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U.S. COURT
 DISTRICT OF IDAHO
 POCATELLO, IDAHO
 CLERK'S OFFICE

**IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF IDAHO**
The Honorable Larry M. Boyle

POCATELLO DENTAL GROUP, P.C.,)
 an Idaho Professional Corporation,)

Plaintiff,)

vs.)

INTERDENT SERVICE)
 CORPORATION, a Washington)
 Corporation,)

Defendant,)

vs.)

POCATELLO DENTAL GROUP, P.C.,)
 an Idaho Professional Corporation;)
 DWIGHT G. ROMRIELL, individually;)
 LEROY R. MISNER, JR., individually;)
 GREGORY ROMRIELL; individually;)
 ERROL ORMOND; individually; and)
 ARNOLD GOODLIFFE; individually;)

Counterdefendant and)
Third-party Defendants.)

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

**MEMORANDUM OF THIRD-
 PARTY DEFENDANTS
 ROMRIELL, ORMOND, and
 GOODLIFFE OPPOSING
 INTERDENT RULE 67 MOTION**

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Procedural Context

Trial of this case is set for April 25, 2005. Defendant Interdent has moved this Court to allow it, pending trial, to withhold money contractually owed to the dentists. The money it proposes to withhold is money paid by patients or their insurers, but collected by Interdent, for *professional services already rendered*. Interdent asks this Court to insulate it from its breach of contract and approve withholding that money so as to create a security fund against should it prevail *at trial* on its claims against the dentists.

Interdent dresses its motion under the *interpleader* Rule 67, *Federal Rules of Civil Procedure*. Rule 67 is most commonly used by insurers to deposit funds owed under an insurance policy when liability is clear but there are more claims and claimants than insurance coverage. Such is not this case.

Interdent's Motion proposes a double standard. Interdent makes no corresponding offer to deposit with this Court *any of its contract portion* (62% of collections) to create a security fund for what may be determined at trial as owed by Interdent to the dentists on their Counterclaims.¹

¹ Interdent's memo argues that because of the potential for the Pocatello Dental Group to "go into bankruptcy" a security fund should be created to protect Interdent. **Interdent's Memo, page 2 referencing Affidavit of Kevin Webb, ¶3.** Interdent has the bankruptcy argument backwards! It is Interdent who so ill-managed its business that it ended up in bankruptcy. If the *potential* for bankruptcy were legally sufficient to allow prejudgment attachment — which it is not — the facts would compel Interdent create such a fund for the individual dentists.

Summary of Argument

1. Rule 67 does not apply. Rule 67 exists for those who assert no interest in the property being deposited or to allow competing claims for the money to be resolved. Interdent concedes the money it proposes to withhold is money contractually owed the dentists.
2. Prejudgment attachment of assets is illegal under long-standing law from the United States Supreme Court. Rule 67 is *not* a vehicle to create a pre-judgment security fund for an undecided claim.
3. Interdent's Motion proposes a double standard. It does not even offer to deposit its 62% of contract proceeds as security for claims against it; it only proposes to breach its contract by withholding the dentists 38% of monies collected.
4. The Motion is contemptuous. Interdent basically threatens this Court that it will breach its contract unless its motion is granted under the guise of Rule 67.

ARGUMENT

POINT ONE

RULE 67 DOES NOT APPLY

Rule 67, *Federal Rules of Civil Procedure* is clear that deposits of money or things are not for *security* but in situations where the person/entity making the tender claims no interest or has a *present* interest, at least in part:

In an action in which any part of the relief sought is a judgment for a sum of money *or the disposition of a sum of*

money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, *whether or not that party claims all or any part of the sum or thing*. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§§§ 2041, and 2042....

- Rule 67, F.R.C.P.²

The Rule references “whether or not that party claims *all or any part* of the sum or thing” which focuses upon a *present* interest in the property. Interdent has no such *present* interest. Even when Rule 67 applies it is still *discretionary* with the Court.

***Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987).**

Contract Payments are Not “Disputed”

Interdent’s memo argues that the purpose of Rule 67 is “to relieve the depositor of responsibility for a fund *in dispute*.” **Interdent’s Memorandum, p. 3, (citing 12 Charles A. Wright, et al., Federal Practice and Procedure § 2991, at 59) (2d ed. 1997))**. Interdent also cites *Cajun Elec. Power Coop., Inc. v. Riley Stoker Corp.*, 901 F.2d 441, 444-45 (5th Cir. 1990) which states that “rule’s purpose is to relieve the depositor of responsibility *for the fund in dispute* while the parties hash out their differences with respect to it.” **See, Interdent’s Memorandum, p. 3-4**. The problem is, the money owed dentists for services already rendered is not money “in dispute.” It is money *earned* for which Interdent is claiming its corresponding contractual share.

² All emphasis in this Memorandum has been added unless stated otherwise.

Interdent's reliance on *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (1987) is misplaced. *Gulf States* makes it clear that in order to deposit the funds in Court the party must have an *interest* thereby making the funds disputed. The Court in *Gulf* compared its situation to that in *Prudential Insurance Co. v. BMC Industries, Inc.*, 630 F. Supp. 1298 (S.D.N.Y. 1986) in which a request to deposit funds was denied because there was no dispute over payments; there was a clear contractual right to interest payments. That is the fact here; each of the dentists are contractually entitled to the monies Interdent wants to withhold.

