

Gary L. Cooper (ISB No. 1814)  
 Ron Kerl (ISB No. 1768)  
 COOPER & LARSEN, CHTD.  
 151 North 3<sup>rd</sup> Avenue, Suite 210  
 P.O. Box 4229  
 Pocatello, Idaho 83205-4229  
 Telephone (208) 235-1145  
 Facsimile (208) 235-1182

FILED  
 CLERK OF DISTRICT COURT  
 POCATELLO, IDAHO  
 N  
 10/10/03

*Counsel for Pocatello Dental Group, P.C.*

**UNITED STATES DISTRICT COURT  
 DISTRICT OF IDAHO**

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

vs. )

INTERDENT SERVICE CORPORATION, )  
 a Washington corporation, )  
 )  
 Defendant. )

Case No. CIV 03-450-E-BLW

INTERDENT SERVICE CORPORATION, )  
 a Washington corporation, )  
 )  
 Counterclaimant, )

**PLAINTIFF POCATELLO  
 DENTAL GROUP'S REPLY  
 MEMORANDUM IN SUPPORT  
 OF MOTION TO COMPEL  
 PAYMENT OF ATTORNEY  
 FEES AND COSTS**

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; )

Counterdefendants. )

COMES NOW Pocatello Dental Group, P.C., by and through its attorneys of record ("Group") and submits this Reply Memorandum to correct erroneous factual representations made by the Defendant Interdent Service Corporation ("ISC") in its opposing papers, and to assist the Court in ruling on the Group's motion seeking this Court's order directing ISC to comply with its contractual obligation to pay the expenses of the Group, including the Group's attorney fees and litigation costs.

### SUMMARY OF ISC'S FACTUAL MISREPRESENTATIONS

ISC has made the following factual misrepresentations in its response to Group's Motion:

1. ISC claims that Group sold its revenue stream to ISC pursuant to Section 2.6(a) of the Management Agreement. In fact, Group only assigned those revenues to ISC for collection purposes under the Management Agreement. See, generally paragraphs 4.5 and 4.6 of the Management Agreement. Pursuant to Article 7 of the Management Agreement, ISC is only entitled to *retain* a management fee from those revenues *after payment of Group's expenses*.<sup>1</sup> Only then does ISC "own" the balance of the revenues it collects on behalf of Group.

Paradoxically, ISC has *also* claimed that these revenues belong to Group. Attached to the Supplemental Affidavit of Ron Kerl, as Exhibit "A," is a true and accurate excerpt from the Bankruptcy Schedules filed by ISC in the U.S. Bankruptcy Court for the Central District of California. In Schedule B - Personal Property, ISC was required to list all personal property of whatever kind. You would expect ISC to list Group's "revenue stream" as one of its assets if, in fact, that revenue stream had been unconditionally assigned to ISC at the inception of the 1996 Management Agreement. It did not.

---

<sup>1</sup>Article 7 of the Management Agreement provides: "For its services hereunder....Manager shall retain as a Management Fee (the "Management Fee") all Revenues after payment of Group's Expenses."

In paragraph 15. of Schedule B, ISC was required to describe all of its Accounts Receivable.

ISC referred the Bankruptcy Court, and all of its creditors, to Footnote 2. Footnote 2 stated:

Pursuant to management agreements between the Debtor and the affiliated professional corporations ("ABC's") on a daily basis the APC's turn over *their collections of receivables to the Debtor, however the APC collections are assets of the APC's and not the Debtor.*" (Emphasis added.)

Group is one of the APC's referred to by ISC in Schedule B. Group's 'revenue stream' was not excepted from ISC's representation to the U.S Bankruptcy Court and its creditors. ISC's representation was made on June 8, 2003, under penalty of perjury:

**DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION**

I, Robert W. Hill, the President of InterDent Service Corporation, a Washington corporation, named as debtor in this case, declare under penalty of perjury, declare that I have read the foregoing summary and schedules, consisting of 82 sheets and that they are true and correct to the best of myh knowledge, information and belief.

Dated June 8, 2003

s/ \_\_\_\_\_  
Robert W. Hill  
President

ICS's schedules were never amended by ISC in order to change its sworn declaration and state that Group's receivables were, in fact, assets of ISC. Therefore, ISC's unsworn representation to this Court, that the receivables of Group belong to ISC, is patently false.

