IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1104318 BC Ltd. v. Dr. Paul Wittenberg, Inc.,* 2023 BCSC 1520

Date: 20230830
Docket: S1912324
Registry: Vancouver

Between:

1104318 BC Ltd.

Plaintiff

And

Dr. Paul Wittenberg, Inc. and Dr. Paul Wittenberg

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:	J.J.R. Schachter P.A. Kressock K. Jalilvand, Articled Student S. Andison, Articled Student J. Ovsenek, Articled Student
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Place and Date of Trial/Hearing:	Vancouver, B.C. March 20–24 & 27–31, April 3–6, May 29–31, June 1–2 and 6–7, July 24–25 and 31, 2023
Place and Date of Judgment:	Vancouver, B.C. August 30, 2023

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I. INTRODUCTION

[1] This matter involves the purchase and sale of a dental practice pursuant to an asset purchase agreement dated September 11, 2017. The action centres on the plaintiff's allegations that the defendants seriously misrepresented the value of the dental practice and, in particular, falsely represented that the dental practice was legitimately capable of generating billings of approximately $700,000 per year.

[2] The plaintiff has sued in both tort and breach of contract, seeking the return of the $870,000 purchase price for the dental practice and consequential damages. The plaintiff alleges that the defendant made fraudulent misrepresentations upon which the plaintiff relied in purchasing the dental practice and, if this had been known, the plaintiff would not have purchased the business.

[3] The plaintiff also seeks punitive damages on the basis the misconduct represents a marked departure from ordinary standards of decency.

II. ISSUES

[4] The plaintiff says there are five issues to be decided at this trial:

1) Did the defendants fraudulently or negligently misrepresent to the plaintiff the legitimate revenue-generating capacity of the dental practice?

2) If the plaintiff had known the truth about the manner in which the defendant billed patients and their insurers in their operation of the dental practice, would he have declined to purchase the dental practice?

3) In addition, or in the alternative, are the defendants liable in breach of contract on the basis that the contractual representations made to the plaintiff in the asset purchase agreement were false?

4) Is recovery barred by virtue of the defendants champerty defence?

5) What is the correct measure of damages?

[5] As can be seen from the statement of issues, the essence of the plaintiff's case is the allegation of fraud or fraudulent misrepresentation. While the plaintiff argues in the alternative that the defendants are liable in breach of contract on the basis of misrepresentations in the asset purchase agreement, the main focus of the plaintiff's case was to establish fraud or fraudulent misrepresentation. The plaintiff did not pursue the claim of negligent misrepresentation in final submissions.

[6] The plaintiff says it is not suggesting it relied upon a promise of future revenue, but rather the representation that the practice was a genuine, i.e. legitimate, source of steady revenue year after year, which was therefore a promise of the legitimate earning potential of the practice.

[7] Although the parties set out a detailed background, I will provide an abbreviated version.

III. BACKGROUND

A. The Parties

[8] In 1975, the defendant Dr. Wittenberg began practicing dentistry. In 1978, he began operating the dental practice that is at the centre of these proceedings from an office located at 1507-805 West Broadway, Vancouver. Dr. Wittenberg incorporated DPW Inc. in 1985, which then became the operating company for the practice.

[9] Susan Lazarus, Dr. Wittenberg's wife, began working as a certified dental assistant ("CDA") in 1994 and started working as a CDA at Dr. Wittenberg's dental practice in 1995. Eventually, Ms. Lazarus became the dental practice's office manager, overseeing the day-to-day running of the office. She hired staff members, set up the training schedule and manual for new staff, ordered supplies and maintained equipment. She was not however involved in the financial matters of the practice. In addition, she performed CDA work as necessary. She did not receive a salary for her work at the practice.

[10] Dr. Danny Shum received his Honours Bachelor of Science from Simon Fraser University in 2006 and his Doctor of Dental Medicine from the Boston University Henry M. Goldman School of Dental Medicine in May 2013. He then undertook approximately a year of advanced studies and residency during which he participated in a number of international aid projects providing dental care.

B. Dr. Shum's Purchase of the Dental Practice

[11] In August 2014, Dr. Shum returned to the Lower Mainland and practiced as an associate at a variety of dental offices until 2017. During this time, he considered his dentistry career options, including purchasing a dental practice.

[12] In October 2016, Dr. Shum met with Teresa Dixon, a wealth advisor and associate portfolio manager with the Royal Bank of Canada ("RBC"). He was referred to an accountant, Shiv Deol, for assistance, as Mr. Deol specialized in and worked with dentists and dental practices.

[13] As Dr. Shum advised Ms. Dixon that he was interested in starting his own dental practice, in the spring of 2017, Ms. Dixon put Dr. Shum in contact with Dr. Wittenberg and Ms. Lazarus.

[14] Dr. Shum met with Dr. Wittenberg and Ms. Lazarus on May 15 and 29, 2017, regarding the prospective purchase of Dr. Wittenberg's dental practice. Dr. Shum said Dr. Wittenberg was interested in selling the practice to a young dentist and not a corporate chain of dental offices.

[15] There is however a dispute as to whether Dr. Wittenberg was interested in selling the practice at this time and whether, as a result, he provided inducements to Dr. Shum to purchase the practice.

[16] On May 31, 2017, Dr. Wittenberg sent an email to Dr. Shum to which was attached the statements of income and retained earnings of DPW Inc. for the dental practice for the financial years ending January 31 for 2015, 2016 and 2017. In that email, Dr. Wittenberg indicated he had a 4.5-day work week with an average of six

to seven weeks of vacation per year. He also indicated there was a potential upside of 35 percent to the dental practice's gross income if the practice were to employ a dental hygienist and began performing certain specialty work, such as implants, in house, as Dr. Wittenberg had previously been referring that work out to specialists. In addition, Dr. Wittenberg advised that he had been told the practice was worth $875,000. Dr. Wittenberg invited Dr. Shum to make a "timely offer" before "we consider officially marketing it for sale".

[17] Dr. Shum indicated he was interested in the practice, as the dental practices he had seen available for purchase cost between $1 million and $1.5 million. He had also explored starting a new practice, but noted that would require an initial investment of between $800,000 and $1 million. Accordingly, he was interested in Dr. Wittenberg's dental practice as it came with an existing patient base. He had been advised that between 900 and 1,000 patients was a good starting number for a dental practice. In his view, 700 to 900 patients was a minimum, with 1200 patients being a "nice, productive practice". In addition, he noted 65 percent of the patients in Dr. Wittenberg's practice were between the age of 25 to 55, which was ideal, as patients in this age range tend to have insurance and families. As Dr. Shum intended to work six days per week and take less vacation than Dr. Wittenberg, he was of the view that there was a real opportunity to grow the practice.

[18] Dr. Shum noted that in the May 31, 2017, email, Dr. Wittenberg indicated that he wished to have an offer and signed agreement by September 2017.

[19] Dr. Wittenberg was examined as an adverse witness by the plaintiff in this trial. He agreed he sent an email dated May 31, 2017, to Dr. Shum to which was attached the practice's 2015, 2016, and 2017 financial statements. With respect to his claimed 4.5-day work week and six to seven weeks of annual vacation time, he noted that these represented the hours that patients were booked. In reality, he would arrive at the office daily at 6:45 AM and work until 5:45 PM.

[20] With respect to the comments in the email about the 35% upside of the practice, he said this arose as a result of Dr. Shum telling him that he would

undertake what he referred to “as high ticket items” that Dr. Wittenberg currently referred out. As a result, if Dr. Shum wanted to do this work and felt he was capable of it, Dr. Wittenberg was of the view that could result in an upside of 35 percent.

[21] When it was put to Dr. Wittenberg that he had noted this 35% upside in conjunction with the $875,000 value of the business in order to entice Dr. Shum to buy his practice, Dr. Wittenberg was adamant that the practice was not for sale. Rather, he was of the view that he was giving Dr. Shum, a young dentist, advice, as Dr. Shum had been referred to him to discuss dentistry practice by Ms. Dixon.

[22] Dr. Wittenberg also indicated he was not attempting to entice Dr. Shum to purchase the practice by referring to how 65 percent of its patients were ages 25 to 55. Instead, he said he was simply advising Dr. Shum of the demographics of the practice.

[23] Dr. Wittenberg said he provided the financial information because Dr. Shum had requested it. None of this information was intended to act as an enticement, as he was not interested in selling the practice.

[24] Dr. Wittenberg was taken to a number of emails in which he described the practice as a great opportunity, highly respected and profitable. However, he was adamant that it was Dr. Shum who had pursued the purchase of the practice. Dr. Wittenberg reiterated that the practice was not for sale, and he did not have an interest in selling it initially. He had explored it at that time because, if it worked out, that would be good, but if not, he was happy to carry on.

[25] Dr. Wittenberg was also taken to a number of emails in which he was described as providing reassurances to Dr. Shum about a variety of matters. Once again, he was adamant these were not reassurances, but rather were part of a conversation about the office, with the information being provided at Dr. Shum’s request.

[26] Dr. Wittenberg was further cross-examined on whether his practice was for sale and why he agreed to a meeting with Dr. Amin Shivji of 123 Dental, who was

buying dental practices in the area. Dr. Wittenberg said that he was merely exploring what was happening with dental practices in the neighbourhood, as he did not know about 123 Dental's business activities or plans. While Ms. Lazarus may have wanted him to slow down and spend more time with his daughter, Dr. Wittenberg said he was a workaholic and enjoyed what he was doing. If this sale had not gone through, he would have continued to work in the dental practice he enjoyed.

[27] Ms. Lazarus also testified on this point. She noted on May 11, 2017, the business was contacted by Dr. Shum, who was referred to them by Ms. Dixon, a friend of Ms. Lazarus.

[28] A meeting was arranged, which Ms. Lazarus said was so that Dr. Wittenberg and Ms. Lazarus, who had been in a dental business for a significant period of time, could discuss and share information with a new dentist to assist him. Ms. Lazarus said she and Dr. Wittenberg were not interested in selling the business at the time. In an email sent May 12, 2017, Ms. Lazarus provided Dr. Shum the dental practice's location and indicated that his "confidentiality in regards to this meeting is appreciated".

[29] At that meeting, Ms. Lazarus said Dr. Shum told them his story and career path and indicated that he wanted to get out of corporate dentistry so he could work independently and be his own boss. He was interested in purchasing a small dentistry practice, as he was unhappy with his current situation. He also noted their similar dentistry approach, which was patient-centred, i.e. it was focused on building relationships with patients. At some point, Ms. Lazarus said the conversation changed, and he asked if they would consider selling the practice.

[30] On May 19, 2017, Ms. Lazarus sent an email to Dr. Shun saying "Let's meet again to discuss more details". Ms. Lazarus indicated this email was sent because Dr. Shum's question as to whether they would consider selling the practice had resulted in lots of discussion between Ms. Lazarus and Dr. Wittenberg over the weekend following the meeting. Ms. Lazarus said this was because the couple were not previously considering selling the dental practice or retiring at this time. As a

result, they wanted to see what a sale would look like, and a meeting was ultimately set up for May 29, 2017, to discuss the details.

[31] Ms. Lazarus was cross-examined extensively on this point and taken to a number of emails that appear to reflect conversations with others, including Dr. Shivji, about the sale of the practice. In response, Ms. Lazarus said she was gathering information because, although Dr. Wittenberg was not interested in selling the dental practice, he was interested in what was happening in his Broadway neighbourhood. It appeared Dr. Shivji, who has a corporate dentistry practice, was purchasing the practices of many dentists that Dr. Wittenberg knew. While Ms. Lazarus acknowledges that Dr. Wittenberg met with Dr. Shivji, Ms. Lazarus said that meeting was aimed at finding out what was happening in the area.

[32] A review of this testimony and the documentary evidence leads me to conclude that, while Dr. Wittenberg and Ms. Lazarus may not have been actively pursuing opportunities for the sale of his practice, after the question of the sale of the dental practice directly arose during their meeting with Dr. Shum, Dr. Wittenberg and Ms. Lazarus discussed the possibility of selling the dental practice, as Ms. Lazarus was interested in Dr. Wittenberg spending more time with his young daughter. The potential sale of the dental practice therefore became more of a concrete path. Dr. Wittenberg still however had reservations about a sale and was prepared to continue with his practice.

[33] The plaintiff points to how when Ms. Dixon first raised the possibility of introducing Dr. Shum to Dr. Wittenberg in an email sent May 10, 2017, she noted how “some good friends of mine are contemplating a practice sale ”. In my view, the operative word here is “contemplating”. This simply indicates they were considering the possibility, not that they had decided to do so.

[34] I also note there was much discussion between Dr. Shum and Dr. Wittenberg about the difference between corporate dentistry and the nature of Dr. Wittenberg’s patient-centred practice. As Dr. Wittenberg noted, he had 40 years of experience

with this approach to dentistry, which put him in the position to share this knowledge with a young dentist who was also looking to move into a patient-centred practice.

