

Erik F. Stidham, ISB #5483  
*efstidham@stoel.com*  
G. Rcy Reinhardt, ISB #6209  
*grreinhardt@stoel.com*  
STOEL RIVES LLP  
101 South Capitol Boulevard, Suite 1900  
Boise, ID 83702-5958  
Telephone: (208) 389-9000  
Facsimile: (208) 389-9040

Scott J. Kaplan, Pro Hac Vice  
*sjkaplan@stoel.com*  
Darian A. Stanford, Pro Hac Vice  
*dastanford@stoel.com*  
STOEL RIVES LLP  
900 SW Fifth Avenue, Suite 2600  
Portland, OR 97204-1268  
Telephone: (503) 224-3380  
Facsimile: (503) 220-2480

Attorneys for Defendant/Third-Party Plaintiff  
InterDent Service Corporation

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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.

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

INTERDENT SERVICE  
CORPORATION'S MEMORANDUM IN  
SUPPORT OF MOTION FOR LEAVE  
OF COURT TO FILE AMENDED  
COUNTERCLAIMS/THIRD-PARTY  
CLAIMS

INTERDENT SERVICE CORPORATION'S MEMORNADUM IN SUPPORT OF MOTION  
FOR LEAVE OF COURT TO FILE AMENDED COUNTERCLAIMS/THIRD-PARTY  
CLAIMS - 1

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POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

## I. INTRODUCTION

This motion follows the Court's August 16, 2004 Order (the "Order") to strike in part defendant and third-party plaintiff Interdent Service Corporation's ("ISC") Amended and Supplemental Counterclaims and Third-Party Complaint, including ISC's Counterclaims 6 through 8, in their entirety and the amendments to ISC's Counterclaims 9 through 11. The Court based its decision on the following: (a) the parties' litigation plan and the Court's scheduling order (which adopted the litigation plan) required the amendment of pleadings on or before May 15, 2004, and therefore ISC's June 2 filing was untimely; and (b) ISC did not comply with Fed. R. Civ. P. 15 and D. Idaho L. Civ. R. 15.1, which require leave of the Court to file an amended pleading. (*See* Order at 10.) ISC files this motion to correct these technical problems. The Court should grant the motion because justice requires that ISC be allowed leave to amend.

Many of the underlying arguments relating to this motion were presented to the Court at oral argument on August 6 as well as in the parties' respective briefing on plaintiff Pocatello Dental Group, P.C.'s (the "Group") and Larry Misner's Motions to Strike ISC's Amended and Supplemental Counterclaims. To briefly restate, the underlying factual timeline is as follows:

October 9, 2003	Group filed initial complaint
November 6, 2003	ISC filed answer along with eight counterclaims/third-party claims

INTERDENT SERVICE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE OF COURT TO FILE AMENDED COUNTERCLAIMS/THIRD-PARTY CLAIMS - 2

February 5, 2004	ISC filed amended answer and counterclaims relating to the Group's and Dr. Dwight Romriell's diversion of the mail
April 19, 2004	PDG sought leave to file amended complaint
May 14, 2004	Court heard oral argument on various motions, including PDG's motion for leave to file amended complaint (unopposed by ISC)
May 15, 2004 <sup>1</sup>	Last date according to scheduling order to file amended pleadings
May 17, 2004	PDG files amended complaint
June 2, 2004	ISC filed answer and amended/supplemental counterclaims in which it asserts three new and three amended counterclaims/third-party claims (the "Amended Counterclaims"), including one new counterclaim that formed the basis for ISC to seek a temporary restraining order against Dr. Larry Misner
August 4, 2004	Court grants in part ISC's request for a temporary restraining order against Misner
August 6, 2004	Court hears oral argument on various motions, including motion to strike portions of ISC's June 2 pleading
August 16, 2004	Court grants motion to strike

Here ISC filed the Amended Counterclaims within the 10-day rule set forth in Fed. R. Civ. P. 15 (a); however, as the Court recognized in its Order, ISC filed after the date set forth in the litigation plan and scheduling order and did not first obtain the Court's leave. One of the supplemental third-party claims that ISC asserted in this pleading was for breach of noncompete agreement against Misner; the Court subsequently (August 4, 2004) granted in part ISC's request for a temporary restraining order against Misner based on this claim.

## II. ARGUMENT

Fed R. Civ. P. 15(a) states that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so*

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<sup>1</sup> May 15, 2004 was a Saturday.

*requires.*" (Emphasis added.) A court should not grant leave to amend "if permitting such an amendment would prejudice the opposing party, produce an undue delay in the litigation or result in futility for lack of merit." *Coeur d'Alene Tribe v. Asarco Inc.*, 2000 WL 34023645 (D. Idaho 2000) at \*6 (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)). Factors to consider in deciding a motion to amend include bad faith, undue delay, prejudice to the opposing party, the futility of amendment, and whether plaintiff has previously amended its complaint. *Forman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962). The burden of establishing prejudice is on the party opposing amendment. *DCD Program v. Leighton*, 833 F.2d 183 (9th Cir. 1987).

As detailed below, justice requires that ISC be allowed to amend its pleading to assert three new third-party claims (Counterclaims 6 through 8) and three amended counterclaims/third-party claims (Counterclaims 9 through 11). There is no prejudice to the opposing parties, no bad faith, no undue delay, and the counterclaims in question are not futile.

