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U.S. DISTRICT COURT  
 POCATELLO, IDAHO  
 11-2-88 PM 1:55

Attorneys for Dr. Ernest Sutton

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. )

INTERDENT SERVICE )  
 CORPORATION, )  
 a Washington corporation, )

Counterclaimant, )

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

REPLY MEMORANDUM IN  
 SUPPORT OF ERNEST SUTTON'S  
 RULE 12(b)(6) MOTION TO  
 DISMISS INTERDENT SERVICE  
 CORPORATION'S  
 COUNTERCLAIM

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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. )

\_\_\_\_\_  
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. )

Counterdefendant Sutton submits this reply brief in support of its Rule 12(b)(6) motion to dismiss InterDent Service Corporation's (ISC's) counterclaim against Counterdefendant Sutton. In Defendant ISC's Opposition to Third Party Defendant Ernest Sutton's Rule 12(B)(6) Motion to Dismiss Counterclaim ("*ISC's Opposition*"), ISC clarified its intent in counterclaim 7 seeking rescission and restitution, *i.e.*, "ISC offered counterclaim 7 merely as an alternative to the tort remedies sought in counterclaim 6; counterclaim 7 is also for fraud". *ISC's Opposition*, p 3. Therefore, if ISC's claim for fraud in the inducement as contained in ISC's counterclaim 6 is dismissed, counterclaim 7 – as merely seeking an alternative remedy to the tort remedy sought in counterclaim 6 – must be dismissed for the same reason.

#### ARGUMENT

**A. ISC's Counterclaim Against Sutton Fails to Satisfy Rule 9(b) of the Federal Rules of Civil Procedure**

ISC's counterclaim against Sutton for fraud in the inducement as pled either meets the pleading requirements of Rule 9(b), FRCP or it does not and, if it does not, its counterclaim should be dismissed with prejudice. While normally leave to amend should be granted a party, such leave should not be granted if this "Court makes a determination that ISC cannot possibly allege facts consistent with the challenged pleading that will cure the deficiency". *ISC's Opposition*, p. 7 (*citing Snowbird Construction Co. V. U.S. Dept. Of housing and Urban Development*, 666 F. Supp. 1437, 1442 (D. Idaho 1987)). This court need look no further than ISC's own brief to determine "that ISC cannot possibly allege [additional] facts consistent with the challenged pleading".

Sutton correctly argues that a fraud claim should, where possible, "specify such facts as the times, places, benefits received, and other details of the alleged fraudulent activity." ISC specified all such facts available to it (detailed above) in support of

its claims against Sutton.

*ISC's Opposition*, p. 5 (*citations omitted*). "Detailed above" in ISC's Opposition are references to specific paragraphs in ISC's current unamended counterclaim. ISC has candidly admitted that it has pled all that it has. The only question before this Court is whether what ISC has pled is legally sufficient to support its counterclaim for fraud in the inducement against Sutton.

ISC claims that the "fraudulent representation was that Sutton and the Group would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶ 92.) This representation occurred '[w]hen entering into the Management Agreement', which was in October 1996. (*Id.* and *Id.* 14.)" *ISC's Opposition*, p. 4. ISC in its brief states that the "9th Circuit has interpreted Fed. R. Civ. P. 9(b) to 'mean that the pleader must state the time, place, and specific content of the false representation as well as the identities of the parties to the misrepresentation'". *ISC's Opposition*, p. 4 (*citations omitted*). ISC fraud in the inducement claim should be dismissed absent any allegation in the counterclaim concerning the "parties to the [alleged] misrepresentation."

Then ISC pled "based upon information and belief" that Sutton "never intended to honor his agreement in, or abide by the terms of, Article 5.2". ISC admits that it does not know what Sutton intended in October of 1996 but contends that allegations concerning Sutton's actions seven years later in October of 2003 are "sufficient circumstantial evidence from which a jury could infer Sutton's fraudulent intent". For purposes of Sutton's 12(b)(6) motion to dismiss ISC's counterclaim, – contrary to ISC's suggestion that the Court should apply a standard based upon a jury's possible inference based upon evidence, – the Court should assume all allegations in ISC's counterclaim to be true. Assuming the truth of all allegations contained in ISC's counterclaim, ISC has shown no more than that the Group in its in its Verified Complaint signed by Misner as the Group's president

in October 2003 contended that the Management Agreement executed between the Group's and ISC's predecessors seven years earlier in October 1996 was illegal. Specifically, ISC has never pled that Sutton was even a member of the Group in October 2003 when the Group filed its Verified Complaint in this matter.