[35] Ultimately, however, I do not find this to be a critical part of the evidence, as the crux of the case is argued to be the alleged fraudulent nature of Dr. Wittenberg's dental billing practices.

[36] On June 6, 2017, Dr. Shum reviewed the statements of income and retained earnings with his accountant, Mr. Deol. The two discussed a number of things, including Dr. Shum's view that he would need to make certain upgrades, including increasing the number of chairs in the dental practice to three. The two also discussed the fact that the salary numbers were low compared to the average of a dental practice, as Ms. Lazarus, who worked as the office manager, did not take a salary. Calculations were prepared to reflect the hiring of a receptionist, CDA and office manager. The wages for these personnel would ultimately would lead to an $130,000 increase in fixed costs.

[37] In addition to the salary issue, Mr. Deol's initial impression was that the dental practice had high profits relative to its size. In the discussion with Dr. Shum, Mr. Deol reviewed a variety of cash-flow scenarios and advised Dr. Shum to do a chart audit of the practice as part of his due diligence.

[38] In these discussions, Dr. Wittenberg was clear that he told Dr. Shum they did not bill exclusively according to the suggested rates found in the 2017 BC Dental Association Fee Guide (the "BCDA Fee Guide"). Rather, the amounts charged varied, and bills would be rendered for amounts greater than the suggested fee in the guide. Crowns and bridges would be over the BCDA Fee Guide rate, as were situations involving difficult case management issues or requiring a significant amount of time. Dr. Wittenberg added that these amounts would be discussed with the patients.

[39] As a result of these discussions, on June 11, 2017, Dr. Shum sent a detailed email to Dr. Wittenberg indicating that he would like to conduct a chart audit to get a

sense of the patient demographics of the office. This would include information such as the age of the patient, how active they were and whether there was insurance associated with the patients. In addition, he asked whether Dr. Wittenberg would prefer a share or asset deal as part of the purchase of the practice.

[40] Neither Dr. Shum nor Dr. Wittenberg wished to retain a broker, but the bank needed a proper evaluation of the practice. Ultimately RBC indicated it would accept an evaluation from Mr. Deol, who was experienced in dealing with the dental industry.

[41] Dr. Shum then contacted two further professionals to assist him with preparing to purchase the dental practice. One was Barb Smith, a commercial account manager at RBC who specialized in healthcare. Ms. Smith assisted Dr. Shum with an application for financing to purchase and operate the dental practice. Dr. Shum intended to finance the purchase by way of a loan from RBC and to access a line of credit with RBC that was sufficient to cover the operating costs of the dental practice for the first few months. Ms. Smith also provided three recommendations for lawyers to provide legal advice with respect to the purchase of the dental practice. As a result, Dr. Shum also retained a solicitor with experience in the purchase and sale of dental practices.

[42] Ultimately, Dr. Shum conducted a chart audit of the dental practice as part of his due diligence. He attended Dr. Wittenberg's office on June 26, 2017, to conduct the chart audit by reviewing a sampling of the charts in order to get a sense of the patient demographics and the nature of the dentistry work performed at the dental practice.

[43] Ms. Lazarus indicated all the charts were available for Dr. Shum to review. The evening of June 26, 2017, Dr. Shum arrived with his computer and a chart audit worksheet template (essentially a Microsoft Excel spreadsheet) given to him by his accountant, Mr. Deol. He selected the charts for review and filled out the spreadsheet with the information required. This process took between four and six

hours. During this process, Dr. Shun noted he was impressed with the meticulous nature of Dr. Wittenberg's notes in the patient charts.

[44] Dr. Shum counted the active files stored in the reception area and took a sampling of the patient files to assess the practice's demographics and nature of the work. Throughout the chart audit process, Dr. Shum was assisted by Ms. Lazarus, who provided the information from the patient charts in a confidential manner, as she was concerned about patient privacy. Dr. Shum entered this information in the spreadsheet.

[45] The spreadsheet indicated a patient profile, the length of time attending the practice, the gender, age, area of residence, and/or whether the office was close to their workplace. Dr. Shum reviewed a sample of 148 files. The information he reviewed also indicated the workflow and how busy it was at the office. There was an average of eight to 10 patients per day from Monday to Thursday and six patients on Friday. Ms. Lazarus also advised that the records reflected eight to 10 new patients a month.

[46] Ms. Lazarus indicated however that Dr. Shum was not interested in any other information. She offered to explain the X-Trac system. Dr. Shum said he was not interested, as he was good with computers and could figure it out himself. The patient ledger cards were also available. When she offered them to Dr. Shum to review, Ms. Lazarus said Dr. Shum replied that the paper system was outdated and he was not interested in looking at it, as he was going to operate the office with new software. Ms. Lazarus also said Dr. Shum had full access to all other dental practice information, including the appointment books.

[47] Dr. Shum said however he requested the appointment book a number of times. He said Ms. Lazarus provided various excuses as to why it wasn't available. Ms. Lazarus however denied saying the appointment book was not available or that it was at the accountants.

[48] On this point, I find it unlikely that Dr. Shum requested the appointment book a number of times. As he said earlier, he was focussed on the patient charts as part of the chart audit and this process of sampling was time-consuming. In addition, he had also declined to review the information in the X-Trac system and the patient ledgers. He was going to update what he saw as an out-dated system and was simply not interested in learning about the paper-based system currently in use.

[49] Dr. Shum was initially told there were 950 active patients and 200 inactive patients, totalling 1150. His chart audit reflected 941 active patients and 229 inactive patients, totalling 1170.

[50] On July 5, 2017, Dr. Shum sent an email to Mr. Deol indicating that he was "happy proceeding" with the purchase, as the chart audit had confirmed "[w]hat they said was pretty much accurate".

[51] On July 21, 2017, Mr. Deol's office prepared three different cash-flow projections for Dr. Shum. Based on these projections. Mr. Deol anticipated best case scenario cash flow of between $173,000 and $200,000, depending on the size of the loan.

[52] On July 31, 2017, Mr. Deol prepared an evaluation of the dental practice based on the statements of income and retained earnings that Dr. Wittenberg provided. Mr. Deol estimated the value of the dental practice to be somewhere between $900,000 and $1.025 million. This valuation pleased Dr. Shum, as the purchase price under discussion was $875,000. Mr. Deol's valuation was provided to RBC on August 1, 2017, to support Dr. Shum's application for financing and a line of credit.

[53] Mr. Deol and Dr. Shum discussed various potential cash flows to model the funds needed to operate the dental practice following completion of the sale. Those projections included accounting for contingencies like patient attrition, increased staffing costs and the need for capital upgrades due to the age of the practice. Dr. Shum in particular was interested in moving to a digital x-ray system and

gradually modernizing the practice. In addition, as Dr. Wittenberg did not wish to enter into an agreement that involved him being part of a transition process, the level of patient attrition (which can normally be up to 20 percent even with a transition process) was modelled to be 30 percent to reflect the lack of a transition.

[54] On July 21, 2017, Dr. Shum emailed Dr. Wittenberg, indicating that he "was happy and wanting to proceed" with the purchase of the dental practice. Dr. Shum forwarded a letter of intent to Dr. Wittenberg on August 1, 2017. After some back and forth, the purchase price was ultimately settled at $870,000.

[55] On August 3, 2017, Ms. Lazarus emailed Dr. Shum indicating that she and Dr. Wittenberg wanted to meet in person, as they had numerous issues to discuss, including the lease and a variety of other matters.

[56] Dr. Wittenberg sent an email to Dr. Shum on September 8, 2017, indicating concern about the length of time it was taking to complete the purchase. In his testimony, Dr. Wittenberg indicated he was getting frustrated, as it appeared Dr. Shum's professionals were disorganized and matters kept going back and forth between Dr. Shum's contacts at RBC, his lawyer and his accountant.

[57] On September 11, 2017, Dr. Shum forwarded a draft asset purchase agreement. The parties had a meeting regarding the agreement in which, Ms. Lazarus said, lots of discussion took place between Dr. Wittenberg and Dr. Shum. The financial statements had been attached and forwarded to Dr. Shum on September 9, 2017.

[58] In examination as an adverse witness in the plaintiff 's case, Dr. Wittenberg was taken to various provisions of the agreement, including those setting out supplies, goodwill, warrantees, contractual representations and other such provisions. He agreed these were in the agreement between the parties. With respect to the nature of billings and whether Dr. Shum had been advised about what fees were charged, he indicated that these were reflected on the financial statements. Neither Dr. Shum nor his advisors inquired about these things. This

included lab work done by Martek, a company that appears to have been owned by Dr. Wittenberg's son. In addition, he noted that lab fees were included in the stated revenue, as they were only broken down for insurance claim purposes.

[59] Dr. Shum financed the purchase price with $20,000 of his own money and a $850,000 loan from RBC. While on numerous occasions RBC requested that a broker be involved in the transaction, which delayed the process, it ultimately accepted the valuation of Mr. Deol in order to provide the financing. Dr. Shum also arranged with RBC a line of credit with a limit of $100,000, a digital upgrade loan for $75,000, and a business credit card with a limit of $70,000.

[60] Dr. Shum was cross-examined on the negotiations for the asset purchase agreement. He agreed there were at least two drafts exchanged before the final agreement was signed. As part of those negotiations, he agreed the financial representations were a "sticking point". He was firm that he did not want an "as-is" sale, but accepted the modification to the financial representations, as he understood that the rate of patient attrition would be between 20 percent and 30 percent, so obviously the income of $700,000 per year would not be generated.

[61] Dr. Shum was taken to a number of emails and letters exchanged between the parties. He agreed, as per his examination for discovery, that Article 5.4 of the asset purchase agreement would be modified to reflect that the vendor was not warranting the gross revenues and income of the practice.

[62] In a letter of October 19, 2017, the lawyer for Dr. Wittenberg indicated that:

> … The Financial Statement representation might be included with the following qualification. … The Vendor expressly disclaims (and the Purchaser must acknowledge) that the financial results shown in the Financial Statements are the result of the Vendor and Covenantor's efforts and there is no assurance by either the Vendor or the Covenantor that the Purchaser will be able to achieve the same (or similar) results as to gross revenues and net income in particular. In other words, the Purchaser is buying a book of business (goodwill) and what the Purchaser is able to make of it, is totally dependent upon the Purchaser's efforts, business acumen and patient retention.

[63] In a response email sent October 20, 2017, Dr. Shum's lawyer forwarded a revision and added an acknowledgement of this request. The actual term in the agreement with respect to financial representation reads as follows:

> 5.4 Financial Performance. The Purchaser understands that the financial results shown in the Financial Statements are the result of the Vendor and Covenantor's efforts and there is no assurance by the Vendor or the Covenantor that the Purchaser will achieve the same (or similar) results.

[64] Dr. Shum noted that, after he had arranged for the financing for the purchase, he received an email from Dr. Wittenberg on October 4, 2017, indicating he wished to have an irrevocable letter of credit for $100,000 because of the lease. Dr. Shum wrote back to Dr. Wittenberg on October 5, 2017, asking if there was "something he should know". That same day Dr. Wittenberg wrote back in some detail, indicating there was "definitely no cause for concern".

[65] With respect to the email of October 5, 2017, from Dr. Wittenberg and Ms. Lazarus to Dr. Shum, Ms. Lazarus indicated that the couple very much wanted to assist Dr. Shum. They wanted to help him, as he was a new young dentist who had never run a business before, while they had to doing so for many years. Ms. Lazarus was of the view that his ideas were quite unrealistic, and they wanted to help him out.

[66] The purchase and sale of the practice was completed as scheduled on October 31, 2017. The closing documents included financial statements indicating the dental practice's fee income to be $706,525 in 2014, $703,877 in 2015, $694,887 in 2016, and $689,873 in 2017. On the basis of these financial statements, Dr. Shum therefore concluded the average fee income for the practice was around $700,000 annually. Schedule B of the closing documents also included a list of dental and office equipment included in the purchase.

[67] On completion, the only employee that remained at the dental practice was the receptionist Tia Tanaka. Dr. Wittenberg and Ms. Lazarus testified that the physical records of the dental practice were located in two areas. The patient files for current patients were stored in filing cabinets behind the reception desk, and the

inactive patient files for former and deceased patients were stored in filing cabinets in the laboratory area. The appointment book for 2017 was left in the reception area.

[68] In the meantime, Dr. Shum sought marketing assistance from a variety of individuals, including a website developer. He also increased staffing by hiring two CDAs to assist him as part of his practice, which further increased his monthly fixed costs.

[69] The financing provided by RBC required Dr. Shum to make monthly payments of $8,500 on the loan. In addition, he was required to pay $3734.78 on the lease and $6,000 a month in rent.

[70] On October 31, 2017, Dr. Shum attended for a final walkthrough to inspect the office and equipment before the hand over of the business. Ms. Lazarus indicated he arrived with a checklist to ensure all the items listed in the asset purchase agreement were present. Ms. Lazarus accompanied him and showed him where all the items were. Dr. Wittenberg then showed Dr. Shum how to use the equipment.