Gulf States also discussed *Baxter v. United Forest Products*, 406 F.2d 1120 (8th Cir.), which held that Rule 67 applies so that the Court may hold the funds for the "true owner" and that where a party affirms the validity of a contract and moves to deposit the remaining installments in the Court's registry, the affirmation of the contract demonstrates that there is no interest in the money sought to be deposited and therefore the funds could *not* be deposited.

The rule in *Baxter* applies here; Interdent admits that the funds it wants to deposit are *funds owed under contract* to the dentists who are entitled to at least 38 percent of sums collected. **Affidavit of Kevin Webb, ¶¶ 2-3.** That Affidavit concedes:

One of these loose ends remaining after termination is the collection of accounts that will be received *for work done* at the Pocatello Office *prior to the termination of the Management Agreement*. Under the parties' *contractual arrangements*, ISC collected the accounts receivable from third-party payors (for example, insurance companies) and patients. It paid approximately 38 percent of net collections to PDG. PDG then uses this sum to pay its professional

employees (dentists and hygienists), including third-party defendants. . . . ISC uses the remaining collections to pay the expenses of the Pocatello office, including the clerical and office staff. This motion thus will not affect payment to nonprofessional *former* staff of the Pocatello office.

– **Affidavit of Kevin Webb, ¶2**

The Kevin Webb Affidavit otherwise admits the funds desired to be withheld are for “PDG’s [Pocatello Dental’s] *share* of pending accounts receivable (approximately 38 percent).” **Affidavit of Kevin Webb, ¶3.**

POINT TWO

GRANTING THE MOTION WOULD VIOLATE DUE PROCESS

Interdent seeks to have funds — essentially the dentists wages — which it *concedes* are already earned under the “share” of contract receivables placed into the Court *not* because they have an interest in the funds, but to protect its unadjudicated claims. Interdent’s Motion is about 35 years behind on the law. Since *Sniadach v. Family Finance*, 395 U.S. 337 (1969) any taking of property prior to an adjudication on the merits “violates the fundamental principles of due process. Reversed.” As the Supreme Court phrased the issue in reversing: “In the context of this case the question is whether the *interim freezing of the wages* without a chance to be heard *violates procedural due process.*” It did. It still does.

POINT THREE

THE MOTION IS CONTEMPTUOUS

Finally, Interdent argues that if its Motion is not granted, it will have no other option than to withhold money and risk breach or have it deposited under Rule 67.

Interdent Memorandum , p. 5. The threat is incredible and immature. Interdent does have other clear options: obeying the law and honoring its contractual obligations. It should not be heard to cry to this Court to assist it in breaching its contractual obligations or it will do so anyway. As one wise jurist stated in a somewhat similar situation in *Dinkins v. General Aniline & Film Corp.*, 214 F. Supp. 281, 283 (S.D.N.Y. 1963), and substituting names we have this:

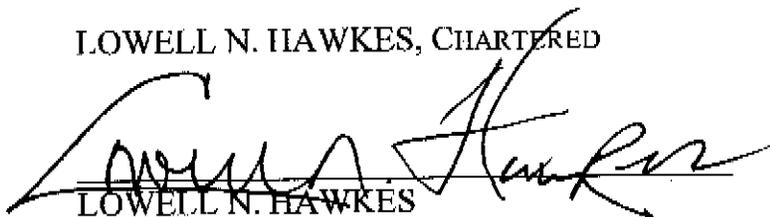
“[B]y depositing money in court, [Interdent wishes] to preserve all its rights under the contract and to avoid the risk of a breach of contract on its part if its position should turn out to be wrong. The result, of course, would be to deprive [Pocatello Dental] of the use of the money pending the final determination of this action, even though the final determination may be that [Pocatello Dental] did not breach the contract and hence was entitled to the money all along.” — **214 F.Supp at 283**

Conclusion

Interdent’s Motion should be denied. It seeks an illegal prejudgment attachment, sets a double standard on contract payments, and otherwise does not fit Rule 67.

DATED this 29th day of October, 2004.

LOWELL N. HAWKES, CHARTERED



LOWELL N. HAWKES

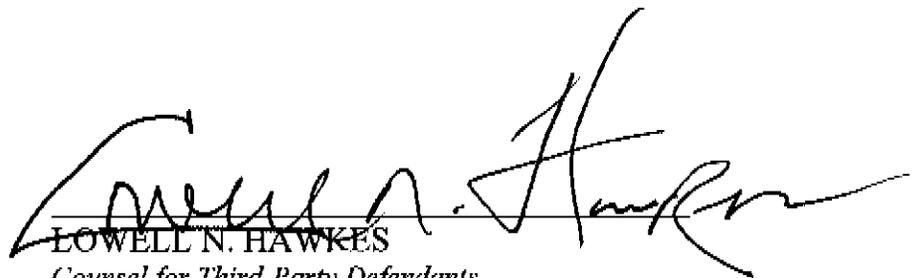
CERTIFICATE OF SERVICE

I certify that on this 28th day of October, 2004 I served by fax a copy of the foregoing to counsel for the parties identified below:

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