Date: 20230505
Docket: CI 23-01-39185
(Winnipeg Centre)
Indexed as: Dentalcorp Health Services Ltd. et al. v.
Dr. Kenneth Hamin Dental Corporation et al.
Cited as: 2023 MBKB 75

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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DENTALCORP HEALTH SERVICES LTD., MEL MCMANUS (MANITOBA) DENTAL CORPORATION, AND DR. LARRY PODOLSKY DENTISTRY PROFESSIONAL CORPORATION,	)	Peter Halamandaris Lauren L. Gergely for the plaintiffs
plaintiffs,	)	
- and -	)	
DR. KENNETH HAMIN DENTAL CORPORATION, KENNETH HAMIN, AND BAMIDELE JAMES LAWAL DENTAL CORPORATION, CARRYING ON BUSINESS AS WESTBROOK DENTAL GROUP,	)	Adam D. Pollock Jonathan A.A. Paterson for the defendants
defendants.	)	JUDGMENT DELIVERED: May 5, 2023

TOEWS J.

INTRODUCTION

[1] In 2014, the defendants (collectively referred to as "Hamin") entered into a series of agreements with the plaintiffs (collectively referred to as "DentalCorp"). These agreements included:

- An Asset Purchase Agreement dated February 28, 2014 (the "Asset Purchase Agreement");
- A Share Purchase Agreement dated March 1, 2014 (the "Share Purchase Agreement");
- A Services Agreement dated March 1, 2014 (the "First Services Agreement");
- A Non-Competition, Non-Solicitation Agreement dated March 1, 2014 (the "Restrictive Agreement" or the "Restrictive Covenants"); and
- An Amended and Restated Services Agreement dated May 31, 2017 (the "Amended Agreement").

(All of which are collectively referred to as "the Agreements")

[2] DentalCorp carries on business as a network of dental practices, which are located across Canada, including Manitoba. The dentists providing dental services with DentalCorp in Manitoba are designated as independent contractors pursuant to the Agreements, and earn a percentage of collected revenue.

[3] Dr. Hamin is a dentist licensed to practice dentistry in the provinces of Manitoba and Ontario, providing dental services through a corporation, one of the named defendants in this action.

[4] Pursuant to the Asset Purchase Agreement, DentalCorp purchased certain assets from the defendants, including the professional goodwill and the relationship with the defendants' patients, along with custody and control of all

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patient records and associated files. Pursuant to the Asset Purchase Agreement, Hamin was paid $540,000.00 for the purchase of the assets and the parties agreed to enter into the First Services Agreement and the Restrictive Agreement.

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[5] As a result of the Asset Purchase Agreement, the plaintiffs carried on the professional practice of dentistry at Reflections Dental Health Centre located on Harrow Street near Pembina Highway in Winnipeg, Manitoba ("the Reflections Premises" or "the Reflections Location", collectively referred to as "Reflections"). In accordance with the Share Purchase Agreement, DentalCorp paid Hamin $2,320,000.00 in exchange for the defendants selling, assigning and transferring all of the shares held by Hamin in respect of the dental operations in two locations – one at the University of Manitoba, which as a result of a fire is no longer in operation, and the Reflections Premises – to DentalCorp.

[6] As a result of these transactions, Hamin agreed to continue working at the Reflections Premises, through Hamin Dental Corporation, pursuant to the terms of the First Services Agreement. The First Services Agreement was for a term of five years, pursuant to which Hamin agreed to provide dental services for DentalCorp in respect of the patients at Reflections, as an independent contractor.

[7] Pursuant to the terms of the First Services Agreement, Hamin agreed that for the duration of the five-year term of the First Services Agreement and for 36 months thereafter, the defendants would not:

- Carry on or be engaged in or concerned with or interested in the practice of dentistry, anywhere within a five kilometre radius of Reflections;
- Disclose or otherwise communicate or make available to any person, the name of any patient of what is now DentalCorp, or the contents of the whole or any part of patient records of such patients, except as required by law;
- Contact, solicit, interfere with or endeavour to entice away from DentalCorp in any manner whatsoever, any patient for their own account or on behalf of any other person who carries on a professional practice similar to or in competition with DentalCorp; and
- Contact, solicit, interfere with or endeavour to entice away from DentalCorp, in any manner whatsoever, any personnel working for DentalCorp on or after March 1, 2014.

[8] It is a further term of the First Services Agreement that a breach or threatened breach of the Restrictive Agreement would constitute irreparable harm, which cannot be calculated, or fully or adequately compensated through the recovery of damages alone, entitling the plaintiffs to interim and permanent injunctive relief.

[9] The Amended Services Agreement expanded the terms of the First Services Agreement to include what is now Podolsky Corporation, and to expand Hamin's

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services to include the patients of the plaintiffs at a specific location on Wolsley Street in Kenora, Ontario. The Amended Services Agreement restated the terms of the First Services Agreement, with the agreement simply being expanded to include the Ontario location.

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[10] Both the First and Amended Services Agreement contained various restrictions prohibiting the defendants from making copies of patient records, either during the term of, or after the termination of the Amended Services Agreement. The Amended Services Agreement commenced May 31, 2017 and was set to expire on May 31, 2022, but by mutual agreement, was extended to September 30, 2022, on which date it was terminated. Dr. Hamin provided a required six months' notice period prior to the termination date, during which time he continued to provide services to the patients of DentalCorp at Reflections, and to the limited extent required, if any, at the Kenora, Ontario location.

[11] The plaintiffs filed a Statement of Claim and a Notice of Motion seeking an interim injunction based on the alleged breach seeking to enforce the Restrictive Agreement alleging that:

- The defendants are carrying on a dental practice, or practising directly or indirectly as a dentist within the restricted five kilometre radius of the Reflections Location and the Ontario location;
- The defendants have solicited, endeavoured to solicit or enticed away the patients of the plaintiffs within the restricted period specified by the Restrictive Agreement; and

- The defendants have used or are using the plaintiffs' confidential information contrary to the provisions of the Restrictive Agreement.

