No. 11-1965

IN THE

Appellate Court of Illinois

FIRST JUDICIAL DISTRICT

MARY A. TUJETSCH,
Plaintiff-Appellant,

v.

TODD C. PUSATERI, FIRST DENTAL, P.C., and FIRST DENTAL OF ORLAND PARK, P.C.
Defendants-Appellees

Circuit Court No.: 2006-CH-11607

(Transferred to Law Division, Commercial Calendar "S")

The Honorable Raymond W. Mitchell, Presiding Judge

BRIEF OF APPELLEES

AND VOLUME I OF TWO-VOLUME SUPPLEMENTARY APPENDIX

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Oral Argument Requested

POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

Whether the trial court correctly construed the phrase "active patients," as employed in the parties' asset purchase agreement, to mean an objective tally of "'those patients who have been treated within the previous twenty four months,' without any consideration of other factors (*i.e.*, death, change of residence)." *See Order of Hon. Raymond W. Mitchell ("Order")*, at p.4 (A000018).

Whether the trial court failed to discern a disputed issue of material fact as to the condition of office equipment on the date of the closing.

STATEMENT OF FACTS

First Dental, P.C. is the seller ("Seller") of a dental practice in Orland Park, Illinois ("Dental Practice"). SA003. Plaintiff (also referred to herein as "Tujetsch"), a licensed dentist, is the buyer. Affidavit of M. Tujetsch ("Tujetsch Aff.") at ¶3; A000248; *Order* at p.1 (A000015).

In September 2002, Plaintiff utilized and defined the term "active patient" in an asset purchase agreement she entered into with another dentist, Dr. Roy Carlson (the "Carlson Agreement"). The Carlson Agreement, which Plaintiff produced in discovery, recites, at the bottom of its first page (bearing Bates number T01106) that "Seller has represented that 481 active patients remain in the practice. Active patients represents the number of individuals treated within past 12 month period"

2. ASSETS INCLUDED.

The business assets included in this purchase and sale are substantially all of Seller's business assets located at Seller's existing dental practice and 18025 Wentworth Avenue, Lansing, Illinois 60438, including all inventory and supplies, dental equipment and tools, all furniture and furnishings, shelving and cabinets, and the goodwill of the business.

Seller has represented that 481 active patients remain in the practice. Active patients represents the number of individuals treated within past 12 month period. Seller will send letter to

T 01103

See SA399. In Section 16 of the Carlson Agreement, the term is used again, defined again, and initialed by the parties, including Plaintiff, thus:

16. PATIENT RECORDS.

Upon Closing, all patient treatment cards and x-rays shall be transferred by the Seller to the Buyer. All white patient ledger cards shall remain the property of the Seller. The Buyer agrees to maintain all patient records and x-rays for a period of ten (10) years after Closing for the benefit of the Seller and the Buyer. The Buyer agrees to make the patient records available to the Seller at reasonable times during said period for purposes of claims and insurance. Seller will provide a listing of 481 active patient names and addresses. Active patients is defined as having been treated by Seller within the last 12 month period.

17. INSURANCE.

SA402.

Approximately 20 months later, in April 2004, Tujetsch advised Dr. Pusateri that she was interested in purchasing the Dental Practice, and requested access to the Dental Practice to perform due diligence. Affidavit of T. Pusateri ("Pusateri Aff.") at ¶¶45-46; SA118. On April 18, 2004, Tujetsch executed an agreement in which she agreed to preserve the confidentiality of books and records of the Dental Practice, including "[a]ny financial data . . which may include such items as value of practice under consideration [or] patient or client lists made known to me during negotiations." Pusateri Aff., ¶46. SA118.

As of April 2004, information about all patients treated in the Dental Practice after it first

opened its doors in March 1998 was recorded in Patient Charts stored on shelves in the Dental Practice, as required by Section 50 of the Illinois Dental Practice Act, 225 ILCS 25/50 (hereinafter Section 50).[1] Pusateri Aff., at ¶¶20-24 (SA115-16). Detailed information about patients of the Dental Practice was also accessible from a redundant, electronic source: the First Pacific Corporation ("FPC") Computer Terminal.[2] *Id.* at ¶¶24-27 (SA116-17). However, the FPC Computer Terminal and the FPC Software were never owned by any Defendant, and were expressly excluded from the assets being conveyed to Tujetsch pursuant to the Agreement. *See* C13; Pusateri Aff., (SA113-187) at ¶77 (SA124); Ketsdever Aff., (SA234-88) at ¶11 (SA235), ¶27 (SA237).

