

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SARAH KIM,

No. C 08-5565 SI

Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTION TO AMEND, GRANTING IN
PART AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT, AND
DENYING DEFENDANTS' MOTION
FOR RULE 11 SANCTIONS.**

v.

INTERDENT, INC., a/k/a INTERDENT
SERVICE CORPORATION, a/k/a GENTLE
DENTAL, a/k/a MOUNTAIN VIEW DENTAL,
a/k/a BLUE OAK DENTAL GROUP, a/k/a
DEDICATED DENTAL, a/k/a AFFORDABLE
DENTAL CARE, a/k/a CAPITAL DENTAL,
and DOES 1-50, inclusive,

Defendants.

On July 9, 2010, the Court heard oral argument on plaintiff's motion to file a second amended complaint, defendant's motion for summary judgment, and defendant's motion for Rule 11 sanctions. For the reasons set forth below, plaintiff's motion to amend the complaint is DENIED, defendant's motion for summary judgment is GRANTED IN PART AND DENIED IN PART, and defendant's motion for Rule 11 sanctions is DENIED.

BACKGROUND

This is a wrongful death and negligence action brought by Sarah Kim, the surviving spouse of decedent Dr. Richard D. Bae ("Dr. Bae"), against InterDent, Inc. ("InterDent"). InterDent contracts with dentists to provide managerial and administrative services to their dental practice groups, and is one of the largest providers of such services in the United States. Beginning in September 2005, Dr. Bae, an oral surgeon, worked as an independent contractor and performed oral surgeries in dental offices

1 that were managed by InterDent.

2 Although the complaint alleges Dr. Bae was an independent contractor for InterDent, the
3 contracts produced in discovery show that Dr. Bae was actually an independent contractor for Tancio
4 Dental Corporation and Nakaki Dental Corporation (the professional corporations or “PCs”), and with
5 Bright Now and Dr. Francis Chung.¹ See Decl. of Powers in Supp. of Def.’s Opp’n to Pl.’s Mot. to
6 Amend FAC (“Powers Opp’n Amend Decl.”), Ex. A, B (contracts showing independent contractor
7 relationship); Decl. Powers in Supp. of Def.’s Summ. J. (“Powers Decl. MSJ”), Ex. D, N. Under
8 separate management agreements, InterDent contracted with the PCs to provide management and
9 administrative services for the PCs. See Powers Decl. MSJ, Ex. R (Group Management Agreement
10 between Gentle Dental and Nakaki Dental Corporation); Hertzog Decl., Ex. 3 (Group Management
11 Agreement between Gentle Dental and Tancio Dental Corporation).

12 The group management agreements between InterDent and the PCs state, *inter alia*, that the
13 “[PC] hereby appoints [InterDent] as its sole and exclusive Manager for the operation of the Practice,”
14 the “[PC] shall retain ultimate responsibility for all activities of [PCs] that are within the scope of a
15 dentist’s licensure and cannot be performed by [InterDent] due to [InterDent’s] non-licensed status.”
16 Powers Decl. MSJ, Ex. R, §§ 3.1, 3.2; see also *id.* at Article IV, “Management Services” (setting forth
17 the various services that InterDent will provide to the PCs). Section 3.3 of both agreements sets forth
18 the relationship between the parties:

19 [I]t is understood and agreed that [InterDent] shall, at all times, be acting and performing
20 as an independent contractor and not as an employee of [PCs]. Except as provided in
21 this Agreement or as required by law, [PCs] shall neither have nor exercise any control
22 or direction over the methods by which [InterDent] shall perform its obligations
23 hereunder; nor shall [InterDent] have or exercise any control or direction over the
24 methods by which [PCs] shall practice dentistry. It is expressly agreed by the parties
25 that no work, act, commission or omission of [InterDent] pursuant to the terms and
26 conditions of this Agreement shall be construed to make or render [InterDent] or
27 [InterDent’s] employees or agents, the employees of [PCs]. [InterDent] and [PCs] are
28 not partners or joint venturers with each other and nothing herein shall be construed so
as to make them partners or joint venturers or impose upon either of them any liability
as partners or joint venturers. [InterDent’s] responsibility is to assure that the services
covered by this Agreement shall be performed and rendered in a competent, efficient and

¹ InterDent’s summary judgment papers state that Bright Now and Dr. Francis Chung are third parties that are not affiliated with InterDent. Although not at issue in the present motions, the parties dispute whether Dr. Bae could have obtained the Fentanyl that led to his overdose from Bright Now or Dr. Chung.

1 showing that Dr. Bae was frustrated with what he perceived to be an inefficient and decentralized
2 ordering process, and he emailed InterDent staff requesting that InterDent centralize the process for
3 ordering controlled substances and other surgical supplies.

4 Plaintiff alleges that on or about July 2006, Dr. Bae began to use Fentanyl obtained from
5 InterDent in order to cope with his workload. InterDent has submitted evidence showing that Dr. Bae
6 had a long history of alcohol and drug use, and that plaintiff was aware of Dr. Bae's addiction problems.
7 Dr. Bae sought outpatient drug counseling, and neither Dr. Bae nor plaintiff ever informed InterDent
8 about Dr. Bae's drug addiction. On December 13, 2006, Dr. Bae overdosed on Fentanyl and collapsed
9 on the bathroom floor of the Stockton dental office. Paramedics were able to restore Dr. Bae's
10 breathing, but he lapsed into a coma and never regained consciousness. On February 22, 2007, Dr.
11 Bae's feeding tube was removed, and he died on April 16, 2007 at the age of 37.