[12] The plaintiffs specifically state that:

- The defendants did not assist with the transfer back of the patients from the care of Dr. Hamin to the dental staff at the Reflections Location, but rather used the opportunity to have conversations with patients of the DentalCorp for the purpose of soliciting and enticing them to follow him to his new practice;
- The defendant Dr. Hamin improperly provided his personal cellphone number and business cards to patients;
- The defendants improperly removed patient records belonging to the plaintiffs prior to September 30, 2022; and
- The defendant Dr. Hamin improperly began practising dentistry in conjunction with another third-party dental clinic within a five kilometre radius of the Reflections Premises.

[13] The plaintiffs allege that the defendants took various steps to solicit and otherwise interfere with patients of DentalCorp in order to entice them to Dr. Hamin's new practice. This included various postings on social media, placing a large billboard overlooking the Reflections Premises, and Dr. Hamin participating in an interview with a local community newspaper about his new practice.

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The Position of the Plaintiffs

[14] The plaintiffs state that the test for an interlocutory injunction is set out in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, 1994 SCC 117, [1994] 1 S.C.R. 311, which provides that an applicant for an interlocutory injunction must demonstrate three interrelated considerations that include:

- There is a serious issue to be tried;
- The applicant would suffer irreparable harm if the injunction is not granted, that is, harm that cannot be remedied by damages at trial; and
- The balance of convenience favours the granting of an injunction, that is, the applicant would suffer more harm if the injunction were refused than the respondent would suffer, if it were granted.

[15] In respect of the first stage of the test, the plaintiffs state that the question whether there is a serious issue to be tried is a lower threshold to be met than demonstrating a strong *prima facie* case. (see ***Polar Bear Rubber Ltd. v. Brothers Industrial Supply Ltd.*** (1998), 131 Man. R. (2d) 292, 1998 CanLII 17770 (MB CA); ***Steinbach Credit Union Ltd. et al. v. Hardman et al.***, 2007 MBCA 25)

[16] The plaintiffs state that the defendant Dr. Hamin is practising dentistry within the restricted five kilometre radius and reject any suggestion by the defendants that because the driving distance between the two locations results in

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a route with a distance of more than five kilometres, this provision has not been breached by the defendants.

[17] The plaintiffs state that a final decision regarding the validity of the Restrictive Agreement must await a trial, but that those restrictions are unambiguous and inherently reasonable. The reasonableness of the restrictions, the plaintiffs argue, is based on a consideration of the following questions:

- Does the plaintiff have a proprietary interest entitled to protection?
- Are the temporal or spatial features of the clause too broad?
- Is the covenant unenforceable as being against competition generally, and not limited to proscribing solicitation of the patients of the plaintiffs?

Proprietary Interest

[18] It is the plaintiffs' position that they have a proprietary interest which is entitled to protection, the temporal and spatial features of the clauses are not too broad, and the clauses do not restrict competition generally. Furthermore, the plaintiffs state that since Hamin is unequivocally in breach of the Agreements and that the restrictions are reasonable with reference to the interests of the parties, the plaintiffs have established a serious interest to be tried.

Irreparable Harm

[19] The plaintiffs take the position that in cases like this, where the restrictions are in respect of a covenant given to a purchaser on the sale of a business, irreparable harm is assumed. The plaintiffs rely on the decision of the Manitoba

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Court of Appeal in ***Miller v. Toews*** (1990), 70 Man. R. (2d) 4, 1990 CanLII 2615 (MB CA) where Twaddle J.A. held, on behalf of the court (at pp. 2 and 3):

> The learned judge who heard the plaintiff's application was not satisfied that the plaintiff would suffer irreparable harm if an injunction was denied. In regarding proof of irreparable harm as an indispensable requirement, the learned judge erred in principle. Such proof is not required in cases, such as this, where the plaintiff seeks to enforce a negative covenant which is prima facie reasonable and was given by the vendor of a business to protect the purchaser's interest in the subject matter of the sale. In cases of this kind, the proper test is not whether damages will prove to be an adequate remedy, but whether it is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages. That test was propounded by Anderson, J. in Baxter Motors Limited v. American Motors (Canada) Limited, 1973 CanLII 1067 (BC SC), [1973] 6 W.W.R. 501 at p. 506 and adopted by Scollin, J. in Western Broadcast v. Winnipeg Football Club (1982), 1982 CanLII 4013 (MB KB), 20 Man.R. (2d) 181 (Q.B.) at p. 185.
>
> .....
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> [Page 3]
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> The covenant in the case at bar is prima facie reasonable. It was given as part of the consideration on the sale of a business. It is limited both in area and in time. Although a final decision must await the trial, nothing has so far been put on the record to indicate that, at the time the covenant was given, it was wider or of longer duration than was necessary to protect the interests which the covenantee was purchasing. Nor is there reason to say that the covenant was injurious to the public interest.

Balance of Convenience

[20] The plaintiffs argue that the balance of convenience favours granting the injunctive relief sought in order to ensure that Hamin lives up to the terms of the Agreement, which they signed as part of the sale of the business and assets to DentalCorp. The plaintiffs argue that they have established a serious issue to be tried as the defendants are in clear violation of the clauses, and that the

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relationship here is not that of employer and employee (which, if it was, would bring other considerations into play).

[21] The plaintiffs argue that there is an equal bargaining position here as between the parties to the Agreements and that the consideration paid by the plaintiffs for the purchase is a relevant factor, such that the plaintiffs are not required to establish irreparable harm. The plaintiffs point out that in similar sales of dental practices, some where more onerous restrictions were imposed on the vendor, the courts have granted injunctive relief. (see ***Button v. Jones***, 2001 CanLII 28303 (ON SC); ***Dr. Jack Newton Dentistry Professional Corporation v. Towell***, 2005 CanLII 37351 (ON SC) ("***Dr. Jack Newton Dentistry***"); ***Parekh et al v. Schecter et al***, 2022 ONSC 302 ("***Parekh***"))

The Position of the Defendants

[22] The issues addressed by the defendants in respect of opposing the motion for the injunctive relief sought by the plaintiffs include:

- Have the plaintiffs come to court with clean hands?
- What was the nature of the relationship between Dr. Hamin and DentalCorp at the time of the breach?
- What is the correct test for an injunction in these circumstances?
- Have the plaintiffs made out a strong *prima facie* case?
- Are the Restrictive Covenants reasonable?
- Can the Restrictive Covenants be saved through severance?
- Did Dr. Hamin breach the Restrictive Covenants?