[71] Ms. Lazarus said all the records were left at the office. The appointment book was left in its normal location at the front desk, along with a new laptop on which an IT specialist had installed the practice's software, the purchase of which was discussed with Dr. Shum in advance. In addition, they left the normal business supplies (*i.e.*, two weeks' worth) of disposable items such as surgical gloves and other dental supplies.

C. Dr. Shum's Dental Practice

[72] Dr. Shum took over the dental practice on November 1, 2017. As mentioned, he had access to the appointment book for 2017, which had been left in the reception area. Dr. Shum said the appointments in that book appeared to indicate that Dr. Wittenberg had far fewer appointments and worked much shorter hours than Dr. Shum had been led to believe. While a 2018 appointment book has also been left in the reception area, no patient appointments were recorded in it, even though

2018 was just two months away. Dr. Shum said he did not recall being told that November and December were traditionally a slow time for Dr. Wittenberg's practice.

[73] However, Dr. Shum did agree in cross-examination that Dr. Wittenberg's former staff would be assisting him with patient appointments for the first two weeks in November, and after that he would be on his own to book patients into his practice.

[74] Dr. Shum did not have a business plan. While he referenced the various projections prepared by Mr. Deol as a business plan, he considered his responsibility to be the dental work, with Ms. Tanaka being responsible for booking patients.

[75] Dr. Shum noted that the new laptop did not work properly. He did however use the laptop until his departure in February 2018, when he duplicated the information onto his own personal laptop. In cross-examination, Dr. Wittenberg agreed that he had replaced the laptop, but that had been done with the knowledge of Dr. Shum, as the previous one had been overheating and he wanted to ensure he had a new version with all the appropriate information.

[76] With respect to whether the dental practice's equipment was in working condition as Dr. Wittenberg had claimed in an email sent to Dr. Shum on August 1, 2017, Dr. Wittenberg confirmed that the equipment in the office was fully operational at that time, and nothing changed subsequently. With respect to a September 11, 2017, email from Dr. Shum to which was attached the asset purchase agreement and in which he inquired about listing equipment "to protect ourselves so in your last week you don't empty out the whole place", Dr. Wittenberg noted the lengthy equipment list set out as Schedule B to the agreement.

[77] Dr. Wittenberg indicated that on the day he left the office, it was fully operational with supplies and equipment stocked as if he would return to work the next day. Dr. Wittenberg indicated the patient charts, files and more were all left in the office.

[78] In contrast, Dr. Shum said his first impression of the office was that it lacked basic supplies and seemed cleaned out. There were numerous supply issues. He had insufficient gloves, parts of the drills were rusty and even the paper towels were gone. He did, however, agree that $25,000 of the $870,000 purchase price was allocated to supplies.

[79] Ms. Tanaka, the receptionist who worked for Dr. Wittenberg from June to October 2017 and then for Dr. Shum until February 2018, did not recall these events. Ms. Tanaka was not of the view that supplies were low and did not observe Dr. Wittenberg nor Ms. Lazarus removing any supplies for the office on their departure. In addition, she did not recall that the dental practice's laptop was not properly working.

[80] In cross-examination, Dr. Shum agreed that he did a final walkthrough of the dental clinic before obtaining the keys for the premises. He also agreed that the equipment listed in the asset purchase agreement was present. However, he noted there were "limited supplies" and said he could not ascertain the condition of the equipment until he actually used it. It was only then that he noticed certain issues. He did however agree that Dr. Wittenberg had indicated they operated with a low level of supplies to keep costs down.

[81] While Dr. Shum said that initially, he was absent from the dental practice office from November 1–3, 2017, as he was completing the second part of a course, he said that, subsequently, he worked hard to get the dental practice re-supplied and to boost patient numbers. On November 20, 2017, in response to an email from his website developer, he indicated the dental practice was an "absolute gong show".

[82] Dr. Shum was cross-examined as to why he did not avail himself of the asset purchase agreement's adjustments clause (Article 2.8), which gave both parties the right to raise issues that could lead to adjustments in the final price within 90 days of the closing. He indicated in discussions with his counsel that the amounts involved to resupply were approximately $8,000 to $10,000, and he was advised that unless

the amounts were closer to $25,000, it was not worth pursuing. Accordingly, he just "took it on the chin".

[83] Ms. Lazarus indicated she visited the office a number of times after the November 1, 2017, handover, and Dr. Shum indicated all was going well. On one visit, Dr. Shum indicated a certain piece of equipment was not working. Ms. Lazarus investigated and, finding the water line kinked, unkinked it, which caused the equipment to begin operating as per normal.

[84] With respect to the supplies issue, while this point does not appear to have been pursued in final argument, I conclude sufficient supplies were left in quantities corresponding with the lower-than-normal par levels Dr. Wittenberg had maintained while operating the practice. Dr. Wittenberg indicated he usually had a two-week supply of the necessary items, and these are the supply levels Dr. Shum found at the clinic. I note that, while Dr. Shum may have had a different impression of what levels of supplies were appropriate, he did not avail himself of any of the tools in the asset purchase agreement to address this matter, including Article 2.8. Furthermore, Ms. Tanaka was clear she did not observe a problem with supplies and did not see Dr. Wittenberg nor Ms. Lazarus removing any items from the premises.

[85] This finding also, to some extent, bolsters the defendants' credibility in this matter, as it reflects a purchaser who did not have a good understanding of how to profitably operate a small dentistry practice. This reality was, to a great extent, responsible for subsequent events.

[86] From November 1–30, 2017, Dr. Shum recorded billings of $16,079.89. From December 1–31, 2017, he recorded billings of 23,300.74. These amounts were far less than the expected monthly billings of approximately $58,000 as reflected in the financial statements forwarded to him by Dr. Wittenberg.

[87] On December 5, 2017, Dr. Shum contacted Ms. Smith of RBC to say things "didn't look good" and to see if he could get a break on loan repayment, although that did not occur until some time later in his testimony. He also indicated there had

been some "'fishy' billings" largely involving the changing of billing dates, and he wanted to look more closely at the matter. He also referred to possible Canada Revenue Agency fraud, as he was "told by the receptionist that payments had been taken in the back room and not recorded". During her testimony, Ms. Tanaka denied ever making this statement to Dr. Shum.

[88] In order to keep the office afloat, he sent out emails to a variety of dental practices seeking to supplement his income by working weekends and Friday afternoons. He also offered discounts to groups of individuals, including the residents of his apartment building, the employees of local businesses and hospital employees. While some of this resulted in new patients, Dr. Shum found he was still in a very difficult situation.

[89] Dr. Shum testified that he believed that there had been a 70% patient attrition rate during his time in the practice. He was, however, taken to comparable numbers for the same time periods indicating a patient attrition rate closer to 37 percent. In January 2018, records indicated that the patient attrition rate was closer to 28 percent.

[90] Despite the fact that Dr. Wittenberg had indicated in October 2017 that he would provide advice for six months without charge, and the asset purchase agreement contained a clause to that effect, Dr. Shum did not consult Dr. Wittenberg about these difficulties. While he agreed he had that opportunity, he said he did not think he needed to talk to Dr. Wittenberg, as he knew how to do dental work and Ms. Tanaka knew how to bill, being the previous receptionist for Dr. Wittenberg. Ms. Tanaka said, however, she took instruction from Dr. Shum because she was still new to being a receptionist.

[91] Dr. Shum also indicated that, once he shared with his lawyer that he had discovered what he considered to be improper billing practices, his lawyer advised him not to consult with Dr. Wittenberg.

[92] Dr. Shum also contacted Mr. Deol by email on December 11, 2017, to indicate the numbers that the practice had initially reflected were significantly lower and seek advice. He told Mr. Deol that he was "bleeding money" and "d[id]n't know how long [he could] stay afloat". Mr. Deol advised him to do a deep dive into the previous dental charts and records.

[93] Dr. Shum spent the Christmas period working very long hours and doing a detailed review of the dental practice's records. On December 26, 2017, he emailed the BCDA indicating his rising stress level, the difficulties he was encountering with the dental practice, and his concerns over potential billing fraud. He also noted possible tax fraud. In cross-examination, he indicated this latter comment was made with reference to comments from Ms. Tanaka, who said that some payments had been taken in cash and not reflected accurately in the ledgers. He also noted some issues with the dating on some invoices, which he thought may be related to possible insurance fraud.

[94] Dr. Palmer responded to him that day, referring him to two other individuals who might be able to deal with some of these concerns. Dr. Palmer also arranged a phone call for the next day, as he was concerned about Dr. Shum's wellbeing.

[95] Dr. Shum also messaged the CEO of a major dental corporation on December 30, 2017, to see if it was possible to sell the patient charts of the practice.

[96] In January 2017, Dr. Shum engaged a credit counsellor and was in contact with an insolvency trustee. He suffered a breakdown stress situation.

[97] Dr. Shum recorded billings of $15,582.58 in January 2018, well below the level needed for the dental practice's continued viability.

[98] On February 9, 2018, Dr. Shum closed the dental practice. On February 13, 2018, he submitted a notice of proposal to creditors in accordance with s. 51 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The initial proposal was not accepted, so he submitted a second proposal on March 22, 2018. The proposals

were rejected by Dr. Shum's creditors, and he was deemed to have made an assignment into bankruptcy on March 22, 2018.

[99] His personal statement of affairs, dated February 10, 2018, indicated his only substantial assets were this contingent lawsuit, which he valued at approximately $400,000 (the "Contingent Action"), and his home, which was worth $165,262.50 after accounting for its mortgage.

[100] These were difficult times for Dr. Shum. After discussions with the BCDA, he eventually took the patient charts to another practice, where he was able to provide services to the patients.

[101] Throughout his testimony and in cross-examination, Dr. Shum said and agreed that he was advised by and relied on two experts, the accountant, Mr. Deol, and Ross Pollock, the lawyer, who both guided him through the process, Dr. Shum emphasized how his reliance on these two individuals was necessary because he was new to running his own business. He agreed however that he had not brought a lawsuit against either of these individuals. He also said he relied upon Ms. Smith of RBC, who is knowledgeable in the health services financing field.

[102] In addition, he agreed that, while he knew Article 5.4 of the asset purchase agreement contained a specific provision that there was no assurance by the vendor that the purchaser will achieve the same financial results, he said he relied on the statements of income and financial documents attached.

[103] In re-examination, Dr. Shum confirmed that on June 19, 2018, RBC obtained a default judgement against Dr. Danny Shum Inc. for the amount of $806,193.43 and interest in the amount of $5,750.91. Dr. Danny Shum Inc. is the principal shareholder of the plaintiff in this matter.

IV. ANALYSIS

A. Preliminary Issue: Can an adverse inference be drawn because the plaintiff has failed to adduce certain documents?

1. Legal Principles

[104] The defendants ask the court to draw an adverse inference in this case on the basis the plaintiff has failed to adduce numerous documents. The defendants note whether an adverse inference should be drawn is a matter of the court's discretion. An adverse inference will be drawn against a party who fails to adduce material evidence without a satisfactory explanation: *Walek v. Guardian Storage Inc.*, 2010 BCSC 365 at para. 46.

[105] The defendants rely upon the following passage from *Wigmore on Evidence* that was recently cited in *Stone v. Milev*, 2022 BCSC 319 at para. 68:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.
>
> [Emphasis in original.]

2. Positions of the Parties

[106] As part of considering this matter, the defendants ask the Court to draw an adverse inference against the plaintiff due to the absence of certain documents, which they allege would have been exculpatory. The defendants note all the dental practice's records were left with Dr. Shum and have been in the plaintiff's possession since November 2017.

[107] The defendants point out that the plaintiff identified possible litigation as early as February 2018. Dr. Shum's statement of affairs in his bankruptcy filings identified the existence of the Contingent Action. In cross-examination, Dr. Shum admitted that he knew as of February 10, 2018, that he would be bringing a lawsuit against the defendants.

[108] Accordingly, the defendants say it was incumbent on Dr. Shum to take all necessary steps to preserve the documents that came into his possession on November 1, 2017. The defendants submit that Dr. Shum would have had possession of documents "including missing Appointment Day Sheets, the One-Write Ledger system, all insurance billings and complete patient files".

[109] The defendants consistently raised these issues prior to trial. In particular, on January 30, 2023, the defendants served the plaintiff with a demand for production of documents, including "missing Appointment Day sheets, Detailed Consultation Notes, Medical History Updates and Notes, Lab Invoices, Treatment Plans and Estimate". As the defendants noted, no Appointment Day Sheets have been produced at all, and some patient charts and patient ledgers are missing.

[110] Since November 1, 2017 all of the dental practice's records have been in the possession of Dr. Shum. Counsel for the plaintiff submits that it was only over the course of the trial that evidence of fraud emerged. However, there has been no forensic audit, and there is not good reason why counsel could not have brought forward this issue sooner. Unfortunately, they failed to do so, and not for lack of legal or accounting advice, as Mr. Deol continues to be the plaintiff's accountant.

