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

Attorneys for Dr. Larry R. Misner, Jr.

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. )

INTERDENT SERVICE )  
 CORPORATION, )  
 a Washington corporation, )

Counterclaimant, )

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

REPLY MEMORANDUM IN  
 SUPPORT OF LARRY R. MISNER,  
 JR.'S RULE 12(b)(6) MOTION TO  
 DISMISS INTERDENT SERVICE  
 CORPORATION'S  
 COUNTERCLAIM

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)  
vs. )  
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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. )  
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LARRY R. MISNER, JR, individually) )  
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Counterclaimant, )  
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vs. )  
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INTERDENT SERVICE )  
CORPORATION, )  
a Washington corporation, )  
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Counterdefendant. )  
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LARRY R. MISNER, JR. individually) )  
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Crossclaimant, )  
)  
vs. )  
)  
POCATELLO DENTAL GROUP,) )  
P.C., an )  
Idaho professional corporation, )  
)  
Crossdefendant. )

Counterdefendant Misner submits this reply brief in support of its Rule 12(b)(6) motion to dismiss InterDent Service Corporation's (ISC's) counterclaim against Counterdefendant Misner. In Defendant ISC's Opposition to Third Party Defendant Larry R. Misner's Rule 12(B)(6) Motion to Dismiss Counterclaim ("*ISC's Opposition*"), ISC clarified its intent in counterclaim 7 seeking rescission and restitution, *i.e.*, "ISC offered counterclaim 7 merely as an alternative to the tort remedies sought in counterclaim 6; counterclaim 7 is also for fraud". *ISC's Opposition*, p 3. Therefore, if ISC's claim for fraud in the inducement as contained in ISC's counterclaim 6 is dismissed, counterclaim 7 – as merely seeking an alternative remedy to the tort remedy sought in counterclaim 6 – must be dismissed for the same reason.

#### ARGUMENT

**A. ISC's Counterclaim Against Misner Fails to Satisfy Rule 9(b) of the Federal Rules of Civil Procedure**

ISC's counterclaim against Misner for fraud in the inducement as pled either meets the pleading requirements of Rule 9(b), FRCP or it does not and, if it does not, its counterclaim should be dismissed with prejudice. While normally leave to amend should be granted a party, such leave should not be granted if this "Court makes a determination that ISC cannot possibly allege facts consistent with the challenged pleading that will cure the deficiency". *ISC's Opposition*, p. 9 (*citing Snowbird Construction Co. V. U.S. Dept. Of housing and Urban Development*, 666 F. Supp. 1437, 1442 (D. Idaho 1987)). This court need look no further than ISC's own brief to determine "that ISC cannot possibly allege [additional] facts consistent with the challenged pleading".

Misner correctly argues that a fraud claim should, where possible, "specify such facts as the times, places, benefits received, and other details of the alleged fraudulent activity." ISC specified all such facts available to it (detailed above) in support of

its claims against Misner.

*ISC's Opposition*, p. 6 (*citations omitted*). "Detailed above" in ISC's Opposition are references to specific paragraphs in ISC's current unamended counterclaim. ISC has candidly admitted that it has pled all that it has. The only question before this Court is whether what ISC has pled is legally sufficient to support its counterclaim for fraud in the inducement against Misner.

ISC claims that the "fraudulent representation was that Misner and the Group would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶ 92.) This representation occurred '[w]hen entering into the Management Agreement', which was in October 1996. (*Id.* and *Id.* 14.)" *ISC's Opposition*, p. 4. ISC in its brief states that the "9th Circuit has interpreted Fed. R. Civ. P. 9(b) to 'mean that the pleader must state the time, place, and specific content of the false representation as well as the identities of the parties to the misrepresentation'". *ISC's Opposition*, p. 4 (*citations omitted*). ISC fraud in the inducement claim should be dismissed absent any allegation in the counterclaim concerning the "parties to the [alleged] misrepresentation."