2. ISC contends that Group filed an adversary proceeding in the California Bankruptcy Court asserting these very same claims. It did not. Attached to the Supplemental Affidavit of Ron Kerl, as Exhibits "B" and "C", is a copy of the docket sheet relating to ISC's chapter 11 bankruptcy proceedings and a list of adversary proceedings filed in that bankruptcy case. Neither the docket sheet nor the list of adversary proceedings identify any adversary proceeding brought by Group. In fact, no adversary proceedings, of any kind, were brought against ISC on behalf of ICS in its bankruptcy case.

An adversary proceeding is governed by Rules of Federal Bankruptcy Procedure 7001 through 7087. The following are adversary proceedings in Bankruptcy Court:<sup>2</sup>

- a. a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
- b. a proceeding to determine the validity, priority or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);
- c. a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;
- d. a proceeding to object to or revoke a discharge;
- e. a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
- f. a proceeding to determine the dischargeability of a debt;
- g. a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
- h. a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
- i. a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
- j. a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

Group did not bring an *adversary proceeding* against ISC in its chapter 11 bankruptcy proceedings. Rather, Group did file a proof of claim pursuant to §501 and objected to ISC's motion to assume the Management Agreement pursuant to §365(a) of the Bankruptcy Code. The filing of a proof of claim and an objection to the assumption of an executory contract are not "adversary proceedings" within the meaning of Bankruptcy Rule 7001.

The stipulated order referred to in Mr. Chhina's affidavit did not provide for anything more than the withdrawal of the Group's proof of claim (on pre-petition breaches) and its objection to ISC's assumption of the management agreement. The stipulated order contains a statement that "no **pre-petition** cure payments are due upon assumption." (Emphasis added.). The stipulated order did

---

<sup>2</sup>See, Rule 7001, Rules of Federal Bankruptcy Procedure.

not identify or release any **post-petition** claims, nor did it address and release any **post-confirmation** claims held by Group.<sup>3</sup> It did not excuse ISC from its post-assumption duty to perform its obligations under the Management Agreement.

Group wants ISC to use Group's revenues to pay Group's post-petition attorney fees and costs incurred in response to ISC's bankruptcy, attorney fees and costs incurred in addressing ISC's post-confirmation breaches of the Management Agreement, and post-confirmation attorney fees and costs incurred in defending ISC's counter-claim and Dr. Misner's cross-claim.

### **RESPONSE TO DEFENSES RAISED BY ISC**

#### **A. Plaintiff's Motion Is Not Procedurally Improper.**

ISC characterizes Group's motion as a motion for costs pursuant to Rule 54. That is not true. Group is not asking ISC to pay Group's attorney fees from ISC's assets. *Group is asking the Court to compel ISC to pay Group's attorney fees from Group's assets.* As shown above, until ISC has performed its services under the Management Agreement and only "after payment of Group's Expenses" is ISC entitled to retain from Group's revenues its management fee. To the extent ISC is paying itself a management fee *before* paying all of Group's expenses, including its attorney fees and costs, ISC is misappropriating Group's assets. Group is still performing its obligations under the Management Agreement by providing dental care to its patients. Group's Motion asks the Court to direct ISC to do the same, pending a determination of all pending issues on their merits.

---

<sup>3</sup>See, Exhibit "G" to Affidavit of Ivar Chhina, Docket No. 15.

**B. Group's Motion Is Consistent With The Express Terms Of The Management Agreement.**

ISC is not entitled to retain any of Group's revenues until it has made payment of Group's expenses.<sup>4</sup> The Group's attorney fees and litigation related expenses were not expressly excluded from the kinds of obligations and liabilities ISC is required to pay and discharge pursuant to paragraph 2.6 the Management Agreement. The Management Agreement, in paragraph 2.6(b) defines "Group Expenses" broadly:

"(b) Liabilities. Manager shall be responsible for paying all claims and obligations associated with the operation of Group pursuant to this agreement...now existing or arising in the future, including those under Provider Subcontracts, Employment Agreements, Group's professional liability insurance and any other operational expense for which group retains responsibility or that are delegated to Group..."

