

Gary L. Cooper (ISB No. 1814)
 Ron Kerl (ISB No. 1768)
 COOPER & LARSEN, CHTD.
 151 North 3rd Avenue, Suite 210
 P.O. Box 4229
 Pocatello, Idaho 83205-4229
 Telephone (208) 235-1145
 Facsimile (208) 235-1182

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Counsel for Pocatello Dental Group, P.C.

**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.)

Case No. CV 03-450-E-LMB

INTERDENT SERVICE CORPORATION,)
 a Washington corporation,)
)
 Counterclaimant,)

**POCATELLO DENTAL
 GROUP'S OPPOSITION TO
 ISC'S MOTION FOR LEAVE
 TO DEPOSIT FUNDS WITH
 THE COURT**

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;)

Counterdefendants.)

INTRODUCTION

COMES NOW the Plaintiff ("Group"), by and through its attorneys of record, and gives notice of its opposition to the Defendant InterDent Service Corporation's ("ISC") motion for leave to deposit funds with the Court pursuant to Rule 67 F.R.C.P. and 28 U.S.C. §2041. Further, the Group seeks this Court's Order directing ISC to honor all of its obligations under the October 11, 1996 Management Agreement, including its obligation under Article 2.6 (b) which requires ISC to pay from the Group's Revenues all of the claims and obligations of the Group, including payments due and payable to the Group's dentists.

ISC has now taken three distinctly different positions with respect to the ownership of the Group's Revenues.¹ First, in its bankruptcy schedules ISC advised the U.S. Bankruptcy Court for the Central District of California and all of its creditors that the Group's Revenues were not assets of ISC, but were assets of the Group. ISC admitted under oath that: "Pursuant to management agreements between Debtor and affiliated professional corporations "APC's." "****on a daily basis

¹ The word "Revenues" is defined by Article 2.4 of the parties' Management Agreement. "Revenues" shall mean all of the Group's accounts receivable (net of contractual adjustments and bad debt), and cash collections. Revenues shall include all funds collected by, or legally due to the Group or any Affiliate of the Group, including, without limitation the following: (a) all fee-for-service payments for services to the Group Patients or Beneficiaries; (b) all payments established under Payor Contracts; (c) all coordination of benefits or deductibles and third-party liability recoveries related to the Group's services; (d) all payments, dues, fees or other compensation to the Group, (e) any income, profits, dividends, distributions or other payments from the Group's investments; and (f) any interest or other non-operating income of the Group." See, Exhibit "A" to Affidavit of Chhina, Docket No. 15.

the APC's turn over their collections of receivables to the Debtor, however, *the APC collections are assets of the APC's and not the Debtor.*"² (Emphasis added).

The second representation from ISC was made in its opposition to the Group's Motion to Compel ISC to pay its attorney fees incurred in this proceeding. ISC's lawyers argued, citing the Court to Article 2.6(a) of the Management Agreement, that all of the Revenues have been irrevocably assigned to ISC and that none of the Revenues generated by the Group's dentists and hygienists are assets of the Group.³

The third representation from ISC on the subject is contained in its Rule 67 motion. In that motion ISC takes the position that 38% of the Revenues generated by the Group's dentists and hygienists actually belong to the Group.⁴

Two of the positions have been taken by ISC under oath (the bankruptcy schedules and the Affidavit of Webb filed in support of ISC's Rule 67 Motion). One has been taken by ISC through the Rule 11 F.R.C.P. representations of its counsel. The three positions taken by ISC are wholly inconsistent with each other and further demonstrate ISC's willingness to make inconsistent and irreconcilable representations to this Court and the parties if those inconsistent factual representations will further its goal *de jur*. Today's goal, of course, is to withhold payment of the lawful claims and obligations the Group owes to its dentists.

²See, Supplemental Affidavit of Ron Kerl, Exhibit "A," Docket No. 110. In footnote 2, page 4 of the schedules (page 8 of the Affidavit).

³See, ISC's Memorandum opposing The Group's Motion to Compel the payment of its attorney fees from its revenues, at page 6, Docket No. 103.

