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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C.,)
)
Plaintiff,)
)
v.)
)
INTERDENT SERVICE CORPORATION,)
)
Defendant.)
)
-----)
INTERDENT SERVICE CORPORATION,)
)
Third-Party Plaintiff,)
)
v.)
)
POCATELLO DENTAL GROUP, P.C., et al.,)
)
Third-Party Defendants.)
-----)

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

Currently pending before the Court are Counterdefendant Larry Misner's Motion to Quash the Larry Bybee Subpoena (Docket No. 144), Counterdefendant Larry Misner's Motion to Quash the Valley Dental Subpoena (Docket No. 145), Orthodontic Centers of Idaho Inc.'s Motion to Quash its Subpoena (Docket No. 151), and Plaintiff Pocatello Dental Group's Motion For Temporary Restraining Order (Docket No. 178). Having carefully reviewed the record, considered oral arguments, and otherwise being fully advised, the Court enters the following Order.

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I.

BACKGROUND

The factual background in this matter has been set forth numerous times in previous orders, particularly in the Court's recently issued August 5, 2004 Order (Docket No. 161). The Court only repeats herein, certain background information necessary to consider the pending motions.

Plaintiff Pocatello Dental Group ("Group") is a conglomerate of dental professionals who provide a variety of dental services to patients residing in eastern Idaho. In October 1996, the Group entered into a management agreement ("Agreement") with an entity which eventually became Interdent Service Corporation ("ISC"). In the Agreement, ISC's predecessor in interest paid \$2.8 million for the acquisition of all of the Group's nonprofessional assets. The Agreement delineated the various duties of the Group and ISC, extending to ISC the responsibility of administrating the Group's dental practice, including providing the Group with facilities, equipment, and management services, including billing and collecting accounts receivable, scheduling appointments, and other administrative responsibilities. Eventually, a dispute arose regarding which party was empowered under the Agreement to employ and discharge the Group's future and present employees, and on October 9, 2003, the Group filed a Complaint (Docket No. 9, Ex. B) in Idaho state district court. On October 16, 2003, that action was removed to this Court. *Notice of Removal* (Docket No. 1).

II.

MOTIONS TO QUASH

At the August 9, 2004 hearing, counsel advised the Court that they were close to reaching an agreement which would resolve Counterdefendant Misner's Motion to Quash the Larry Bybee Subpoena (Docket No. 144), Counterdefendant Misner's Motion to Quash the Valley Dental Subpoena (Docket No. 145), and Orthodontic Centers of Idaho Inc.'s Motion to Quash its Subpoena (Docket No. 151). Counsel advised the Court that the only impediment to their agreement was a document which they wished the Court to review *in camera*, in order that the Court might determine its relevancy. *Order*, p. 18 (Docket No. 167).

In light of their request, the Court deferred ruling on the aforementioned Motions to Quash, and agreed to review said document upon its filing. *Id.* The Court entered its Order more than two months ago, on August 16, 2004, and to date, those document(s) have not been submitted to the Court for an *in camera* review. The Court is of the view that the facts and legal arguments are adequately presented in the briefs and submissions of the parties. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the Court will address and resolve these pending motions without a hearing.

- A. **Counterdefendant Misner's Motion to Quash the Larry Bybee Subpoena (Docket No. 144); Counterdefendant Misner's Motion to Quash the Valley Dental Subpoena (Docket No. 145).**

On July 15, 2004, Misner filed simultaneous motions to quash the subpoenas issued by ISC to Dr. Larry Bybee (Docket No. 144) and Valley Dental, P.A. (Docket No. 145). Misner's grounds for both his motions are two-fold: (1) that both subpoenas require persons not a party or

an officer of a party to travel to a place more than 100 miles from the place where that person resides in violation of Federal Rule of Civil Procedure 45(c)(3)(A)(ii), and (2) that both subpoenas are not likely to lead to any relevant information. *Misner's Motion to Quash Bybee Subpoena* (Docket No. 144); *Misner's Motion to Quash Valley Dental Subpoena* (Docket No. 145). Because Misner's Motions to Quash are intertwined and raise identical issues, the Court will consider both motions together.