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[23] To the extent that it may be necessary, I will deal with the plaintiffs' position in response to these issues in my reasons for judgment where the issues were not initially raised or addressed in the plaintiffs' motion brief. I would note that the plaintiffs have filed a responding motion brief subsequent to the defendants filing their motion brief, and the plaintiffs' position in respect of these additional issues are set out therein.

Have the plaintiffs come to court with clean hands?

[24] The defendants raise a number of circumstances, which they argue should disentitle the plaintiffs from the equitable injunctive relief they seek.

[25] First, the defendants argue that the plaintiffs improperly withheld payments owing to the defendants under the terms of the Agreements between them. The failure to remit certain payments to Hamin, and to Dr. Hamin in particular, is predicated on a dispute over expenses which Dr. Hamin claimed, and which, despite some adjustments to the claims advanced by the plaintiffs in respect of these claims, amount to approximately $173,000.00. The defendants state there is no right to withhold payments on account of the disputed expenses and by doing so, the plaintiffs' actions amount to a failure to come to court with clean hands when seeking equitable relief, and therefore the injunction ought to be denied.

[26] Second, the defendants argue that the plaintiffs are in breach of their own restrictive covenant. They argue that clause 10.1 of the Amended Agreement forbids DentalCorp from operating a number of clinics, which they operate within the five kilometre radius of the Reflections Location.

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[27] These clinics were being operated prior to the purchase of the Reflections Location by DentalCorp. Nevertheless, the defendants state that upon the purchase of the Reflections Location, only those businesses that DentalCorp purchased after the acquisition of the Reflections Location and which had been in operation for more than 24 months prior to the acquisition, are entitled to operate. Since these locations were acquired and were in operation prior to the acquisition of the Reflections Location, their continued operation by DentalCorp is a breach of the Restrictive Covenants. It appears their argument is that unless the consent of Hamin is obtained, these clinics must be shut down or otherwise disposed of by DentalCorp.

[28] Third, the defendants argue that the purchase of Reflections by DentalCorp from the defendants is an orchestrated scheme to restrict the public's right of choice of dentist in violation of the Agreements between the parties, as well as the applicable statutory and regulatory provisions governing the practice of dentistry in the province.

[29] The defendants argue that each of these breaches amount to a failure to come to court with clean hands and therefore, it would be inequitable to enforce Restrictive Covenants in DentalCorp's favour when it is in breach of its obligations under the very same Agreements.

The nature of the relationship between Dr. Hamin and DentalCorp at the time of the alleged breach

[30] The defendants argue that the only agreement between the parties that has not expired is the Amended Agreement. The Amended Agreement came into

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effect on May 31, 2017 as a result of DentalCorp acquiring the dental practice in Kenora, Ontario. They take the position that the only Restrictive Covenants in place are the Restrictive Covenants set out in the Amended Agreement.

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[31] They state that the vendor/purchaser relationship established by virtue of the Asset Purchase Agreement (executed February 28, 2014), the Share Purchase Agreement (executed March 1, 2014), the First Services Agreement (executed March 1, 2014) and the Restrictive Agreement (executed March 1, 2014) have expired. In its place, the Amended Agreement establishes a relationship as of May 31, 2017 that is "strictly a relationship of independent contractor and employer". (see para 81 of the defendants' motion brief)

[32] The defendants state that as a result of the execution of the Amended Agreement, the defendant Dr. Hamin became an employee of the plaintiffs notwithstanding the specific language of the Amended Agreement which characterizes him as an independent contractor. Therefore, the case must be evaluated on the standards applicable to employment relationships.

What is the correct test for an injunction in these circumstances?

[33] It is the defendants' position that analyzing this relationship on the basis of the standards applicable to employment relationships, the court must consider the following:

- Have the plaintiffs established a strong *prima facie* case?
- Will the plaintiffs suffer irreparable harm not compensable in damages?

- Which of the two parties will suffer greater harm from the granting or refusal of the remedy pending a decision on the merits?

[34] This standard is set out in ***People Corporation v. Mansbridge***, 2022 MBCA 37.

[35] On the basis of this standard, the defendants argue that the Restrictive Covenants are presumptively void as a restraint of trade, and it is the plaintiffs who have the onus to displace the presumption that the covenants are unenforceable on the basis of reasonableness. The defendants state that the factors to be considered in determining whether the Restrictive Covenants are valid are set out in ***National Bank Financial Inc. v. Canaccord Genuity Corp.***, 2018 BCSC 857 ("***National Bank***"), which provides:

> [58] To demonstrate there is a serious question to be tried, the plaintiff must show a "strong *prima facie* case" that the non-solicitation covenants are enforceable and that the defendants' ongoing conduct are in contravention of those enforceable provisions: *853947 B.C. Ltd* at para. 78.
>
> [59] The public has an interest in every person's carrying on his or her trade freely. So has the individual. Accordingly, the general rule is that the court will presume that a non-solicitation clause is void as a restraint of trade unless the following characteristics are shown:
>
> a) it protects a legitimate proprietary interest of the employer;
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> b) the restraint is reasonable between the parties in terms of temporal length, spatial area covered, the nature of activities prohibited and overall fairness;
>
> c) the terms of the restraint are clear, certain and not vague; and
>
> d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.
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> *Aurum Ceramic Dental Laboratories Ltd. v. Hwang*, 1998 CanLII 5759 (BC SC), [1998] B.C.J. No. 190, 77 A.C.W.S. (3d) 161 (S.C.) at

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> para. 11; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 16 ("*Shafron*")

[36] On an analysis of these factors, it is the defendants' position that the Restrictive Covenants are void and unenforceable.

Can the Restrictive Covenants be saved through severance?

[37] The Restrictive Covenants under the Amended Agreement are set out at para 31 of the defendants' motion brief. As stated at para 23 of the defendants' motion brief, the entire Restrictive Covenants is in the same form in all of the relevant Agreements. The defendants take the position that all of the clauses that fall within Article 10 of the Amended Agreement are bound together, and removing any portion of the Restrictive Covenants set out in Article 10 would amount to something more than trivial or technical removals. A removal of any one of those clauses is therefore impermissible. The defendants state that even if the plaintiffs may be seeking to enforce something less is irrelevant.