Then ISC pled "based upon information and belief" that Misner "never intended to honor his agreement in, or abide by the terms of, Article 5.2". ISC admits that it does not know what Misner intended in October of 1996 but contends that allegations concerning Misner's actions seven years later in October of 2003 are "sufficient circumstantial evidence from which a jury could infer Misner's fraudulent intent". For purposes of Misner's 12(b)(6) motion to dismiss ISC's counterclaim, - contrary to ISC's suggestion that the Court should apply a standard based upon a jury's possible inference based upon evidence, - the Court should assume all allegations in ISC's counterclaim to be true. Assuming the truth of the allegations contained in all eight points set out in ISC's Opposition on pages 5 and 6, ISC has shown no more than that Misner as the Group's

president in October 2003 contended that the Management Agreement executed between the Group's and ISC's predecessors seven years earlier in October 1996 was illegal. The absurdity of ISC's counterclaim against Misner as pled for fraud in the inducement is disclosed by ISC's argument that Misner allegedly intentionally misrepresented his and the Group's intentions regarding the legality of the Management Agreement in October of 1996, but, waited seven years to ever act on that allegedly secret and fraudulent intention.

**B. ISC's Counterclaim Fails to State a Claim for Fraud in the Inducement or Any Other Claim Against Misner**

ISC in its opposition brief claims that "ISC's fraud claims against Misner are based not only on Misner's status in October 1996 as a minority shareholder of the Group, but also as an individual who personally signed a number of the documents for which he received \$400,000. (See Affidavit of Scott J. Kaplan in Opposition to Motion to Dismiss, Exhibits 1-8; ISC's Counterclaim ¶ 14.)" *ISC's Opposition*, p 7<sup>1</sup>. Paragraph 14 of ISC's Answer to Complaint and Counterclaims simply states that ISC's predecessor acquired from the Group's shareholders including Misner for a price of \$2.8 million in cash and stock all the nonprofessional assets of the Group in October 1996. ISC's pleadings make no mention of any documents signed by Misner as part of this transaction nor claim that any representation contained in any such document was false. There is no basis for ISC's contention that it has brought a counterclaim against Misner for any fraud other than the fraud in the

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<sup>1</sup> Because ISC has elected to present matters outside the pleadings to the Court in response to Misner's Fed. R. Civ. P. 12(b)(6) motion, Misner's motion should be treated as one for summary judgment and disposed of as provided in Rule 56 unless the Court in its discretion excludes the matters outside the pleadings from its consideration. Because such matters as are attached to the Kaplan Affidavit bear no relevance to the issues raised by Misner's motion, Misner recommends the Affidavit and all attached Exhibits be excluded. Fed. R. Civ. P. 12(b).

inducement plead in its counterclaim 6.

As for its fraud in the inducement claim, ISC clarifies that it is seeking to hold Misner responsible for the "fraud in the inducement" of either the Group or its officers under a legal theory expressed in *L.B. Industries, Inc. V. Smith*, 817 F.2d 69 (9th. Cir. 1987). ISC then recounts the standard for holding a minority shareholder liable for the fraudulent representation of a corporate officer from *L.B. Industries, Inc.* Misner, as a minority shareholder, could only be found legally responsible for the alleged fraud of the Group and/or its corporate officers if he "specifically directe[d], actively participate[d] in, or knowingly acquiesce[d] in the fraud". *L.B. Industries, Inc.*, 917 F.2d at 70.

But here, the pled fraud concerns Misner's alleged misstatement in October 1996 of his then present intent regarding either his or the Group's future compliance with Article 5.2 of the Management Agreement between the Group and ISC. Because a "promise or a statement of future event will not serve as basis for fraud", *Mitchell v. Barendregt*, 120 Idaho 837, 843, 820 P.2d 707, 713 (Ct App. 1991) (*quoting Sharp v. Idaho Investment Corp.*, 95 Idaho 113, 122, 504 P.2d 386, 395 (1972)), only a defendant's intentional misstatement of his then present intent will support a claim for fraud. *Mitchell*, 120 Idaho at 844, 820 P.2d at 713 (*quoting* W. Prosser & W. Keeton, *Prosser and Keeton on the Law of Torts*, § 109 pp. 762-65 (5th. Ed. 1984)). .