12 13 LEGAL STANDARDS

14 I. Leave to Amend

15 Federal Rule of Civil Procedure 15 governs amendment of the pleadings. It states that if a
16 responsive pleading has already been filed, the party seeking amendment "may amend its pleading only
17 with the opposing party's written consent or the court's leave. The court should freely give leave when
18 justice so requires." Fed. R. Civ. P. 15(a). This rule reflects an underlying policy that disputes should
19 be determined on their merits, and not on the technicalities of pleading rules. *See Foman v. Davis*, 371
20 U.S. 178, 181-82 (1962). Accordingly, the Court must be generous in granting leave to amend. *See*
21 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (leave to amend granted
22 with "extreme liberality"); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989).

23 However, there are several accepted reasons to deny leave to amend, including the presence of
24 bad faith on the part of the plaintiff, undue delay, prejudice to the defendant, futility of amendment, and
25 that the plaintiff has previously amended the complaint. *See Ascon Properties*, 866 F.2d at 1160;
26 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir. 1988). Courts do not ordinarily consider
27 the validity of a proposed amended pleading in deciding whether to grant leave to amend, but leave may
28 be denied if the proposed amendment is futile or would be subject to dismissal. *See Saul v. United*

1 *States*, 928 F.2d 829, 843 (9th Cir. 1991).

2
3 **II. Summary Judgment**

4 Summary judgment is proper “if the pleadings, the discovery and disclosure materials on file,
5 and any affidavits show that there is no genuine issue as to any material fact and that the movant is
6 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the initial
7 burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
8 U.S. 317, 323 (1986). The moving party, however, has no burden to disprove matters on which the
9 non-moving party will have the burden of proof at trial. The moving party need only demonstrate to
10 the Court that there is an absence of evidence to support the non-moving party’s case. *Id.* at 325.

11 Once the moving party has met its burden, the burden shifts to the non-moving party to “set out
12 ‘specific facts showing a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). To carry
13 this burden, the non-moving party must “do more than simply show that there is some metaphysical
14 doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,
15 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient; there must be
16 evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v. Liberty*
17 *Lobby, Inc.*, 477 U.S. 242, 252 (1986).

18 In deciding a summary judgment motion, the court must view the evidence in the light most
19 favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255.
20 “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from
21 the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment.” *Id.*
22 However, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise
23 genuine issues of fact and defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d
24 730, 738 (9th Cir. 1979).

25
26 **III. Rule 11 Sanctions**

27 Under Federal Rule of Civil Procedure 11, a court may impose sanctions against an attorney, law
28 firm, or party when a complaint is filed for an improper purpose such as harassment or delay, when the

1 claims in the complaint are unwarranted under with existing law or a nonfrivolous argument for
2 extension of the law, or when the allegations in the complaint are without evidentiary support and
3 unlikely to have evidentiary support after further investigation and discovery. Fed. R. Civ. P. 11(b)
4 & (c). When evaluating whether a complaint is frivolous or without evidentiary support, the court “must
5 conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from
6 an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry
7 before signing and filing it.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (internal
8 quotation marks and citation omitted).

10 DISCUSSION

11 I. Plaintiff’s motion to amend the complaint

12 Plaintiff seeks to amend the complaint in the following ways: (1) to substitute in a number of
13 defendants in place of the “Doe” defendants; (2) to strike her claim for loss of consortium; (3) to clarify
14 that the second cause of action for negligence is being pleaded by plaintiff as successor in interest to Dr.
15 Bae; and (4) to add a fourth cause of action for negligence pleaded on plaintiff’s behalf.

16 With regard to the Doe substitutions, plaintiff seeks to substitute the defendants as follows: (1)
17 InterDent Service Corporation in place of Doe 1; (2) Michael S. Tancio, D.M.D. for Doe 2; (3) Tancio
18 Dental Corporation for Doe 3; (4) Robert Nakaki, D.D.S. for Doe 4; (5) Nakaki Dental Corporation for
19 Doe 5; (6) P. Nakaki Dental Corporation for Doe 6; and (7) Nakaki and Stromberg Dental Corporation
20 for Doe 7. Plaintiff claims that the relationships among InterDent and the dentists and dental
21 corporations that contract with InterDent were not clarified until depositions were taken in April 2010,
22 and that “Plaintiff has always believed that Dr. Bae was an independent contractor for InterDent.”
23 Motion at 5:4. According to plaintiff, discovery has now revealed that Dr. Bae was an independent
24 contractor for Tancio Dental Corporation and Nakaki Dental Corporation, and that Dr. Bae did not have
25 a contractual relationship with InterDent. InterDent’s 30(b)(6) witness also explained the relationship
26 between InterDent, Inc. and InterDent Service Corporation, revealing that InterDent Inc. holds the stock
27 for InterDent Service Corporation and InterDent Service Corporation provides all the services. The
28 witness also stated that Gentle Dental is a service mark that InterDent permits the dental offices with

1 which it contracts to use.