If enforceable, did Dr. Hamin breach the Restrictive Covenants?

[38] In this context, the defendants argue that while the new work location of Dr. Hamin is within a five kilometre radius "as the crow flies", the correct interpretation of the geographic range of the covenant is "driving distance". The defendant Dr. Hamin states that the minimum driving distance between the Reflections Location and the new place of business is 5.3 kilometres, and therefore beyond the five kilometre radius. (see paras 136 – 140 of the defendants' motion brief)

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[39] Furthermore, the defendants argue that Dr. Hamin’s interaction with his patients at the Reflections Location prior to and after leaving the practice of dentistry at that location do not amount to solicitation or the targeting of those patients, and dispute that he breached the confidentiality covenant by retaining certain specific patient data. They argue that it is legally required for him to retain that data, including the patient logbook, which is apparently being held in trust by counsel until this matter is decided.

Irreparable Harm

[40] The defendants argue that the plaintiffs have failed to meet their onus of demonstrating that they will suffer irreparable harm if the injunction is not granted. They state that delay is a factor to be considered in this type of application. The defendants also note that the plaintiffs have delayed bringing their motion for an injunction until almost four months have passed since Dr. Hamin began practising at the new location, of which the plaintiffs complain.

[41] In response to the plaintiffs’ position that the delay was necessary in order to try to quantify the losses they are suffering, the defendants state that quantification of loss is not necessary in order to seek an injunction, and in fact, the plaintiffs’ position suggests that the loss is not irreparable at all.

The Balance of Convenience

[42] The defendants argue that the balance of convenience weighs against granting an injunction in this case. Based on the factors identified in ***National Bank***, the defendants state that damages are an adequate remedy here and that

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to grant an injunction would effectively prohibit the defendant Dr. Hamin from earning a living. They argue that the failure of the plaintiffs to act quickly has resulted in circumstances where the defendants have spent considerable resources in opening up a new practice, only to be subjected to an application for an injunction.

[43] The defendants also point out that an injunction would have a significant impact on Dr. Hamin's patients who require dental assistance. Furthermore, the defendants state that the relative financial position of the parties would have a significant impact on the defendants if an injunction were granted, while the plaintiffs would only suffer a slight impact in its overall profits if the injunction were not granted.

[44] In the conclusion of the defendants' brief (at para 168), they make the following plea to the court as a basis on which to deny the plaintiffs injunctive relief:

> 168. The conduct of the plaintiffs disentitles them to equitable relief. They have proceeded how they wish without regard to the legality of their actions. They now seek the assistance of this Honourable Court to continue dominance over Dr. Hamin and the dental industry in Canada. Their conduct should not be permitted to continue.

ANALYSIS AND DECISION

[45] I am satisfied on the basis of the material before me that the plaintiffs have established the appropriate basis for an interlocutory injunction.

[46] It is clear that pursuant to the Agreements, as well as the Amended Agreement, the plaintiffs purchased assets from Hamin, including the professional

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goodwill, and their relationship with patients and all related patient files. Dr. Hamin was paid $540,000.00 in respect of the purchase of goodwill as well as $2,320,000.00 in exchange for the sale, assignment and transfer of all shares held by the defendants of their dental clinics to DentalCorp.

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[47] It was an express term of the Asset Purchase Agreement and the Share Purchase Agreement that Dr. Hamin would enter into the First Services Agreement and the Restrictive Agreement. It was also an express term of both the First Services Agreement and the Amended Agreement that Dr. Hamin would provide dental services to the DentalCorp patients at the Reflections Location as an independent contractor in conjunction with the plaintiffs. Specifically, Article 2.0 of the First Services Agreement provides:

ARTICLE 2
SERVICES OFFERED IN CONJUNCTION

> 2.0 SERVICES OFFERED IN CONJUNCTION – The Professional Corporation, the Associate and the Facility Operator hereby agree to provide their respective professional dental services and Health Care Services in conjunction with each other. Nothing in this Agreement shall be deemed to create a joint-venture, partnership or any employer-employee relationship between the parties hereto. The Associate, the Professional Corporation and the Facility Operator hereby confirm with one another that the Associate, the Professional Corporation and the Facility Operator are each independent contractors. The Associate acknowledges and agrees that all professional dentistry services performed by the Associate as part of the Associate Services shall be performed by the Associate as an independent contractor engaged by the Professional Corporation, and not as an employee, associate or partner of the Facility Operator. The Associate, the Professional Corporation and the Facility Operator covenant that they shall not hold themselves out as being partners of each other, co-joint venturers or as having an employer-employee relationship.

[48] While the vendor agreed to provide services for a specified time period in conjunction with the purchase of the business by the purchaser, none of the terms

of the sale, or the First Services Agreement specifically, give rise to a relationship akin to that of a dependent contractor or an employer/employee relationship. As the First Services Agreement specifically states, the defendants were providing the services of an independent contractor in conjunction with the plaintiffs.

[49] As the court held in ***Parekh***, when examining the propriety of restrictive covenants, it is important to consider the context in which those covenants were provided:

> [62] In *Payette v. Guay*, 2013 SCC 45 (CanLII), [2013] 3 SCR 95 at para 45, the Supreme Court provided guidance on whether a restrictive covenant flows from an employment or commercial context:
>
> > To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is, in my view, important to clearly identify the reason why the covenant was entered into. The "bargain" negotiated by the parties must be considered in light of the wording of the obligations and the circumstances in which they were agreed upon. The goal of the analysis is to identify the nature of the principal obligations under the master agreement and to determine why and for what purpose the accessory obligations of non-competition and non-solicitation were assumed.
>
> [63] I am satisfied, based on the aforementioned evidence, that the non-compete covenant flowed from the bargain struck with respect to the sale of the business. Ira's goodwill in the practice was part and parcel of the sale transaction, and the Associate Agreement in which the non-compete covenant was found was a necessary and corresponding extension of the Share Purchase Agreement.

