb Suppl. Aff.") ¶ 3.)

Neither do Misner nor the Romriell defendants identify any breach of the Noncompete Agreement by ISC. Instead, the Romriell defendants argue at length that ISC did not perform to their satisfaction its responsibilities under the Management Agreement with PDG. ISC, of course, disagrees with these contentions, but for purpose of the TRO, the Romriell defendants do not explain how ISC's alleged breach of a *different contract* with a third party, PDG, excuses Misner's performance under the Noncompete Agreement.

Finally, Misner contends that the public will suffer if Misner is limited to the status quo before June 11, 2004: to practicing in Burley, Idaho. This argument relating to emergency treatment of children, an appeal to emotion rather than to the facts, does not bear close inspection. First, it does not justify Misner's scheme to practice three days per week in Pocatello, depriving ISC of the revenue from hundreds of (nonemergency) former PDG patients. Moreover, Misner does not identify a single child who failed to obtain necessary treatment between the time Misner left PDG and June 11, 2004. Instead, the testimony is clear that Dr. Larry Bybee (who does not have a direct noncompete with ISC) and other Pocatello dentists treated these patients. The contention that other Pocatello dentists will not see pediatric patients is pure speculation, to be generous. The dental-emergency issue is a red herring.

ISC is entitled to enforce the plain language of the Noncompete Agreement for which Misner received \$400,000.

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## II. ARGUMENT

### A. **Neither Misner nor the Romriell Defendants Address the Dispositive Plain Language of the Contract**

At the hearing on June 30, the question asked of Misner's counsel was what did Misner think he was doing in 1996 when he received \$400,000 in exchange for the Noncompete Agreement—whether the Noncompete Agreements with Misner and the other PDG shareholders were intended to be worthless pieces of paper. Misner's and the Romriell defendants' supplemental filings provide no illumination on this point. ISC maintains that healthcare professionals are not exempt from the same rules of contract that govern the conduct of every other individual: that Misner is bound by the plain language of the document he signed.

Nor do the supplemental filings address the plain language of the Noncompete Agreement under which Misner consented to the issuance of injunctive relief. (Affidavit of Kevin Webb in Support of Defendant/Third-Party Plaintiff's Motion for Temporary Restraining Order (Misner Noncompete), Ex. 1 at 3.) As detailed in the accompanying supplemental affidavit of Kevin Webb, Misner consented to injunctive relief, not simply to prevent him from leaving the Pocatello office to practice just down the street, but also to prevent him from using ISC's trade secrets and proprietary business knowledge to do so. For example, Misner attended InterDent National Meetings and has had eight years of exposure to ISC's accounting, personnel and promotional practices as well as the clinical protocols and standards developed by the dentists on InterDent's Clinical Leadership Board. (Webb Suppl. Aff. ¶ 3.) The concern about his misuse of this information is only heightened by the fact that his new office, Kidds Dental, is managed by a competing practice management company, Orthodontic Centers of America.

If ever there was a case to enforce the plain language of a contract, this is that case.

**B. ISC's Irreparable Injury Resulting from Misner's Breach**

Misner argues that, notwithstanding his contractual consent to injunctive relief and the "devastation" his conduct is doing to ISC's Pocatello office, ISC has not shown irreparable injury. Misner does not explain why, given his contractual consent to injunctive relief, ISC would still be required to make such a showing. In any event, ISC will not repeat in this brief the showing of irreparable injury made in its opening papers—harm of such a magnitude it might necessitate ISC's closing its Pocatello office and laying off its 89 employees.

Instead, ISC must put in context the fact that *the Romriell defendants* are making extraordinary efforts to find some justification for Misner's breach of the Noncompete Agreement. As ISC explained in its opening papers, this is in part because only ISC, not the Romriell defendants, are harmed by Misner's conduct. (Romriell Depo. at 54-55.) Until and unless the office closes, their practice expenses will be paid by ISC no matter how greatly ISC is harmed by Misner's breach. However, there is more to the Romriell defendants' actions than mere indifference. They are actively abetting Misner's breach because they plan to engage in similar misconduct *if* Misner's noncompete is not enforced by the Court. (Webb Suppl. Aff. ¶ 3.) Third-party defendants Gregory Romriell and Ormond have refused to provide assurances that they will comply with their direct Noncompete Agreements with ISC and have located office space from which to compete with ISC. (*Id.*) They are likely only awaiting the outcome of these proceedings. If these general dentists leave the ISC/PDG office, there is no question it will have to close. (*Id.*)

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As part of a long-established strategy,<sup>2</sup> Misner is the test case for the remaining PDG shareholders. If he is not enjoined from breaching his Noncompete Agreement, these agreements, for which ISC's predecessor in part paid \$2.8 million, will indeed be worthless pieces of paper. In contrast, Misner does not dispute his lack of any financial harm from the issuance of a TRO. Therefore, either no bond or a very small bond should be required of ISC.

**C. ISC Did Not Breach the Noncompete Agreement—The Romriell Defendants' Arguments Are Simply Irrelevant**

The Romriell defendants go on at great length trying to establish that ISC breached the Management Agreement with their employer, PDG. (ISC's Amended and Supplemental Answer, Counterclaims and Third-Party Complaint, Ex. 1.) However, as pointed out in ISC's pending motion against the Romriell defendants' counterclaim, neither the Romriell defendants nor Misner have standing to complain about a third-party's breach of contract with their employer. *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1202 n. 4 (9th Cir 2001) (shareholder/employee of law firm has no standing); *Jordan v. Hunter*, 124 Idaho 899, 904, 865 P.2d 990 (Idaho App. 1993) (shareholder has no claim for breach of fiduciary duty to corporation). Misner, at least, understands this and does not join in the Romriell defendants' argument. In any event, ISC is not in this motion seeking to enforce the Management Agreement, but a distinct and separate contract, Misner's Noncompete Agreement.