⁴See, Memorandum of Points and Authorities, page 2, Docket No. 183, and Affidavit of Kevin Webb, page 2, Docket No. 184.

ARGUMENT

ISC unilaterally terminated the Management Agreement at the close of business on October 1, 2004. The Revenues ISC desires to deposit into an account supervised by the Court are Revenues earned by the Group prior to the termination of the Management Agreement and closure of the Group's office on October 1, 2004. As a result of ISC's election to terminate the Management Agreement, these Revenues must be applied by ISC pursuant to the express terms of the Management Agreement.

ISC'S MOTION SHOULD BE DENIED ON THE BASIS OF THE MANAGEMENT AGREEMENT'S EXPRESS TERMS

It is not in dispute that ISC terminated the parties' Management Agreement on October 1, 2004. Nor is it in dispute that Article 6.2(c) of the parties' Management Agreement controls the rights and responsibilities of the Group after the Agreement's termination.⁵ The reasons for the Management Agreement's termination are not controlling or even relevant. Article 6.2(c) of the Management Agreement *requires* the parties to do the following upon termination of the Management Agreement:

(c) Effect of Termination. Upon termination of this Agreement:

(1) Group shall surrender to Manager all of Manager's property...

⁵See, Exhibit "1" to the Affidavit of Bruce Call dated October 11, 2004. [Docket No. 187]. ISC's CEO, Ivar Chhina stated that: ... "pursuant to Article 6.2(b)(1) and (2) the [Management] Agreement is hereby terminated. *Please refer to Article 6.2(c) of the Agreement regarding PDG's rights and responsibilities.* ..." (Emphasis added). This Notice of Termination is also attached to the Supplemental Affidavit of Ron Kerl filed herewith.

(2) Manager shall deliver to Group all records related to the business of and provision of dental care through the Practice, including, without limitation, patient records and any corporate, personnel and financial records maintained for the Practice and Providers...

(3) Manager shall deliver to Group any other property of Group in Manager's possession;

(4) Both parties shall cooperate to insure the provision of appropriate dental care to Group Patients and Beneficiaries;

(5) Group shall promptly deliver to Manager any Revenues that it may receive in payment for dental services rendered by Group prior to termination; and

(6) Both parties shall cooperate to ensure the appropriate billing and collections for dental services rendered by Group prior to the effective date of termination, ***and any such cash collected shall be retained by Group and/or paid to Manager pursuant to Article 7.***

ARTICLE 7 MANAGEMENT FEE

For its services hereunder, which shall include the providing of all facilities and furniture, fixtures and equipment at the Practice, all non-dentist employees of manager who perform services at or for the Practice and all management services provided hereunder, ***Manager shall retain as a Management Fee (the "Management Fee") all Revenues after payment of Group Expenses.*** (Emphasis added).

Article 2.6(b) of the Management Agreement provides that:

Manager (ISC) shall be responsible for paying ***all claims and obligations associated with the operation of Group pursuant to this Agreement***; provided, ***Manager shall be deemed to discharge fully its responsibility to Group*** for the liabilities described in this subparagraph ***by its timely payment on Group's behalf of, or delivery to Group of an amount sufficient to discharge, all of Group's obligations now existing or arising in the future, including those under Provider Subcontracts, Employment Agreements***, Group's professional liability insurance and any other operational expense for which Group retains responsibility or that are delegated to Group, whether pursuant to this Agreement or any other agreement of the parties or action of the Joint Operations Committee ("**Group Expense**"). Notwithstanding the forgoing, Manager does not assume any liabilities of Group which are unrelated to the Practice or any liabilities for income taxes. (Emphasis added).

The Management Agreement doesn't allow ISC to pay some, but not all of the claims and obligations of the Group which make up and constitute a Group Expense. It must either (1) make payment of these claims and obligations on the Group's behalf or (2) deliver to the Group sufficient sums to discharge "all of Group's obligations now arising or arising in the future, including those under Provider Subcontracts, Employment Agreements...".

