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Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

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

MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER
BY DEFENDANT/THIRD-PARTY
PLAINTIFF INTERDENT SERVICE
CORPORATION

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER BY
DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION - 1

149

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

As detailed in plaintiff's pending motion to compel against defendant/third-party plaintiff InterDent Service Corporation ("ISC"), plaintiff is seeking production of ISC's financial records and patient healthcare information. To permit the discovery of this information, counsel for all parties except Mr. Hawkes, counsel for third-party defendants Dwight G. Romriell, Gregory Romriell, Errol Ormond and Arnold Goodliffe, have stipulated to a form of protective order. Mr. Hawkes has refused, citing "philosophical objections" to protective orders.

However, a protective order is required by law under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its implementing regulations. Because documents requested in discovery include patient healthcare and billing information, without such an order, it would simply be unlawful for ISC to produce the requested documents. With regard to ISC's financial information, third-party defendants Misner and Dwight Romriell are already competing with ISC, and the other third-party defendants have refused to provide assurances they will not do so. As described in the TRO briefing filed in this case, third-party defendant Misner even has a business relationship with a competing practice management company, Orthodontic Centers of America ("OCA"). A protective order is necessary to protect ISC's confidential financial data from disclosure to its competitors and from use other than for the purposes of this litigation.

II. ARGUMENT

A. A Protective Order Is Required by HIPAA

All parties to this case (and their counsel, expert witnesses the like) are probably “covered entities” within the meaning of HIPAA. *See* 45 C.F.R. § 160.103. Under 45 C.F.R. § 164.512(e), a covered entity may *only* produce protected health information in response to lawful discovery requests upon the entry of a “qualified protective order.” The regulations define a “qualified protective order” as

an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

A. Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

B. Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 C.F.R. § 164.512(e)(v).¹

Patient health information is defined very broadly to include essentially *any* information related to healthcare, billing and payment for healthcare. 45 C.F.R. § 501. Billing issues are the subject of numerous discovery requests, as are documents that identify dental patients. A protective order covering this information is therefore necessary if discovery is to proceed.

¹ The only exception to the requirement of a protective order is if the individual patients are provided notice of the proceedings and the right to seek a protective order themselves. 45 C.F.R. § 164.512(e)(vi). This procedure is obviously too unwieldy and burdensome on patients for use here.

B. A Protective Order Is Necessary to Guard Against Misuse of ISC's Financial Information

Fed. R. Civ. P. 26(c)(7) permits the Court to enter a protective order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Under this provision, a protective order is commonly issued to prevent actual or potential competitors such as the third parties herein from using the information produced other than for purposes of this litigation and to prevent disclosure to third parties. *See generally Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992); *In re Remington Arms Co.*, 952 F.2d 1029, 1032-33 (8th Cir. 1991); *Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20, 22 (D. Del. 1988).

One such third party to whom ISC's confidential data would no doubt be extremely interesting is third-party defendant Misner's financier and practice manager, Orthodontic Centers of America ("OCA"). Moreover, discovery of Misner's and OCA's information will also be necessary with regard to ISC's damages. Presumably, this is one of the reasons Misner agreed to the issuance of the protective order. Discovery from Dr. Dwight Romriell, who is objecting to the protective order, will similarly need to be had on the issue of ISC's damages. Notwithstanding his current objection to such an order, it is in his interest as well.

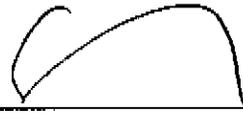
Finally, Mr. Hawkes' "philosophical objections" to the protective order (to the extent ISC understands them) relate to the potential that a protective order might limit dissemination of facts the public needs to know, for example, of a product defect. Whatever the merits of this contention might be in a products liability or consumer case, here the public has neither the right nor an interest in knowing about ISC's confidential business information nor about the protected healthcare information of dental patients.

III. CONCLUSION

The Court should enter a protective order in the form attached to ISC's motion.

DATED: July 12, 2004.

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InterDent Service Corporation

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Memorandum in Support of Motion for Protective Order by Defendant/Third-Party Plaintiff InterDent Service Corporation** on the following named persons on the date indicated below by

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

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.

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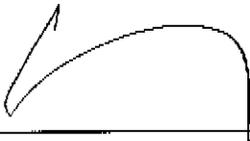
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