

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.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Scott J. Kaplan, being first duly sworn, state as follows:

1. I am a member of Stoel Rives LLP, counsel for defendant/third-party plaintiff InterDent Service Corporation ("ISC") in this case.

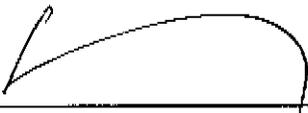
2. In response to ISC's document subpoena on Dr. Larry Bybee and his corporation, Valley Dental, P.A., third-party defendant Larry Misner's counsel, Messrs. Hearn and Muhonen, indicated that they would represent Dr. Bybee and Valley Dental. They told me they had relevance objections to the discovery, which we discussed. However, neither Mr. Hearn nor Mr. Muhonen ever expressed any objection to the place of production stated in the subpoena: the Stoel Rives Boise office. Had they done so, I would have indicated that Dr. Bybee and Valley Dental need only mail the documents to us — that no personal appearance was necessary.

3. Plaintiff Pocatello Dental Group has designated Dr. Bybee as an expert. In Dr. Bybee's "report" (and without conceding that Dr. Bybee is qualified to provide expert testimony), he bases his opinions in part "from the experience [he] gained from building [his] own practice at 716 Yellowstone Avenue in Pocatello, Idaho;" that is, the Valley Dental office he built with assistance from Orthodontic Centers of America as detailed in the TRO briefing. Dr. Bybee included in his expert report a "Service Agreement" between he, Misner and Valley

Dental, on one hand, and a consultant, on the other. The Service Agreement describes tasks to be done "in cooperation with Kevin Nelson and O.C.A. as needed." Dr. Bybee also includes in his expert report invoices for equipment to be delivered to "OCA Bybee and [Larry] Russ Misner" by "Ortho Centers of America" in Metairie, Louisiana. Pertinent portions of Dr. Bybee's expert report are attached as Exhibit 1.

4. Attached hereto as Exhibit 2 are cited portions of the Deposition of Larry Bybee taken in this action.

DATED: July 21, 2004.

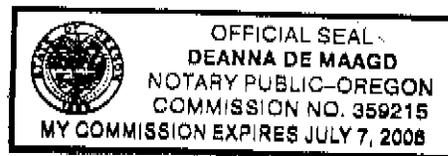


Scott J. Kaplan

SUBSCRIBED AND SWORN to before me this 21 day of July, 2004.



Notary Public for Oregon



CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **AFFIDAVIT OF SCOTT J. KAPLAN IN OPPOSITION TO DR. LARRY BYBEE'S AND VALLEY DENTAL'S MOTION TO QUASH** 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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DATED: July 21, 2004.



Scott J. Kaplan, Pro Hac Vice
Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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

Plaintiff,)

vs.)

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

INTERDENT SERVICE CORPORATION,)
a Washington corporation,)

Defendant.)

INTERDENT SERVICE CORPORATION,)
a Washington corporation,)

Third Party Plaintiff.)

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,)

Third Party Defendants.)

ORAL DEPOSITION OF LARRY W. BYBEE
Taken on June 25, 2004

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1 position?
2 A. Full time.
3 Q. How long did you stay a full-time dentist with
4 the Pocatello Dental Group?
5 A. Until February of '96.
6 Q. Then what did you do in February of '96?
7 A. I retired.
8 Q. How long did you retire?
9 A. About a year.
10 Q. So what did you do in '97?
11 A. In July of '97 Dr. Russ Misner asked me to
12 join his practice.
13 Q. And this is at Pocatello Dental Group?
14 A. Yes.
15 Q. What do you mean join his practice?
16 A. He asked me to come and help him treat
17 children.
18 Q. So you were going to see patients who were
19 already coming to him, was that the idea?
20 A. Correct.
21 Q. As opposed to patients coming to other
22 Pocatello Dental Group dentists, were you going to see
23 any of their patients?
24 A. No, children only. I had worked with Russ in
25 late 19 -- I am trying to remember. I am just trying to

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1 remember when my wife was killed, this is what it all
2 keys around. I think it was late -- I don't know, '95 or
3 '96. I worked with him while I was still at the group
4 part time.
5 Q. When you were at the group from 1990 to 1996,
6 did you work as a general dentist?
7 A. Yes.
8 Q. And you saw adults as well as children?
9 A. Mostly adults but I saw some children, yes.
10 Q. So from 1997 you went back to working at Dr.
11 Misner's practice. How long did you do that?
12 A. Until March 15 of 2004.
13 Q. Then what did you do?
14 A. I went and built a new office here in
15 Pocatello.
16 Q. When you say built a new office, is it a new
17 building or were you remodeling an existing space?
18 A. It's an existing space, so leasehold
19 improvements.
20 Q. Had it been a dental office previously?
21 A. No.
22 Q. That's the space at 716 Yellowstone?
23 A. Yes.
24 Q. When did you start remodeling that space?
25 A. The day that construction started was March