Preliminarily, ISC has clarified that it does not require any "person" to travel, and that the documents it seeks can simply be mailed to the office of ISC's counsel, relieving the subpoenaed parties from any potential expense or inconvenience.¹ *Response in Opposition to Motions to Quash*, p. 4 (Docket No. 149). Such clarification is in harmony with Federal Rule of Civil Procedure 45(c)(2)(A), which provides that "[a] person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial."

i. Relevancy

As a general rule, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Federal Rule of Civil Procedure 26(b)(1). Although the information requested need not be admissible at trial, it must be reasonably calculated to lead to the discovery of admissible evidence. *Id.* The Supreme Court of

¹Regarding ISC's contention that Dr. Larry Bybee need only mail the requested documents to comply with ISC's subpoena, Misner acknowledges, "[i]n all candor to this Court, Bybee does hereby note the existence of authority from outside this jurisdiction supporting ISC's legal position. See *Stewart v. Mitchell Transport*, 2002 U.S. Dist. LEXIS 12958 (D. Kan. 2002)." *Reply in Support*, p. 5 (Docket No. 158).

the United States has indicated that the definition of relevancy, for purposes of discovery, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised in the pleadings, for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (internal citations omitted).

The Supreme Court of the United States has also clarified that "discovery, like all matter of procedure, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). This Court is mindful that, "while the standard of relevancy [in discovery] is a liberal one, it is not so liberal to allow a party to 'roam in the shadows zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'" *Food Lion, Inc. v. United Food & Comm'l Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012-1013 (D.C. Cir. 1997) (internal citations omitted). In the end, however, parties are afforded a liberal right to examine documents reasonably calculated to lead to the discovery of admissible evidence. *See e.g., Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (a broad right of discovery is based on the principle that wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for truth). It should be noted, however, that:

Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary

or under court order, is not a concession or determination of relevance for the purposes of trial.

1970 Amendment to Federal Rule of Civil Procedure 26(b)(1). With the aforementioned principles of law in mind, the Court will consider what is at the heart of the pending discovery dispute.

ISC asserts that Misner, and his associate Dr. Larry Bybee, took the knowledge and business that they had developed at the practice managed by ISC and opened a competing office managed by an ISC competitor, Louisiana-based Orthodontic Centers of America ("OCA"). *Response in Opposition to Motions to Quash*, p. 2 (Docket No. 149). ISC argues that "[b]ecause Misner has a direct noncompetitor agreement with ISC, he and Bybee, possibly with OCA's assistance, carefully structured this transaction by creating a new corporation, Valley Dental, with Dr. Bybee as the sole shareholder and Dr. Misner as only an officer and employee." *Id.* Further, ISC states that none of the records relating to the relationship between OCA and Misner are in Misner's possession, rather ISC believes, they are in the possession of Dr. Larry Bybee and his corporation, Valley Dental. *Id.* at 3.

Upon reviewing the subpoenas sought by ISC and the basis for the requests, and in light of ISC's previously noted clarification, and recognizing the broad standard for discovery—and that the documents sought need not be discoverable in themselves but need only be reasonably calculated to lead to the discovery of admissible evidence, *see* Federal Rule of Civil Procedure 26(b)(1), the Court concludes that the documents subpoenaed by ISC are discoverable.

Accordingly, Misner's Motion to Quash the Larry Bybee Subpoena (Docket No. 144), and Misner's Motion to Quash the Valley Dental Subpoena (Docket No. 145), are denied.

B. Orthodontic Centers of Idaho's Motion to Quash Subpoena (Docket No. 151).

On July 23, 2004, Orthodontic Centers of Idaho ("OCI"), pursuant to Federal Rule of Civil Procedure 45(c)(3)(A), filed a motion to quash the subpoena issued by ISC because (1) the subpoena requires persons not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides in violation of Federal Rule of Civil Procedure 45(c)(3)(A)(ii), and (2) because the subpoena is not likely to lead to any relevant information. *OCI's Motion to Quash Subpoena* (Docket No. 151).

As a beginning point to the Court's analysis, ISC has clarified that the deposition can proceed at any location convenient to the witness, including OCA's national headquarters in Metairie, Louisiana.² *Response in Opposition to Motion to Quash*, p. 4 (Docket No. 159); *Kaplan Affidavit*, p. 2 (Docket No. 160) ("Had OCA expressed any objection to the place of deposition stated in the subpoena, I would have indicated that OCA could appear at its national headquarters in Metairie, Louisiana or at any other location convenient to the witness and counsel"). ISC's clarification leaves only the disputed subpoena's relevance as the sole remaining issue.

