

Erik F. Stidham, ISB #5483
efstidham@stoel.com
G. Rey Reinhardt, ISB #6209
grreinhardt@stoel.com
STOEL RIVES LLP
101 South Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040

Scott J. Kaplan, Pro Hac Vice
sjkaplan@stoel.com
Darian A. Stanford, Pro Hac Vice
dastanford@stoel.com
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

U.S. COURTS
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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.

POCATELLO DENTAL GROUP, P.C., an

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

DEFENDANT/THIRD-PARTY
PLAINTIFF INTERDENT SERVICE
CORPORATION'S COMBINED
OPPOSITION TO PLAINTIFF'S AND
THIRD-PARTY DEFENDANT
MISNER'S MOTIONS TO STRIKE
DEFENDANT'S AMENDED AND
SUPPLEMENTAL COUNTERCLAIMS
DATED JUNE 2, 2004

DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S COMBINED
OPPOSITION TO PLAINTIFF'S AND THIRD-PARTY DEFENDANT MISNER'S MOTIONS TO STRIKE
DEFENDANT'S AMENDED AND SUPPLEMENTAL COUNTERCLAIMS DATED JUNE 2, 2004 - 1

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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

Both plaintiff Pocatello Dental Group (“PDG”) and third-party defendant Larry R. Misner, Jr. (“Misner”) move to strike defendant/third-party plaintiff InterDent Service Corporation’s (“ISC”) June 2, 2004 counterclaims and supplemental claims. However, in purporting to set forth the facts relevant to their motions, they fail to mention the most significant underlying fact—*PDG filed an Amended Complaint on May 17, 2004*. ISC therefore has a right to, and did, respond to this Amended Complaint—it filed an Answer and Amended and Supplemental Counterclaims and Third-Party Complaint (the “Answer and Amended/Supplemental Counterclaims”). For this reason, and as detailed further below, PDG’s and Misner’s Motions to Strike should fail. They will have to respond to ISC’s claims on the merits rather than through procedural evasion.

II. FACTS

PDG filed its initial complaint in this matter on October 9, 2003. ISC filed its answer on November 6, 2003, in which it also alleged eight counterclaims: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) abuse of process, (4) breach of fiduciary duty, (5) intentional interference with contract, (6) fraud in the inducement, (7) rescission and restitution and (8) declaratory judgment.

ISC subsequently filed an Amended Answer and Counterclaims on February 5, 2004. The reason for this amendment was that ISC sought a temporary restraining order relating to PDG's and Dr. Dwight Romriell's diversion of the mail (which had not occurred until after ISC filed its initial counterclaim). The underlying eight counterclaims remained unchanged except as related to the mail diversion.

On April 19, 2004, PDG sought leave to file an Amended Complaint, adding claims for alleged breach of fiduciary duty, breach of covenant of good faith and fair dealing and indemnity. The Court heard oral argument by telephone on this motion as well as on ISC's Motion for Summary Judgment on May 14, 2004. Upon counsel for PDG's admission that the injunctive relief claim relating to Romriell (third claim) was moot and the discovery of a numbering error in the proposed Amended Complaint, the Court ordered PDG to revise its Amended Complaint accordingly before filing. It was in this context that PDG finally filed its Amended Complaint on May 17, 2004.

ISC filed its Answer and Amended/Supplemental Counterclaims on June 2, 2004. ISC asserted 12 counterclaims. The first five and the twelfth—(1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) abuse of process, (4) breach of fiduciary duty, (5) intentional interference with contract and (12) declaratory judgment—are essentially identical to those previously filed. Counterclaims six through eight—(6) breach of noncompete agreement against Larry Misner, (7) anticipatory breach of noncompete against Greg Romriell and (8) anticipatory breach of noncompete against Errol Ormond—arise out of new facts, events that had not occurred at the time of previous filings. Counterclaims nine through eleven—(9) fraud in the inducement, (10) illegality and (11) mutual mistake—are slight modifications of

earlier counterclaims arising out of negotiation with counsel for third-party defendants Misner, Porter Sutton and Ernest Sutton to avoid a threatened motion by these third-party defendants.¹

III. ARGUMENT

A. ISC Properly Responded to PDG's Amended Complaint

As detailed above, PDG filed an Amended Complaint on May 17, which was served on May 19, 2004. FRCP 15(a), which governs amended and supplemental pleadings, states in relevant part:

A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading

That is precisely what ISC did. It "pled in response to an amended pleading" within the requisite time frame.² PDG has not and cannot identify a single provision of the Federal Rules that prohibits ISC's Answer and Amended/Supplemental Counterclaims.