[111] It is therefore open to the court to conclude that, had such evidence been available, it would have been brought forward—and it has not.

[112] The defendants point out it is not incumbent on them to disprove the allegations made against them. Rather, the onus to prove such allegations rests on the plaintiff, who has not met this burden.

[113] The defendants further submit that, in view of the lack of evidence of: (1) any investigation or audit by any insurer; (2) any complaint by a patient as to overbilling; or (3) any forensic audit by a qualified professional, the Court is being asked to draw inferences as to fraudulent conduct based on the representations of counsel in closing submissions drawn from counsel's review of a limited set of records. This falls far short of meeting the threshold burden that rests on the plaintiff.

[114] Ms. Lazarus described the business systems as paper-based with patient charts and patient ledgers all stored at the front desk in the file cabinet. In addition, she noted that printouts for insurance companies, lab fees, daily appointment sheets (of which there were five years worth) and master one-write ledger sheets were all stored in the back lab in a separate filing cabinet.

[115] With respect to patient records, Ms. Lazarus indicated the patient charts would contain the notes from the dental assistant, x-rays, Dr. Wittenberg's detailed consultation notes, treatment plans, treatment estimates and lab invoices along with letters from specialists, if pertinent. The practice used a one-write ledger system, which included a carbon copy, so there were back-up copies of patient information. At the end of each day, there would be a calculation at the bottom of the one-write ledger sheet that would indicate how much had been billed that day. The ledger cards were stored in boxes at the front desk.

[116] I note that, while the plaintiff recently produced laboratory invoices from third parties and had copies of the what are referred to as "sum-total invoices", they did not produce the lab invoices or other documents, including detailed consultation notes, that the defendants say should have been in the patient charts.

3. Discussion

[117] I am inclined to agree with the defendant on this point: The overwhelming weight of the evidence suggests that all patient records and business records were left at the dental practice when it was turned over to Dr. Shum, and these documents have been in the control and possession of Dr. Shum since November 1, 2017. Importantly, Ms. Tanaka did not substantiate Dr. Shum's allegations that supplies and materials had been removed from the office. The plaintiff has failed to produce all patient and business records of the dental practice, which I find severely prejudiced the defendants.

[118] In relation to missing laboratory invoices, while the plaintiff says "Naturally, Ms. Lazarus and Dr. Wittenberg defaulted to their same excuse—the exculpatory documents which they claim would have explained all of this 'extra work'—had

conveniently gone missing", contrary to this statement, the plaintiff's failure to produce these documents has been overwhelmingly prejudicial to the defendants. The plaintiff has repeatedly said that the evidence of the defendants should not be preferred or relied upon, as it is in many instances unsupported by documentation form the dental practice, being only the bare assertion of Dr. Wittenberg and/or Ms. Lazarus.

[119] I now turn to the critical factual determinations sought by the plaintiff in order to establish its case. As part of considering this, I will take into account the lack of documents in this case.

B. Did the defendants fraudulently or negligently misrepresent to the plaintiff the legitimate revenue-generating capacity of the dental practice?

1. Legal Principles

a. Fraudulent Misrepresentation

[120] Allegations of fraud are central to this matter. The elements of civil fraud are set out in *0895625 B.C. Ltd. v. Ascent Developments Corp.,* 2014 BCSC 1722 at para. 18 [*Ascent Developments*], as follows:

1. A false representation made by the defendant to the plaintiff;
2. The defendant made the false statement:
   (a) knowingly,
   (b) without belief in its truth, or
   (c) recklessly, careless whether it be true or not;
3. The defendant intended to induce the plaintiff to act; and
4. The plaintiff did act on the representation and suffered a loss.

[121] There must be proof of fraud and, as noted in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 19, "the false statement must 'actually [induce the plaintiff] to act upon it' …. [T]ort law requires proof that 'but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of". In addition, "proof of loss is also required": para. 20.

[122] The Court of Appeal recently commented on the applicable standard of proof when considering allegations of fraud in *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 [*Angel Acres*]. They must be proven on a balance of probabilities; however, the quality of the evidence required is commensurate to the seriousness of the allegations: paras. 162–163.

[123] This sentiment was echoed in *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at 170, 1982 CanLII 13 [*Continental Insurance*], in which the Supreme Court of Canada stated:

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.

[124] The Court then went on to reference Lord Denning's words in *Bater v. Bater*, [1950] 2 All E.R. 458 at 459, that the standard of proof when considering fraud "does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion", before commenting on the case as follows at 171:

> I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

[125] The Court's commentary in *Continental Insurance*, the defendants say, is consistent with the guidance of the Court of Appeal in *Angel Acres* with respect to context and understanding the seriousness of the allegations made.

[126] The plaintiff points out that the two principal sources of evidence about the operation and billing practices of the business are the large volume of practice records from the period in question (particularly the appointment book, the patient files and daily activity report from the X-Trac Dental System, the dental practice's

electronic claim submission software) and the oral evidence of Dr. Wittenberg and Ms. Lazarus.

[127] As a result, the plaintiff says many of the key determinations of fact, including whether documents were created for fraudulent purposes, turn on the Court's assessment of the credibility of Dr. Wittenberg and Ms. Lazarus, who testified as to how the dental practice was operated in the years leading up to its the sale to the plaintiff. The plaintiff says both Dr. Wittenberg and Ms. Lazarus made many claims about how the dental practice was run that are not supported by any documents, and often conflict with the practice records.

b. Credibility

[128] With regards to credibility, the plaintiff relies upon *Bradshaw v Stenner*, 2010 BCSC 1398, in which Justice Dillon set out a number of principles for assessing the credibility of witnesses:

> [186] … The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally …. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time…
>
> [187] … [T]he court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions"…

[129] In this case, the plaintiff says that the evidence of both Dr. Wittenberg and Ms. Lazarus not credible, with their recollections having been modified to suit their own interests. Dr. Wittenberg's testimony featured the traditional hallmarks of testimony that is not credible. In particular, he was uncomfortable, agitated and combative. He frequently gave non-responsive answers, half-truths and made highly improbable claims that were not corroborated by independent or documentary evidence. When asked about certain practices in his office, he invoked his "path to

excellence". In terms of reliability, he frequently could not recall basic facts about his own practice, such as whether Star Dental was one of the dental labs he used.

[130] The plaintiff says Ms. Lazarus also gave evidence that was meant to fit the defendant's themes and theories rather than the truth. As per *Bradshaw*, the plaintiff submits that both Dr. Wittenberg and Ms. Lazarus have given evidence that is unreasonable, impossible, or unlikely and have been shown to be unable to resist the influence of interest to modify their recollections.

[131] The plaintiff sets out six specific allegations that it maintains are the basis for the fraud. For each of these, it says, there is no evidence to support the claims other than Dr. Wittenberg and Ms. Lazarus' testimony.

c. Factual Inferences

[132] The law with respect to factual inferences in civil cases was recently canvassed by the Court of Appeal in *Angel Acres*. In that case, the trial judge dismissed the claim by the Director of Civil Forfeiture seeking forfeiture of three clubhouses owned by the Hells Angels. The Court of Appeal overturned the trial decision and entered judgement in favour of the Director on the basis that the trial judge erred in principal and made palpable and overriding errors in declining to draw certain factual inferences that were clearly supported by the factual record.

[133] In its judgement, the Court of Appeal considered the process a trial judge should undertake when drawing a factual inference. As the court explained, a factual inference is a conclusion as to the existence of further facts that may, not must, be drawn from a proven fact or group of proven facts: *Angel Acres* at para. 172. A judge must rely on logic, common sense and experience, taking into account the totality of the evidence when deciding whether to draw an inference: para. 172. The evidence may support more than one inference, and it need not prove conclusively the proposition of fact, but rather need only render the fact it is seeking to establish slightly more or less probable than would be the case without it: para. 173. The court elaborated as follows:

> [174] … [W]here the evidence as a whole supports more than one factual inference, the trier of fact is generally not obliged to consider "the most probable inference to draw from the evidence." Rather, the trier of fact is obliged to determine whether the evidence establishes particular factual inferences on a balance of probabilities. After all, "the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred" …. It is only in the case of inconsistency between such available inferences — namely, where the two inferences cannot both be true — that the trier of fact must determine which is more probable.

[134] The error identified by the Court of Appeal was that, when presented with two reasonably available inferences, the trial judge declined to draw the requested inference in light of the alternative inference that could also be reasonably drawn. The Court of Appeal says because these inferences were not inconsistent, the judge is not obliged to choose between them. He was obliged to consider whether either or both were established on a balance of probabilities.

[135] Based on these principles, the plaintiff submits that the evidence adduced at trial clearly supports the factual inferences sought as to the systemic fraudulent billing practices employed by the defendants and compels the court to make those inferences.

2. Positions of the Parties

[136] As noted earlier, the plaintiff's final argument focussed on establishing fraud, with counsel maintaining in particular that the discontinuance of Dr. Wittenberg and Ms. Lazarus' fraudulent billing practices was a material contributing cause of the failure of the dental practice. The plaintiff argues forcefully that this is a fraud case and, while there may be no direct evidence of fraud, the Court may make factual inferences as to whether Dr. Wittenberg and Ms. Lazarus routinely engaged in fraudulent billing practices.

[137] The plaintiff submits that, if the court accepts the defendants misrepresented the legitimate revenue of Dr. Wittenberg's practice, the other elements of the legal test for fraudulent misrepresentation are easily met. It says it is clear that Dr. Wittenberg and Ms. Lazarus knew of or were reckless to the fraudulent billing

practices and the true manner in which the dental practice was operated. This was information that any reasonable purchaser would need to know to understand how the revenue, including illegitimate revenue, was generated. The plaintiff says it was obvious that Dr. Wittenberg and Ms. Lazarus did not want Dr. Shum to know how the practice was operated because, if he knew the truth, he would have walked away from the transaction.

[138] On the eve of trial, the plaintiff obtained third-party invoices from Star Dental and Space Maintainers, two labs used by Dr. Wittenberg and, later, by Dr. Shum while they each owned the dental practice. The plaintiff says these invoices demonstrate that the defendant has forged laboratory invoices, increasing the lab fees claimed before submitting them to various insurance companies for payment to the dental practice. In addition, the plaintiff maintains that Dr. Wittenberg engaged in various other alleged fraudulent practices, which I will deal with in more detail below.

[139] As noted above, the plaintiff asks this court to infer that the discontinuance of these fraudulent billing practices was a material contributing cause of the failure of the dental practice. The plaintiff says the Court must consider the documentary record, along with the testimony of Dr. Wittenberg and Ms. Lazarus, to determine whether the following factual inferences are established by the evidence on a balance of probabilities:

1) Dr. Wittenberg and Ms. Lazarus routinely sent falsified Star Dental, Space Maintainers and Protec invoices to insurers for payment;

2) Any lab work purportedly performed by Martek was not chargeable as lab fees;

3) Dr. Wittenberg condoned patient recall appointments being future dated so that insurance companies would provide coverage;

4) Dr. Wittenberg routinely billed patients and their insurers for excessive units of scaling and other time-based procedures;

5) Dr. Wittenberg did not charge his relatives co-payments in connection with appointments when he billed their insurers for the insured portion; and,

6) Dr. Wittenberg routinely billed his general anaesthesia patients for an impossible amount of work during their appointments.

[140] The plaintiff says the Court must also consider whether the evidence supports an inference that Dr. Shum would not have purchased the practice had he known the truth about how Dr. Wittenberg operated the dental practice and how he billed patients and their insurers.

[141] I now turn to considering these allegations.

3. Discussion

a. Did Dr. Wittenberg and Ms. Lazarus routinely send falsified Star Dental, Space Maintainers and Protec invoices to insurers for payment?

i. Positions of the Parties

[142] With respect to whether forged lab fee invoices were routinely submitted to insurers for payment, the plaintiff says Dr. Wittenberg and Ms. Lazarus offered a series of implausible assertions about the purpose of these invoices, including that there was only one available space to enter lab fees on the electronic X-Trac Dental System and that the staff couldn't keep track of the various invoices or add them up thus necessitating the creation of these sum-total invoices.

[143] Rather, the plaintiff says the only lab fee invoices contained in the hundreds of patient files or documents were those made by dental clinic staff to mimic genuine lab fee invoices from Star Dental and Space Maintainers, as well as some that were made to look like lab invoices from Protec. The plaintiff maintains the only possible reason to create these invoices is for billing insurers, such that inflated charges would be paid by the insurer. This is common sense, they say, and there is no other reason to create this document.

[144] In support of these allegations, the plaintiffs note how the documents were labelled “invoice” and featured the names, addresses, logos of either Star Dental, Space Maintainers or Protec, along with invoice numbers that were not genuine. The plaintiff submits the documents were obvious forgeries of Star Dental, Space Maintainers and Protec invoices. The only reasonable explanation for the existence of documents made to look like genuine lab fee invoices was that they were intended to lead someone receiving the document to believe it was a genuine invoice from the issuer.