ISC argues that OCA financed Misner's competing dental office, leased space for him, and obtained equipment, thus facilitating in every way possible Misner's alleged breach of his noncompete agreement. *Response in Opposition*, p. 2 (Docket No. 159). More importantly, ISC argues, "evidence from OCA will demonstrate the pretextual nature of Misner's, plaintiff

²At the August 9, 2004 hearing, counsel for OCI clarified that OCI is a subsidiary of OCA.

Pocatello Dental Group's and the third-party defendants' complaints about ISC's conduct." *Id.*

ISC concludes that:

Here the relevance is obvious: what promises were made to Misner to induce him to breach his noncompete? How long has Misner's scheme been in development and how is it connected to the claims PDG made and withdrew in bankruptcy? How, if at all, do OCA's practices differ from ISC's with regard to the alleged "unlawful practice of dentistry?" OCA has no excuse for disregarding the duty of every citizen to provide evidence in [*sic*] pending legal proceedings.

Id. at 3.

Recognizing that the standard for discovery, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised in the pleadings, for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits," *see Oppenheimer Fund, Inc.*, 437 U.S. at 351, the Court concludes that the OCI subpoena is proper following its review of the subpoena itself, the bases for its request, and ISC's explanatory statement. Accordingly, OCI's Motion to Quash its Subpoena (Docket No. 151) is denied.

III.

MOTION FOR TEMPORARY RESTRAINING ORDER (Docket No. 178)

A. Background

In a telephone conference call hearing on October 21, 2004, the Court heard argument of counsel in this motion. ISC argues in support of injunctive relief that the Group and its dentists

have made the Pocatello practice so uneconomic³ that as a result of the Group's continuing breaches of the Agreement, "ISC was forced to terminate the contract ." *Response in Opposition*, p. 2 (Docket No. 186). On October 1, 2004, ISC closed the Group's Pocatello office. *Id.* at 3.; *Memorandum in Support*, p. 2 (Docket No. 179). In immediate response to the closing of the office, on October 4, 2004, the Group filed this pending Motion for Temporary Restraining Order (Docket No.178), asking the Court to restrain ISC from:

(1) refusing to immediately surrender to the Plaintiff the names, addresses and telephone numbers of all current patients of the [Group] and its dentists,

(2) refusing to immediately surrender to the [Group] the names, addresses and telephone numbers of all patients of the [Group] and its dentists who were scheduled to receive dental care on and after October 2, 2004, and

(3) refusing to immediately surrender to the [Group] and its dentists their personal property, which personal property ISC removed from the [Group's] office without the owners' consent.

Memorandum in Support, pp. 6-7 (Docket No. 179).

During the October 21, 2004 hearing, and upon reviewing the record, the Court discovered that the primary relief sought by the Group has largely been remedied. Regarding the patient information sought, the Group acknowledges that "ISC has turned over patient files to Pocatello Dental Group." *Memorandum in Support*, p. 3 (Docket No. 179). Further, ISC has

³Bruce Call, ISC's regional manager over Idaho testified that, "[o]n October 11, 2004, we discovered that Dr. Romriell was telling patients not to pay their bills." *Call Affidavit*, ¶ 7 (Docket No. 187). While the Group has objected to this statement, *Evidentiary Objection* (Docket No. 189), curiously, Dr. Romriell states in rebuttal only that "[s]ince October 1, 2004, I have not directed any patient of the Group to withhold payment of any fees or charges for dental care provided by the Group or its dentists and hygienists on or before October 1, 2004." *Romriell Affidavit*, ¶ 3 (Docket No. 190) (emphasis added). The Court notes that Dr. Romriell, ironically, does not testify as to his actions, in that regard, pre-dating October 1, 2004.

"offered to direct patients to contact [the Group] at a telephone number of [the Group's] choosing, allowing [the Group] to handle its own scheduling." *Response in Opposition*, p. 3 (Docket No. 186). Finally, at the October 21, 2004 hearing the parties clarified that: (1) ISC had recently provided the Group with its most recent version of the patient appointment schedule (complete with patient telephone numbers), covering the time period from October 20, 2004 through the last patient scheduled, (2) that ISC was searching for the patient appointment schedule covering the time period from October 1, 2004 through October 20, 2004, and (3) that the parties had reached a resolution regarding the alleged withholding of the dentists' personal property. The Group concluded that the only remaining issue was whether ISC would agree to provide the Group with the patient recall list, a list it needs in order to schedule patients.

