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InterDent Service Corporation

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

INTERDENT SERVICE  
CORPORATION'S REPLY IN  
SUPPORT OF MOTION FOR LEAVE  
OF COURT TO FILE AMENDED  
COUNTERCLAIMS/THIRD-PARTY  
CLAIMS

175

POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

Third-party defendant Larry Misner makes three arguments in his opposition to defendant and third-party plaintiff InterDent Service Corporation's ("ISC") motion for leave to amend: (1) that ISC did not properly seek modification of the Court's scheduling order, (2) that ISC failed to show "good cause" to support the motion to amend, and (3) that ISC's proposed amendments to Counterclaims 9-11 are "merely legal theories."

In making these arguments, Misner either ignores or mischaracterizes the underlying facts. To say, as Misner does, that ISC did not file its motion to amend until "more than three months after this Court's [May 15, 2004] deadline for such motions" (Misner's Opposition Memo at 7) is technically true, but this statement nonetheless ignores what actually happened. As set forth in oral argument on August 6 and in ISC's memorandum in support of its motion to amend ("ISC's Memorandum"), plaintiff Pocatello Dental Group ("PDG") filed an amended complaint on May 17, 2004. ISC responded by filing its answer, which included amended and supplemental counterclaims and third-party claims, on June 2 (within the 10 days allowed for a responsive pleading under the Federal Rules of Civil Procedure but after the deadline established in the scheduling order). Misner moved to strike these counterclaims and third-party claims for failing to comply with the scheduling order, and the Court heard oral argument on Misner's motion (and other motions) on August 6. On August 16, the Court granted Misner's motion to strike. On August 19, only *three days later*, ISC moved to amend.

## I. ISC's Motion to Amend Is Proper

The cases cited by Misner, *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9<sup>th</sup> Cir. 1992) and *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099 (9<sup>th</sup> Cir. 1985) do not articulate any hard-and-fast rule that would preclude the Court from considering the merits of ISC's motion. *U.S. Dominator* had nothing to do with amending a complaint—it involved a motion for summary judgment that was filed nearly a year after the deadline established in a pretrial order. 768 F.2d at 1104. *Johnson* did consider a party's motion to amend a complaint under Fed. R. Civ. P. 15, as opposed to requesting a scheduling order modification under Fed. R. Civ. P. 16. But the *Johnson* court's language stops *far* short of the hard-line rule that Misner suggests: "We have *suggested* the contrary [that a motion to amend not be treated as a motion to modify the scheduling order]. 975 F.2d at 608 (emphasis added). In fact, the *Johnson* court specifically held that its decision (to not allow amendment) was not dependent on any distinction between Fed. R. Civ. P. 15 and 16 and spent two full pages discussing how the appellant had not met the requisite showing. *Id.* at 609-10.

Additionally, the Court itself implicitly directed ISC to seek to amend pursuant to Fed. R. Civ. P. 15. The August 16 order (which granted Misner's motion to strike) expressly states that "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." (Order at 10 (emphasis added).) ISC followed this directive in moving to amend.

Finally, ISC effectively *did* ask the Court to modify the scheduling order. In ISC's Memorandum, ISC noted that the Court granted Misner's motion to strike for two reasons: (1) failure to comply with the scheduling order and (2) failure to comply with Fed. R. Civ. P. 15. Immediately following, ISC stated: "ISC files this motion to correct *these technical problems.*"

(ISC's Memorandum at 2 (emphasis added).) ISC's use of the plural "these" and "problems" plainly means that, through the present motion, ISC seeks to both (1) have the Court modify the scheduling order and (2) comply with Fed. R. Civ. P. 15.

## **II. ISC's Motion to Amend Is Supported by Good Cause**

Misner argues that ISC was not diligent, in part because it waited "more than three months" to move to amend. (Misner's Opposition Memo at 7.) As detailed above, this argument mischaracterizes what really happened. ISC has acted with the requisite diligence. It moved to amend a mere *three days* after the Court issued its August 16 order. Moreover, as detailed in ISC's Memorandum, Misner is in no way prejudiced by the proposed amendment. *Johnson*, 975 F.2d at 60 (whether party opposing modification is prejudiced may be considered in deciding whether to allow amended complaint/modification of scheduling order).

## **III. ISC's Amended Counterclaims 9-11 Arose In Large Part Due to Conversations with Counsel for Misner**

Misner's final argument is confusing. Essentially, Misner says that the Court should not allow ISC to amend Counterclaims 9-11 because the amendments are merely legal theories. This is true—the amendments are legal theories/claims. In fact, ISC's amendments to Counterclaims 9-11 arose out of concerns expressed by counsel for Misner. ISC responded to Misner's concerns by clarifying its claims. That Misner now seeks to disallow amendments that *were made primarily at his request* makes little sense.

ISC believes that Counterclaims 9-11, as amended (counterclaims for fraud in the inducement, illegality, and mutual mistake, as opposed to counterclaims for fraud in the inducement and rescission/restitution) most accurately describe and characterize the causes of action. In any event, whatever the result of this motion, it is clear that Misner has more than sufficient notice that ISC is proceeding on these theories and that Misner has waived any

objections to ISC doing so. However, ISC submits that the better practice would be to have the pleadings more accurately reflect the issues to be tried.

DATED: September 22, 2004.

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InterDent Service Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **INTERDENT SERVICE CORPORATION'S REPLY IN SUPPORT OF MOTION FOR LEAVE OF COURT TO FILE AMENDED COUNTERCLAIMS/THIRD-PARTY CLAIMS** 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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