[145] In contrast, the defendant says, despite the language used by counsel, Dr. Wittenberg did not commit fraud nor did he illegitimately generate additional revenue with forged invoices. There were no fraudulent billing practices at the dental clinic during Dr. Wittenberg and Ms. Lazarus’ tenure, and no evidence of any insurance or patent claim or investigation.

[146] With respect specifically to the plaintiff’s closing book of documents referenced in final submissions, which largely contained lab invoices and patient claim forms submitted to the various insurance companies, the defendants systematically pointed out deficiencies in the plaintiff’s argument on this point. First, they noted how these claim forms had been signed by patients, indicating their approval of the amounts claimed. Second, they pointed out how many of the claim forms indicated the amounts claimed should be forwarded directly to the patient, not to Dr. Wittenberg. Third, many of these invoices noted pre-approvals by the respective insurance company for the procedure, indicating a pre-approval process had been undertaken. Fourth, many of these invoices indicated that pre-approvals, pre-estimates or “explanations of benefits” had been attached to these forms, yet none of these documents had been produced by the plaintiff as part of these proceedings. This latter point dovetails with the defendants’ submissions regarding the adverse inference I should draw due to the plaintiff’s failure to adduce key documents, as these missing documents could well explain the irregularities alleged by the plaintiff.

[147] These documents, the defendants say, were placed in front of the Court to support the allegation of fraud; however, drawing the inference requested by the plaintiff would require the court to ignore the noted pre-approval process undertaken by the insurance companies.

[148] Relatedly, the plaintiff argued that these documents demonstrated that a significant amount of illegitimate revenue was generated—approximately $150–200 per lab invoice—as Dr. Wittenberg and Ms. Lazarus knew they could not charge for in-house fees.

[149] The defendants respond that is incorrect: Dr. Wittenberg negotiated a special fee for crowns from Star Dental, as he would be doing work in-house on these crowns, and this practice is allowed as reflected in both the Pacific Blue Cross Fee Guide and the BCDA Fee Guide: The former states that lab fees "may include [c]ommercial [l]aboratory charge[s], in-house [l]aboratory charges, part and components and/or services charge[s]", and the latter references billing for "In-Office Laboratory Procedures", with an in-office laboratory defined as "a laboratory service(s) performed within the same business entity".

[150] With respect to the plaintiff's argument that there was no reason to believe Dr. Wittenberg or Ms. Lazarus' contention that all records were left at the practice, the defendants raise a number of points that counter the plaintiff's position. First, the two were contractually bound to do so, and the evidence is consistent with that. Second, Dr. Shum had all the records as of November 1, 2017, and, as previously noted, when filing for bankruptcy in February 2018, he identified the existence of the Contingent Action in a statement he filed under oath. The defendants submit that the Court is entitled to presume that, from that time, Dr. Shum knew this proceeding would be initiated. Thus, since the documents were not produced, the defendants are entitled to question why they were not made available for this lawsuit.

[151] I will turn to the specific evidence regarding the invoices from the various labs now.

ii. Discussion

[152] Soon Kun Lee, the owner of Star Dental, testified in this matter. Star Dental is located in the same building as the dental clinic and had been providing services to Dr. Wittenberg for 15 years prior to its sale to Dr. Shum. Among the services provided was the fabrication of crowns, for which he billed Dr. Wittenberg $175 to $250 per crown, depending on the nature of the crown required and, in certain cases, the amount of gold required.

[153] Mr. Lee was taken to a variety of invoices dating from January 2013 to September 2016 that purported to be those of Star Dental. He indicated these documents were not authentic Star Dental invoices. He was able to determine the invoices he was shown were not authentic because Star Dental invoices include the word “Canada” written in capital letters (which the invoices he was shown did not), set out the date differently than on the invoices he was shown, and include at the bottom of the invoice the phrase “Thank you for your business” set out in a different font than on the invoices he was shown.

[154] In his cross-examination, Mr. Lee indicated that, in addition to Dr. Wittenberg, he provided other dentists in the same building with a key to his laboratory so they can pick up completed orders when he is not in the office. He also indicated the $175 rate for crowns was one specifically negotiated with Dr. Wittenberg, and could be because Dr. Wittenberg would perform additional lab work after they were delivered to his office.

[155] The defendants say that Star Dental offered this discounted rate for crowns specifically because Dr. Wittenberg and/or Martek did a portion of the crown preparation and fabrication. As a result, the ultimate price for the crown would include Star Dental’s fee plus Dr. Wittenberg and/or Martek’s fee in relation to the crown’s preparation.

[156] Relatedly, during his cross-examination, Dr. Wittenberg was asked about the alleged discrepancies with the Star Dental invoices, and he gave a detailed explanation. He agreed that there were differences, indicating that years ago they

identified an issue with the X-Trac Dental System, which only allowed one line for lab fees when, in certain cases, there were a multiple invoices that had to be entered. Ms. Lazarus was concerned that they were losing track of some number of these invoices and therefore requested the receptionist at the time create a sum-total invoice, similar in appearance to that of Star Dental, that would include all the lab work done. While Star Dental charged the dental clinic $175, Dr. Wittenberg would undertake further work, such as pouring their own models in the office to make a stronger cast to ensure the quality of the crown.

[157] Dr. Wittenberg said the sum-total invoices were internal office documents that were “never to go anywhere” and designed “years ago” to set out the sum-total of the potential two or three separate invoices that may be associated with a given crown. When it was put to him that this scheme aimed at allowing the dental clinic to charge higher fees as part of an insurance claim, Dr. Wittenberg was adamant that this was not true, reaffirming that this was an internal document to capture the sum-total of work done to the initial product provided by Star Dental for the easy reference of the receptionist. He said they were not to be submitted to insurance providers. Rather, each patient chart would contain the back-up invoices from Star Dental and Martek that reflected the work that would be attached to the standard patient claim form and submitted to the insurance provider for payment.

[158] With regards to why a sum-total invoice for a Star Dental’s, which as mentioned cost $175, instead listed the value of the work done as $520.50, Dr. Wittenberg said this invoice included the work done in-house by Martek, including certain preparatory work that was necessary to create a temporary crown. He said these temporary crowns were almost as good as a real crown, reflecting his “path of excellence” in his dentist practice. The $520.50 total also included standard fees for things like “everything from master cast to impression trays, to temporaries, lab fabricating quality temporaries, to articulation of the models, wax-ups associated with the aesthetics or the major cases I would do”.

[159] Ms. Lazarus similarly testified that the Star Dental sum total invoices were created because the receptionists were confused about the number of invoices when it came time to enter the lab fee in the X-Trac Dental System, as there was only one field for this purpose. In order to avoid mistakes, Ms. Lazarus asked the receptionist to create a template similar, but not identical, to the Star Dental invoices, which they did. As this was only to be used internally, Ms. Lazarus used this template for all the lab invoices going forward. None of these were to be submitted to insurance companies or otherwise used externally.

[160] Ms. Lazarus was also cross-examined extensively on the sum-total invoices, but she not deviate from her testimony that she asked a receptionist to make a template which she then used to add in various lab invoices and create a sum-total. When doing so, she would enter the information into the template on her private computer and consolidate the lab invoices into a sum-total invoice. When pressed particularly on a Protec invoice and the difference in the sum-total bill prices, she noted the differences were minor, in the range of $0.50–1.00, with the larger amount likely reflecting further work that had been performed on the Protec item when it arrived at the office, such as polishing or the application of acrylic. She reiterated however she could not confirm any of this, as the original lab invoices were kept in the patient file and none of these had been produced. Without those, she could not confirm whether this was a sum-total bill.

[161] In argument on this point, the plaintiff said that the only purported lab fee invoices contained in the patient files produced in this litigation were documents that were made to look like genuine lab fee invoices from Star Dental and Space Maintainers, as well as some from Protec. These documents were labelled “Invoice” and featured the names addresses, logos and invoice numbers of these labs, but were not genuine. The plaintiff submits these documents are obvious forgeries made to look like genuine lab fee invoices and were intended to lead someone receiving the document to believe it was a genuine invoice from the issuer.

[162] The plaintiff says it was only after the plaintiff tendered evidence from Mr. Lee that these invoices were not genuine that Dr. Wittenberg and Ms. Lazarus offered this exculpatory explanation for the existence of the documents, which they submit is absurd and unbelievable.

[163] I do not agree. While the Plaintiff says Dr. Wittenberg said Ms. Lazarus asked the receptionist to create a document that looked "just like a genuine Star Dental invoice", that is not an accurate reflection of the evidence.

[164] On this point, Dr. Wittenberg said:

> [Y]ears ago … we discovered on the X-Trac system, when you input a crown procedure code, there was one line for addition of a lab. We had, in certain cases, a number of invoices for each case … because we were losing track of some of these. It was difficult to maintain and ensure that the right number was submitted … and it was getting a little bit confusing.
>
> So what we did, Susan asked the receptionist at the time to create what's called an internal summary total lab invoice. ... This is the template that we created in the office for internal use. With this invoice, the sum total invoice in the charts would be the 175 that … Star [Dental] gave us the invoice, the actual invoice, as well as the extra work that was done, most probably in this case, by Marte[k] …
>
> …
>
> This was an internal invoice, never to go anywhere …

[165] When asked "if this was an internal document, why would you put a lab's name on it?", Dr. Wittenberg said:

> What happened is whoever create[d] it, she was told to create a similar style invoice. So what she did was create something similar to this. Unfortunately, in hindsight, not the best thing to do. But this is the internal document. Nobody was ever to send this out. It was not meant for public distribution. It was meant for a total.

[166] I accept this explanation. The reality is in this paper-based system, templates were used and taken from other examples. This explanation is credible, especially when one takes into account this solution to the X-Trac Dental System's shortcomings occurred "years ago", and there is no debate over that time frame. Templates such as these were (and are) valuable tools in an office, especially at a

time when computer systems were not as prolific and efficient as present. It is important to assess this evidence from that perspective.

[167] I note further that, contrary to the plaintiff's submission, neither Dr. Wittenberg nor Ms. Lazarus said that this system was implemented because the various receptionists the dental clinic employed over the years were too incompetent to add the amount on two or more invoices. Rather, both pointed to the administrative confusion of having several invoices for lab fees when there was only one space for this information in the X-Trac system.

[168] With respect to the issues of lab invoices, I accept that crowns ordered from Star Dental were provided at a lower negotiated rate, and then Dr. Wittenberg or Martek would provided additional laboratory services as part of the crown preparation and fabrication processes. As a result, while Star Dental would charge $175 for a crown, the additional laboratory fees reflected on Dr. Wittenberg's sum-total invoice would include charges for additional laboratory work provided in-house.

[169] With respect to the invoices from Space Maintainers, Mr. Berg, Vice President of Corporate Services for Acumen, a dental manufacturing company whose head office is in Calgary, AB, testified about Space Maintainers. He indicated Space Maintainers are a dental manufacturer located in Vancouver that is under the same ownership as Acumen.

[170] Mr. Berg reviewed a number of invoices from March 2013 to June 2014 that appeared to be issued by Space Maintainers. He indicated these were not invoices from Space Maintainers because Space Maintainers only charged $76 for a night guard, and the invoices indicated in charge of $120.25.

[171] In cross-examination, the reliability of the documents used to cross-reference the invoices came into question, as they are reproduced from a computer system and are not the original documents. In addition, cross-examination cast doubt on who exactly charged the amount reflected in the invoice, and the differences in the

price charged were the only thing that this witness identified as indicating these invoices were not issued by Space Maintainers.

[172] With respect to the Space Maintainers invoices, Dr. Wittenberg said he was "mystified" and "stumped". He indicated that he could only conclude that a receptionist has been asked to replicate an invoice, but this again would be an internal invoice. As was the case with the Star Dental invoices, while Dr. Wittenberg was charged $76 for the night guard, the invoice submitted to the insurance company was $245. That total, however, would reflect preparatory and finishing work done in house by Martek that made the guard much more palatable to the patient and therefore more likely to be used. Dr. Wittenberg said these invoices were all in the patient charts.

[173] Relatedly, while the plaintiff submits that Space Maintainers prices for night guards were inflated by about $160, Dr. Wittenberg testified about the additional laboratory service that he and/or Martek provided in relation to the preparation of nightguards that resulted in additional lab fees. He again provided a detailed description of these additional services, including making a master cast, fabricating a wax wafer, or other tasks representing "the stuff a lab might do".

[174] These are all tasks that, as per the Pacific Blue Cross Fee Guide, may be properly included in lab fees, as Dr. Wittenberg said that is what he did here. As set out in that document, lab fees "may include [c]ommercial [l]aboratory charge[s], in-house [l]aboratory charges, part and components and/or services charge[s]". In dealing with suggested fees, the BCDA Fee Guide also refers to costs associated with "In-Office Laboratory Procedures" and "Additional Expense of Materials" in referencing "[T]he fee commonly attached to these procedures compensates the practitioner for his/her time and expertise in offering these services under normal circumstances".