2 InterDent contends that plaintiff has unreasonably delayed in seeking to amend the complaint,
3 and that plaintiff has possessed the information about the relationships between Dr. Bae, InterDent, the
4 dentists and the PCs long before the April 2010 depositions. InterDent states that plaintiff herself
5 produced Dr. Bae's independent contractor agreements to InterDent, including a Specialist Independent
6 Contractor Agreement between Nakaki Dental Corporation and Dr. Bae and a Specialist Independent
7 Contractor Agreement between Tancio Dental Corporation and Dr. Bae. In addition, when InterDent
8 moved to dismiss the original complaint in January 2009, InterDent's motion set forth its explanation
9 of the business relationships between Dr. Bae, the dentists and the PCs, and InterDent, and attached to
10 that motion the management agreement between Gentle Dental Management, Inc. and Tancio Dental
11 Corporation and the employment agreement between Tancio Dental Corporation and Dr. Bae. *See* Def's
12 Motion to Dismiss at 4:17-6:2, Hertzig Decl. Ex. 3, 4. InterDent also notes that when InterDent made
13 its initial disclosures on July 7, 2009, InterDent identified Dr. Nakaki and Dr. Tancio as witnesses with
14 information about this case. In its initial disclosures, InterDent also provided: a management agreement
15 between Gentle Dental Management, Inc. and the Nakaki Dental Corporation; a management agreement
16 between Gentle Dental Management, Inc. and Tancio Dental Corporation; a service provider agreement
17 between Dr. Bae and Tancio Dental Corporation; an employment agreement between Dr. Bae and
18 Tancio Dental Corporation; and the articles of incorporation for Tancio Dental Corporation. Powers
19 Decl. ¶¶ 2-7, Ex. A-F.

20 The Court finds that plaintiff has unduly delayed in seeking to substitute the Doe defendants.
21 As InterDent has demonstrated, plaintiff has long possessed the documents and information setting forth
22 the business relationships between Dr. Bae, the dentists and dental corporations, and InterDent. Plaintiff
23 makes much of the fact that discovery was stayed until November 16, 2009 while the pleadings were
24 being resolved. However, plaintiff has had copies of the various contracts since well before November
25 2009. Moreover, while the April 2010 depositions may have provided more detail regarding how the
26 dental offices were run and the precise nature of the relationships at issue, plaintiff has not explained
27 how the information gleaned from the depositions provided, for the first time, the basis for holding the
28 proposed defendants liable. However, because delay alone is not a basis for denying leave to amend,

1 the Court must also determine whether amendment would be prejudicial and/or futile. *See Owens v.*
2 *Kaiser Foundation Health Plan Inc.*, 244 F.3d 708, 712-713 (9th Cir. 2001) (“Assuming arguendo that
3 Kaiser had unreasonably delayed the filing of the motion to amend its answer, undue delay by itself is
4 insufficient to justify denying a motion to amend.”) (internal citation and quotations omitted).

5 InterDent contends that the proposed amendments are futile because the proposed second
6 amended complaint is subject to a Rule 12(b)(6) motion for failure to allege sufficient facts against any
7 of the additional parties. The Court agrees. The proposed second amended complaint does not contain
8 any factual allegations indicating how each of the new defendants is liable for Dr. Bae’s death. The first
9 amended complaint is alleged against “defendants, InterDent, Inc., a Delaware corporation, a/k/a
10 InterDent Service Corporation, a/k/a Gentle Dental, a/k/a Mountain View Dental, a/k/a Blue Oak Dental
11 Group, a/k/a Dedicated Dental, a/k/a Affordable Dental Care, a/k/a Capital Dental (collectively
12 ‘InterDent’).” FAC ¶ 4. The proposed second amended complaint contains the identical allegation,
13 SAC ¶ 3, and contains a new paragraph substituting InterDent Service Corporation for Doe 1. There
14 are no additional allegations in the proposed SAC regarding InterDent Service Corporation, and indeed
15 the proposed SAC continues to refer to the collective “InterDent.” Similarly, aside from substituting
16 in the other new defendants for the Doe defendants, SAC ¶¶ 8-13, the proposed SAC does not contain
17 any factual allegations regarding Michael S. Tancio, Tancio Dental Corporation, Robert P. Nakaki,
18 Nakaki Dental Corporation, Robert P. Nakaki Dental Corporation, or Nakaki and Stromberg Dental
19 Corporation. Indeed, remarkably the proposed SAC continues to allege that “Dr. Bae performed
20 services as an independent contractor for InterDent as an oral surgeon,” *id.* ¶ 14, and there are no
21 allegations in the proposed SAC about the nature of the business relationships between Dr. Bae,
22 InterDent, the dentists, and the dental corporations. Although the claims in the proposed SAC are
23 alleged against all defendants, the allegations under each cause of action relate solely to “InterDent,”
24 and indeed appear to be identical or virtually identical to the allegations contained in the FAC.

25 In addition, the Court finds that the proposed amendments would be prejudicial to the added
26 defendants, and to InterDent. Adding the new defendants would cause significant delay because the
27 new defendants would engage in motion practice and be entitled to take discovery. Fact discovery
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1 closed on May 12, 2010, and thus discovery would need to be reopened.⁵ This litigation is substantially
2 complete, and the Court will set a new trial date at the August 4, 2010 telephone conference.⁶ Although
3 plaintiff asserts that the delay in the trial mitigates whatever delay would be caused by amending the
4 complaint, the Court disagrees, as adding the new defendants would substantially delay the resolution
5 of this case, whereas the Court anticipates that this case can proceed to trial in the near future.