When called upon by Sutton's Motion to Dismiss to show that its pleadings meet the minimum requirements of Fed. R. Civ. P. 9(b), ISC points only to paragraph 94 of their counterclaim where ISC alleges – based upon information and belief – that Sutton “never intended to honor [his] agreement”. *ISC Opposition*, p. 5. What is the basis of ISC's “information and belief”? ISC answers that

[i]t is not possible for ISC to know, without taking discovery, precisely what Sutton thought or intended in October 1996. However, ISC has subsequently learned, through the Group's complaint and its application for a temporary restraining order that Sutton and the Group believe that Article 5.2 is invalid, unenforceable and in violation of public policy. (Complaint ¶¶ 19-20). This is sufficient circumstantial evidence from which a jury could infer Sutton's fraudulent intent.

*ISC's Opposition*, p. 5. But, Sutton was not a member of the Group when the Group filed its complaint and application for a temporary restraining order. See Group's Memorandum in Support of Motion for Temporary Restraining Order to Show Cause and Preliminary Injunction (“Memorandum in Support of TRO”) filed in this matter on October 9, 2003, p.1. (“There are currently five shareholder-dentists in the Group, including Drs L.R. Misner, Gregory Romriell, Dwight Romriell, Errol Ormond and Arnold Goodliffe”). Because Sutton was not a member of the group, allegations contained in that complaint filed by the Group against ISC cannot be attributed to Sutton individually as a basis for ISC's claimed “information and belief” about Sutton. Furthermore, ISC's counterclaim against Sutton as pled for fraud in the inducement fails to even hint

at any basis for finding that Sutton's alleged representations regarding the Management Agreement made in 1996 were false as required under *Aspiazu v. Mortimer*, 82 P.2d 830, 832 (2003).

**B. ISC's Counterclaim Fails to State a Claim for Fraud in the Inducement or Any Other Claim Against Sutton**

ISC in its opposition brief implies that ISC's fraud claims against Sutton are based NOT only on Sutton's status in October 1996 as a minority shareholder, but also as an individual who personally signed a number of the documents for which he received \$400,000 in stock and cash. (See Affidavit of Scott J. Kaplan in Opposition to Motion to Dismiss, Exhibits 1-8) *ISC's Opposition*, p 7<sup>1</sup> ISC's pleadings make no mention of any document attached to the Kaplan Affidavit signed by Sutton as part of this transaction nor claim that any representation contained in any such document was false. There is no basis for ISC's contention that it has brought a counterclaim against Sutton for any fraud other than the fraud in the inducement plead in its counterclaim 6 based upon allegedly misrepresentations made pertaining to the Management Agreement..

As for its fraud in the inducement claim, ISC clarifies that it is seeking to hold Sutton responsible for the "fraud in the inducement" of either the Group or its officers under a legal theory expressed in *L.B. Industries, Inc. V. Smith*, 817 F.2d 69 (9th. Cir. 1987). ISC then recounts the standard for holding a minority shareholder liable for the fraudulent representation of a corporate

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<sup>1</sup> Because ISC has elected to present matters outside the pleadings to the Court in response to Sutton's Fed. R. Civ. P. 12(b)(6) motion, Sutton's motion should be treated as one for summary judgment and disposed of as provided in Rule 56 unless the Court in its discretion excludes the matters outside the pleadings from its consideration. Because such matters as are attached to the Kaplan Affidavit bear no relevance to the issues raised by Sutton's motion, Sutton recommends the Affidavit and all attached Exhibits be excluded. Fed. R. Civ. P. 12(b).

officer from *L.B. Industries, Inc.*. Sutton, as a minority shareholder, could only be found legally responsible for the alleged fraud of the Group and/or its corporate officers if he "specifically directe[d], actively participate[d] in, or knowingly acquiesce[d] in the fraud". *L.B. Industries, Inc.*, 917 F.2d at 70.

But here, the pled fraud concerns Sutton's alleged misstatement in October 1996 of his then present intent regarding either his or the Group's future compliance with Article 5.2 of the Management Agreement between the Group and ISC. Because a "promise or a statement of future event will not serve as basis for fraud", *Mitchell v. Barendregt*, 120 Idaho 837, 843, 820 P.2d 707, 713 (Ct App. 1991) (*quoting Sharp v. Idaho Investment Corp.*, 95 Idaho 113, 122, 504 P.2d 386, 395 (1972)), only a defendant's intentional misstatement of his then present intent will support a claim for fraud. *Mitchell*, 120 Idaho at 844, 820 P.2d at 713 (*quoting* W. Prosser & W. Keeton, *Prosser and Keeton on the Law of Torts*, § 109 pp. 762-65 (5th. Ed. 1984)). .