**A. Supplemental Counterclaims 6 Through 8**

Counterclaims 6 (breach of noncompete agreement against Larry Misner), 7 (anticipatory breach of noncompete agreement against Greg Romriell) and 8 (anticipatory breach of noncompete agreement against Errol Ormond) arise out of new facts—namely, Misner's exit from practice with the Group and flagrant violation of his noncompete by opening a competing practice down the street, and Romriell and Ormond's threats to do the same. As set forth in the Court's August 4, 2004 Order granting in part and denying in part ISC's motion for a temporary restraining order against Misner (the "TRO Order"), it was not until April or May 2004 that "Misner began requesting dental records of former patients from ISC and, on June 11, 2004, he

began seeing patients at Kidds Dental in Pocatello.” (TRO Order at 3.) The Court also recognized ISC’s concerns with regard to Romriell and Ormond:

ISC claims that two other dentists bound by similar non-compete contracts, Gregory Romriell and Errol Ormond, are in the process of obtaining new office space in Pocatello in which to open a competing dental practice. Neither of them has answered ISC’s requests for assurances of intent to comply with their own non-compete agreements, a fact which, according to ISC, suggests they are just waiting to see the outcome of Misner’s attempt to violate his non-compete agreement before following his lead. The Court concludes that ISC’s concerns in this regard are reasonable and justified.

(TRO Order at 12.)

Given these facts, ISC did not act with undue delay in bringing its new claims—it would have been impossible for ISC to have brought the claims much sooner than May 2004. ISC has not acted in bad faith in asserting these claims, and the Group, Misner, Greg Romriell and Ormond have no basis to claim they are somehow prejudiced by this amendment. Finally, the Court has already rejected arguments as to the “futility” of ISC’s noncompete claims—it granted the TRO against Misner in part and it noted that ISC’s concerns regarding Romriell and Ormond were “reasonable and justified.” (TRO Order at 12.)

**B. Amended Counterclaims 9 Through 11**

Counterclaims 9 (fraud in the inducement), 10 (illegality) and 11 (mutual mistake) are slight modifications of previously filed counterclaims 6 (fraud in the inducement) and 7 (rescission and restitution). The amendments arose through negotiation with Rick Hearn, counsel for Larry Misner, Porter Sutton and Ernest Sutton, regarding the underlying legal theory behind ISC’s request for rescission and restitution. They are not substantively different from what was previously filed—the only difference is the label attached to the claims and the fact that the Suttons have been dismissed.

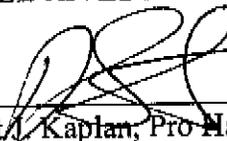
Given this, there is neither undue delay or bad faith, nor are the parties prejudiced in any way by such amendment. Finally, the claims are certainly not futile—in the same Order in which the Court granted Misner's and the Group's motions to strike, it also rejected Misner's motion to dismiss ISC's fraud in the inducement and rescission/restitution claims. Also in the same Order, the Court rejected ISC's Motion to Dismiss the counterclaim asserted by third-party defendants Dwight Romriell, Greg Romriell, Arnold Goodliffe and Errol Ormond on the basis that the pleading of a specific legal theory (or the failure to do so) was not determinative.

### III. CONCLUSION

As detailed above, the Court should grant ISC leave to file an amended pleading in the attached form.

DATED: August 20, 2004.

STOEL RIVES LLP

  
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Scott L. Kaplan, Pro Hac Vice  
Darian A. Stanford, Pro Hac Vice

Attorneys for Defendant/Third-Party Plaintiff  
InterDent Service Corporation

INTERDENT SERVICE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION  
FOR LEAVE OF COURT TO FILE AMENDED COUNTERCLAIMS/THIRD-PARTY  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of August, 2004, I caused to be served a true copy of the foregoing **INTERDENT SERVICE CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE OF COURT TO FILE AMENDED COUNTERCLAIMS/THIRD-PARTY CLAIMS** upon the following:

Ron Kerl  
COOPER & LARSEN  
151 N. 3rd Avenue, Stc. 210  
PO Box 4229  
Pocatello, ID 83205-4229  
Phone: (208) 235-1145  
Fax: (208) 235-1182  
*Attorneys for Pocatello Dental Group*

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Via Hand Delivery

Lowell N. Hawkes  
Law Office of Lowell N. Hawkes, Chtd.  
1322 East Center  
Pocatello, ID 83201  
Phone: (208) 235-1600  
Fax: (208) 235-4200  
*Attorney for Dwight Romriell, Greg  
Romriell, Errol Ormond, Arnold  
Goodliffe*

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Via Hand Delivery

Richard A. Hearn  
Racine Olson Nye Budge & Bailey,  
Chtd.  
201 E. Center  
P.O. Box 1391  
Pocatello, ID 83704-1391  
Phone (208) 232-6101  
Fax (208) 232-6109  
*Attorney for Larry Misner*

Via U.S. Mail  
 Via Facsimile  
 Via Overnight Mail  
 Via Hand Delivery

DATED: this 20<sup>th</sup> day of August, 2004.

  
\_\_\_\_\_  
Scott J. Kaplan  
Darian A. Stanford  
G.Rey Reinhardt  
Attorneys for Defendant/Third-Party Plaintiff  
InterDent Service Corporation