B. FRCP 12(f) Does Not Provide a Proper Basis for PDG's Motion

Motions to strike are a "drastic remedy" and are disfavored. 2 J. Moore, *Moore's Federal Practice* §12.37 at 12-93[1] (3d ed. 2002). Nonetheless, PDG and Misner purport to bring their motions under FRCP 12(f), which allows the Court to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." This requires a showing that the challenged matter "has no bearing on the subject matter of the litigation and that its inclusion will prejudice the defendants." *FRA S. p. A. v. Surg-O-Flex of America, Inc.*, 415 F. Supp. 421, 427 (S.D.N.Y. 1976); J. Moore, *supra*, § 1237(3) at 12-95. PDG and Misner never specify

¹ The Suttons and ISC subsequently entered into a stipulation for a mutual dismissal of all claims dated June 30, 2004.

² According to FRCP 6(a), June 3, 2004 is within the requisite 10 days from May 19, 2004.

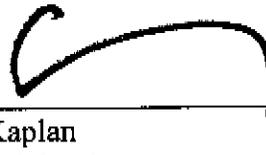
which of the permissible bases (redundancy, immorality, impertinence or scandal) underlies their motions or how they are possibly prejudiced. There is no dispute that ISC's claims relate to the subject matter of the litigation. Consequently, the motions are without merit.

IV. CONCLUSION

As detailed above, the Court should deny PDG's and Misner's Motions to Strike.

DATED: July 2, 2004.

STOEL RIVES LLP



Scott J. Kaplan
G. Rey Reinhardt
Darian A. Stanford

Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Defendant/Third-Party Plaintiff InterDent Service Corporation's Combined Opposition to Plaintiff's and Third-Party Defendant Misner's Motions to Strike Defendant's Amended and Supplemental Counterclaims Dated June 2, 2004** on the following named persons on the date indicated below by

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

Gary L. Cooper
Ron Kerl
COOPER & LARSEN
151 North Third Avenue, Suite 210
PO Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Fax: (208) 235-1182
gary@cooper-larsen.com
ron@cooper-larsen.com
jim@cooper-larsen.com

Attorneys for Plaintiff/Third-Party
Defendant Pocatello Dental Group, P.C.

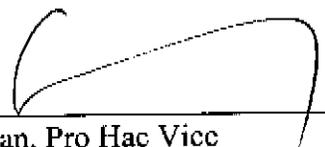
Richard A. Hearn
Stephen J. Muhonen
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
PO Box 1391/Center Plaza
Pocatello, ID 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109
rah@racinelaw.net
sjm@racinelaw.net

Attorneys for Third-Party Defendant
Dr. Larry R. Misner, Jr., Dr. Ernest
Sutton and Dr. Porter Sutton

Lowell N. Hawkes
LOWELL N. HAWKES, CHARTERED
1322 East Center
Pocatello, ID 83201
Telephone: (208) 235-1600
Fax: (208) 235-4200
hox@nicoh.com

Attorney for Third-Party Defendants
Dwight G. Romriell, Gregory Romriell,
Errol Ormond and Arnold Goodliffe

DATED: July 2, 2004.



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

* * * COMMUNICATION RESULT REPORT (JUL. 2.2004 1:54PM) * * *

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900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
phone 503-224-3380
fax 503-220-2480
www.stoel.com

Name:	Fax No.	Company/Firm	Phone No.
TO: Ron Kerl Gary L. Cooper	(208) 235-1182	Cooper & Larsen	(208) 235-1145
Richard A. Hearn Stephen J. Muhonen	(208) 232-6109	Racine Olson, et al.	(208) 232-6101
Lowell N. Hawkes	(208) 235-4200	Lowell N. Hawkes Chtd.	(208) 235-1600

Name:	Sender's Direct Dial:	Sender's Direct Email:
FROM: Scott J. Kaplan	(503) 294-9186	sjkaplan@stoel.com

Client: InterDent, Inc.	Matter: Pocatello Dental Group
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Date: July 2, 2004

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