After signing the April 2004 confidentiality agreement, Tujetsch was entitled to access to books and records of the Dental Practice, including patient and client lists of the Dental Practice, as well as the FPC Terminal. Pusateri Aff., at ¶¶46-49 (SA118-19). On April 29, 2004, the FPC Terminal was used by Dr. Pusateri to print out two separate "Practice Overview" reports, one as

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[1] Section 50 of the Illinois Dental Practice Act, 225 ILCS 25/50, provides that "[e]very dentist shall make a record of all dental work performed for each patient. The record shall be made in a manner and in sufficient detail that it may be used for identification purposes. Dental records required by this Section shall be maintained for 10 years." 225 ILCS 25/50.

[2] In addition to storing patient information in Patient Charts maintained pursuant to Section 50 (Pusateri Aff., at ¶¶20-24 (SA115-16); ¶47 (SA119), the Dental Practice had, since April 1, 2001, also redundantly stored patient information in the FPC Terminal. *Id.*, ¶48; SA119. Tujetsch performed due diligence on the FPC Terminal and contracted for continued access to the FPC Terminal and FPC services on June 30, 2004. Pusateri Aff., ¶¶75-76; SA124.

of December 30, 2003, the other as of April 29, 2004. *Id.* at ¶¶27-34 (SA116).[2] According to the Practice Overview as of December 30, 2003, the Dental Practice had 1,223 "active patients." *Id.* According to the Practice Overview dated as of April 29, 2004, the Dental Practice had 1,227 "active patients." *Id.* Documentation of the FPC Software defines the number of "active patients" reported in the Practice Overview as the number of patients treated in the practice during the previous 24 months. *Id.*, ¶28 (SA116); Ketsdever Aff., ¶21 (SA236). This definition of "active patient" as an objective tally of patients treated in a defined period is consistent with the definition of "active patient" promulgated by the American Dental Association. Pusateri Aff., ¶30 (SA116); Ketsdever Aff., ¶22 (SA236; A000566).

On May 1, 2004, Tujetsch sent a letter to Dr. Pusateri thanking him for "all of [his] efforts and expertise [and for his] time and cooperation," and stating that she had spent "a considerable amount of time with [her] financial advisors and dental expert;" that her "experts [had] evaluated [the Dental Practice] and . . . informed [Tujetsch] that the practice ha[d] leveled off, with no indication of future growth;" and that "[t]his indicates the potential for financial problems ahead." Pusateri Aff., ¶55 (SA120); SA152-53. Tujetsch stated that "[d]espite [the potential for financial problems ahead], [she] believe[d] that the practice could be turned around

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[2] One of the "canned" reports that the FPC Software could generate upon request was a summary report called "Practice Overview." As explained in written documentation of the FPC Software, the Practice Overview provides a month-to-date and year-to-date overview of important information for monitoring a practice, including "the number of active patients," defined as "[t]he number of patients seen within the last two years." Pusateri Aff., ¶¶27-34 (SA116-17).

through hard work," and concluded, "[i]f I am going to invest my time and talent in this venture, it is important that I look at this project in terms of a long term projection." *Id.* Notwithstanding "the potential for financial problems ahead," Tujetsch stated "[m]y experts have evaluated the practice to be worth an estimated $144,500.00. I am prepared to offer you $150,000.00. I believe this offer to be fair and mutually beneficial." Pusateri Aff., ¶¶51-55 (SA119-20); SA152-53.