ISC's motion is not based upon any claim that the dentists, through their "Provider Subcontracts" and/or "Employment Agreements" are not entitled to be paid for their services to the Group before the Management Agreement was terminated by ISC. In fact, without these dentist's professional services to the Group there would be no Revenues to fight over! Rather, ISC seeks to pick and choose which claims and obligations of the Group are to be paid and which claims and obligations of the Group are not to be paid. ISC wants the Court to ratify ISC's unilateral decision to not pay these dentists. Yet, ISC stands before the court without any contractual authority to withhold payment to these dentists. ISC's failure to pay these dentists, as a Group Expense, further breaches the Management Agreement. ISC's proposed action may also be a breach of the fiduciary duty ISC owes to the Group.⁶

The effect of ISC's motion before the Court is to place a pre-judgment writ of attachment on 38% of the Group's Revenues, Revenues which are due and payable to the Group's dentists, without the filing a motion under Rule 64 F.R.C.P. or the posting of a bond pursuant to *Idaho Code* §8-503. This Court should, instead, order ISC to honor its obligations under Article 6.2(c) of the Management Agreement by (1) making payment of "all of Group's obligations now arising or

⁶The fiduciary duty ISC owes to the Group is explained and established by Plaintiff's Brief in Support of its motion to compel ISC to pay Group's attorney fees from these revenues, pages 4-7, Docket No. 80.

arising in the future, including those under Provider Subcontracts, Employment Agreements...”or
(2) delivering to the Group sufficient sums to discharge “all of Group’s obligations now arising or
arising in the future, including those under Provider Subcontracts, Employment Agreements...”.

Such an order will maintain the status quo between the parties. Such a result is precisely
what the parties’ contract requires.

**ISC HAS MADE AN ELECTION OF REMEDIES,
AND FOR THAT REASON ITS MOTION SHOULD BE DENIED.**

The Management Agreement controls the remedies available to ISC for the alleged breach
by the Group. The Management Agreement’s remedy for such a breach is for one party to give the
other party a written notice of default under Article 6.2(b) of the Management. If the alleged breach
is not ‘cured’ within the 30 day cure period the non-breaching party may pursue its civil remedies
arising from the breach *or* the non-breaching party may elect to terminate the Management
Agreement.

Article 6.2.(b)(1) provides the following with respect to an “Early Termination” of the
Management Agreement:

(1) Material Breach. In the event either party materially breaches this Agreement and
such Breach is not cured to the reasonable satisfaction of the non-breaching party
within thirty (30) days after the non-breaching party serves written notice of the
default...*the Agreement shall automatically terminate at the election of the non-
breaching party upon the giving of a written notice of termination to the defaulting
party...*

On October 1, 2004, ISC elected to terminate the Management Agreement by giving the
Group written notice of termination. Without admitting that ISC had grounds to do so, upon ISC’s
election to terminate the Management Agreement the parties rights and responsibilities are fixed and
defined by the Agreement’s Article 6.2(c). This result was acknowledged by ISC in the Notice of

Termination, when its Chief Executive Officer stated that the Group should “refer to Article 6.2(c) of the Agreement regarding PDG’s rights and responsibilities.”⁷

Article 6.2(c) of the Agreement requires ISC to take the pre-termination revenues generated by the Group and its Providers, pay the Group’s pre-termination expenses, and only allows ISC to retain the balance of those Revenues as its management fee. That is the only relief to which ISC is entitled following termination of the Management Agreement.

In *J.T. Wolford v. Tankersley*, 107 Idaho 1062, 695 P.2d 1201 (1984) the Idaho Supreme Court has noted that there are three conditions justifying the Court’s application of the election of remedies rule:

“(1) There must be in fact two or more coexisting remedies between which the party has the right to elect; (2) the remedies thus open to him must be inconsistent; and (3) he must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between two inconsistent remedies.” Citing *United States Fidelity & Guar. Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 899 (Idaho, 1969)

continuing, the Court stated that:

“Inconsistency of remedies is defined not as an inconsistency between the remedies, but as an inconsistency in the facts relied upon. “To make actions inconsistent one action must allege what the other denies, or the allegation in one must necessarily repudiate or be repugnant to the other.” Citing to *Taylor v Robertson Petroleum Co.*, 156 Kan. 822, 137 P.2d 150, 154 (Kan 1943).