6 In addition, InterDent would be prejudiced if plaintiff is allowed to add a fourth cause of action
7 for negligence to plaintiff directly. Plaintiff argues that InterDent has already conducted discovery
8 relevant to this cause of action during the course of litigating this case, and therefore will not be
9 prejudiced. For example, plaintiff claims that “[InterDent] treated plaintiff’s claim for negligence as
10 being made on her behalf and not just as the successor in interest to Dr. Bae,” when they inquired about
11 plaintiff’s emotional distress. Reply to Defs. Opp’n to Mot. to Amend, 3:9-16. However, InterDent
12 asserts that it would be required to conduct discovery and litigation over the question of what duty, if
13 any, InterDent owed to plaintiff, as opposed to Dr. Bae. Consistent with the Ninth Circuit, “[a] need
14 to reopen discovery and therefore delay the proceedings supports a district court’s finding of prejudice
15 from a delayed motion to amend the complaint.” *Solomon v. North Am. Life & Cas. Ins. Co.*, 151 F.3d
16 1132, 1139 (9th Cir. 1998). Accordingly, the Court DENIES plaintiff’s motion for leave to amend the
17 complaint.

18
19 **II. Defendant’s motion for summary judgment**

20 **A. Wrongful death and negligence claims**

21 InterDent has moved for summary judgment on plaintiff’s wrongful death and negligence claims.
22 Wrongful death is a cause of action created by statute for “pecuniary loss brought by heirs against a
23 person who causes the death or another by a wrongful act or neglect.” *Jacoves v. United Merchandising*
24 *Corp.*, 9 Cal. App. 4th 88, 114 (1992). Wrongful death requires “all the traditional elements of
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26 ⁵ The parties have submitted a number of discovery disputes to the Court for resolution. The
27 Court will issue a separate order addressing those disputes.

28 ⁶ The August 23, 2010 trial date was vacated due to a conflict in defense counsel’s trial
schedule.

1 negligence, i.e., duty, breach of duty, causation, and damage.” *Id.* at 113. InterDent contends that it is
2 entitled to summary judgment on the wrongful death and negligence claims because InterDent did not
3 owe a legal duty to Dr. Bae. InterDent advances two arguments. First, InterDent contends that it did
4 not owe a duty to Dr. Bae because there was no special relationship between InterDent and Dr. Bae.
5 Second, InterDent contends it did not owe a duty to Dr. Bae because, even assuming InterDent supplied
6 the Fentanyl, InterDent did not know or have reason to know that Dr. Bae was abusing the Fentanyl.
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8 **1. Special relationship**

9 InterDent contends that there was no special relationship between InterDent and Dr. Bae because
10 Dr. Bae was neither an employee nor an independent contractor of InterDent. InterDent argues that the
11 evidence shows that at the time of his death, Dr. Bae was an independent contractor of Tancio Dental
12 Corporation and Nakaki Dental Corporation, as per the Service Provider Agreements between Dr. Bae
13 and the dental corporations. InterDent also argues that the evidence shows that InterDent did not have
14 any control over Dr. Bae’s work or his schedule. *See Powers Decl. MSJ, Ex. M (Wallace Depo.,*
15 *142:4-18)*(“InterDent does nothing with the dentists. There’s that line. It’s clinical. So we don’t tell the
16 dentists to do anything”). The management agreements between InterDent and the dental corporations
17 state that InterDent shall not “exercise any control or direction over the methods by which [PCs] shall
18 practice dentistry.” *See Powers Decl. MSJ, Ex. R; Hertzog Decl., Ex. 3.* Further, the independent
19 contractor agreements between Dr. Bae and the PCs state that the “[PCs] shall have no right to and shall
20 not control the manner or prescribe the method by which the Specialist Services are provided by [Dr.
21 Bae].” *See Powers Opp’n Amend Decl. Ex. A, B.* Moreover, contrary to plaintiff’s argument that
22 InterDent paid the dentists, InterDent merely handled the payroll services. *See Powers Decl. MSJ, Ex.*
23 *F (Tancio Depo., 54: 16-19).* The Court agrees with InterDent that the undisputed evidence shows that
24 Dr. Bae was neither an employee nor an independent contractor of InterDent.

25 In opposition to InterDent’s motion for summary judgment, plaintiff acknowledges that Dr. Bae
26 was an independent contractor for Tancio Dental Corporation and Nakaki Dental Corporation.
27 However, plaintiff argues that InterDent nevertheless owed a duty to Dr. Bae because “InterDent
28 undertook to render services for consideration that were necessary for the protection of Dr. Bae and

1 other professionals in its offices.” Opp’n at 13:24-25. Plaintiff argues that because InterDent “had
2 undertaken to provide management services for all the management functions of the offices, including
3 its narcotics distribution,” InterDent owed a duty to Dr. Bae. Plaintiff relies on Sections 323 and 324
4 of the Restatement (Second) of Torts, which relate to the rendering of services for the protection of
5 another, or to a third party. Section 323 states:

6 One who undertakes, gratuitously or for consideration, to render services to another
7 which he should recognize as necessary for the protection of the other’s person or things,
8 is subject to liability to the other for physical harm resulting from his failure to exercise
9 reasonable care to perform his undertaking, if

- 10 (a) his failure to exercise such care increases the risk of such harm, or
11 (b) the harm is suffered because of the other’s reliance upon the undertaking.

