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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,)

**BRIEF IN SUPPORT OF
 MOTION TO COMPEL
 PAYMENT OF ATTORNEY
 FEES AND COSTS**

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.)

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 motion seeking this Court's order directing the Defendant Interdent Service Corporation ("ISC") to comply with its contractual obligation to pay the expenses of the Group, including the Group's attorney fees and litigation costs incurred in responding to ISC's chapter 11 bankruptcy proceeding, in prosecuting the Group's complaint, and in defending ISC and Dr. Misner's counterclaims on file in this proceeding.

I.

RULES OF CONSTRUCTION - CONTRACT INTERPRETATION

On October 11, 1996, the Group entered into a Dental Group Management Agreement ("Management Agreement") with GMS Dental Group Management, Inc. ISC claims to be the successor in interest to GMS Dental Group Management, Inc.

The Management Agreement, at paragraph 2.5(b) thereof, requires ISC to bill and collect, in the Group's name, all charges and reimbursement for the Group's dental related activities and to deposit such collections in an account or accounts in the name of the Group at a banking institution selected by the Group and approved by ISC. Therefore, ISC has control of *all* of the Group's revenues. These revenues, however, still belong to the Group. These revenues do not belong to ISC until ISC has fully performed its obligations under the Management Agreement, including its duty to pay and discharge the Group's obligations and liabilities.

The Management Agreement, at paragraph 2.6 thereof, requires ISC to pay "...all claims and obligations associated with the operation of the Group..." ISC can discharge its responsibility to the Group "by its timely payment on Group's behalf of, or delivery to Group of an amount sufficient to discharge, **all of Groups and obligations and liabilities now existing or arising in the future, including those under Provider Subcontracts, Employment Agreements, Group's professional liability insurance and any other operational expense for which Group retains responsibility....**" The contract does not exclude from this obligation any attorney fees or litigation expenses incurred by the Group.

In *Reynolds v. Shoemaker* 83 P.3d 135 (Idaho App. 2003) the Court of Appeals recited the applicable rule:

If the terms of a contract are clear and unambiguous, then interpretation of that contract is a question of law. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995). The meaning of an unambiguous contract must be determined from the plain meaning of the contract's own words. *Id.*

The Management Agreement is not ambiguous. It states that the Group's fees are to be billed and collected by ISC, and any revenues are to be deposited to a bank account by ISC. From those revenues ISC is obligated to pay the Group's obligations and liabilities. The revenues belong to the Group until "**all of Groups and obligations and liabilities now existing or arising in the future**" are discharged.

The Group's attorney fees and litigation related expenses were not expressly excluded from the kinds of obligations and liabilities ISC is required to pay and discharge pursuant to the Management Agreement.

II.

IT IS INHERENTLY UNFAIR FOR ISC TO WITHHOLD GROUP'S REVENUES AND AT THE SAME TIME FORCE GROUP TO INCUR ATTORNEY FEES AND LITIGATION EXPENSES TO ENFORCE THE MANAGEMENT AGREEMENT AND DEFEND ITSELF

The revenues generated by the Group belong to the Group and not to ISC. The Group is not asking ISC to pay the Group's attorney fees and litigation costs from ISC's income and revenues, but from the Group's income and revenues derived from the Group's operations.

ISC is contractually obligated to either pay the Group's obligations or deliver to the Group a sufficient amount of the Group's revenues to it so that the Group can discharge its obligations. The Management Agreement makes no distinction between the payment of the Group's costs, generally, and the payment of the Group's attorneys fees and costs, specifically. The Group's attorney fees and costs were not excluded from the obligations and liabilities ISC is required to discharge in the performance of its obligations under the Management Agreement.

It is inherently unfair for ISC to force the Group into the United States Bankruptcy Court for the Central District of California, force the Group to file this action to enforce the Management Agreement in the face of ISC's default, and force the Group to defend the counterclaims of ISC and Dr. Misner in this Court, while at the same time withholding from the Group its *own* revenues so that it has *no ability* to pay its lawyers to protect its rights. Not only is it unfair, it is a breach of the fiduciary duty ISC owes to the Group. Quoting from *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.* 121 Idaho 266, 277-278, 824 P.2d 841,852 - 853 (Idaho1991):

“A fiduciary relationship imparts a position of *peculiar confidence placed by one individual in another*. A fiduciary is a person with a duty to *act primarily for the benefit of another*. A fiduciary is in a position to have and exercise, and does *have and exercise influence over another*. A fiduciary relationship implies a condition of *superiority of one of the parties over the other*. Generally, in a fiduciary relationship, the property, interest or authority of the other is *placed in the charge of the fiduciary....* 640 P.2d at 1241-42 (citations omitted, italics in original).

The South Carolina Supreme Court recently defined a fiduciary duty as follows:

The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him.... As a general rule, mere respect for another's judgment or trust in this character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party. *Burwell v. South Carolina Nat. Bank*, 288 S.C. 34, 340 S.E.2d 786, 790 (1986) (citations omitted).

ISC, as the manager of the Group's dental operations, is charged with a duty to act primarily for the benefit of the Group. ISC bills and collects the Group's revenue, pays its obligation, maintains its equipment and facility. Pursuant to the Management Agreement, ISC has been placed in a position to have and exercise, and does have and exercise great influence over the success or failure of the Group's dental operations. The Management Agreement implies a condition of superiority of ISC over the Group because ISC absolutely controls the purse strings of the Group. The property, interest or authority of the Group has been squarely placed in the charge of ISC. ISC is obligated to bill and collect the Group's dental fees, pay and discharge the Group's obligations and liabilities, and provide equipment, non-professional staff, and business operational support to the Group so that it's dentists and licensed dental care providers can engage in the successful practice

of dentistry.¹ ISC is clearly in a superior position to that of the Group and that superior position enables ISC to exercise great and virtually unchecked influence over the success of the Group, which has reposed special trust and confidence in ISC to carry out, in good faith, all of its obligations under the Management Agreement.