[175] Importantly, Dr. Wittenberg and Ms. Lazarus consistently testified that production by the plaintiff of the full patient charts, including all original laboratory invoices, would demonstrate that the internal sum-total invoices provided an

accurate summation of the total laboratory fees charge to a patient by various laboratories in a particular case. This litigation has been plagued by document issues, and I conclude it more than likely than not that these documents did exist in the patient charts. I would otherwise have to conclude that the defendants systematically destroyed these documents over the years, which is not at all likely, and even less likely is that they went through close to 1,000 patient files to eliminate the invoices from the practice records prior to turning them over to Dr. Shum on November 1, 2017.

[176] Again, as noted by the Defendants, the practice records were placed in the care and control of Dr. Shum on November 1, 2017, and as early as February 2018, Dr. Shum had identified the possibility of this lawsuit. It was therefore incumbent on him to safeguard the records. While he noted he had the records copied by BC Records, Ms. Lazarus described a visit to the dental practice's premises in March 2018, after its closure, where the office appeared "ransacked", with ledger cards strewn all over the floors and on the reception desk.

[177] I agree, as noted by the defendants, that the plaintiff has failed to provide any explanation as to why they have not produced these pertinent documents, despite the defendants having consistently identified the documents relevance and for which the defendants made a demand for production on January 20, 2023. I also agree, as argued by the defendants, that the overwhelming weight of the evidence supports the inference that the plaintiff either failed to produce or failed to preserve the patient and business records relating to the dental practice despite having them in its sole custody and possession from November 1, 2017.

[178] I therefore draw the adverse inference that, had such documents been retained and produced, the contents of those documents would support the evidence of the defendants.

[179] While the plaintiff argues there was no real explanation of why the genuine lab fee invoices or any individual Martek invoices were not in the patient files, other than to suggest in general terms that Dr. Shum may have lost documents, this

ignores the reality that these documents would have been in Dr. Shum's possession, as reflected by the defendants' submissions on the adverse inference requested.

[180] The plaintiff also says there are no claim forms in evidence that reference the attachment of multiple lab fee invoices nor are there any documentary evidence that any claim forms ever attached multiple lab fee invoices. In addition, there are no invoices in evidence with corresponding dollar amounts for fees. However, I ultimately find that this argument suffers from the same deficiencies set out above and is answered in large part by the adverse inference drawn by the Court in this matter. With respect to the reference in the claim forms to a singular lab fee instead of multiple lab fees, I accept the explanation that the receptionists were told to follow, and did follow, the procedure set out in a training manual that referenced a singular lab fee alone.

[181] The plaintiff also said Dr. Wittenberg was unable to explain why the internal sum-total invoices for crowns frequently stated that the crown ordered from Star was an E-Max crown while the prescription form would refer to a BruxZir Zirconia crown. Dr. Wittenberg, in fact, did explain the discrepancy as follows:

> I'm not sure how to explain exactly that, but these are both under the same code that would be submitted to the insurance company. This fee, whatever it is at the sum-total bottom, would be the exact fee that would be supported by all. It's irrelevant. This is an internal document. Any questions that would be asked or if there was any invoices asked for, they would be in the chart behind the sum-total invoice, and those are the invoices that would be referenced.

[182] Notably, while the plaintiff in closing asked the court to infer that "the discontinuance of the fraudulent billing practices was a material contributing cause of the failure of the Dental Practice", it is pertinent that Dr. Shum asked Ms. Taneka to continue to charge patients the same lab fees that Dr. Wittenberg had charged, as the patients were used to a certain price. Accordingly, it is difficult to see how the plaintiffs can maintain the position this was a material contributing cause of the failure of the practice.

b. Was any lab work purportedly performed by Martek not chargeable as lab fees?

i. Positions of the Parties

[183] Much of the evidence on this point is tied up with the evidence that was canvassed with regards to the alleged fraudulent invoices from Star Dental and Space Maintainers. I have already found that these discrepancies stem from a combination of the limitations of the X-Trac Dental System and extra work undertaken by Dr. Wittenberg with respect to crowns and nightguards. Similarly, Ms. Lazarus and other staff undertook certain work for Martek, which was a company with some family connection, i.e. owned by Dr. Wittenberg's son and for which Ms. Lazarus was the director.

[184] Ms. Lazarus testified about Martek, which she indicated was a company that provided lab services, radiographic services and general anaesthetic booking services to the dental practice. She indicated individual invoices were made for the lab services, which included taking impressions; pouring master casts; making temporary crowns, wax bites, and articulating models; and the trimming of models. She had learned these skills as a teenager and, over the years, had become very good at it. The cost for these items was reflected in an end-of-the-month total monthly invoice billed to the practice. The individual invoices for lab services were placed in the patient files. Ms. Lazarus and the practice's various CDAs undertook this work. The CDAs would receive extra payments by cheque from Martek for this work, but Ms. Lazarus would not. She was cross-examined on this and, when it was put to her that she was as a result a volunteer in the practice, she agreed.

[185] Cross-examination spent a lot of time on the fees charged by Martek and on the Star Dental and Space Maintainers invoices. Comparisons were made between what Space Maintainers charged for the master casts used in making night guards ($3) and the amount charge by Martek ($168). Ms. Lazarus said the Martek amount seemed too low, and described the process for making a night guard, which included taking impressions and setting the top and bottom impressions to ensure patient's bite is correct.

[186] This is consistent with the testimony of Dr. Wittenberg in reference to work that was done with respect to Crowns and night guards. Ms. Lazarus said those services provided by Martek are services that a CDA could legally provide. This was not contradicted in the evidence, and there was simply no evidence on which to conclude that Martek was not entitled to charge for the tasks it performed.

[187] The plaintiff says Ms. Lazarus has no training or qualifications to undertake this work and, even if she or other CDAs performed the tasks purportedly done on Martek's behalf, such as the preparation of the master casts and special impression trays, it is highly dubious that this was actually chargeable lab work, as it required no lab technical qualifications. More importantly, there is no documentary or independent evidence that Dr. Wittenberg ever submitted an actual Martek invoice for payment, as charges for these items were added to the sum-total invoices.

ii. Discussion

[188] At the outset I note, as pointed out by the defendant, that there is no evidence to support the allegations that Martek did not provide these services nor that they were not entitled to charge for these services.

[189] As referenced above, the billing of in-house laboratory procedures is allowed pursuant to both the Pacific Blue Cross Fee Guide and the suggested fees set out by the BCDA Fee Guide.

[190] I conclude therefore that the allegation that Martek's purported lab work was illegitimate revenue has not been established.

c. Did Dr. Wittenberg condone patient recall appointments being future dated so that insurance companies would provide coverage?

i. Positions of the Parties

[191] The plaintiff says so-called "future dating" is a fraudulent billing practice which entails the misrepresentation of the date of a procedure so that the insurer will provide coverage where coverage would not be otherwise available. Dr. Wittenberg

agreed that future dating was wrong and confirmed his discovery evidence to the effect that he would “never condone or allow that”.

ii. Discussion

[192] While the plaintiff says there was ample evidence on which this court should infer that future dating routinely occurred while Dr. Wittenberg and Ms. Lazarus owned and operated the dental practice and was condoned by both, I disagree.

[193] With respect to these allegations, Dr. Wittenberg was taken to a number of entries in his office records from 2013 to 2017 indicating future dating in the X-Trac Dental System files. Dr. Wittenberg indicated he was not aware of this practice, saying that “it was all new to me”. While his records appeared to indicate certain future dating notations, he was adamant that he knew nothing about this and would not allow this to happen, as this is not the way he practiced for 40 years. He also indicated he was not computer literate and not familiar with the X-Trac Dental System files, so his evidence on this is somewhat limited.

[194] Dr. Wittenberg noted he had five receptionists over this time period who would be responsible for inputting data in the X-Trac Dental System, in addition to individuals completing practicums. He was flabbergasted by the number of entries, particularly when counsel indicated there were 200 pages from the X-Trac Dental System that reflected this. He did not agree that this happened a lot, being of the view either that there must be some other reason for the entries reflecting future dating or that the individuals had called in a patient in error earlier than appropriate and were trying to protect themselves through future-dating practice. While Dr. Wittenberg was asked numerous questions based on what the X-Trac Dental System reflected, he was also very clear and said more than once that he was not familiar with the system.

[195] When taken to the X-Trac Dental System entries, Ms. Lazarus said she only dealt with the system occasionally, and the only reports she printed off were patient recall reports. With respect to the allegations and references to future dating, she noted these references appeared to fall into three categories. The first category

involved references to crown and bridge work, which were entered correctly, as you could only bill once the permanent crown or bridge was affixed. The second category involved keying errors, which occurred when an incorrect entry had been made in the system. To remedy the error, they had to "write over" it, and the change would appear to be future dating, although she had no idea why this was the case. The third category appeared to be certain processes that had no time limit associated with them, unlike certain processes that could only be undertaken every 3 or 6 months. Despite this, the system would reference these as future dating, and she again did not know why this occurred.

[196] While Ms. Lazarus set out her view of the instances of alleged future dating in the X-Trac Dental System, when she was taken to an entry of February 20, 2017, in the appointment book, reflecting the submission of claims for three patients who had work done in the week prior, she was adamant that she and Dr. Wittenberg would never allow future dating, and this was clearly set out in the training manual for receptionists. The appointment book was maintained by the receptionists. The entry was not her handwriting and, if it was a receptionist who was doing this, it was because she had made a mistake and booked a recall patient in too early, a practice which contravened both office policy and the training manual.

[197] This evidence does not establish the extent of future dating. In at least two instances of apparent future dating, Ms. Lazarus gave a reasonable and uncontradicted explanation that I accept. With respect to any other situations, there is no evidence that Dr. Wittenberg condoned the practice and indeed the evidence of both Dr. Wittenberg and Ms. Lazarus indicated the opposite: Both were clear such a practice is not appropriate and neither condoned it. The reasonable explanation is more likely to be that occasionally a mistake would be made in booking a patient too early, especially in view of the evidence of the number of receptionists and Ms. Lazarus' evidence with respect to staffing issues.

[198] The plaintiff says that, even if the court concludes that future dating was done by the receptionists, each on their own, Dr. Wittenberg is still responsible for the

misconduct of his staff. The plaintiff submits this would be illegitimate revenue in an amount that would be material.

[199] On this point, I note that to succeed in establishing fraudulent misrepresentation, the plaintiff must demonstrate that Dr. Wittenberg knew of or was completely reckless to the alleged fraud. I find the plaintiff has failed to discharge this burden. The plaintiff takes documents and makes certain assertions without real evidence to back this up. Dr. Wittenberg and Ms. Lazarus have given reasonable explanations that I accept.

[200] Accordingly, I conclude this allegation has not been made out.

d. Did Dr. Wittenberg routinely billed patients and their insurers for excessive units of scaling and other time-based procedures?

[201] The plaintiff says during Dr. Shum's detailed review of the records of the dental practice, he realized early on that Dr. Wittenberg was routinely scheduling recall appointments for 30 minutes rather than for 45 minutes or one hour. (Dr. Shum said he routinely booked recall appointments for one hour.) Despite scheduling recall appointments for 30 minutes, Dr. Wittenberg routinely billed for two or three units of scaling in addition to other non-time-based procedures, including recall exams, prophylaxis, fluoride and x-rays.

[202] Each unit of scaling takes 15 minutes, as per Dr. Rosenstock's evidence and other evidence in this matter. The plaintiff notes Dr. Rosenstock's opinion that:

> In most dental practices, patients are recalled in 6-month intervals to examine their oral health, scale and clear their teeth, and take any necessary x-rays.
> …
> … Accordingly, if patients are booked for a one-half-hour appointment, it would only be possible to complete one unit of scaling, along with a recall exam, prophylaxis, fluoride and any necessary x-rays.

[203] Dr. Wittenberg was also taken through his appointment book, where it was put to him that the appointment book reflected all of the clinic's appointments and cancellations. Dr. Wittenberg however was adamant that the daily appointment sheets were also essential, and the appointment book must be looked at in

conjunction with these documents. The daily appointment sheets reflected the fluidity of the daily dental practice, which may change if someone was late for an appointment, cancelled or came at a different time. Dr. Wittenberg also said the appointment times reflected the time he would spend with the patient rather than the entire appointment, and the CDA would finish up with fluoride and/or polishing.

[204] With respect to billing practices, Dr. Wittenberg was cross-examined on notes in his charts that had been crossed out. It was put to him that he wrote the procedures and the patient charts that he intended to bill for in advance, which he adamantly denied. He instead indicated that these procedures may have been started but were unable to be completed for a variety of reasons.

[205] With respect to the number of units billed, Dr. Wittenberg was taken to a number of appointments that were 30 minutes in length, but for which he billed three units of scaling, which would require 45 minutes. In addition, the plaintiff pointed out that during those appointments, he would frequently bill for additional units, half-units of other time-based procedures, like occlusal adjustment or pulp vitality tests.