12 Restatement (Second) of Torts § 323. Section 324A parallels Section 323 and applies when a third party
13 is involved. Section 324A states:

14 One who undertakes, gratuitously or for consideration, to render services to another
15 which he should recognize as necessary for the protection of a third person or his things,
16 is subject to liability to the third person for physical harm resulting from his failure to
17 exercise reasonable care to protect his undertaking, if

- 18 (a) his failure to exercise reasonable care increases the risk of such harm, or
19 (b) he has undertaken to perform a duty owed by the other to the third person, or
20 (c) the harm is suffered because of reliance of the other or the third person upon the
21 undertaking.

22 Restatement (Second) of Torts, § 324A. The rule embodied in Sections 323 and 324 is known as the
23 “negligent undertaking doctrine,” or the “Good Samaritan rule.” *See Mukthar v. Latin American Sec.*
24 *Serv.*, 139 Cal. App. 4th 284, 289 (2006); *see also Delgado v. Trax Bar & Grill*, 36 Cal.4th 224, 249,
25 (2005) (“Our cases establish that a volunteer who, having no initial duty to do so, undertakes to provide
26 protective services to another, will be found to have a duty to exercise due care in the performance of
27 that undertaking if one of two conditions is met: either (a) the volunteer’s failure to exercise such care
28 increases the risk of harm to the other person, or (b) the other person reasonably relies upon the
volunteer’s undertaking and suffers injury as a result.”).

Plaintiff emphasizes the fact that InterDent ordered, paid for, and provided the Fentanyl to Dr.

1 Bae. Plaintiff has submitted the declaration of Steven B. Kupferman, DMD, MD.⁷ Dr. Kupferman
2 states,

3 Although Dr. Bae was an independent contractor, InterDent had assumed the
4 responsibility to order, pay for, and receive narcotics for Dr. Bae, as well as manage the
5 offices where Dr. Bae provided services, including providing surgical assistants, office
6 staff, and records maintenance. InterDent had no provisions in place to prevent its
7 independent contractors or employees from diverting narcotics.

8 Throughout his time at InterDent, Dr. Bae had given a substantial amount of his
9 income to InterDent for their provision of administrative services. This would have
10 included such responsibilities as ordering, procuring and logging of narcotic
11 medications. InterDent did not properly keep track of the narcotic medications that they
12 were ordering on a regular basis which would have alerted them to any employee or
13 independent contractor diverting the narcotics. . . .

14 Itinerant oral surgery as practiced in California is required to abide by the
15 standards of care within the private practice community. The standard of care in the
16 private practice sector is to have an assistant or a manager in the office keep a log of the
17 narcotics that are ordered and used. Dr. Bae was contributing a significant amount of
18 his earned income to InterDent in what appeared to be a fifty-fifty split, such that
19 InterDent was responsible for the administrative aspect of his practice. InterDent failed
20 to maintain the administrative standards as would occur in the private practice sector.
21 Therefore, it is my opinion that InterDent bears responsibility for not properly abiding
22 by the standards of care for the administrative aspects of the practice of oral surgery.

23 Kupferman Decl. ¶¶ 3-5.

24 Plaintiff has also attached the declaration of Alfred Hurt, Jr., D.Pharm., a pharmacist registered
25 with the California State Board of Pharmacy, who states that “Facilities that order and store controlled
26 substances must maintain practices and procedures regarding the control of such substances to prevent
27 and detect diversion of such substances.” This is required because “Fentanyl has a high potential for
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23 ⁷ InterDent objects to Dr. Kupferman’s declaration on the ground that plaintiff did not attach
24 sworn or certified copies of the documents relied upon by Dr. Kupferman in making his declaration.
25 Rule 56(e)(1) provides that “If a paper or part of a paper is referred to in an affidavit, a sworn or
26 certified copy must be attached to or served with the affidavit.” Fed. R. Civ. P. 56(e)(1). Courts have
27 held that “[i]f documentary evidence is cited as a source of a factual contention, Rule 56(e) requires
28 attachment.” *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir.
1993). Here, Dr. Kupferman’s declaration did not refer to any specific document for a factual
contention, but rather he simply stated that he had reviewed various documents in this case in order to
form his expert opinion. InterDent also objects that Dr. Kupferman’s declaration is conclusory and
lacks foundation. The Court finds that defendant’s objections go to weight and not admissibility, and
the objection is OVERRULED.

1 abuse” and Fentanyl’s “potential for abuse is well known in the medical profession.” Hurt Decl. ¶¶ 2-4.⁸

2 Plaintiff has submitted evidence showing that InterDent ordered, paid for, stored, and supplied
3 the narcotics to Dr. Bae; that InterDent did not have any policies or practices to monitor and control the
4 narcotics that it supplied to Dr. Bae; that Dr. Bae repeatedly emailed InterDent staff about the ordering,
5 administration and general procedures regarding controlled substances in the offices where he worked
6 and asked InterDent staff to centralize the ordering process; and that no one from InterDent ever
7 reviewed Dr. Bae’s drug logs for accuracy. Plaintiff asserts that if InterDent had been tracking the
8 Fentanyl it supplied to Dr. Bae, InterDent would have discovered Dr. Bae’s diversion of the Fentanyl.
9 In addition, plaintiff has submitted evidence suggesting that other dental offices have policies in place
10 to verify the accuracy of the drug logs maintained by the dentists.

