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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  
Idaho professional corporation; DWIGHT G.  
ROMRIELL, individually; LARRY R.

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

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT/THIRD-PARTY  
PLAINTIFF'S MOTION FOR LEAVE  
TO DEPOSIT FUNDS WITH THE  
COURT

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

Third-Party Defendants.

Defendant/third-party plaintiff InterDent Service Corporation ("ISC"), by and through its attorneys, submits the following Memorandum of Points and Authorities in Support of Defendant/Third-Party Plaintiff's Motion for Leave to Deposit Funds with the Court.

## I. INTRODUCTION

Because the Court is familiar with the background facts, ISC will present them in summary form. The present dispute arises out of the October 11, 1996 Management Agreement (the "Management Agreement") between ISC and plaintiff/ third-party defendant Pocatello Dental Group, P.C., ("PDG"). Under the Management Agreement, PDG assigned all of the revenues, accounts receivables and all other funds received for the performance of professional services to ISC. ISC, in turn, remits approximately 38 percent of the revenues to PDG. PDG uses these funds to pay its professional employees, including third-party defendants, and to ISC's knowledge, does not retain any of the funds. (Affidavit of Kevin Webb ¶¶2-3). Indeed, PDG has represented to the Court that it essentially has no assets, claiming that it is unable to pay its attorneys. (See e.g., Brief in Support of Motion to Compel Attorney Fees and Costs at 6). PDG has also threatened bankruptcy to try to gain negotiating leverage. (Webb Aff. ¶3).

ISC has raised claims for breach of contract against this purportedly judgment-proof party, including those related to its failure to enforce noncompete agreements. These breaches have required ISC to terminate the management agreement for default. (Webb Aff ¶1). As a result of these breaches, ISC is entitled to its lost profits for the remaining 32 years of the

Management Agreement, an amount of many millions of dollars. The sole assets that might be available upon which ISC might be able to collect even a portion of this judgment are PDG's share of remaining accounts receivable against which ISC has a right of set-off.<sup>1</sup> Rather than unilaterally exercising this right, in the interests of transparency and to satisfy any remaining contractual obligations it might have to PDG, ISC moves to deposit those funds with the Court on the first business day of each month until their rightful ownership is determined upon the resolution of this action.

## II. ARGUMENT

Federal Rule of Civil Procedure 67 provides:

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, § 725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

(Footnote omitted.)

The purpose of Rule 67 is "to relieve the depositor of responsibility for a fund in dispute." 12 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 2991, at 59 (2d ed. 1997); *see also* *Cajun Elec. Power Coop., Inc. v. Riley Stoker Corp.*, 901 F.2d 441, 444-45 (5th Cir. 1990) ("The rule's purpose is to relieve the depositor of responsibility for the fund in dispute

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<sup>1</sup> ISC estimates accounts receivable at \$500,000. PDG's approximately 38 percent is thus only approximately \$190,000.

while the parties hash out their differences with respect to it.”). Rule 67 permits a deposit with the court in cases where the depositor claims an interest in the funds deposited. Wright, *supra*, § 2991, at 62.

A deposit with the court under Rule 67 is appropriate when funds in the possession of one party are allegedly due to another party under a contested contract. See *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In *Gulf States Utilities*, the plaintiff, GSU, contracted to buy electricity from Southern Companies (“Southern”). After changes in the electricity market and regulatory environment, GSU ultimately sued Southern, alleging, *inter alia*, that Southern breached a section of the contract requiring renegotiation and that GSU was legally excused from performance. *Id.* at 1469. As a result, GSU claimed that the contract with Southern should be set aside as of a certain date and that it did not owe money to Southern under the contract after that date. *Id.* at 1475. GSU moved to deposit funds allegedly due to Southern with the court pursuant to Rule 67, and the district court allowed the motion. *Id.*

The Fifth Circuit upheld the district court’s decision allowing the deposit. The court concluded that, because GSU denied that it owed payments to Southern under the contract, those funds were “in dispute.” *Id.* The court explained that it saw “no reason to force” GSU to breach its contract with Southern by withholding money from Southern and the court. *Id.* Rather, the district court properly permitted the funds to be deposited with the court, thus preserving the status quo and allowing the court to determine the true ownership of the funds in dispute. See also John Quincey Somerville, *Fed. R. Civ. P. 67: Is It More Than Meets the Eye?*, 42 Ala. L. Rev. 215, 230 (1990) (arguing that Rule 67 deposit is proper when depositing party wishes to be relieved of responsibility or obligation under contract or lease).

ISC is in a similar situation here, and a deposit of funds allegedly due to PDG with the Court is appropriate. ISC's right of set-off places in dispute the revenues or cash accounts receivable that ISC will receive subsequent to the October 1, 2004 termination of the Management Agreement. Furthermore, ISC faces the same choice as did GSU of either withholding money and risking a possible breach, or paying money that it denies it owes to the Group. As in *Gulf States Utilities*, a Rule 67 deposit provides a practical alternative to those two extremes. Finally, the requirement that the funds be deposited in an interest-bearing account eliminates any possible harm to the ultimate owner while the Court adjudicates ownership of the funds.

### III. CONCLUSION

For the foregoing reasons, ISC respectfully requests that its Motion for Leave to Deposit Funds with the Court be granted and that ISC be given leave to deposit 38 percent of collections received from pre-termination work at the Pocatello Office on the first business day of each month into a interest-earning account with the Court pending the outcome of this action.

DATED: October 7, 2004.

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT/THIRD-PARTY PLAINTIFF'S MOTION FOR LEAVE TO DEPOSIT FUNDS WITH THE COURT** on the following named person(s) on the date indicated below:

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