In a letter dated Monday, May 10, 2004, Tujetsch indicated that she had "experience with many dental brokers over the past fifteen years as [she had] purchased four dental practices to date," and increased her offer for the Dental Practice from $150,000, to $165,000:

> I received your fax on Saturday [(May 8, 2004)] and I was able to fax it on to my advisors the same day. I thought I would send my new offer to you as soon as possible. In this way, we could still talk on Wednesday [(May 12, 2004)], as agreed upon, and be one step closer to an agreement.
>
> I have had experience with many dental brokers over the past fifteen years as I have purchased four dental practices to date. I am well aware that for each different broker there will be a different criteria formula, or method of evaluating a practice. Obviously, your broker has your best interest in hand and my broker has my best interest at hand. The truth probably exists somewhere in the middle.
>
> In the interest of moving the process along, I am willing to meet you more than half way. I would like to offer you $165,000.00 with $50,000 of it being cash upfront. The remaining balance would be paid at the current interest rate of 5%. It is my intention to pay the practice off sooner rather than later as I do not like paying interest payments. This deal allows you to make a considerable amount of

additional cash in terms of rent and interest payments.

I believe this offer to be fair. I hope that we can agree and move forward with the process.

Pusateri Aff., ¶¶56-58 (SA121); SA155.

On May 13, 2004, Tujetsch sent a letter to Dr. Pusateri stating, "We have agreed at a purchase price of $165,000.00 and this $5,000.00 deposit will be subtracted from the $165,000.00 purchase price at closing." *Id.* at ¶61 (SA121); A000530.

Thereafter, the terms of the Agreement and the Lease were negotiated. By Friday, June 25, 2004, those negotiations were complete, and the parties planned to meet at the Premises and execute the Agreement and the Lease on Sunday, June 27, 2004. The execution copy of the fully-integrated[4] Agreement uses the phrase "active patient" in its first paragraph, wherein it states:

> Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has _____ active patients, who have been treated within the previous twelve months.

Id. at ¶64 (SA122); A000473-74; SA008-09.

The underscored space in the foregoing recital remained blank until Sunday, June 27,

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[4] Section 9.02 of the Agreement provides that "[t]his Agreement and the Schedules and Exhibits referred to herein embody the entire agreement and understanding of the parties and supersede any and all prior agreements, arrangements and understandings relating to matters provided for herein." A000121.

2004, when Tujetsch and Dr. Pusateri met at the Premises to execute the Lease and the Agreement. The blank was first filled in by Dr. Pusateri as he and Tujetsch were executing the Agreement. *Id.* at ¶65 (SA122). At that time, Dr. Pusateri consulted the FPC Terminal in the Premises to confirm that the number of active patients previously reported by FPC Software (in the two Practice Overviews downloaded by Dr. Pusateri on April 29, 2004) remained at approximately 1,200. *Id.* at ¶66 (SA122). After confirming that, Pusateri modified the recital, in Tujetsch's presence, to read as follows: "Seller has represented that the Dental Practice has ***approx.*** **1200** active patients, who have been treated within the previous ~~twelve months~~ ***twenty four months according to First Pacific Corporation Software.***" Dr. Pusateri changed "twelve months" to "twenty four months" to conform the Recital to the definition of "active patient" used by the FPC Software, and inserted 1,200 as the number of "active patients" reported by that Software. Pusateri Aff., ¶64-68 (SA122).

The modified recital was then initialed by both Tujetsch and Dr. Pusateri. It appears in the fully executed Agreement, as follows:

> Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has approx 1200 active patients, who have been treated within the previous ~~twelve months~~. twenty four months according to FIRST PACIFIC Corporate Software.
>
> In consideration of the mutual promises and covenants contained in this Agreement, the parties agree as follows:

Id. at ¶69. SA123.

The Agreement executed on June 27, 2004 states that "all equipment ***is*** working and in good order" (A000043) (emphasis supplied), but does not warrant that equipment will remain in working order thereafter. Section 1.06 of the Agreement provides that "[t]he consummation of

the transactions contemplated by [the] Agreement . . . shall take place on July 1, 2004 . . . but Purchaser shall take possession of the Dental Practice on June 30, 2004." A000045. In fact, after Tujetsch and Dr. Pusateri executed the Agreement at the Premises on Sunday, June 27, 2004, Tujetsch gave Pusateri a check for the balance of the $165,000 purchase price and received keys (and unrestricted access) to the Dental Practice. Pusateri Aff., ¶72 (SA123).