[50] Similarly in this case, there has been a sale of a business by the vendor to the purchaser where the restrictive covenants were given by the vendor of the business to protect the purchaser's interest in the subject matter of the sale.

[51] The fact that the parties agreed to an extension of the First Services Agreement by the execution of the Amended Agreement does not alter the

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fundamental nature of that relationship. The Restrictive Covenants continued in place for a period of time after the Amended Agreement expired as part and parcel of the original sale transaction, which was amended and restated by virtue of the Amended Agreement. In other words, the execution of the Amended Agreement, which then included the Kenora, Ontario dental practice, extended the timeframe during which the terms of the sale of the business, including the terms of the Restrictive Agreement, continued.

[52] The practice of entering into restrictive covenants, as part and parcel of the sale of a customer or client-centred business, has been widely accepted by the courts. These types of restrictive covenants are necessary to protect the sale of the goodwill by the vendor to the purchaser in order to allow the purchaser's dentists and other employees to get to know the patient and build a relationship.

[53] In ***Mardon & Campbell Insurance Brokers Ltd. v. Creed***, 2002 BCSC 1342, [2002] B.C.J. No. 2138 (QL) ("***Mardon***"), there was a sale of a business where the share purchase agreement contained similar restrictive covenants as those in this case. As in the case at bar, the parties there were sophisticated business people. The court stated:

> [35] In this matter, the individual players Ball, Creed, and MacDonald, are sophisticated businessmen, particularly in relation to a type of business – the brokering of insurance – where personal involvement directly with clients is of paramount significance. It is in this perspective that the value of a given insurance agency is largely predicated upon good will when sale of the business is under consideration.
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> [36] In the circumstances here, the purchasers paid a significant and substantial price for essentially the good will of this business, based in part upon the expectation of subsequent renewals of contracts of insurance.

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[54] There is no suggestion here by the plaintiffs that they are advancing a proprietary interest in the clients or patients themselves. The plaintiffs are simply seeking to preserve their goodwill occasioned by their management of dental practices at Reflections. As in ***Mardon***, the plaintiffs here have a legitimate proprietary interest in the goodwill and the plaintiffs are entitled to have those interests protected and enforced where there is a breach of those interests by the defendants.

[55] This position is neatly summarized in ***Smilecorp Inc. v. Pesin***, 2012 ONCA 853 ("***Smilecorp***") where the court rejected an argument similar to the one being advanced here:

> [30] In essence, therefore, Dr. Pesin contracted to obtain the benefits of a 'turn key' dental practice built by others. By executing the management agreement, he gained an existing patient base, attracted and developed by Smilecorp and other dentists at the Centre, in exchange for his non-solicitation covenant, his professional services and his commitment that, when he left the Centre, those patients treated by him would remain at the Centre as patients of another dentist unless the patients elected otherwise. As the application judge held, at para. 76, the enticement to sign the management agreement with Smilecorp was the existence of "a built in client base and goodwill associated with the Centre".
>
> [31] Importantly, the management agreement also established a scheme to preserve the continuity of patient care and patient choice regarding patients' selection of their dentist in the event of termination of the agreement. The management agreement provided that a patient's records would be transferred, on request, to a dentist of the patient's choice (clause 19(9)(b)(iii)) and that "the patient's right to choose his or her health care provider is of paramount importance" (clause 3(4)). The management agreement also contained provisions that were designed to ensure that, upon Dr. Pesin's departure, the dental care of patients at the Centre would continue with a successor dentist at the Centre.
>
> [32] In my view, having embarked on his dental practice at the Centre on this basis, and having expressly acknowledged Smilecorp's right to protect its investment at the Centre, it was not open to Dr. Pesin, on termination of the management agreement, to deny either Smilecorp's

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> proprietary interest in the business conducted and the premises at the Centre or its right to protect that interest by means of injunctive relief.[2]
>
> [33] Accordingly, I would reject Dr. Pesin's attack on the application judge's finding that Smilecorp had a proprietary interest in its premises and business at the Centre. This attack is defeated by the express terms of the contracts that Dr. Pesin voluntarily entered into with Smilecorp, and of which he was the beneficiary.

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[56] I find no substantive distinction between the facts in ***Smilecorp*** and the case here, insofar as the application of the relevant law to this issue.

[57] The defendants' position that the motion for injunctive relief should fail on account of the plaintiffs' conduct, by coming to court without 'clean hands', is not persuasive. There are clearly outstanding disputes between the parties, including the dispute centered around the issue of expenses claimed by Dr. Hamin. Nevertheless, I agree with the plaintiffs that these disputes, including primarily the issue of expenses, do not relate to the allegation that the defendants breached the Restrictive Agreement and the plea for injunctive relief in the context of this motion.

[58] In my opinion, the reasoning of the court in ***Parekh*** is determinative of whether injunctive relief should be granted in favour of the plaintiffs. In ***Parekh***, the defendant argued that the plaintiffs had ignored COVID-19 protocols recommended by the governing regulatory authority, and refused to pay him for work performed over two months pursuant to the services agreement governing their relationship. Accordingly, the defendant stated that the plaintiffs were barred from the injunctive relief sought.

[59] In dismissing the argument that these allegations prevented the plaintiffs from seeking equitable relief, the court in ***Parekh*** held:

> [25] I am not persuaded that these allegations directly relate to the subject of this injunction motion. In *Toronto (City) v Polai, supra*, at para 46, the Court of Appeal stated that "[t]he misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief."
>
> [26] For the most part, the allegations raised against the plaintiffs are modest or have no relation to the Associate Agreement. One complaint that does relate to the Associate Agreement is the non-payment of billings due under it. If those funds are due to Ira, they should be paid or addressed at a mediation or arbitration, as required under the Associate Agreement. If they are due, they are only three or four months outstanding. The plaintiffs note that there is nothing in the Associate Agreement that states time is of the essence in paying these amounts. They rely upon *Singh v 3829537 Canada Inc.*, 2005 CanLII 20816 (ON SC) at para 66, where the absence of such a clause was relevant to the judge's determination of whether equitable relief should be barred. Furthermore, I was unable to identify in the record an admission that these amounts are owed, which distinguishes this case from *Altam*. In any event, I cannot conclude that the non-payment of billings is directly related to the matters that are in dispute – namely, the enforceability of the restrictive covenants.