“When a fiduciary relation is established between parties, courts of equity scrutinize very closely any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void.” 25 C. J. 1120, § 10, and authorities cited under note 77.

“In respect to either confidential or fiduciary relationship, it is possible that an unfair advantage may be taken and where one is bound to act for the benefit of another, he can take no advantage to himself; no precise language can define the limits of such relationships, *In re Null's Estate*, 302 Pa. 64, 153 A. 137. *Stearns v. Williams* 72 Idaho 276, 288-288, 240 P.2d 833, 841 (1952). *McDougall v. McFall* 215 P. 847, 850 (Idaho 1923).

ISC's refusal to pay the attorney fees and costs of litigation being incurred by the Group places ISC in the position of exercising unfair advantage over the Group in this litigation. ISC is seeking damages of \$12,450,000.00 from the Group.² Since ISC controls the purse strings of the Group, the Group is unable to hire and pay for the expert witnesses needed to respond to such an extraordinarily large damage claim, and is unable to pay for its lawyers' and paralegals' assistance in defending itself from them. Likewise, by controlling the Group's revenues and withholding payment of its attorneys fees ISC is acting for its own benefit in an effort to thwart Group's ability to enforce the Management Agreement in the face of ISC's material and repeated defaults.

¹*See, generally*, Article 4, Management Services, set out in the Management Agreement, Exhibit “A” to the Affidavit of Ivar Chhina (Docket No. 15).

²Exhibit “A” to the Affidavit of Ron Kerl in Opposition to Defendant's Motion for Summary Judgment. It is a copy of Exhibit “A”, ISC's calculation of damages, attached to its Initial Disclosures dated February 25, 2004.

The only way to eliminate this unfair advantage is for the Court to enter its order directing the ISC to comply with its contractual obligation to pay the expenses of the Group, including its attorney fees and litigation costs incurred in responding to ISC's chapter 11 bankruptcy proceeding, in prosecuting the Group's complaint, and in defending ISC and Dr. Misner's counterclaims on file in this proceeding.

III.

ISC OWES GROUP AN OBLIGATION TO ACT IN GOOD FAITH AND TO DEAL FAIRLY IN CARRYING OUT ITS OBLIGATIONS UNDER THE MANAGEMENT AGREEMENT.

The covenant of good faith and fair dealing is violated when the actions of a party to a contract "... violates, nullifies or significantly impairs any benefit of the ... contract." *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989). The implied covenant requires "that the parties perform in good faith the obligations imposed by their agreement." *Badgett v. Security State Bank*, 116 Wash.2d 563, 807 P.2d 356 (1991). *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.* 121 Idaho 266, 289, 824 P.2d 841, 864 (1991).

ISC is charged with billing and collecting the Group's dental fees, paying and discharging the Group's obligations and liabilities, and providing equipment, non-professional staff, and business operational support to the Group so that it's dentists and licensed dental care providers can engage in the successful practice of dentistry. Implied in that contract is an obligation to not take any action which violates, nullifies or significantly impairs any benefit of the contract to the Group. By controlling the money earned by the Group through its practice of dentistry, and by restricting and

eliminating the Group's use of its own money to enforce the Management Agreement against ISC, and to defend the counterclaims brought against it by ISC and Dr. Misner, the benefit of having ISC manage the Group's money for the Group's benefit is severely impaired, if not nullified.

This Court must act now to protect the Group from these bad faith and predatory practices of ISC. The only way to eliminate this immediate, and the pervasive, negative effect of ISC's bad faith conduct, is for the Court to enter its order directing the Defendant ISC to comply with its contractual obligation to pay the expenses of the Group, including its attorney fees and litigation costs incurred in responding to ISC's chapter 11 bankruptcy proceeding, in prosecuting the Group's complaint, and in defending ISC and Dr. Misner's counterclaims on file in this proceeding.

IV. THE ATTORNEY FEES ARE NOT GOING TO BE PAID FROM MONEY BELONGING TO ISC

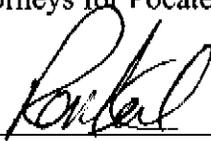
This is not the typical claim for attorney fees customarily brought at the end of litigation when the prevailing party seeks an award of attorney fees and litigation costs from the losing party. *The Group wants to use its own money to pay its own attorney fees and litigation costs.* If, at the end of the litigation the Group is the prevailing party, it will then seek an award of attorney fees and litigation costs from the losing party, ISC. If at the end of the litigation ISC is the prevailing party, the attorney fees and litigation costs paid from the Group's revenues can be an element of ISC's \$12,500,000 plus damage claim, and further, ISC can also seek an award of its own attorney fees and litigation costs from the Group.

V. CONCLUSION

The interim relief requested by the Group's motion is only intended to even the playing field between these two litigants. That result is called for by the express terms of the parties' contract, the fiduciary duty owed to the Group by ISC, and to prohibit ISC from acting in bad faith to the detriment of the Group.

Respectfully submitted this 17 day of March, 2004.

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



Ron Kerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 17 day of March, 2004, I served a true and correct copy of the foregoing document as follows:

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