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**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. CIV 03-450-E-BLW

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

**PLAINTIFF'S REPLY IN  
 SUPPORT OF ITS RULE 56(f)  
 MOTION**

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 GOODLIFE, individually; )  
 )  
 Counterdefendants. )

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COMES NOW Pocatello Dental Group, P.C., by and through its attorneys of record ("Group") and submits this memorandum to assist the Court in ruling on the Group's Rule 56(f) motion requesting additional time to complete discovery in order to respond to ISC's summary judgment motion.

ISC opposes the motion, arguing that its summary judgment motion targets claims of the Plaintiff which are barred under the doctrine of *res judicata*. As stated in response to ISC's summary judgment motion, Group's complaint does not include claims for relief arising out of claims existing at the time ISC filed its chapter 11 petition in the Bankruptcy Court for the Central District of California ("pre-petition claims"). The Group is not seeking to recover any relief as a result of ISC's breaches of the Management Agreement which occurred prior to the confirmation of ISC's plan of reorganization or prior to ISC's assumption of the Management Agreement in its bankruptcy case. There have been numerous breaches of the Management Agreement after confirmation of the plan and after ISC assumed its obligations to perform the Management Agreement. These post-confirmation breaches form the basis of the Group's claims in this lawsuit. ISC's bankruptcy does not protect it from Group's claim that ISC has breached the Management Agreement post-confirmation and post-assumption.

#### **THE ELEMENTS OF *RES JUDICATA* ARE NOT PRESENT**

ISC correctly asserts that Group filed a proof of claim in the ISC chapter 11 bankruptcy proceedings. The claim related to pre-petition breaches of the Management Agreement.<sup>1</sup> As clearly stated in the proof of claim (at Par. 4), Group's proof of claim related to ISC's breaches of

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<sup>1</sup>A true and accurate copy of the Group's Proof of Claim filed in ISC's chapter 11 case is an exhibit to Group's objection to ISC's assumption of the Management Agreement. That Objection is attached to the Supplemental Affidavit of Ron Kerl, as Exhibit "D."

the Management Agreement which existed on the date ISC filed for bankruptcy relief. ISC also correctly states that Group withdrew its proof of claim in the stipulated order.<sup>2</sup> The conclusion ISC wishes the Court to draw from this withdrawal of the claim is that the withdrawal of *pre-petition claims* acts to also waive and forever forgive ISC's *post-petition, post-assumption, and post-confirmation breaches* of the Management Agreement. ISC offers no evidence or law to support that conclusion. The stipulated order certainly does not so provide.

ISC also correctly states that Group objected to ISC's assumption of the Management Agreement pursuant to §365(b) of the Bankruptcy Code.<sup>3</sup> Group's objection was based upon §365(b) of the Bankruptcy Code, which requires ISC to (1) cure any default in the Management Agreement before it can be assumed or (2) provide adequate assurance that the Debtor will promptly cure such default. The stipulated order, on which ISC supports its entire argument, only states that Group withdrew its objection to ISC's assumption and agreed that "pre-petition cure payments" would not need to be made as a condition for assumption of the Management Agreement.<sup>4</sup> While "cure payments" related to pre-petition defaults were not to be made as a condition for assumption, there was no agreement permitting ISC to continue in default indefinitely, after confirmation of the plan.

The conclusion ISC wishes the Court to draw from the withdrawal of the objection and agreement not to demand pre-petition cure payments, is that the withdrawal of the objection acts to also waive and forever forgive ISC's *post-petition, post-assumption, and post-confirmation breaches*

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<sup>2</sup>See, Exhibit "G" to Affidavit of Ivar Chhina, Docket No. 15.

<sup>3</sup>See, generally, Exhibit "A" attached hereto.

<sup>4</sup>See, Exhibit "G" to Affidavit of Ivar Chhina, Docket No. 15.

of the Management Agreement. ISC offers no evidence or law to support that conclusion. The stipulated order certainly does not so provide.