[60] As in ***Parekh***, in my opinion, the disputes between the parties such as the dispute over the payment of expenses are not directly related to the application for injunctive relief based on the Restrictive Agreement. While they are properly a matter which the court must consider in the context of the trial itself, they are not relevant to the enforceability of the Restrictive Covenants in the context of this application for injunctive relief.

[61] It is also my opinion that the defendants' position that the parties' contractual arrangements offend the regulatory scheme established by the statutory and regulatory provisions governing the conduct and practice of

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dentistry, so as to make the Restrictive Agreement unenforceable, is unfounded.

As the court held in ***Smilecorp***:

> [41] I do not think that the Advisories or the Regulation compel the conclusion that the non-solicitation covenant is unreasonable or unenforceable.
>
> [42] The Advisory on the Release and Transfer of Patient Records addresses a dental patient's right to receive a copy of his or her dental records and contains provisions designed to ensure compliance by dentists with their professional obligations regarding patient records. The Advisory warns:
>
>> Disputes between practitioners or contractual arrangements should not prejudice the future treatment of patients, restrict patients' rights to choose the dentist of their choice, or limit the access of patients to their dental charts or records.
>
> [43] For the reasons set out above, nothing in the management agreement violates these principles. The agreement preserves, indeed emphasizes, a patient's ability to choose his or her dental provider. The agreement also confirms that the patients at the Centre are entitled to access their dental charts and records, to obtain information concerning their previous dentist at the Centre, and to require transfer of their patient files, if they so elect. Further, and importantly, no endangerment of future patient dental care was occasioned on Dr. Pesin's departure from the Centre because of the scheme for immediate file transfer contemplated, and agreed to by Dr. Pesin, under the management agreement.
>
> …..
>
> [48] In my view, s. 6(c) of the Regulation also does not support the assertion that the non-solicitation covenant is unreasonable or unenforceable. Section 6(c) is concerned with the solicitation of dental patients when a dentist ceases to practise with another dentist or where a partnership of dentists dissolves. Neither scenario is engaged here. Clause 3(1) of the management agreement specifically provided that the parties were not entering into a partnership, professional association or employer-employee relationship. Other provisions of the management agreement stressed the independence of Dr. Pesin's practice. In light of these provisions, s. 6(c) of the Regulation and the cases relied on by Dr. Pesin involving disputes between dentists are inapplicable.
>
> [49] Finally, I agree with the application judge that any conflict between Dr. Pesin's obligations under the Advisories and the Regulation, on the one hand, and under the management agreement, on the other hand, is an

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> issue for Dr. Pesin and his regulator. Under preamble L of the management agreement, Dr. Pesin accepted that Smilecorp made no representation or warranty that the terms of the management agreement conformed with the regulatory regime that governs Dr. Pesin's dentistry practice. Indeed, under that preamble, Dr. Pesin was obliged to satisfy himself as to such conformity. General principles of contract law, therefore, govern the issues in contention as between Smilecorp and Dr. Pesin.

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[62] In response to the defendants' assertion that the Restrictive Covenants in their entirety are void for illegality, I am not satisfied that they are improper, much less illegal, in whole or in part. Even if certain aspects of those Restrictive Covenants may be susceptible to attack (in respect of which I make no finding at this stage), I would not be prepared to strike down the Restrictive Covenants in their entirety as the defendants urge me to do. The defendants specifically agreed at clause 10.2 of the Services Agreement and of the Restrictive Agreement that each of those covenants are separate and distinct. Those provisions specifically agreed to by the defendants provide (at para 3):

> …. If any covenant or provision herein is determined to be void or unenforceable in whole or in part, it shall not be deemed to affect or impair the validity of any other covenant or provision and such unenforceable or invalid covenant or other portion shall be severable from the remainder of this Agreement. In that regard, it is agreed that paragraphs 2(a), 2(b), 2(c), 2(d), and 2(e) [of the Restrictive Agreement and subsections 10(i),(ii),(iii),(iv) and (v) of the Services Agreement] are each declared to be separate and distinct covenants. Notwithstanding the foregoing, if, in any judicial proceeding, any provision of this agreement is found to be so broad as to be unenforceable, it is hereby agreed that such provision shall be interpreted to be only so broad as to be enforceable. …"

[63] In my opinion, even if portions of the covenants are somehow improper as argued by the defendants, I would note that the plaintiffs are not seeking to enforce those provisions impugned by the defendants. Even if those covenants are void for reasons of law or public policy (in respect of which I make no

determination in the context of this proceeding), I have no hesitation in upholding the remaining covenants which the plaintiffs are seeking to enforce in the context of this proceeding and which the defendants, after receiving legal advice and valuable consideration, specifically agreed to abide by. I see no basis in law or equity to accept the all or nothing approach being advanced by the defendants in seeking to strike all of the substantive individual covenants set out in clauses 2 and 10 of the Restrictive Agreement and the Services Agreement respectively, where the parties specifically agreed that they would be treated as separate and distinct covenants.

[64] In respect of the geographical restriction imposed by the Restrictive Agreement, I have no hesitation in finding that Dr. Hamin is in breach of the five kilometre radius restriction. There is no justification for interpreting the definition of radius to mean the driving distance between the Reflections Location and his new place of business. The evidence establishes that his new place of business is within the five kilometre radius of the Reflections Location.