11 InterDent argues that the negligent undertaking doctrine is inapplicable because InterDent did
12 not render services for the protection of Dr. Bae. Although InterDent admits that it acted as a
13 purchasing agent for the narcotics Dr. Bae used in his practice, it disclaims any responsibility for the
14 necessary safety and tracking procedures to be followed when dealing with controlled substances
15 because the management agreements between InterDent and the dental corporations are silent on the
16 point. However, in the agreements InterDent specifically did undertake day-to-day management of the
17 dental offices and procurement of the narcotics necessary to those practices, and plaintiff’s expert asserts
18 that management responsibilities include “logging of narcotic medications” and having “an assistant or
19 a manager in the office keep a log of the narcotics that are ordered and used.” Further, plaintiff submits
20 evidence that the narcotic Fentanyl “has a high potential for abuse,” which is “well known in the
21 medical profession.” As such, it becomes a question of fact whether InterDent’s management
22 responsibilities amounted to an undertaking “to render services . . . necessary for the protection” of its
23 collaborating dentists or their clients.

24 Although the question is a close one, the Court finds that there is sufficient evidence in the
25 record to prevent summary judgment on this issue.

27 ⁸ InterDent objects to Dr. Hurt’s declaration to the extent that it evaluates specific documents
28 from discovery in this case. The Court does not use those sections of the declaration for these purposes
and accordingly need not rule on that objection.

1 **2. Know or reason to know of drug abuse**

2 InterDent also contends that even assuming it supplied the Fentanyl that Dr. Bae took when he
3 overdosed, InterDent did not owe a duty to Dr. Bae because there is no evidence that InterDent knew
4 or had reason to know that Dr. Bae was abusing Fentanyl. Cases involving the provision of dangerous
5 instrumentalities such as cars and firearms hold that “a person owes a duty of care not to provide a
6 dangerous instrumentality to an individual whose use of the instrumentality the supplier knows, or has
7 reason to know, will result in injury.” *Jacoves*, 9 Cal. App. 4th at 116.

8 InterDent has submitted deposition testimony from the employees and dentists who worked with
9 Dr. Bae, and every such witness testified that he or she did not know that Dr. Bae was using narcotics.
10 These witnesses also testified that they did not see “track marks” on Dr. Bae’s arms, and that they did
11 not observe any aberrant behavior that would have led them to believe Dr. Bae was using drugs. In
12 addition, plaintiff conceded that she and Dr. Bae actively hid Dr. Bae’s addiction from everyone except
13 Dr. Bae’s treating physicians. At her deposition, plaintiff testified that Dr. Bae never told anyone at the
14 Dental Board about his drug dependency problems for fear of losing his license. Plaintiff also testified
15 that she never told anyone at InterDent about Dr. Bae’s drug use.

16 Plaintiff argues that there at least a triable issue of fact as to whether InterDent knew or should
17 have known about Dr. Bae’s drug use. Plaintiff cites, *inter alia*, her own testimony that she saw
18 multiple, obvious track marks on both of Dr. Bae’s arms, the fact that Dr. Bae wore short-sleeved scrub
19 shirts at the office, and testimony by Dr. Bae’s surgical assistant, Mike Bazan, that he once saw bruises
20 on Dr. Bae’s arm, but upon inquiry, Dr. Bae explained that he had been dehydrated and gave himself
21 IV fluids over the weekend. Plaintiff has also submitted evidence showing that in the months leading
22 up to his overdose, Dr. Bae lost weight and appeared unwell.

23 Again, although it is a very close call, the Court finds that on this record summary judgment is
24 not appropriate. A jury could believe plaintiff’s testimony that the track marks on Dr. Bae’s arms were
25 obvious and visible, and could disbelieve the testimony of InterDent staff that they did not see any such
26 marks. Dr. Bae wore short-sleeved scrubs, and thus if plaintiff’s testimony is credited, InterDent staff
27 should have seen the marks on his arms. A jury could believe that Mr. Bazan saw the bruising, but that
28 Dr. Bae’s explanation was not credible and thus that Mr. Bazan knew or should have known that Dr.

1 Bae was abusing drugs, particularly when Dr. Bae had unfettered access to Fentanyl.

2
3 **B. Negligence per se**

4 Plaintiff also alleges a claim for negligence per se. The negligence per se doctrine is codified
5 in Evidence Code Section 669, which provides:

6 The failure of a person to exercise due care is presumed if: (1) He violated a statute,
7 ordinance, or regulation of a public entity; (2) The violation proximately caused death
8 or injury to person or property; (3) The death or injury resulted from an occurrence of
9 the nature of which the statute, ordinance, or regulation was designed to prevent; and (4)
10 The person suffering the death or the injury to his person or property was one of the class
11 of persons for whose protection the statute, ordinance, or regulation was adopted.