In order to retain access to the FPC Terminal and Software, Tujetsch entered into a Sales and Service Agreement with FPC on June 30, 2004. Ketsdever Aff., ¶31 (SA237). Pursuant to that Sales and Service Agreement, Tujetsch contracted, on terms and conditions that she negotiated bilaterally with FPC, for continued access to FPC billing services and an FPC Terminal after the sale. Pusateri Aff., ¶78 (SA124); Ketsdever Aff., ¶¶33-35 (SA237-38); SA259-62).

By June 30, 2004 Tujetsch had contracted for continued FPC services and taken possession of all of the assets of the Dental Practice without incident, pursuant to the Agreement and the Lease.[5]

Over nine months later, in April 2005, Pusateri received a letter from Tujetsch stating that her "absentee ownership" of the Dental Practice had been a "recipe for disaster," and that she had been thinking of selling the Dental Practice. Pusateri Aff., ¶83 (SA124-25). Tujetsch

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[5] Section 6.03 of the Agreement provides that "[a]t or before closing, Purchaser shall execute a five-year lease for the offices of the Dental Practice at 7714 159th Street, Orland Park, IL 60462 [(the "Premises")] . . . ." A000052. On June 28, 2004, Tujetsch entered into a five-year lease on the Premises, where were owned by Pusateri (hereinafter the "Lease"). Tujetsch Aff., ¶5 (A000248).

opined that the Dental Practice would fetch a higher price if it were bundled with the building that housed its Premises. Pusateri Aff., ¶¶83-84 (SA124-25). Tujetsch explained that she had advertised the Premises for "Space Sharing" with other dentists, and in response had received "numerous calls regarding dentists wanting to purchase the office." *Id.*

> These interested dentists forced me to contemplate the option of selling the practice if the money was right. I then went ahead and advertised the office for sale and decided that if the price was right, I would be willing to sell. If the price is not right will keep the office and nothing will change. I have received a lot of interest in the practice and I find myself needing to devote more time to my Chicago practice. When I originally purchased the office, I have anticipated that the office could run itself efficiently with little or no input/time from me. I have come to learn that an absentee owner and is a recipe for disaster.
>
> My question to you is, would you be interested in selling the building at 7714 W. 159th Street? I believe that my chances of selling the practice would be greatly enhanced if I could offer the sale of the building, in addition to my practice. I know that at the time of the purchase, in July 2004, you were open to the idea of selling the building. Have you given it any additional consideration? From your perspective, it would be easier to sell the building with the sale of the dental practice. I understand that the chiropractors' lease is coming to an end so the time could not be more ideal for both of us. The feedback I am getting is that a potential buyer, who is a dentist, would desire the entire office space . . .
>
> * * *
>
> I ask that you keep all of this letter confidential as I may ultimately option [sic] to

keep the practice in the end. I do not want to alarm Dr. Purdue or the staff and patients.

Id. The foregoing letter said nothing about a perceived shortfall in "active patients," or faulty "equipment." It admitted that the "disaster," if there was one, was of Tujetsch' own making, and closed with the salutation, "The best to you always." *Id.* at ¶86 (SA126); SA174-75.

On April 6, 2005, Tujetsch sent a second letter to Dr. Pusateri "offering [him] one million ($1,000,000.00) for the purchase of [his] building located at 7714 W. 159th Street, Orland Park, Illinois." Pusateri Aff., ¶86 (SA126); SA177.

Over six months later, in October 2005, Pusateri received another letter from Tujetsch. Pusateri Aff., ¶88 (SA127-28). In the letter, dated October 24, 2005 (SA179-80), Tujetsch claimed, for the first time,[6] that the Agreement executed by the parties on June 27, 2004 had overstated the number of "active patients" of the Dental Practice:

> Today, 10/24/05, I have been informed that the actual number of active patients, at the time of the sale, was 50% less than what you represented in our signed, legal contract. Please refer to the contract where you note that 1200 active patients of record are involved in the sale of the practice. A detailed report by First Pacific Corporation, your former and current billing agency, indicates that the actual number of active patients, at the sale, was 668. This misrepresentation has created an enormous burden for this office as you are also profiting from a monthly rent of nearly $3,000.00.