The issue then is whether ISC has alleged in its counterclaim that Sutton in October 1996 specifically directed, actively participated in or knowingly acquiesced in the Group's alleged fraud in the inducement of ISC. Because ISC has not alleged in its counterclaim that Sutton "specifically directed, actively participated in or knowingly acquiesced" in the Group's alleged fraud, ISC cannot now avoid dismissal of its fraud in the inducement claim based on the holding of *L.B. Industries, Inc.*. There are no allegations that Sutton or any other shareholder "specifically directed" anyone else associated with the Group to do anything allegedly defrauding ISC. ISC's argument that Sutton either "actively participated or knowingly acquiesced to the fraudulent representations of the Group in October 1996 that it would abide by Article 5.2" should be rejected for the following reasons.

*ISC's Opposition*, p 7.

First, ISC is mistaken in arguing that Sutton's active participation in the Group's sale to ISC's predecessor somehow means that Sutton either "actively participated or knowingly acquiesced" in the Group's alleged fraud. ISC's argument here begs the question that they failed to plead. Absent at least some allegation that the other members of the Group informed Sutton of their alleged scheme to defraud ISC, Sutton as part of that sale, regardless of his then present intentions, could not have "actively participated or knowingly acquiesced" in the Group's fraud.

Could Sutton have actively participated in his own fraud as distinct from that alleged of the Group? No, because Sutton had already left the Group prior to the Group's contention that Article 5.2 was illegal allegedly contained in the Group's complaint filed in October of 2003. Therefore, ISC's allegation - based upon information and belief - that Sutton misrepresented his true present intent regarding Article 5.2 in October 1996, absent some allegation that he and the Group's other shareholders informed one another of their plans for the Group to defraud ISC, cannot support a claim of fraud in the inducement against Sutton under the theory of *L.B. Industries, Inc.*. Absent knowledge and agreement among the Group shareholders to jointly execute this alleged scheme to defraud ISC, the Group could not defraud ISC. ISC did not allege in its counterclaim that the shareholders so informed one another and, absent such an allegation, ISC's claim for fraud in the inducement should be dismissed under the heightened pleading requirements of Fed. R. Civ. P. 9(b).

**C. ISC's Counterclaim Against Sutton Is Barred by the Applicable Statute of Limitations**

ISC claims that in paragraphs 45 through 50 of its counterclaim, it pled that it did not discover the alleged fraud occurring in 1996 until October 2003 thereby invoking the discovery rule exception to the three year statute of limitations. *ISC's Opposition*, p 7. Paragraphs 45 through 50 of ISC's counterclaim however allege no more than discovery of the Group's contention in October

2003 that the Management Agreement was illegal. But, as stated above, Sutton was not a member of the Group in October 2003 and, therefore, nothing the Group did or said at that time can be argued as evidence of Sutton's contentions at that time. This ISC "discovery" is not relevant to ISC's claim for fraud in the inducement allegedly occurring in 1996 against Sutton. Assuming the truth of every allegation contained in paragraphs 45 through 50 of ISC's counterclaim, there is nothing contained therein to suggest that Sutton either made any representation in 1996 that he individually or as a part of the Group would comply with Article 5.2 which (1) was false, or (2) was made with the then present intent of not complying with it. As such, ISC has yet to allege any fact relating to discovery of the alleged fraud implicating Sutton. Absent such "discovery", ISC's claim from 1996 is now time barred.

### CONCLUSION

For the reasons both as stated above and contained in the Memorandum in Support of Ernest Sutton's Motion to Dismiss InterDent Service Corporation's Counterclaim, ISC's counterclaim against Sutton should be dismissed with prejudice.

DATED this 2<sup>nd</sup> day of April, 2004.

RACINE, OLSON, NYE, BUDGE  
& BAILEY, CHARTERED

By   
Richard A. Hearn

### CERTIFICATE OF SERVICE

REPLY MEMORANDUM IN SUPPORT OF ERNEST SUTTON'S RULE 12 (b)(6) MOTION TO DISMISS  
INTERDENT SERVICE CORPORATION'S COUNTERCLAIM - Page 10

I HEREBY CERTIFY that on this 2 day of April, 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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