ISC cites the Court to *Rein v Providian Financial Corporation*, 270 F.3d 895 (9<sup>th</sup> Cir.2001) in support of its claim that post-confirmation and post-assumption breaches of the agreement are barred under the doctrine of *res judicata*. ISC fails to show how ISC's breaches of the Management Agreement, *which had not yet occurred*, "could have been raised in that [bankruptcy] action."

Before the Bankruptcy Court could approve ISC's assumption of the Management Agreement it had to be satisfied that ISC, as the chapter 11 trustee, "cures, or provides adequate assurance that the trustee will promptly cure, such default." 11 U.S.C. §365(b)(1)(A)(Emphasis added).

Since Group stipulated that no pre-petition cure payments would be required before ISC could assume the Management Agreement, ISC had to provide the Bankruptcy Court with "...adequate assurance that the trustee will promptly cure, such default." That means that Group expected ISC, upon assuming the Management Agreement, to promptly cure the breaches identified in its objection. Instead, ISC continued to act in the same manner as it did before it assumed the Management Agreement. Those post-confirmation and post-assumption breaches are identified in Group's complaint and summarized in its response to ISC's summary judgment motion.

ISC's assumption of the Management Agreement did not excuse its future performance of all of its obligations required by it. If ISC's argument is adopted by the Court, ISC is given a free reign to breach the Management Agreement for its entire remaining term so long as those breaches are similar in nature to the pre-petition breaches for which it was granted a discharge. Besides being

a patently ridiculous argument, ISC does not receive support for this argument through its citation to *Rein v Providian Financial Corporation*.

### PLAINTIFF'S RULE 56(f) MOTION IS WELL TAKEN

Group has served written discovery upon ISC seeking documents and evidence which will establish ISC's post-confirmation and post-assumption failure to (1) include in dentists' compensation the dentists' share of interest charged on patients' accounts; (2) deposit Group's accounts receivable in an account approved by the Group; (3) pay the claims and obligations of the Group; (3) hire and train all non-dentist personnel necessary for the operation of the Group's practice; (4) maintain the Group's practice as the preeminent dental practice in the Pocatello and surrounding area; (5) provide and maintain equipment and supplies necessary for the efficient and effective operation of the practice; (6) provide an experienced manager; (7) provide financial statements and accounting records; (8) provide Group with access to its patients' records; and (9) comply with the Management Agreement, and not violate any laws or public policy related to the practice of dentistry and (10) comply with the Management Agreement and not interfere with the Group's practice of dentistry.

In *Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation* 323 F.3d 767, 773 -774 (C.A.9 2003), the Ninth Circuit stated:

Where, however, a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly freely. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir.2001) ("Although Rule 56(f) facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the non-moving party has not had the opportunity to discover information that is essential to its opposition.' ") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

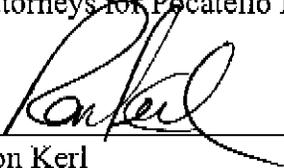
250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); *see also Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C.Cir.1995) (describing "the usual generous approach toward granting Rule 56(f) motions"); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 n. 4 (5th Cir.1992) (Rule 56(f)-based "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence" (internal quotation marks and citation omitted)); *Sames v. Gable*, 732 F.2d 49, 52 (3d Cir.1984) (same).

Group points out that a jury trial for this case is scheduled to commence on April 25, 2005, more than a year from now. Discovery has only just begun. The discovery cut-off date will not arrive until December 15, 2004. ISC cannot argue that Group has not diligently pursued discovery of the evidence.

In the exercise of its discretion the Court should grant Group's Rule 56(f) motion. In the alternative, the Court should deny ISC's summary judgment motion, without prejudice to re-file the motion after discovery has had a reasonable opportunity to be concluded.

DATED this 21 day of April, 2004.

COOPER & LARSEN, CHTD.  
Attorneys for Pocatello Dental, P.C.

  
\_\_\_\_\_  
Ron Kerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 21 day of April, 2004, I served a true and correct copy of the

foregoing document as follows:

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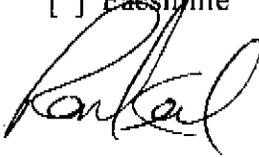
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