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Attorneys for Dr. Larry R. Misner, Jr.

UNITED STATES DISTRICT COURT
 DISTRICT OF IDAHO

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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,)
)
 vs.)
)
 POCATELLO DENTAL Group, P.C., an)
 Idaho professional corporation; DWIGHT)
 G. ROMRIELL, individually; LARRY R.)

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

LARRY R. MISNER JR.'S REPLY TO
 INTERDENT SERVICE
 CORPORATION'S OPPOSITION TO
 MOTIONS TO STRIKE INTERDENT
 SERVICE CORPORATION'S AMENDED
 AND SUPPLEMENTAL
 COUNTERCLAIMS DATED JUNE 2,
 2004

1412

MISNER, JR., individually; PORTER)
SUTTON, individually; ERNEST)
SUTTON, individually; GREGORY)
ROMRIELL, individually; ERROL)
ORMOND, individually; and ARNOLD)
GOODLIFFE, individually,)
)
Counterdefendants.)

LARRY R. MISNER, JR, individually,)
)
Counterclaimant,)

vs.)

INTERDENT SERVICE CORPORATION,))
a Washington corporation,)
)
Counterdefendant.)

LARRY R. MISNER, JR., individually,)
)
Crossclaimant,)

vs.)

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

COMES NOW Counterdefendant L.R. Misner Jr. ("Misner"), through his counsel of record and offers his reply to Counterclaimant Interdent Service Corporation's ("ISC") combined opposition to Plaintiff's and Third-Party Defendant Misner's motions to strike Defendant's amended and supplemental counterclaims dated June 2, 2004.

INTRODUCTION

As previously stated in Misner's motion to strike ISC's amended and supplemental counterclaims dated June 2, 2004, Misner has not filed any motions to amend his counterclaim against ISC, thus negating the ability of ISC to amend its allegations and claims for relief against Misner without first obtaining leave from this Court. Especially since ISC has previously stipulated with Misner and this Court has ordered that any and all motions for leave to amend the pleadings were to have been pled by May 15, 2004. ISC has amended its claims against Misner after the May 15, 2004 cut-off date, without leave from the Court and without instigation from Misner.

Further, ISC's amended claims against Misner must fail pursuant to F.R.C.P. 13(a). ISC's claims against Misner for intentional interference with contract and mutual mistake are all compulsory counterclaims which ISC failed to plead against Misner within the stipulated and ordered time frames and without leave from the Court. ISC's claims against Misner for fraud in the inducement and for rescission and restitution have previously been responded to by Misner in his Rule 12(b)(6) motion to dismiss ISC's counterclaims (Docket Nos. 58 and 59), which remain pending before the Court.

ISC's alternative claim for illegality is also without merit as such a claim is futile and should be disallowed by this Court since such claim does not allow for any relief for ISC, but merely leaves the parties where the Court finds them.

ARGUMENT

ISC's amended and supplemental counterclaims against Misner in its June 2, 2004 Answer to Plaintiff's amended complaint are untimely pled and must be stricken. Federal Rule of Civil

Procedure (FRCP) 13(a) provides, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." "Under Rule 13(a) a party who fails to plead a compulsory claim against an opposing party is held to have waived such claim and is precluded by res judicata from bringing suit upon it again." *Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244 (9th Cir. 1967). See also *Union Paving Co. v. Downer Corp.*, 276 F.2d 470 (9th Cir. 1960).

ISC's claims against Misner for intentional interference with contract and mutual mistake are compulsory in nature, yet both are pled against him for the first time in ISC's June 2nd Amendment. Though the Plaintiff has amended its complaint against ISC, neither that amendment, nor any actions by Misner, have given rise to any new information or operative facts for ISC to unilaterally and without leave of court, amend its pleadings against Misner. ISC, through its failure to state these claims against Misner during the stipulated and ordered time frame to amend pleadings, is precluded from bringing suit upon them now.

ISC is also claiming illegality as an alternative claim for relief against Misner. "An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy." *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). The general rule in Idaho pertaining to illegal contracts is that where the parties are equally at fault, the court will leave the parties as it finds them. *Id.* at 9, 56 P.3d at 773. However, if possible, the court will sever, the illegal portion of the contract from the legal portion. If the contract is found to not be "separable and if any of its elements are tainted with the illegality, however slight, the Plaintiff cannot recover." *Id.*

at 9, 56 P.3d at 771.

In this instance, ISC's claim against Misner for illegality should not be allowed due to its futility. This illegality claim as pled by ISC involves the management agreement, which if void as per public policy, would not entitle ISC to any affirmative relief.

CONCLUSION

For the foregoing reasons, Misner respectfully requests this Court to strike from ISC's June 2, 2004 pleadings alleging new counterclaims against Misner, those claims against him for intentional interference with contract, illegality and mutual mistake.

DATED this 13 day of July, 2004.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By 
STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of July, 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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