[206] Dr. Wittenberg however indicated that he had two operatories in which work would be performed. The 30-minute appointment was for his time alone. In addition, he is allowed to round partial units up to a full unit, e.g. if the procedure took 37 minutes, he could bill for three units, or 45 minutes, worth of time. He also noted the 30 minutes allocated for the appointment did not necessarily reflect the actual time spent with the patient, and some matters would be delayed. He had loyal patients who understood and would wait for their appointment. When he was taken to certain billings where more than 30 minutes of work had been billed in a 30 minutes appointment, and it was put to him that he could not have done all that working 30 minutes, Dr. Wittenberg was indignant and repeated the same answer, indicating that it was not a time-based practice but rather a boutique practice of dental excellence.

[207] In his testimony, when it was put to him that his recall appointments were generally booked for 30 minutes, he said:

> I had explained to you that my recalls were booked for 30 minutes of my time. In other words, that's the minimum amount of time that I would be with a patient.

[208] When it was put to him that the amount of time booked was the maximum time he would spend with a patient, Dr. Wittenberg said:

> No, it is not. That's not the way – see, you're failing to understand the way my practice worked. You're assuming that these were all lined up in one column as they're written here. We had two chairs, two operatories, identically equipped.

[209] He then went on to detail his practice, and noted that if he decided to spend more time with a patient, his assistant would advise the next patient while he finished what he had to do. In noting his typical practice, he said it was "two units of time, minimum, that I would spend with a patient. If I had to exceed, it was exceeded. If I had to delay a patient, it was delayed."

[210] The plaintiff relies in particular on one recall appointment of January 9, 2017, in which the X-Trac system records note that Dr. Wittenberg billed for 3.5 units of time base procedures—two units of scaling, one unit of pulp vitality testing and a half-unit of occlusal adjustment—as well as several non-time based procedures.

[211] The plaintiff notes that, when asked how this was possible, Dr. Wittenberg speculated that the patient might have been rescheduled, invoking the paper-based nature of his practice and suggested that rounding up of units is how the system works while also conceding that he could not remember what had actually happened. When it was put to Dr. Wittenberg that it would not be possible to complete three-and-a-half units for time-based procedures in a 30-minute appointment the transcript reflects he said:

> I'm going to suggest, without my notes in front of me, and … I don't like to speculate, but this gentleman was in and out. He could very easily have been appointed another time either in the morning, or in the afternoon, where there's plenty of time. Again, the day sheets would indicate it, if, indeed, he had another appointment, somebody moved, somebody dropped down. There's plenty of time. You can't do what you're doing. It … doesn't work in dentistry. It doesn't work. It may work for a hygienist, who books an hour, boom, boom, boom and does nothing else. But when you are in active practice, you – it's time – it's not time-based by what's in the book.

> You're not understanding my practice. You're not understanding the way a practice would run.
>
> This is not a corporate practice, it's not computers all over the place, typing in things. Paper-based. And you have to understand that. And you don't understand my routine style of dental practice.

[212] In my view, that Dr. Wittenberg could not remember the appointment is not surprising, and one cannot be faulted lacking specific recall of an appointment five years ago. I also note that both Dr. Wittenberg and Ms. Lazarus reiterated many times that both the daily appointment sheets and Dr. Wittenberg's consultation notes would have assisted in providing an explanation for these discrepancies, but these documents were not produced by the plaintiff.

[213] While the plaintiffs say that Dr. Wittenberg and Ms. Lazarus' evidence that a 30-minute appointment reflected only Dr. Wittenberg's time rather than the overall length of the appointment, and that this is not corroborated by any document so these explanations should not be believed, once again arises the question of the missing daily appointment sheets and other possibly corroborative documents, and I again draw an adverse inference due to the absence of these documents.

[214] Relatedly, Ms. Tanaka, the plaintiff's witness, confirmed Dr. Wittenberg's testimony that the time represented in the appointment book represented the time that Dr. Wittenberg was scheduled to be with the patient. Ms. Lazarus similarly noted the same, explaining how, at the time of an appointment, Dr. Wittenberg would see the patient first, assessing them and undertaking any scaling that was needed. The CDA would then finish the appointment. While this was occurring, Dr. Wittenberg would move to the next appointment and the same process would be repeated.

[215] I find that Dr. Wittenberg's description of how he ran his practice is eminently believable. It is striking that the plaintiff seeks to rely on a 30-minute timeframe in an appointment book and use it as a definitive time without recognising the fluid nature of a practice in which delays, cancellations and re-bookings regularly occur during, as Dr. Wittenberg put it, the "daily flow of the dental day".

[216] Ms. Lazarus also indicated that not every appointment was in the appointment book because of the fluidity of the day. Ms. Lazarus explained that the appointment book was kept at the front desk along with the daily appointment sheets. The daily appointment sheets would record any additions or cancellations of patients that day. The daily appointment sheets would be posted in each of the two operatories. These daily appointment sheets were then stored in the back lab area with the One-Write Ledger system sheets.

[217] Ms. Lazarus indicated that the X-Trac Dental System was used minimally, primarily to keep track of recalls for past-due patients and to submit claims electronically to insurance companies, as the business primarily used a paper-based system.

[218] With respect to billings, Ms. Tanaka indicated that Dr. Wittenberg provided her with the code numbers after he had finished with the patient, which she then entered into the X-Trac Dental System. She also agreed the initials “RC”, used in the X-Trac Dental System, referred to a “recall appointment”, that was scheduled for half an hour. She agreed in cross-examination however that half an hour was the time that Dr. Wittenberg would spend with the patient. She was not aware when or if polishing or other activities would be added. Ms. Tanaka’s evidence does not support Dr. Shum’s case.

[219] While the plaintiff notes that the BCDA Fee Guide provides that a dentist cannot bill for more time than the total time the patient is attended to by caregivers, it is important to note that caregivers include CDAs. Accordingly, I agree, as pointed out by the defendants, that while the calendar book sets out appointments in one column for the day, the practice had two operatories, which allowed Dr. Wittenberg and his CDAs to spend more than 30 minutes with their patients during recall exams, even if there was another patient booked to come in at that time. The second patient could be seated in the unused operatory and tended to by the CDA before and after seeing Dr. Wittenberg. This allowed, as argued by the defendant, Dr. Wittenberg to

perform up to two and three units of scaling in a recall appointment, depending on the patient's needs.

[220] While the plaintiff alleged that Dr. Wittenberg pre-wrote his chart notes in patient charts, Dr. Wittenberg denied this allegation. He specifically said he never wrote notes in advance. Where notes were written and included measurements, these would likely be those measurements made before a procedure that ultimately could not be performed. He indicated:

> I don't have an explanation without reviewing my chart notes. I would assume it was attempted and that's what we – we were expecting to do and I made a note saying that's what we expected to do and probably stopped and crossed it out. So, this would be par[t] of the notes down below, trying to explain what's going on. But the consultation notes would be very explicit in a case like this.

[221] Ultimately, I agree, as argued by the defendant, that the plaintiff is asking the court to infer that the defendants billed for excessive units of scaling based on mischaracterizations of the evidence and counsel's misinterpretations of the practice records. The defendant also notes the absence of a forensic audit.

[222] On this latter point, while the plaintiff says a forensic audit is not needed, as these are factual inferences that the court must draw in all allegations of fraud cases, this is simply not a realistic view of the nature of the inferences that the plaintiff is asking the court to draw. The court requires more than documents and counsel's arguments as to what those documents mean where directly contradictory evidence exists on critical points of the adverse inference sought. In such instances, the plaintiff's evidence must be sufficient to overcome the contradictory evidence of the defendant, and counsel's bare assertions are simply insufficient.

[223] Indeed, the plaintiff sought to have an expert report by Dr. Rosenstock accepted into evidence in this matter in support of its case.

[224] After a *voir dire* and a ruling with respect to Dr. Rosenstock's expertise, he finally testified to a much-redacted expert report on May 30, 2023 (see *1104318 BC Ltd. v. Dr. Paul Wittenberg, Inc*., 2023 BCSC 1408). In view of the redactions, the

plaintiff simply presented Dr. Rosenstock for cross-examination. That cross-examination focussed mainly on the BCDA Fee Guide.

[225] As part of that cross-examination, Dr. Rosenstock agreed that what is discussed in the BCDA Fee Guide are guidelines. He also agreed, as outlined in the "General Understanding" section of the guide, that no dentist is under any obligation to charge the suggested fees, and dentists who do not choose to use these fees will not be affected in terms of their relationship with the BCDA.

[226] He also agreed that that a "caregiver" under the guidelines referred to a dentist, a CDA or a chair-side assistant, depending on what that person is doing. He agreed that that only one qualified to provide diagnosis is the dentist. Further, when he was taken to the scaling codes set out on p. 11 of the BCDA Fee Guide, he agreed that different codes are used for different patients depending on their circumstances.

[227] In re-examination, he did say the only definitive time frame in the BCDA Fee Guide was the 15 minutes suggested for one unit of scaling. He also said that, with respect to crowns, while an initial x-ray of the tooth may be required in preparation for a crown, at the time of the final insertion of the permanent crown, an x-ray would not be needed to ensure the fit of the crown. If problems arose with the temporary crown, an x-ray may be needed, but not at the final appointment stage. He also said oral disease codes are usually used by specialists only, rather than general practitioners, as they are for treatment, not diagnosis.

[228] Dr. Wittenberg also testified in chief as part of the defendants' case. He was taken to Dr. Rosenstock's expert report and answered each of the points set out there. He noted some of the criticisms would have been answered by his consultation notes, which were no longer in the files. He disagreed with other aspects of Dr. Rosenstock's assessment, such as the use of x-rays for crowns.

[229] On May 29, 2023, Dr. Shum was recalled to testify that he had provided a description of certain dental practice documents contained on a USB drive filed in

these proceedings and provided by the plaintiff. His testimony on this point does not answer the question of the lack of certain documents, particularly as Dr. Shum agreed earlier in cross-examination that he had seen some of the documents that the plaintiff ultimately failed to produce at the time of his chart audit prior to purchasing the dental clinic. In addition, on cross-examination, Dr. Shum was taken to some patient names that had ledgers but no patient files and vice versa, further demonstrating the issue of the lack of pertinent documents in this case.

[230] I therefore conclude that the plaintiff has not proven this allegation, and I decline to make the requested factual inference.

e. Did Dr. Wittenberg not charge his relatives co-payments in connection with appointments when he billed their insurers for the insured portion?

i. Positions of the Parties

[231] The plaintiff alleges that Dr. Wittenberg did not charge his relatives co-payments (i.e. the outstanding fees remaining after insurance coverage) when he billed insurers for the insured portion of dental procedures at the clinic. Again, the defendants deny this allegation.

ii. Discussion

[232] Dr. Wittenberg was again taken through a number of entries in his office records dating from 2013 to 2017. With respect to an indication that a group of patients with the last name of “Al” did not have coinsurance payments charged to their files, he noted this was not because they had not been charged but rather represented a separate ledger for a family trust or corporation that would pay these amounts charged.

[233] Ms. Tanaka testified that one of her main duties was to bill patients for their co-payments. She was however never asked if she was instructed by Dr. Wittenberg or Ms. Lazarus not to collect co-payments for certain patients. Dr. Wittenberg said he did not fail to collect co-payments from his patients, and there is, in fact, no evidence that he failed to collect co-payments from his patients.

[234] Furthermore, the plaintiff failed to establish which particular patients, if any, were relatives of Dr. Wittenberg. While certain names were used, there is no evidence to that effect. While the plaintiff alludes to the fact that the Lipetz family is Dr. Wittenberg's family, that is simply not in evidence.

[235] I therefore conclude that the plaintiff has not proven this allegation, and I decline to make the requested factual inference.

f. Did Dr. Wittenberg routinely bill his general anaesthesia patients for an impossible amount of work during their appointments?

i. Positions of the Parties

[236] The plaintiff asks the court to draw the inference that Dr. Wittenberg systematically overbilled his general anaesthesia patients. This submission is largely based on Dr. Rosenstock's opinion that "[m]any of these procedures involved unnecessarily filling simple abfractions. … In my experience, it is not possible to perform 19 fillings in a one-hour operating period."

[237] The defendant submits that Dr. Wittenberg's evidence explaining the billing for anaesthetized patients should be preferred to that of Dr. Rosenstock.

ii. Discussion

[238] I agree with the defendant, however that the evidence of Dr. Wittenberg with respect to the amount of work that is possible to perform on patients under general anaesthesia ought to be preferred to that of Dr. Rosenstock.

[239] Dr. Rosenstock was accepted by the Court as an expert in general dentistry and not in anaesthesia dentistry. His experience with performing dental work on patients under general anaesthesia was limited to a period extending from 1970 to 1974. In contrast, Dr. Wittenberg testified that his office was one of the dental offices that did the most general anaesthesia dental work in the city, and that he had performed hundreds and hundreds of these procedures.

[240] According to Dr. Wittenberg, during a procedure where a patient is under general anaesthetic, the dentist has complete control of the patient and, in particular, is able to easily manipulate their lower jaw, allowing them to see clearly and perform dental work very efficiently.