The Management Agreement, however, does not define the phrases "claims and obligations associated with the operation of Group" or "operational expenses." ISC asks the Court to interpret these phrases narrowly so that they exclude attorney fees and costs incurred by the Group when Group acted to enforce the Management Agreement in ISC's bankruptcy proceeding, when Group acts to enforce that agreement with respect to post-confirmation breaches by ISC, when Group acts to defend ISC's \$6 Million counter-claim, and when Group seeks to defend Misner's cross-claim arising out of his employment contract with Group. There is no factual or legal support for such a narrow reading of the contract.

In fact, paragraph 2.6, when read as a whole and when read in the context of the entire Management Agreement, supports Group's interpretation. First, the revenues from which these fees and costs are to be paid belong to Group, not ISC. Second, attorney fees and costs associated with

---

<sup>4</sup>See, Exhibit "A," Article 7, page 16, attached to Affidavit of Ivar Chhina, Docket No. 15.

the enforcement of the Management Agreement fit within the phrase "claims and obligations associated with the operation of Group pursuant to this Agreement" and Group's Complaint relates directly to ISC's performance "pursuant to this [Management] Agreement." Third, Group's attorney fees and costs associated with its defense of ISC's \$6 Million counter-claim arise out of Group's natural right to defend itself from ISC's claims, which claims also allegedly arise out of the Management Agreement. Fourth, Group's attorney fees and costs associated with its defense of Dr. Misner's claims arise out of a provider subcontract or employment agreement.

**C. Group's Hiring Of Legal Counsel Is Not Illegal.**

Contrary to the assertions of ISC, the Management Agreement neither expressly, nor inferentially, prohibits Group's hiring of legal counsel. Nor is it *ultra vires* for a corporation to hire attorneys to enforce its contracts and to defend it from claims brought by those with whom it contracts. *Idaho Code §301-304*. ISC would ask this Court to rule that on the basis of the Management Agreement alone, Group expressly gave up its right to ever seek enforcement of the Management Agreement, and gave up its right ever to defend itself from claims arising out of the Management Agreement by eliminating its right to hire and pay, from its own revenues, its own counsel and related litigation expenses. ISC fails to understand, or is simply ignoring the fact that the parties' disputes arise "pursuant to the Agreement." Group claims that its "operations" are being impaired by ISC's post-confirmation breaches of the Management Agreement.<sup>5</sup> These post-confirmation breaches include:

ISC's failure to include in dentists' compensation the dentists' share of interest charged on patients' accounts; ISC's failure to deposit Group's accounts receivable

---

<sup>5</sup>For a detailed description of these post-confirmation breaches, see PDG's Response to ISC's summary judgment motion, Docket No. 76.

in an account approved by the Group; ISC's failure to pay the claims and obligations of the Group including a Medicaid reimbursement claim of more than \$20,000; ISC's interference with the Group's practice of dentistry; ISC's failure to hire and train all non-dentist personnel necessary for the operation of the Group's practice; ISC's charge to its dentists, in violation of the contracts Group has with its dentists, the paid time off given to ISC's employees; ISC's failure to maintain the Group's practice as the preeminent dental practice in the Pocatello and surrounding area; ISC's failure to provide and maintain equipment and supplies necessary for the efficient and effective operation of the practice; ISC's failure to provide an experienced manager; ISC's failure to provide Group with its financial statements and accounting records; ISC's refusal to provide Group with access to its patients' records; and ISC's violation of laws and public policy related to the practice of dentistry.

Each of these complaints relates directly to Group's "operations" under the Management Agreement. The cost of hiring a lawyer to seek the enforcement of the Management Agreement, therefore, is a natural, probable, and necessary cost related directly to Group's operation of its dental practice.

**D. Group's Relationship With ISC Is Not A Creditor-Debtor Relationship, But, Rather, A Fiduciary Relationship.**

ISC claims that "The parties' relationship is simply a contractual one, not one subject to fiduciary duties."<sup>6</sup> ISC boldly says that no fiduciary relationship exists between the parties. However, in ISC's Answer and Counterclaim against PDG,<sup>7</sup> in its Fourth Claim for Relief, ISC alleges that a fiduciary relationship does exist between the parties. Apparently ISC, at the time it filed its Response to Plaintiff's Motion, forgot that only five days earlier it had affirmatively alleged the parties' fiduciary relationship. Now, when a different argument better serves its purpose, ISC claims that "there is simply no fiduciary relationship in these circumstances."