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1 22, 2004.
2 Q. And do you have a lease of that space?
3 A. I don't understand what you are asking.
4 Q. Is that a leased space?
5 A. Yes.
6 Q. And who is the lease in the name of?
7 A. Orthodontic Centers of America.
8 Q. Do you sublease from Orthodontic Centers of
9 America?
10 A. Yes, I do.
11 Q. I guess the question I was getting at is when
12 I say do you sublease, is it a particular business or is
13 it you personally or who is the sublessee?
14 A. Valley Dental, doing business as Kidds Dental.
15 Q. Valley Dental is a corporation?
16 A. Yes, it is.
17 Q. And are you a shareholder of that corporation?
18 A. Yes, I am.
19 Q. Are there other shareholders?
20 A. No, there are not.
21 Q. Are you an officer of that company?
22 A. Yes.
23 Q. President?
24 A. President.
25 Q. Are there other officers?

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1 A. Yes.
2 Q. Who?
3 A. Russ Misner.
4 Q. What is his position?
5 A. Secretary.
6 Q. When did your office actually open for
7 business?
8 A. The first patient was June 11.
9 Q. Did you make requests for transfer of patient
10 records prior to June 11?
11 A. Yes.
12 Q. When was the first time you made such a
13 request? Was it sometime in April?
14 A. I saw patients at my brother's office around
15 the first of April, so requests could have been made in
16 late March or early April.
17 Q. So for the period from the beginning of April
18 until June 11 you were seeing patients at your brother's
19 office; is that right?
20 A. Yes.
21 Q. And what name does your brother do business
22 under?
23 A. Just Darryl Bybee, D.D.S.
24 Q. Is it a professional corporation?
25 A. I don't know.

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1 Q. Does Dr. Misner have any kind of interest in
2 your brother's business?
3 A. I don't know.
4 Q. Now, Dr. Misner also does business as Kidds
5 Dental, correct?
6 A. Correct.
7 Q. He has an office in Burley?
8 A. That's correct.
9 Q. is his business also Valley Dental or does he
10 have another formal corporate name?
11 A. It's Valley Dental doing business as Kidds
12 Dental in Burley.
13 Q. So Valley Dental has two offices, one in
14 Pocatello and one in Burley?
15 A. Yes.
16 Q. And Dr. Misner is not an owner of Valley
17 Dental?
18 A. No, he is not.
19 Q. Is Dr. Misner an employee of Valley Dental?
20 A. He has a contract agreement.
21 Q. He has a written contract?
22 A. Yes.
23 Q. And he is also an officer of the company?
24 A. Yes.
25 Q. Does Dr. Misner have another business for

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1 which he practices dentistry besides Valley Dental?
2 A. I don't know the answer to that.
3 Q. Now, physically where you practice, do you
4 practice solely in Pocatello?
5 A. Me personally?
6 Q. Yes.
7 A. Yes.
8 Q. And Dr. Misner, does he also practice out of
9 your Pocatello office?
10 A. He has been there.
11 Q. And he has been there to treat patients?
12 A. Yes.
13 Q. If you opened on June 11, how soon thereafter
14 was Dr. Misner there to treat patients?
15 A. He saw patients on June 11.
16 Q. Is there a regular schedule for when he is in
17 Pocatello, or how often is he there?
18 A. We have a schedule, yes.
19 Q. And how many days a week is he in Pocatello?
20 A. He is scheduled in three days a week.
21 Q. Does he also have a regular schedule for
22 practicing in Burley?
23 A. Yes, he does.
24 Q. How many days does he practice there?
25 A. Four days a month, four to five days a month.