[65] A similar argument was advanced by the defendant and rejected by the court in ***Dr. Jack Newton Dentistry***, where the court held:

> [17] I have found that the non-competition term in the offer to purchase continued to be valid and binding on the parties. Dr. Towell warranted and agreed that he would not carry on a dental practice within a radius of 15 kilometres of the existing practice being purchased. The non-competition agreement was a term of the sale of his practice for $635,000, which included $346,000 for goodwill.
>
> [18] The evidence is uncontested that the proposed site for Dr. Towell's new dental office on March Road is 11.6 kilometres from the existing practice, which is less than 15 kilometres. The natural and ordinary meaning of radius was found to be as it appeared in the Concise Oxford

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> Dictionary, namely "A straight line from the centre to the circumference of a circle or a sphere." *Hajieshaeli v. Elahe* (2002), 123 A.L.W.S. (3d) 685 and *Phillipe v. Campbell* (1994), B.C.J. No. 3241. I adopt the definition of radius as set out in the above cases and find that the proposed location of Dr. Towell's new dental office is within a radius of 15 kilometres.
>
> [19] I also distinguish the case of *Giannakopoulos v. Minister of National Revenue*, [1995] 2 C.T.C. 316, 95 D.T.C. 5477 (F.C.A.) on the facts, which held that when a legislative enactment speaks of the distance between two geographic points and no method of measurement is specified, the normal route of public travel should be used and not a straight line i.e. "as the crow flies". The *Giannakopoulos* case dealt with a taxpayer's ability to claim expenses for moving a distance greater than 40 kilometres to obtain employment. The court considered the context and the purpose of the provision and decided that the distance should be measured using the distance by road.
>
> [20] In this case, the relevant non-competition agreement states that Dr. Towell agreed not to operate a dental office within a radius of 15 kilometres. This wording does not state, "a distance of 15 kilometres". I find that the definition of radius is clear and unambiguous and it is not therefore necessary to decide whether to follow the *Giannakopolous*, *supra*, rationale or that of Houlden J. in *Ernest's Char Pit Limited v. Demendeiros*, 1970 CanLII 342 (ON SC), [1971] 1 O.R. 481 and *Lake v. Butler* (1855), 5 EL & B1.92, 119 E.R. 416.
>
> [21] In the decision of *Ernest's Char Pitt*, *supra*, Houlden J. stated that:
>
> > … if the clause had read "within a radius of three miles" there would of course be no difficulty.
>
> As the non-competition agreement in our case states "within a radius of 15 kilometres", I find that the intention of the parties was clear and the prohibited distance was clearly defined.

[66] Furthermore, even though it is not necessary for me to do so in view of my finding that the defendants have breached the geographical restriction discussed in the previous paragraphs, I am also satisfied that on the arguments advanced by the plaintiffs and set out in its responding motion brief (at paras 112 – 118), that, for the purposes of this motion, the plaintiffs have also established that the defendants have breached the additional covenants of the Restrictive Agreement

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prohibiting solicitation of patients at the Reflections Location by attempting to entice Dr. Hamin's patients to follow him to his new place of business.

[67] I should also address the defendants' argument that the Agreements should be interpreted in the following manner: that upon the purchase of Reflections, the plaintiffs breached the Restrictive Agreement by continuing to operate a number of dental clinics which they owned and operated prior to the purchase of Reflections, and which carry on business within the five kilometre radius of Reflections.

[68] It is the defendants' position that on the basis of Article 10.1 of the First Services Agreement, the only dental clinics which the plaintiffs are entitled to operate without breaching the Restrictive Agreement are those dental clinics which the plaintiffs purchased after their purchase of the Reflections Location, and which were in operation within the five kilometre radius at least 24 months prior to their purchase of Reflections. The defendants argue that those dental clinics, which the plaintiffs owned and operated within the five kilometre radius prior to the purchase of Reflections, require the consent of the defendants to operate; without that consent, the continued operation of those dental clinics by the plaintiffs is a breach of the Restrictive Agreement.

[69] Article 10.1 of the First Services Agreement and the Amended Agreement both provide:

> 10.1 The Facility Operator and the Professional Corporation, jointly and severally, covenant and agree with the Associate and the Dentist that, commencing on the Closing and ending on the termination of this Agreement, neither the Facility Operator, the Professional Corporation nor

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> any of their affiliates will, without the prior written consent of the Dentist, directly or indirectly, for themselves or on behalf of any other Person, be engaged in any business or undertaking, either as incorporator, director, officer, shareholder, partner, joint venturer, owner, employee, consultant, independent contractor, agent licensor, licensee, franchisor, franchisee, trustee or in any other capacity whatsoever, that is competitive with the Dental Endeavour within the Territory. Notwithstanding the foregoing, the parties hereto acknowledge and agree that this provision shall not apply in respect of any Existing Practice which the Facility Operator, the Professional Corporation or any of their affiliates may acquire after the date hereof.

[70] I am not convinced that the interpretation advanced by the defendants is a proper interpretation of the above-noted provision in the context of the entire contractual relationship between the parties. This interpretation leads to the incongruous result that would effectively compel the plaintiffs to close a number of the existing dental clinics, which they owned at the time of the purchase of Reflections, at the same time they were purchasing other dental clinics presumably in order to expand their market share in Winnipeg. It is not an issue that appears to have been raised by the defendants after the sale of Reflections to the plaintiffs, despite the fact that those existing dental practices continued to operate nearby. Certainly, if that had been the intention of the parties, the failure of the plaintiffs to seek the consent of the defendants to keep those clinics open is a matter that should have been raised by the defendants well before the defendants, and specifically Dr. Hamin, terminated their relationship with the plaintiffs.

[71] Even if there is some merit to this argument, as unlikely as it may seem, in my opinion, it is not a matter that prevents the plaintiffs from seeking injunctive relief at this stage. If the delivery of dental services in those clinics owned by DentalCorp, prior to the execution of the Agreements, was in breach of the

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contractual relationship between the parties, it is not one that suggests any improper or flagrant disregard of the contractual relationship between the parties. This is especially so given the apparent failure of the defendants to raise this as an issue of contention with the plaintiffs, while Dr. Hamin provided dental services at the Reflections Location after the sale of that location to DentalCorp.

[72] There is a dispute between the parties as to what is the applicable test in determining whether the injunctive relief should be granted. The plaintiffs take the position that in a case of this nature, which they characterize as the sale of business assets, there is less need for judges to concern themselves with proof of irreparable harm or nicely weighing the balance of convenience when considering the appropriateness of injunctive relief. The defendants state that the relationship between the parties at the relevant time during which the dispute arose is one closer akin to an employment relationship, particularly as a consequence of the extension of the First Services Agreement by the Amended Agreement. Accordingly, the defendants argue that irreparable harm and the balance of convenience must be more carefully considered as is the case in considering the application of restrictive covenants arising out of the context of an employment relationship.