12 Cal. Evid. Code § 669; *see also Galvez v. Frields*, 88 Cal. App. 4th 1410, 1419 (2001). Plaintiff alleges
13 that InterDent violated the Controlled Substances Act (“CSA”), 21 U.S.C. § 801 *et seq.* The regulations
14 implementing the CSA provide:

15 Every person who manufactures, distributes, dispenses, imports, or exports any
16 controlled substance or who proposes to engage in the manufacture, distribution,
17 dispensing, importation or exportation of any controlled substance shall obtain a
18 registration unless exempted by law or pursuant to §§ 1301.22 through 1301.26 . . .
19 [o]nly persons actually engaged in such activities are required to obtain a registration;
20 related or affiliated persons who are not engaged in such activities are not required to be
21 registered.

22 21 C.F.R. § 1301.11(a). “Person” includes “any individual, corporation, . . . business trust, partnership,
23 association, or other legal entity.” 21 C.F.R. § 1300.01(b)(34). Persons who are registered must provide
24 effective controls and procedures to guard against theft and diversion of controlled substances. 21
25 U.S.C. § 823(a)(1). Plaintiff alleges that InterDent was required to be registered under the CSA, that
26 InterDent failed to provide effective controls and procedures, and that Dr. Bae was a member of the
27 class of people whom the regulations were designed to protect.

28 InterDent moves for summary judgment on the ground that InterDent is not subject to the
registration requirement of the CSA because it did not “dispense” or “distribute” controlled substances.
The definition of the term “dispenser” is “an individual practitioner, institutional practitioner, pharmacy
or pharmacist who dispenses a controlled substance.” 21 C.F.R. § 1300.01(b)(11). An “individual
practitioner” is defined as “a physician, dentist, veterinarian, or other individual licensed, registered, or
otherwise permitted, by the United States or the jurisdiction in which he/she practices, to dispense a

1 controlled substance in the course of professional practice, but does not include a pharmacist, a
2 pharmacy, or an institutional practitioner.” 21 C.F.R. § 1300.01(b)(17). Additionally, an “institutional
3 practitioner” is defined as a licensed or registered hospital. 21 C.F.R. § 1300.01(b)(18). InterDent
4 argues that it does not fit any of these definitions because it simply provides administrative support
5 services for the PCs. *See Powers Decl. MSJ, Ex. R (Group Management Agreement between Gentle*
6 *Dental and Nakaki Dental Corporation); Hertzig Decl., Ex. 3 (Group Management Agreement between*
7 *Gentle Dental and Tancio Dental Corporation).*

8 Plaintiff contends that InterDent is an institutional practitioner because it dispensed and/or
9 distributed controlled substances. To support this argument, plaintiff argues that InterDent’s surgical
10 assistants “would obtain narcotics . . . from InterDent’s boxes or cabinets and provide them to Dr. Bae
11 for use in his procedure on patients.” Pl.’s Opp’n to Df.’s Mot. Summ. J., 20:17-19. However,
12 “dispense” is defined as delivering “a controlled substances to an *ultimate user*.” 21 U.S.C.
13 § 802(10)(emphasis added). An ultimate user “means a person who has lawfully obtained, and who
14 possesses, a controlled substance for his own use or for the use of a member of his household or for an
15 animal owned by him or by a member of his household.” 21 U.S.C. § 802(27). Consistent with these
16 definitions, InterDent did not dispense controlled substances. Rather, Dr. Bae, as the registered oral
17 surgeon, “dispensed” controlled substances to the “ultimate users,” his patients.

18 The CSA states “‘distribute’ means to deliver (other than by administering⁹ or dispensing) a
19 controlled substance or a listed chemical. The term ‘distributor’ means a person who so delivers a
20 controlled substance or a listed chemical.” 21 U.S.C. § 802(11). “Deliver,” in turn, is defined as “the
21 actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not
22 there exists an agency relationship.” 21 U.S.C. § 802(8). Here, InterDent employees placed orders and
23 paid for controlled substances on behalf of Dr. Bae and other registered dentists, for use in the dental
24 practice. However, the registration requirement is waived “for any agent or employee of a person who

25
26 ⁹ According to the CSA, “[t]he term ‘administer’ refers to the direct application of a controlled
27 substance to the body of a patient or research subject by—
28 (A) a practitioner (or, in his presence, by his authorized agent), or
(B) the patient or research subject at the direction and in the presence of the practitioner,
whether such application be by injection, inhalation, ingestion or any other means.” 21 U.S.C.
§ 802(2).

1 is registered to engage in any group of independent activities, if such agent or employee is acting in the
2 usual course of his/her business or employment.” 21C.F.R. § 1301.22(a). Under the dental group
3 management agreement between InterDent and the PCs, InterDent “serve[s] as the purchasing agent for
4 [PCs]” and does not possess dental licenses or certificates. *See* Powers Decl. MSJ, Ex. R; Hertzig Decl.,
5 Ex. 3. Thus, pursuant to the terms of the management agreements and 20 C.F.R. § 1301.22(a),
6 InterDent is exempt from the registration requirement because its employee acted as purchasing agents
7 for the dentists.