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1 Q. Prior to the opening of your Kidds Dental
2 office in June, did Dr. Misner practice exclusively in
3 Burley after he left Pocatello Dental?
4 A. Yes, he did.
5 Q. Do you know what kind of schedule he had then
6 how many days a week he was working?
7 A. Four to five days a month.
8 Q. Do you have any specialty certification?
9 A. In dentistry?
10 Q. Yes.
11 A. No, I do not.
12 Q. You are a licensed dentist?
13 A. Yes.
14 Q. In what states?
15 A. State of Idaho.
16 Q. Dr. Misner does have a specialty
17 certification, correct?
18 A. Yes, he does.
19 Q. In what specialty?
20 A. Pediatric dentistry.
21 Q. How many employees does Kidds Dental have?
22 A. Fourteen.
23 Q. Are there other dentists besides you and Dr.
24 Misner?
25 A. Dr. Johnson, an orthodontist, will be there

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1 later this year.
2 Q. Do you have a contract with Dr. Johnson?
3 A. We are working on drawing that up.
4 Q. Dr. Johnson was formerly at Pocatello Dental
5 Group?
6 A. Yes.
7 Q. Now, was Dr. Misner involved at all in hiring
8 Dr. Johnson?
9 A. No.
10 Q. That's solely your involvement?
11 A. Yes. You are talking about hiring a dentist.
12 The contract is he is going to lease space from us, so we
13 are not per se hiring him, we are providing space for him
14 and he will pay for that space. He will have his own
15 employees, own supplies.
16 Q. Will he sign an employment agreement with your
17 company?
18 A. No, not unless recommended by our lawyer.
19 Q. Have you ever been convicted of a felony?
20 A. No.
21 Q. Any crime involving dishonesty?
22 A. No.
23 Q. Just to finish up your background, what
24 happened to the pizza business?
25 A. Couldn't sell enough pizza; it went bankrupt

1 A. Yes.
2 Q. Whose idea was it, yours or his?
3 A. (Shrugs shoulders.)
4 Q. Something you came up with together?
5 A. Yes, it was a together thing.
6 Q. When did you come up with that idea?
7 A. Probably late 2003.
8 Q. Do you recall when you gave notice that you
9 were going to leave Pocatello Dental Group?
10 A. October or November of 2003.
11 Q. Was that in writing?
12 A. Yes.
13 Q. Who was it provided to in writing?
14 A. To the president of the Pocatello Dental
15 Group.
16 Q. That's Dr. Greg Romriell or was it Dr. Misner
17 at the time?
18 A. I don't remember. I think it was Dr.
19 Romriell.
20 Q. And did both you and Dr. Misner provide notice
21 at the same time?
22 A. I don't believe so.
23 Q. Who gave notice first?
24 A. I don't remember. I would have to look at the
25 documents to see that.

1 number of patients that needed to be seen at my brother's
2 office, so it was at least mitigated.
3 Q. Was there any request made of Dr. Misner to
4 stay temporarily to see patients or to come in and see
5 patients?
6 A. I don't know of that directly.
7 Q. Indirectly had you heard that?
8 A. (Witness shakes head negatively.) Well, Russ
9 offered, the same as I did, to see kids for free at the
10 Pocatello Dental Group until such a time as the other
11 office was available.
12 Q. What happened to that offer?
13 A. It was rejected by InterDent.
14 Q. And how do you know InterDent rejected that
15 offer?
16 A. Because I was told by Bruce Call in a phone
17 conversation.
18 Q. We started off talking about how you and Dr.
19 Misner formed your Kidds Dental practice. You came up
20 with the idea and then what was the first concrete step
21 that you took towards putting that practice together?
22 A. We flew back to New Orleans to talk to
23 Orthodontic Centers of America.
24 Q. And why did you do that?
25 A. For funding issues.

1 Q. And by the documents, you mean notice letters?
2 A. Notice letters.
3 Q. When you gave your notice letter, did Dr.
4 Romriell or anybody else at Pocatello Dental Group do
5 anything to stop you from leaving?
6 A. No.
7 Q. Do you know if anyone at Pocatello Dental
8 Group did anything to stop Dr. Misner from leaving?
9 A. I don't know that.
10 Q. Were there any discussions with Dr. Romriell
11 or others at Pocatello Dental Group to the effect of,
12 hey, don't go, we would like you to stay, was there
13 anything like that?
14 A. No.
15 Q. So there was no request from them that you
16 stay; is that right?
17 A. There was only requests at the end for me to
18 stay longer to treat patients, until the current office
19 at 716 Yellowstone opened.
20 Q. And that problem was solved by seeing patients
21 at your brother's office; is that right?
22 A. It was a Band-Aid, it wasn't solved.
23 Q. It was taken care of temporarily; is that
24 fair?
25 A. It was taken care of -- I couldn't see the