[73] In my opinion, the facts are clear here, not only from the specific wording of the Agreements, including the Amended Agreement, but also from the consideration of the factual matrix in which the parties operated, that there is no employment relationship between the parties. Nor is there any relationship here

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which bears the hallmarks of an employment or dependent contractor relationship. The relationship is that of an independent contractor.

[74] In my opinion, like many similar cases in which the plaintiff seeks to enforce a negative covenant which is *prima facie* reasonable, and which is given by the vendor of a business in order to protect the purchaser's interest in the subject matter of the sale, the appropriate test is that, enunciated by the court in ***Miller*** (at p 2 of the decision), which held that proof of irreparable harm is not required in cases of this kind. Rather, "…the proper test is not whether damages will prove to be an adequate remedy, but whether it is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages".

[75] In ***Miller***, the court further held that (at pp 4 and 5):

> That view was adopted by the Divisional Court of the Supreme Court of Ontario in Bank of Montreal v. James Maine Holdings Ltd. (1982), 28 C.P.C. 157. Delivering the judgment of the Court, Galligan, J. said (at p. 160):
>
> > "In cases of clear breach courts are inclined to grant injunctions enforcing negative covenants until trial. In such cases the inquiry as to the adequacy of damages as a remedy, and into the balance of covenience, do not have the importance that they otherwise do ...".
>
> These views are not novel. They are merely an affirmation, in the case of applications for interlocutory relief, of a rule stated in the House of Lords as long ago as 1878. In Doherty v. Allman (1878), 3 App. Cas. 709, Lord Cairns, L.C., had this to say (at p. 720):
>
> > "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give {the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of

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> damage or of injury -- it is the specific performance, by the Court, of that negative bargain which the parties have made with their eyes open, between themselves."

> [Page 5]
>
> That is not to say that either the absence of irreparable harm or the presence of a much greater inconvenience to the covenantor is totally irrelevant. It is a question of emphasis. What it means is that, when a negative covenant of this kind is reasonable on its face, the person who gave it will have a heavy burden to show that his escape from the bargain will not cause irreparable harm to the covenantee and that the balance of convenience so substantially favours him (the person who gave the covenant) that it would be unjust to restrain his activities until the trial.
> In the case at bar, the defendants say that the balance of convenience is substantially in their favour. In saying that, however, the defendants rely on the situation in which they find themselves as a result of their deliberate breach of their own covenant. A party cannot tip the scales of convenience in his favour by such deliberate misconduct.
>
> This is a simple case of those who have given a negative covenant finding it inconvenient to them. To repeat the words of Megarry, J., "I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligation until the trial."

[76] It is this approach to the issues of irreparable harm and the balance of convenience taken by the court in the foregoing paragraphs of ***Miller*** that I find are applicable here, and it is the approach I have adopted in coming to my conclusion to grant injunctive relief. I am of the opinion that in the context of the sale of a business of this nature taking place between sophisticated business people and entities, the temporal and spatial features of the restrictive clauses are not too broad. The clauses do not restrict competition unnecessarily or generally in the Winnipeg market, or in respect of the Kenora, Ontario dental practice. In my opinion, they are carefully and specifically focussed on protecting the plaintiffs' proprietary interest.

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[77] There is nothing unreasonable about the Restrictive Covenants which both parties agreed to in return for valuable consideration. It was stated unambiguously in the Agreements, including the Amended Agreement, that the Restrictive Covenants are in place for the clear purpose of protecting the assets and interests sold to the plaintiffs by the defendants. The comments of the court in ***Miller*** are directly applicable here, and the facts demonstrate that the plaintiffs are entitled to the injunctive relief sought and should not be limited to a remedy in damages.

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CONCLUSION

[78] On the basis of the foregoing, I have concluded that the plaintiffs have established a *prima facie* case, and that following the approach of the court in ***Miller***, I have considered the issues of irreparable harm and the balance of convenience in the manner expressed by that court and reproduced above, namely (at p 5):

> That is not to say that either the absence of irreparable harm or the presence of a much greater inconvenience to the covenantor is totally irrelevant. It is a question of emphasis. What it means is that, when a negative covenant of this kind is reasonable on its face, the person who gave it will have a heavy burden to show that his escape from the bargain will not cause irreparable harm to the covenantee and that the balance of convenience so substantially favours him (the person who gave the covenant) that it would be unjust to restrain his activities until the trial.

[79] The Restrictive Covenants are reasonable on their face, and the defendants have failed to satisfy me that it would be unjust to restrain their activities in the manner requested until the trial.

[80] Accordingly, an interim injunction is granted to the plaintiffs until the trial of this matter:

- Restraining the defendants, Dr. Kenneth Hamin Dental Corporation and Kenneth Hamin, from carrying on a dental practice, or practising directly or indirectly as a dentist within the restricted five (5) kilometre radius of the Reflections Premises located at 717 Harrow Street, Winnipeg, Manitoba and the restricted five (5) kilometre radius of the plaintiffs' dental practice at 4 - 35 Wolsley Street, Kenora, Ontario for a period of three (3) years, commencing September 30, 2022;
- Restraining the defendants Dr. Kenneth Hamin Dental Corporation and Kenneth Hamin, from soliciting, endeavouring to entice away and/or enticing away patients and/or clients of the plaintiffs for a period of three (3) years, commencing September 30, 2022;
- Restraining the defendants, Dr. Kenneth Hamin Dental Corporation and Kenneth Hamin, from using or disclosing any of the plaintiffs' confidential information, including, but not limited to patient records; and
- Costs.

[81] I understand from the submissions of counsel for the plaintiffs that the plaintiffs have arrived at a settlement of this matter with the third defendant and therefore, it is not necessary to name that defendant in this order. If I am

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mistaken in that respect, I am prepared to consider including that defendant in the injunction granted.

[82] I am also mindful that given the nature of a dental practice, it may be necessary for the defendants to take certain administrative or other similar steps before this interim injunction can be complied with. I am prepared to grant the defendants a period of two weeks from the date of these reasons in order to take those steps.

_____________________________ J.

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