8 Plaintiff relies on *United States v. Stidham*, 938 F. Supp. 808 (S.D. Ala. 1996), to argue that
9 InterDent is subject to the CSA registration requirement. In *Stidham*, the defendant owned the Gulf
10 Coast Drug Control Center, which obtained a DEA registration in order to operate a methadone
11 treatment clinic. There was a factual dispute as to whether the defendant owned the Gulf Coast Drug
12 Control Center either solely, or in partnership with a doctor. The methadone clinic failed to maintain
13 a dispensing log and other records required of a DEA registrant. The defendant claimed that he was not
14 liable because he believed that the actual registrant was the doctor, who had signed the registration
15 application. The court rejected that argument. “The application, however, was signed on behalf of the
16 Gulf Coast Drug Control Center, which was the entity operating a narcotic treatment center. Moreover,
17 there is nothing in the Act or the regulations that makes the registration requirement applicable solely
18 to medical personnel. To the contrary, the regulations require that all persons involved in the
19 manufacture, distribution and dispensing of controlled substances be registered, 21 C.F.R. § 1301.21,
20 and defines persons to include ‘any individual corporation, government or governmental subdivision
21 or agency, business trust, partnership, association, or other legal entity.’ 21 C.F.R. § 1301.02.” *Id.* at
22 814. *Stidham* is inapposite because there it was undisputed that the clinic was dispensing methadone
23 and subject to the registration requirements.

24 Defendant’s motion for summary adjudication of the claim for negligence per se is GRANTED.

25
26 **C. Unclean hands**

27 InterDent moves for summary judgment on its affirmative defense of unclean hands. InterDent
28 argues that plaintiff’s claims are barred by unclean hands because Dr. Bae illegally diverted the

1 Fentanyl, and plaintiff knew about Dr. Bae’s drug addiction and yet never informed InterDent or any
2 other third party (except therapists) about his drug problems. InterDent has submitted, *inter alia*,
3 deposition testimony by Karen Weinberger, Dr. Bae’s therapist, in which Ms. Weinberger stated that
4 plaintiff was “babysitting” Dr. Bae and accompanying him to work every day to make sure Dr. Bae
5 would not use drugs.¹⁰ InterDent argues that by failing to report her husband’s drug addiction to the
6 California Dental Board, the dental corporations, InterDent, or any third party who could have
7 intervened, plaintiff ensured that Dr. Bae maintained his access to Fentanyl.

8 Plaintiff contends that there are numerous questions of fact that preclude summary judgment on
9 this affirmative defense. In addition, plaintiff argues that InterDent cannot invoke unclean hands
10 because it violated the Controlled Substances Act and because it would violate public policy. As
11 discussed *supra*, the Court finds that InterDent has not violated the Controlled Substances Act, and thus
12 the CSA is not a bar to InterDent’s unclean hands defense. None of the cases cited by plaintiff
13 demonstrate why, as a matter of public policy, InterDent should be precluded from asserting an unclean
14 hands defense here.

15 The Court finds that on this record, the Court cannot grant summary judgment on InterDent’s
16 unclean hands defense. There are numerous factual questions implicated by the unclean hands defense,
17 and those questions cannot be resolved on summary judgment. *See Mattco Forge, Inc. v. Arthur Young*
18 *& Co.*, 5 Cal. App. 4th 392, 407 (1992) (reversing summary judgment and explaining that “as a general
19 rule, application of the unclean hands doctrine remains primarily a question of fact.”). Plaintiff requests
20 that the Court bifurcate the unclean hands defense and hold a separate court trial on the matter, while
21 InterDent asserts that because the facts surrounding the unclean hands defense are intertwined with the
22 legal claims, the defense should be tried to the jury. The Court will address this matter at the pretrial
23 conference.

24
25 **III. Rule 11 Sanctions**

26 InterDent seeks Rule 11 sanctions against plaintiff and her counsel on the ground that plaintiff

27 _____
28 ¹⁰ Ms. Weinberger’s deposition was taken after InterDent’s reply brief was filed, and thus this
evidence was first submitted in InterDent’s post-hearing supplemental briefing on unclean hands.

1 failed to conduct a reasonable investigation into the facts before filing this case. InterDent seeks three
2 forms of sanctions: an order requiring plaintiff to withdraw her complaint and FAC with prejudice, an
3 award of attorney's fees incurred in this action, and an order that all outstanding costs to be paid to
4 InterDent in the underlying action be paid immediately, with interest. Plaintiff contends that InterDent's
5 Rule 11 motion is baseless and requests that the Court grant plaintiff her attorney's fees in opposing this
6 motion, in the amount of \$8, 670.

7 The Court finds that Rule 11 sanctions are not warranted. The parties' arguments on the
8 sanctions motion largely mirror those made on summary judgment. Although the Court has granted
9 partial summary judgment in favor of InterDent, the Court does not find that plaintiff's unsuccessful
10 claims were frivolous or brought for an improper purpose. The Court DENIES InterDent's motion, and
11 DENIES plaintiff's request for fees.

12
13 **CONCLUSION**

14 For the foregoing reasons, the Court DENIES plaintiff's motion to amend, GRANTS IN PART
15 AND DENIES IN PART defendant's motion for summary judgment, and DENIES defendant's motion
16 for Rule 11 sanctions. (Docket Nos. 79, 99, 103). The Court SUSTAINS plaintiff's objection to
17 InterDent's citation to an unpublished California Court of Appeal opinion. (Docket No. 155). Except
18 as addressed in this order, the Court does not rule on the parties' evidentiary objections because this
19 order does not rely on the evidence at issue.

20
21 **IT IS SO ORDERED.**

22
23 Dated: August 3, 2010

24 
25 _____
26 SUSAN ILLSTON
27 United States District Judge
28