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[6] *See* Amended Complaint at ¶28 (A0000034) ("Tujetsch notified defendants of the breach of the Agreement on or about October 24, 2005").

Id. The foregoing letter said nothing about faulty "equipment." In response, Pusateri steadfastly denied that he overstated, in the Recital on June 27, 2004, the number of "active patients" treated in the Dental Practice, as reported by FPC Software, and produced copies of the two FPC Practice Overviews on which he relied.

Thereafter, an FPC account manager advised Tujetsch that a list of patients produced by FPC at Tujetsch's request in October 2005 could not be relied to prove that the Recital was inaccurate as to the number of "active patients." Ketsdever Aff., ¶¶60-108 (SA241-46); Pusateri Aff., ¶¶91-92 (SA127). On July 6, 2006, by means of a letter "To Whom It May Concern," an officer of FPC confirmed that FPC had never provided a report to Tujetsch that could be relied upon to conclude that the number of active patients of the Dental Practice, as of June 27, 2004, was fewer than 1,200. Pusateri Aff., ¶¶91-92 (SA127); Ketsdever Aff., ¶¶75-81 (SA243).

On October 31, 2007, Tujetsch gave written notice that she was "terminating the Lease . and moving out of the [P]remises immediately due to the Landlord's failure to correct the breaches outlined in [an earlier] letter[7] . . ."

Thereafter, Plaintiff initiated the civil action at bar. The pending Amended Complaint ("Complaint") purports to plead three Counts. Count I is styled "Breach of Contract (Performance)," and is based on the notion that "Seller never provided Tujetsch with any patient lists," and that Plaintiff -- who took possession of the Dental Practice without incident in June

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[7] In an earlier letter (dated October 12, 2007), Tujetsch complained that Landlord breached the Lease by failing to document the amount of "Additional Rent," and by violating Tujetsch's right of quiet enjoyment by, among other things, scheduling landscaping maintenance during business hours. *See* SA230-232.

2004, and thereafter ran the Dental Practice for over a year without protest -- was therefore unable to contact the Dental Practice's customers. Complaint, ¶18 (A000033).

Count II is styled "Breach of Contract (Accuracy of Representations and Warranties)." Count II asserts that Defendants breached the Agreement by overstating, in the Agreement, the number of "active patients" treated in the Dental Practice in the 24 months prior to its sale (Complaint, ¶¶30, 31; A000035), and by misrepresenting, on June 27, 2004, that "equipment" of the Dental Practice was then in working order (Complaint, ¶¶32, 33; A000036). With regard to overstatement of "active patients," Plaintiff alleges that "[a]fter acquiring the Dental Practice, [she] sought to determine the actual number of Active Patients. In this regard, [Plaintiff] reviewed patient files This review indicates that there were less than 700 active patients that had been treated at the Dental Practice in the two years prior to the sale, compared to the approximately 1200 Active Patients that Pusateri represented and warranted to Tujetsch." Complaint, at ¶30 (emphasis supplied); A000035.

Count III characterizes the contract breaches alleged in Counts I and II as intentional, and therefore fraudulent.

Plaintiff contends that the tally of "active patients" set forth in the Recital fraudulently induced her, because she "understood and intended . . . the term 'active patient' to mean a patient who maintains a continual, ongoing relationship where treatment is obtained on a fee basis," Tujetsch Aff., at ¶7; (A000249), such that "active patients" cannot include patients who changed dentists, moved, refused to schedule appointments, had billing disputes, or died. *Id.* at ¶8; *see also* A000015, A000017, A000234-36, A000239, A000243-44, A000246, A000249, A000252, A000329-30, A000450, A000454-55, A000662-63, and A000766-67. Based on a review of patient records that commenced at least 16 months after the closing, Plaintiff claims, in an

Affidavit, that the tally of "active patients" in the Recital includes patients who changed dentists, moved, refused to schedule appointments, had billing disputes, or died. Tujetsch Aff., at ¶¶17-21 (A000252-53). As such, Plaintiff contends that the Recital constitutes a breach of the Agreement (Count II) and fraud (Count III).