ISC gave notice of default to PDG on August 26, 2004; the Group replied on September 8, 2004; ISC’s counsel dismissed the Group’s reply on September 14, 2004; and ISC gave notice of

⁷ See, footnote 5, *supra*.

its election to terminate the Management Agreement on October 1, 2004.⁸ ISC could have kept the Management Agreement in place and sought its civil remedies for the Group's alleged breach, *or* it could have elected to terminate the contract and perform under the only remedial provisions of the contract relating to "early termination." It chose the latter remedy, early termination of the Management Agreement.

Having elected to terminate the Management Agreement, ISC is bound by its express provisions governing the parties' responsibilities to each other as a result of such a termination. Those provisions, quoted above, do not provide ISC with a contractual basis for the relief it is requesting in its motion because post-termination damages are not included in the rights and responsibilities of the parties as enumerated in Article 6.2(c) of the Management Agreement.

Had ISC wanted the remedy it now seeks by its Motion it should not have terminated the Management Agreement. Or, it should have drafted the Management Agreement to provide for post-termination damages. It did not do so. Interestingly, the Management Agreement does not contain a clause stating that:

Nothing herein contained shall be construed as an election of remedies or as a waiver by the Manager of any rights or remedies otherwise provided by law for breach of this contract by Group.

The strict enforcement of the contract is not harsh, but consistent with another "termination" provision contained in the parties' Management Agreement. Article 6.2(b)(4) would have allowed ISC to terminate the Management Agreement if, during two consecutive fiscal quarters, it had not been paid the Management Fee and if ISC, in its sole discretion, did not think it would be paid the

Copies of this exchange of letters are attached to Supplemental Affidavit of Ron Kerl, as Exhibits A, B, C, and D.

Management Fee during the next fiscal quarter. Under those circumstances the contract could have been terminated by ISC and the provisions of Article 6.2(c), "Effect of Termination" would also have come into play. Again, post termination "damages" are not allowed by the parties' agreement.

The provisions of Article 6.2(c) do not provide for the assessment of damages for the Manager's early termination of the contract. The Manager is given the right to "opt out" of future performance. The Manager is not given a right to also recover future damages for its election to terminate the agreement before its expiration date.

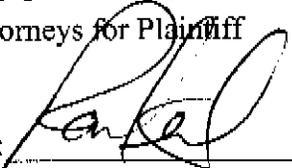
CONCLUSION

The Court is asked to specifically enforce the provisions of Article 6.2(c) of the Management Agreement and to require ISC to honor Article 7 of the Management Agreement. These unambiguous provisions of the Management Agreement only allows ISC to "retain as a Management Fee (the "Management Fee") all Revenues *after payment of Group Expenses.*" The court should order ISC to turn over the disputed funds to the Group so it can pay its dentists, or ISC should use the funds to pay the Group's dentists.

Dated this 28 day of October, 2004.

COOPER & LARSEN, CHTD

Attorneys for Plaintiff

By: 

Ron Kerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 20 day of October, 2004, I served a true and correct copy of the foregoing document as follows:

Erik F. Stidham
G. Rey Reinhardt
STOEL RIVES LLP
101 S. Capitol Blvd., Ste.1900
Boise, ID 83702-5958

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile

Scott J. Kaplan
STOEL RIVES LLP
900 SW Fifth Ave. Ste. 2600
Portland, OR 97204-1268

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile

Lowell N. Hawkes
1322 East Center
Pocatello, ID 83201

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile

Richard A. Hearn
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHTD.
P.O. Box 1391
Pocatello, ID 83204

U.S. Mail, postage prepaid
 Hand Delivery
 Overnight Mail
 Facsimile

By: 

Ron Kerl