[241] In addition, Dr. Wittenberg's evidence was that he conducted cleanings, i.e. recall examinations, on the patients before they were put under general anaesthetic. The standard practice however was that the patient would be pre-medicated prior to the general anaesthetic. As a result, the time between when the patient first sat in the dental chair to the time of the actual sedation was approximately 40 minutes. In this time, he had the opportunity to efficiently perform procedures such as scaling.

[242] While the plaintiff criticized the assertion that Dr. Wittenberg would perform procedures prior to the general anaesthetic, this criticism does not adequately answer the point that the patient was already pre-sedated and, as a result, certain procedures could be performed. As Dr. Wittenberg testified:

> So the standard procedure was they would use premedication on most of their patients. You have to be familiar with the procedure, the facilities, the type of individual and the … techniques. This is not regular dentistry in any way, shape, or form.

[243] Ms. Lazarus also noted "the patient was sedated before they left for their appointment. So, the sedation would be administered to an hour before they got the car to come to the appointment. And the sedation lasted depending on the medication for many hours."

[244] Dr. Robert Marciniak testified as to the length of dental procedures that occurred under anesthetic and "courtesy time" which Dr. Wittenberg referenced in his testimony. While he said there was no "courtesy time" provided, the time notations on the medical documentation indicate the patient was checked in and 40 minutes had elapsed before the administration of the general anesthetic.

[245] Carlos Sorensen of the Pacific Blue Cross also testified in this matter. He referenced the Pacific Blue Cross Fee Guide and said it was mandatory for the providers that billed them. He said Pacific Blue Cross assumes all claims are

accurate as to date and nature of services provided unless there is a post claim audit handled by the fraud investigations unit that determines otherwise. Pacific Blue Cross has an automated adjudication system for claims that are submitted electronically that adjudicates and accounts for payment limits in the system. A claim is only rejected if it exceeds the adjudication limit. Mr. Sorensen also confirmed that a unit of scaling requires 15 minutes and referenced the pre-authorization system for crowns.

[246] None of this evidence points to any wrongdoing by the defendants. Indeed, it appears to represent the realities of an electronic insurance claim submission system.

[247] Finally, I once again return to the defendants' point about adverse inferences, as the Court is in essence being asked to draw inferences as to fraudulent conduct based on the representations of counsel with regards to a review of a subset of records, as missing are a number of potentially exculpatory records, that no doubt would exist in an ordinary dental practice. Again, there has not been a forensic audit by a qualified professional to establish the allegations made by counsel for the plaintiff.

[248] Indeed, one of the fundamental problems for the plaintiff is the lack of expert evidence establishing that Dr. Wittenberg engaged in fraudulent billing practices. It appears the plaintiff was attempting to produce a report along those lines, but with the Court's ruling that Dr. Rosenstock was not an expert in the required areas, the critical evidence and therefore a critical part of the plaintiff's case fell away. I concluded in *1104318 BC Ltd. v Dr. Paul Wittenberg, Inc.*, 2023 BCSC 1408, with respect to the tendering of Dr. Rosenstock's report in this matter as follows:

> [18] There is no question that the nature of these conclusions reflects, as the defendants have argued, essentially a forensic audit of Dr. Wittenberg's practice in order to reach these conclusions. While the plaintiff maintains this is simply a matter of arithmetic, I disagree. Dr. Rosenstock is being essentially offered as an expert in fraud investigation and said to have analyzed Dr. Wittenberg's records to identify areas of fraudulent or insurance-abuse claims and matters of that nature. These have been identified as key issues in this case.

> [19] While it would appear that Dr. Rosenstock has expertise in dentistry generally, I am not satisfied he has expertise in the second general area for which his opinion is now being proffered and the specific questions set out in the letter of instruction. While he may be able to proffer evidence about the length of time a procedure should take or whether one should have been undertaken, that would appear to be only one part of the expertise that would be necessary to ultimately proffer an opinion on this subject matter.
>
> [20] Even if he is not a certified fraud examiner, there is no indication that Dr. Rosenstock has any particular expertise or training in the audit of dental practices generally or in auditing billings in dental practices. Indeed, as he candidly admitted, Dr. Rosenstock has never undertaken such work or an audit prior to doing so in this case. There is no indication that Dr. Rosenstock is qualified by way of forensic training or examination to say, as he did in his report, that the defendants falsified the dates and circumstances of Dr. Wittenberg's procedures in his billing practices.
>
> [21] In view of all the above, while I accept Dr. Rosenstock may have expertise in general dentistry, the weight of which may be affected by its currency, I am unable to accept Dr. Rosenstock as an expert in dental billing practices with respect to the six questions asked in the report proffered as an expert report in this matter.

[249] I therefore conclude that the plaintiff has not proven this allegation, and I decline to make the requested factual inference.

4. Conclusion on Fraudulent Misrepresentation

[250] The plaintiff ultimately has failed to meet its burden, and the allegations of fraudulent misrepresentation are dismissed for the reasons set out above. I do not accept that the defendants misrepresented the legitimate revenue of the practice. This in large part deals with the crux of the plaintiff's case.

[251] I also note that the defendants made an important point in argument that the plaintiff would also have had to prove the defendant intended the plaintiff act on any fraudulent financial representations established: see *Ascent Developments* at para. 18. While it is not necessary for me to decide this point, suffice it to say that would have been difficult to discharge this burden on the evidence presented in this case.

C. Are the defendants liable in breach of contract on the basis that the contractual representations made to the plaintiff in the asset purchase agreement were false?

[252] I turn now to the plaintiff's alternative position, i.e. that the defendants are liable for breach of contract as they made certain false representations in the terms of the asset purchase agreement for the dental clinic.

[253] As a preliminary point, I note that this position was not vigorously pursued in final submissions, and the focus of the case was on fraud and fraudulent misrepresentation. This is likely because it would prove to be difficult to establish liability on the basis of breaches of the express, strong representations made by the defendants in the asset purchase agreement.

1. Legal Principles

[254] The Supreme Court of Canada has set out the guiding principles on contract interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 5 at para. 47:

> The overriding concern is to determine "the intent of the parties and the scope of their understanding" …. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[255] With respect to this latter point, the Court further noted that "While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement": para. 57.

2. Positions of the Parties

[256] The plaintiff maintains Article 3.1(a)(ii) of the asset purchase agreement contains a representation by the defendants that the attached financial statements truly and accurately reflect the financial position of the dental practice and its ordinary course of business. The very reason the language "truly and accurately reflect the financial position of the Practice" was used is because the plaintiff is relying on the financial representation being substantially true, fair and not misleading, not merely technically true. If the Court agrees that a material amount of

revenue stated in the financial statements was illegitimate and the result of fraudulent billing practices, this would amount to a breach of the asset purchase agreement.

[257] I have already concluded, as set out above, that the plaintiff has not established that a material amount of revenue stated in the financial statements was illegitimate and the result of fraudulent billing practices. These findings are a complete answer to the plaintiff's position.

[258] The plaintiff also points out Article 3.5(k) of the Agreement contains a representation by the defendants that the practice has been operated "in compliance with the rules and the Code of Conduct of the College" of Dental Surgeons of British Columbia. This provision was intended to assure that the dental practice had been operated in a professional and ethical manner. The plaintiff again relies on allegations of fraudulent billing practices to argue that the defendants had not complied with the professional obligation in the code of ethics, which therefore amounts to a breach of the asset purchase agreement.

[259] Once again, this point has been answered by the findings set out above.

[260] The plaintiff says, however, that even apart from the question of illegitimate revenue, the financial statements do not truly and accurately reflect the dental practice's financial position, as Martek was paying a portion of employees' salaries. Martek owned the lab and radiographic equipment. Further, expenses for lab fees and radiographic and anesthetic services up to a certain point in 2017 included payments to Martek. Thus, when DPW Inc. acquired that equipment for zero dollars, that should have been recorded as a gain.

[261] The plaintiff also says the defendants represented that nothing in the financial statements was false, a broadly worded representation that offers the plaintiff significant protection against both false statement as well as material non-disclosure. Notably, the second half of Article 3.5(g) is not tied to the asset purchase agreement

or the attached financial statements, but amounts to a broad, general representation that information reasonably affecting the plaintiff's purchase has not been withheld.

[262] I will now deal with these remaining arguments.

3. Discussion

[263] The background of the negotiations has been set out above. I have considered that background and the various provisions cited and relied upon respectively by each party. To a great extent however the answer to this case lies in the consideration of two main provisions. The first of these is Article 3.1(a), the provision which the plaintiff says the defendants breached:

> 3.1 Financial Representations. The Vendor and the Covenantor jointly and severally represent and warrant to the Purchaser (and acknowledge that the Purchaser is relying on such representations and warranties in entering into this Agreement and completing the transactions contemplated herein) that:
>
> (a) the Financial Statements truly and accurately reflect the financial position of the Practice as of the last day of the fiscal period for which they were prepared and, since that time:
>
> (i) there has been no material adverse change in the financial position or condition of the Practice nor any damage, loss or other change in circumstance materially affecting the Practice; and
>
> (ii) the Practice and the business thereof has been carried on in the ordinary course;

[264] The second of relevant provision is Article 5.4, which reads:

> 5.4 Financial Performance. The Purchaser understands that the financial results shown in the Financial Statements are the result of the Vendor and Covenantor's efforts and there is no assurance by the Vendor or the Covenantor that the Purchaser will achieve the same (or similar) results.

[265] The defendants maintain Article 5.4 refers more broadly to "financial results", encompassing those shown in the financial statements attached to the asset purchase agreement. The defendants point out the that Article 5.4 contains an acknowledgement that those financial results were "the result of the Vendor and Covenantor's efforts" and that "there is no assurance by the Vendor or the Covenantor that the Purchaser will achieve the same (or similar) results".

[266] The defendants submit, and I agree, that the sequence of the negotiations and the combined effect of Articles 3.1(a) and 5.4 made clear that Dr. Wittenberg did not intend Dr. Shum to act on the representations made in the financial statements. Rather, as per Article 5.4, Dr. Wittenberg wanted an acknowledgement that he was not representing that Dr. Shum could achieve the same or similar financial results to those he had achieved. Article 5.4 is a significant qualification on the representations in Article 3.1(a). Dr. Wittenberg testified he would not have signed the agreement if this clause had not been agreed to.

[267] Dr. Shum agreed he reviewed the clause with his lawyer and "this was one of the sticking points for a while." He agreed that Article 5.4 was an acknowledgement that he was not relying on the on average $700,000 annual gross billings of the practice.

[268] With respect to whether the defendants omitted to tell the plaintiff anything they knew or ought reasonably to have known about the practice that would reasonably affect Dr. Shum's decision to proceed with the purchase of the dental clinic, the plaintiff relies on Dr. Shum's lack of knowledge of Martek, noting that he was unaware that a portion of the CDAs' salaries were paid by Martek and some of the clinic's equipment was owned by Martek. In my view, none of this can be considered a material non-disclosure.

[269] First, the uncontroverted evidence from both Dr. Wittenberg and Ms. Lazarus is that this amount was "very, very small" or "inconsequential amount" of the full expenses for the dental practice, including the employment expenses that were set out in the defendants' financial statements. Furthermore, it was uncontroverted that Martek had ceased operating by late 2016 or early 2017, certainly before Dr. Shum was introduced to the parties. The transfer of equipment took place in late December or early January, well before Dr. Shum became involved in negotiations, and no evidence was led as to how this might be consequential or material to Dr. Shum's decision to purchase the dental clinic or how it would affect the operation or financial viability of the practice.

[270] Furthermore, when it was put to Dr. Wittenberg that “You didn’t tell Dr. Shum anything about Martek, right?”, Dr. Wittenberg replied that “Just as I didn’t tell him anything about Star Dental, Protec, any of the other particular companies I worked with. … There was no reason to”. The Plaintiff has not established why it was material to know about Martek, and this is a complete answer to the plaintiff’s submission.

[271] I do not find the defendants made misleading statements, nor that they omitted to tell the plaintiff anything necessary with regards to the financial statements. I also do not find the defendants omitted to tell the plaintiff anything they knew or ought reasonably to have known about the practice that would reasonably affect the plaintiff’s decision to proceed.

[272] Ultimately, I conclude that the plaintiff has not established that the unfortunate circumstances leading to Dr. Shum’s decision to close the practice—with the concomitant adverse financial consequences—lies at the feet of the defendants. Rather, that responsibility lies with the plaintiff.

V. CONCLUSION

[273] The plaintiff has failed to meet its burden. It has failed to prove fraud or breach of contract. The plaintiff’s claim is therefore dismissed.

[274] In view of these conclusions, I do not need to deal with the defendants’ champerty defence or its submissions on assessing damages.

[275] Costs are awarded to the successful party, which in this case is the defendants. If there are matters with respect to costs that should be brought to the court’s attention, the parties are at liberty to resolve these matters or file an application, provided such application is filed within 90 days of this judgment.

“Burke J.”