The issue then is whether ISC has alleged in its counterclaim that Misner in October 1996 specifically directed, actively participated in or knowingly acquiesced in the Group's alleged fraud in the inducement of ISC. Because ISC has not alleged in its counterclaim that Misner "specifically directed, actively participated in or knowingly acquiesced" in the Group's alleged fraud, ISC cannot now avoid dismissal of its fraud in the inducement claim based on the holding of *L.B. Industries*,

*Inc.*. There are no allegations that Misner or any other shareholder "specifically directed" anyone else associated with the Group to do anything allegedly defrauding ISC. ISC argument that Misner either "actively participated or knowingly acquiesced to the fraudulent representations of the Group in October 1996 that it would abide by Article 5.2" should be rejected for the following reasons. *ISC's Opposition*, p 7.

First, ISC is mistaken in arguing that Misner's active participation in the Group's sale to ISC's predecessor somehow means that Misner either "actively participated or knowingly acquiesced" in the alleged fraud. ISC's argument here begs the question that they failed to plead. Absent at least some allegation that the other members of the Group or its officers informed Misner of their alleged scheme to defraud ISC, Misner as part of that sale, regardless of his then present intentions, could not have "actively participated or knowingly acquiesced" in **the Group's fraud**.

Could Misner have actively participated in his own fraud as distinct from that alleged of the Group? No, because Misner was in no position as a minority shareholder to cause the Group not to comply with Article 5.2 regardless of any intent he may have had at the time. Therefore, ISC's allegation – based upon information and belief – that Misner misrepresented his true present intent regarding Article 5.2 in October 1996, absent some allegation that he and the Group's other shareholders informed one another of their plans for the Group to defraud ISC, cannot support a claim of fraud in the inducement against Misner under the theory of *L.B. Industries, Inc.*. Absent knowledge and agreement among the Group shareholders to jointly execute this alleged scheme to defraud ISC, the Group could not defraud ISC. ISC did not allege in its counterclaim that the shareholders so informed one another and, absent such an allegation, ISC's claim for fraud in the inducement should be dismissed.

**C. ISC's Counterclaim Against Misner Is Barred by the Applicable Statute of Limitations**

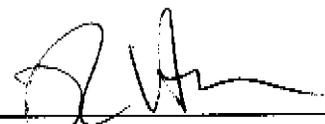
ISC claims that in paragraphs 45 through 50 of its counterclaim, it pled that it did not discover the alleged fraud occurring in 1996 until October 2003 thereby invoking the discovery rule exception to the three year statute of limitations. *ISC's Opposition*, p 8. Paragraphs 45 through 50 of ISC's counterclaim however allege no more than discovery of Misner's contention in October 2003 that the Management Agreement was illegal. This "discovery" however is not relevant to ISC's claim for fraud in the inducement allegedly occurring in 1996. Assuming the truth of every allegation contained in paragraphs 45 through 50 of ISC's counterclaim, there is nothing contained therein to suggest that Misner either made a representation in 1996 that the Group would comply with Article 5.6 or that he made such a representation with the then present intent of not complying with it. As such, ISC has yet to allege any fact relating to discovery of the alleged fraud implicating Misner.

**CONCLUSION**

For the reasons both as stated above and contained in the Memorandum in Support of Larry R. Misner, Jr.'s Motion to Dismiss InterDent Service Corporation's Counterclaim, ISC's counterclaim against Misner should be dismissed with prejudice.

DATED this 25<sup>th</sup> day of March, 2004.

RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHARTERED

By   
Richard A. Hearn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of March, 2004, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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