Notwithstanding the foregoing, a fiduciary relationship does exist between the parties, and the fiduciary duty is owed by ISC to PDG. Under the Management ISC controls PDG's revenues;

---

<sup>6</sup>See, Page 9 of ISC's opposition brief, Docket No. 103.

<sup>7</sup>Docket No. 100.

ISC is obligated to pay PDG's debts before it can "retain" its management fee; and PDG is obligated to provide PDG with staff, equipment and supplies necessary for the operation of its dental practice.

ISC is clearly in a superior position to that of the Group and that superior position enables ISC to exercise great and virtually unchecked influence over the success of the Group through its control of the Group's revenues. Group has reposed special trust and confidence in ISC to carry out, in good faith, all of its obligations under the Management Agreement. The Court is again directed to PDG's opening brief in which it quoted from the Idaho Supreme Court case of *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.* 121 Idaho 266, 277-278, 824 P.2d 841,852 - 853 (Idaho1991).<sup>8</sup> The requisite elements for the establishment of a fiduciary relationship exists in this case, but ISC is the fiduciary because it has a contractual duty to act as a manager of PDG's dental practice, to collect its fees, to pay its obligations, to hire and to pay for its staff, purchase adequate equipment and supplies, and to otherwise preserve PDG's practice as the preeminent group dental practice in Pocatello and the surrounding area.

*"A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise, and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary....*

640 P.2d at 1241-42 (citations omitted, italics in original).

ISC's role, pursuant to the Management Agreement, satisfies the legal test set out in the *Idaho First Nat'l Bank* case.

---

<sup>8</sup>See, Docket No. 80, pages 4-8.

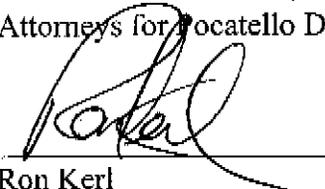
**E. ISC Owes PDG A Duty To Fulfill Its Express Obligations Under The Management Agreement In Good Faith And To Deal Fairly With PDG.**

The question is not whether or not ISC believes PDG's claims are "meritless." It is whether or not, in good faith, the contract requires ISC to use PDG's revenues to pay PDG's legal fees and expenses associated with PDG's efforts to enforce its rights in ISC's bankruptcy proceeding, to enforce its rights with respect to post-confirmation breaches by ISC, to defend ISC's \$6 Million counter-claim, and to defend Misner's cross-claim arising out of his employment contract with Group. Since the Management Agreement does not expressly exclude these costs as obligations ISC must pay from PDG's revenues, it is a breach of the implied covenant of good faith and fair dealing for ISC to not pay these expenses.

ISC wants the Court to conclude that because ISC has PDG's money, PDG can be forced to: (1) respond to ISC's bankruptcy, (2) seek enforcement of the Management Agreement, (3) defend against ISC's claims and (4) defend against the claims of its dentists and the State of Idaho, all without the use of its own money to pay its legal counsel. That assertion, in and of itself, is evidence of ISC's breach of the implied covenant.

Respectfully submitted this 21 day of April, 2004.

COOPER & LARSEN, CHTD.  
Attorneys for Pocatello Dental Group, P.C.



---

Ron Kerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 21 day of April, 2004, I served a true and correct copy of the foregoing document as follows:

Erik F. Stidham  
G. Rey Reinhardt  
STOEL RIVES LLP  
101 S. Capitol Blvd., Ste.1900  
Boise, ID 83702-5958

U.S. Mail, postage prepaid  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Scott J. Kaplan  
STOEL RIVES LLP  
900 SW Fifth Ave. Ste. 2600  
Portland, OR 97204-1268

U.S. Mail, postage prepaid  
 Hand Delivery  
 Overnight Mail  
 Facsimile

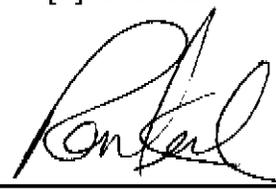
Lowell N. Hawkes  
1322 East Center  
Pocatello, ID 83201

U.S. Mail, postage prepaid  
 Hand Delivery  
 Overnight Mail  
 Facsimile

Richard A. Hearn  
RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHTD.  
P.O. Box 1391  
Pocatello, ID 83204

U.S. Mail, postage prepaid  
 Hand Delivery  
 Overnight Mail  
 Facsimile

By: \_\_\_\_\_

  
Ron Kerl