The Romriell defendants do not identify a single provision of the Noncompete Agreement allegedly breached by ISC nor suggest any reason that contract should be enforced according to its terms. Section 5 of the Noncompete Agreement signed by Misner (and the Romriell defendants) expressly provides that "[t]his Agreement and the Employment Agreement

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<sup>2</sup> *See* Webb Suppl. Aff., Ex. 3 (demonstrating that since at least February 2003, certain of the PDG shareholders, led by Misner, have been engaging in a concerted effort to escape their obligations under their Noncompete Agreements).

[between PDG and the shareholder dentist] sets forth the entire agreement between the parties with respect to the subject matter hereof . . . .” While Misner’s Employment Agreement is made a part of the contract, the Management Agreement specifically is *not* incorporated into Misner’s Noncompete Agreement. Under the standard principle of contract construction of *expressio unius est exclusio alterius*, specifically including one document showing an intent to exclude others, confirming that the parties did not intend performance under the Management Agreement to be pertinent to the parties’ duties under the Noncompete Agreement. *See In re Lares*, 188 F.3d 1166, 1169 (9th Cir. 1999) (“Idaho courts apply the *exclusio* rule to contracts.”)

**D. Misner’s Actions Speak for Themselves—ISC Did Not Breach the Management Agreement**

Even if the Court for some reason were to address the Romriell defendants’ arguments related to the Management Agreement—and it should not—the record shows that these arguments are pretextual. This is demonstrated by another piece of evidence neither Misner nor the Romriell defendants bother to address: the letter to Misner from Dr. Porter Sutton, PDG founder and longtime president, indicating that Misner, in making these complaints, was merely trying to build a record, “trying to prove a breach so that [Misner] can practice in Pocatello independent of Pocatello Dental Group.” (Webb Suppl. Aff., Ex. 3.)

The pretextual nature of Misner’s complaints are demonstrated by his conduct. For example, two of the primary complaints raised by the PDG shareholders related to alleged corporate practice of dentistry by a management company and allegedly inadequate training of ISC staff. The fact that Misner simply moved down the street to an office managed by another “for-profit foreign corporation” shows he has no objections to a corporate-managed office when

it suits his interests. (*See* Bybee Depo. at 12, 44-45.)<sup>3</sup> The fact that 13 of the 14 employees of his new practice were former ISC employees (Bybee Depo. at 18-20) demonstrates the confidence he has in the training provided to these employees by ISC.

Misner and the Romriell defendants' strategy of raising pretextual complaints to seek an advantage in litigation provides no reason to excuse Misner from compliance with the plain language of his Noncompete Agreement.

**E. No Public Interest Will Suffer by Misner Complying with His Noncompete Agreement as He Did for Months After Leaving PDG**

Misner argues that it is necessary for he and he alone to practice in Pocatello to treat children with emergency dental needs. Misner does not explain how those emergencies were handled for the four months he worked exclusively in Burley. There is a reason for his omission: because those patients received the treatment they needed without him. They were treated by Dr. Bybee, who does not have a direct noncompete with ISC. (Romriell Depo. at 28; Bybee Depo. at 13, 64.)<sup>4</sup>

And even setting aside Dr. Bybee's willingness and ability to treat emergency patients, Misner offers only speculation that other dentists would be unwilling to treat these children. Dr. Romriell, Misner's witness on this issue, testified in deposition about only some of the dentists listed in the Pocatello telephone book as having a family practice, as being willing to treat children, including children receiving state assistance. Out of this sample of approximately 11, there were 7 family practice dentists who Dr. Romriell admitted might (or might not, he did not know) accept Medicare-Medicaid, one office he conceded "may" take Medicare-Medicaid

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<sup>3</sup> Except as noted herein, deposition transcripts cited were attached to the Reply Affidavit of Scott J. Kaplan in Support of Defendant/Third-Party Plaintiff's Reply in Support of Motion and Application for a Temporary Restraining Order.

<sup>4</sup> Attached to PDG's supplemental filings.

and one family practice dentist Dr. Romriell indicated "will take anyone he can get in the door."  
(Romriell Depo. at 23-28.)

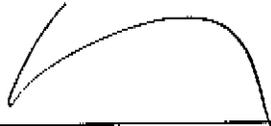
Given the availability of these dentists and Dr. Bybee, any dental emergencies can be handled by the existing Pocatello dental community. We know this to be true because such emergencies were handled without Dr. Misner's assistance before his breach of the Noncompetete Agreement beginning on June 11. Nor does his "pediatric emergency" theory explain why Misner would be entitled to practice three days per week in Pocatello and see hundreds of patients per month as is his plan. (Bybee Depo. at 15, 27-29.) Again, Misner's actions belie his words and show that the pediatric emergency theory is simply another pretext.

### III. CONCLUSION

ISC's motion should be granted. Because Misner offers no evidence of any tangible or monetary harm from the TRO, ISC should not have to put up a bond or, failing that, a bond at a very low level.

DATED: July 12, 2004.

STOEL RIVES LLP



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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **Defendant/Third-Party Plaintiff's Supplemental Memorandum in Support of Motion and Application for a Temporary Restraining Order (Misner Noncompete)** on the following named persons on the date indicated below by

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery

to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at his or her last-known addresses indicated below.

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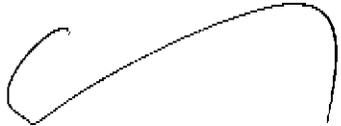
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