1 Q. Did you get funding from them?
2 A. Yes.
3 Q. And did you present a business plan to them by
4 which you got funding?
5 A. No, presented a business plan to Wells Fargo
6 Bank and received funding there, also.
7 Q. What did you present to Orthodontic Centers of
8 America, if anything?
9 A. Just an idea.
10 Q. Did you give them anything in writing?
11 A. No.
12 Q. This business plan that you presented to Wells
13 Fargo, when did you present that?
14 A. January of 2004.
15 Q. And do you have a copy of that?
16 A. Not with me.
17 Q. To your knowledge, does Dr. Misner have a copy
18 of it?
19 A. No.
20 Q. Did you have the only copy?
21 A. I had a copy, Wells Fargo and Bank of Idaho
22 had a copy.
23 Q. And did the business plan make projections as
24 far as revenue?
25 A. Yes.

1 Q. And what sort of revenues did you project?
2 A. The first year 1.1 million.
3 Q. Now, of that 1.1 million, a very high
4 percentage of that would have been generated from
5 Pocatello as opposed to Burley, correct?
6 A. Probably 80 percent. That 1.1 also included
7 Dr. Johnson in there, also.
8 Q. Did you make projections beyond the first
9 year?
10 A. Yes, out to 2006.
11 Q. Do the revenues go up as the years go on?
12 A. Yes.
13 Q. What was the projection for the second year?
14 A. Oh, 1.25, something like that, and the last
15 year was just over 1.4.
16 Q. Did you make projections about the numbers of
17 patients you would be seeing?
18 A. I don't remember that.
19 Q. How was the 1.1 million calculated, how did
20 you come up with that number?
21 A. Based on what we had done in the past at
22 Pocatello Dental Group.
23 Q. So it was based on an -- was it based on an
24 expectation that a percentage of the patients you saw at
25 Pocatello Dental Group would see you in your new

1 correct?
2 A. No, I saw about 80 patients this week and
3 about 30 the week before. We weren't open five full days
4 last week.
5 Q. And do you have patients scheduled for next
6 week?
7 A. I hope so.
8 Q. Do you know how many?
9 A. No, I do not.
10 Q. How many days do you plan to be open next
11 week?
12 A. Five days.
13 Q. And the same the following week?
14 A. I'd have to have a calendar.
15 Q. But for the July 4 holiday in there somewhere.
16 Do you plan to keep your office open full time for the
17 foreseeable future?
18 A. Yes.
19 Q. And would you expect this 80 patients a week
20 number to go up as time goes on?
21 A. Yes.
22 Q. What would full capacity for you be?
23 A. Oh, 130 per day.
24 Q. So that would be 900 per week -- no, wait, you
25 are not open five days --

1 practice?
2 A. Yes.
3 Q. And what percentage was that?
4 A. About 60 percent.
5 Q. And when I say patients seeing you, I meant
6 you and Dr. Misner together. Does that change your
7 answer?
8 A. No.
9 Q. Are all of these projections based on you and
10 Dr. Misner and Dr. Johnson together?
11 A. Yes.
12 Q. And the 60 percent number, how did you come up
13 with that?
14 A. Reached up and grabbed it (indicating).
15 Q. Best estimate?
16 A. Best guess.
17 Q. In the less than a month you have been open,
18 how many patients have you been seeing?
19 A. Twenty a day last week -- or this week.
20 Q. And the week before?
21 A. Less than ten a day.
22 Q. And how many days a week are you open?
23 A. Monday through Friday.
24 Q. So you would have seen about a hundred
25 patients last week and about 50 the week before; is that

1 A. Well, we are scheduled five days, we are not
2 always open five days.
3 Q. What would be that be a week, what would your
4 expectation be, how many patients would you see a week
5 A. 120 times four, 480.
6 Q. Was it four or five days a week?
7 A. The office is open five days, we work four;
8 some days we will work five. Some days we are off
9 Thursday, some we are working.
10 Q. Are there days that you work and Dr. Misner
11 doesn't and vice versa, or do you both take the same day
12 off?
13 A. No, we take different days off -- well, it's
14 an open schedule. He is scheduled in Burley and then
15 I'll be here scheduled. We work most the time together
16 when we are here in Pocatello.
17 Q. Of the over a hundred patients you have seen
18 so far, have any of them told you that they are going to
19 go back to Pocatello Dental Group?
20 A. No.
21 Q. Have any of their parents told you that?
22 A. No. They told me that they would not go back
23 there. They are not treated very nicely to get their
24 records. InterDent employees do not treat them very nice
25 when they show up with a request for records.