B. Standard for Temporary Restraining Order

Generally, the purpose of a temporary restraining order is to hold the status quo in place until the court has an opportunity to hear a request for fuller relief, such as a preliminary injunction. *See, e.g., Hospital Resource Personnel, Inc. v. United States*, 860 F. Supp. 1554, 1556 (S.D. Ga. 1994). A preliminary injunction, however, is also directed at freezing circumstances in place until there is greater opportunity to hear the merits of a case. *See, e.g., CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 620 (1st Cir. 1995). The Court is satisfied that, here, the Group is simply attempting to maintain the status quo as it existed before ISC's closing of the Group's Pocatello office.

Federal Courts have authority to grant a temporary restraining order under Federal Rule of Civil Procedure 65. In the Ninth Circuit, courts apply the same standard when ruling on a request for a temporary restraining order under Fed. R. Civ. P. 65(b) as is applied to a request for

preliminary injunctive relief under Fed. R. Civ. P. 65(a). *See Byron v. City of Wittier*, 46 F.Supp.2d 1032 (C.D. Cal.1998) (applying the standard for a preliminary injunction under *International Jensen v. Metrosound U.S.A.*, 4 F.3d 819 (9th Cir. 1993) to a request for a temporary restraining order). To prevail on a motion for a preliminary injunction, or a temporary restraining order, the plaintiff must demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits are raised and the balance of hardships tips sharply in plaintiff's favor. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115,1119 (9th Cir. 1999). These two alternatives represent "extremes of a single continuum," rather than two separate tests. *See id.* Therefore, the greater the probability of success, the less hardship to the plaintiff must be shown. *See id.*

Of the two alternatives, the Court places its focus on whether the Group has raised serious questions going to the merits and whether the balance of hardships tip sharply in the Group's favor.

C. Analysis

Article 6.2(c)(2) of the Agreement provides, in part, the following provisions to be followed upon termination:

Manager shall deliver to Group all records related to the business of and provision of dental care through the Practice including, without limitation, patient records and any corporate, personnel and financial records maintained for the Practice and Providers, provided, that except as limited by law, including, but not limited to laws governing the confidentiality of patient records, Manager shall have the option to copy (or otherwise duplicate) at its sole cost and expense such records of Group and to retain and utilize such records for its own use.

Reply, Ex. A (Docket No. 191) (emphasis added). Article 6.2(c)(4) also provides that, "[b]oth parties shall cooperate to ensure the provision of appropriate dental care to Group Patients and Beneficiaries." *Id.*

The Agreement requires that ISC deliver to the Group "all records related to the business of and provision of dental care through the Practice, including, *without limitation*, patient records and any corporate, personnel and financial records maintained for the Practice and Providers," *Id.* (emphasis added). The Court finds, and thus concludes, that the act of refusing to provide the Group with the recall list used to contact current patients to schedule their appointments could result in a hardship to the Group and its patients.

Accordingly, for purposes of this motion, the Court is satisfied, and so finds, that the Group has raised serious questions going to the merits and that the balance of hardships tip sharply in the Group's favor on this issue. Finally, because ISC terminated the Agreement and closed the Pocatello office, the Court is unable to divine any legitimate purpose ISC may have to refuse to turn over the patient recall list. For these reasons, the Court grants the Group's Motion For Temporary Restraining Order (Docket No. 178) and orders ISC to provide the Group with the patient recall list as requested within ten (10) days of the date of this Order.

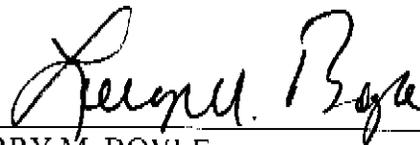
IV.

ORDER

Accordingly, based on the foregoing, IT IS HEREBY ORDERED:

1. Counterdefendant Larry Misner's Motion to Quash the Larry Bybec Subpoena (Docket No. 144) is DENIED.
2. Counterdefendant Larry Misner's Motion to Quash the Valley Dental Subpoena (Docket No. 145) is DENIED.
3. Orthodontic Centers of Idaho Inc.'s Motion to Quash its Subpoena (Docket No. 151) is DENIED.
4. Plaintiff Pocatello Dental Group's Motion For Temporary Restraining Order (Docket No. 178) is GRANTED.

DATED this 25th day of October, 2004.



LARRY M. BOYLE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Idaho
October 25, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:03-cv-00450

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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____ Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 10-25-04

BY: QW
(Deputy Clerk)