In early 2011, Defendants filed two motions for summary judgment, one on all Counts of the Complaint[8], another for summary judgment as to the correct meaning of "active patient." Plaintiff filed a cross-motion for summary judgment on Count II.

In June 2011, the trial court found that "Plaintiff failed to address [Defendants' motion for summary judgment as to Count I] in her response. Further, at oral argument, Plaintiff's counsel did not oppose Defendants' same argument [*i.e.*, "that there is no evidence that Plaintiff failed to receive access to, or the right to copy, patient lists of the dental practice."]." *Order* at p.3 (A000017). Accordingly, the Court granted Defendants' motion for summary judgment on Count I. *Id.*

The trial court's 6-page *Order* found that "active patients," as used in the Recital, unambiguously refers to the number of patients "'treated within the previous twenty-four months,' without any consideration of other factors (*i.e.*, death, change of residence." *Order* p. 4; A000018. The *Order* articulates three reasons for this finding, as follows.

First, the *Order* states that courts initially look to the language of a contract in order to discern the intent of parties. According to the *Order*, "[t]he plain language of the Agreement

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[8] The first of Defendants' two Motions for Summary Judgment is appended hereto in the Supplementary Appendix because, as stipulated by the parties, the copy of that motion included in Plaintiff's Appendix is missing numerous pages.

states how the term "active patients" is to be defined," because "active patients" is defined by the dependent clause that follows "active patients" in the Recital (hereinafter the "Dependent Clause"). *Order*, at p. 4 (A000018). Applying the rules of English grammar to the plain language of the Recital, "active patients" must be construed in accordance with the express definition set forth in the Dependent Clause. *Order*, at p. 5-6 (A000019-20). The Dependent Clause expressly defines "active patients" as patients "who have been treated [in the Dental Practice] within the previous twenty four months . . . ." *Order*, at p. 4 (A000018). To read the clause otherwise would, as the trial court said during oral argument, "defy grammar." SA528-29.

Second, the trial court found, in the *Order*, that "active patient" has a well established meaning among dental professionals, and has attained the status of a term of art in that profession, thus eliminating any issue of fact as to its proper definition. *See Order*, at p.3 (A000017), *citing* Calamari and Perillo, Contracts §3.13 at 155; Grismore, Law of Contracts §106 at 165-66 (1947). *See also* Def. Mot. Summ. J. as to "Active Patient" (SA290-305). The court found that, as a term of art, the meaning of "active patient" is the definition provided by the American Dental Association ("ADA"). *See Order*, at p. 3-4; A000017-18.

Third, the court found that Plaintiff had previously purchased several dental practices, and that a purchase agreement for one of the practices included language similar to that of the Agreement in question. *Order*, at p. 4; A000018. Specifically, the Carlson Agreement between Plaintiff and Dr. Roy Carlson for the purchase of Dr. Carlson's dental practice provides, "Active patients represents the number of individuals treated within the past 12 month period." *See Id. See also* A000459-469. The Court found that this definition not only conformed to the ADA definition of "active patient," but was also "similar" to the definition of "active patient" in the

Agreement at bar, because the only difference was the length of time within which a patient was treated (*i.e.*, 12 months instead of 24). *Order*, at p. 4; A000018.

For the foregoing three reasons, the Court held: "As there is not only a commonality between the definitions provided in the [asset purchase] agreements as well as to the ADA definition, **the applicable definition of active patients shall be those patients who have been 'treated within the previous twenty four months,' without any consideration of other factors (*i.e.*, death, change of residence)**." (Emphasis supplied.) *Id.*

The court also found that there was no issue of fact as to whether any equipment in the dental practice was not in working order on the date that Plaintiff took possession of the practice. *Order*, pp.4-5 (A000018-19).

This appeal followed. Plaintiff contends that the trial court's *Order* is wrong for five reasons.

First, Plaintiff asserts that she is not bound by the definition of "active patient" in the Dependent Clause of the Recital because she understood the reference to FPC Software as a reference to the FPC database where the identity of the active patients could be found, such that the Recital was not a definition of "active patient." See Tujetsch Aff., at ¶¶7, 8 (SA412).

Second, Plaintiff asserts that the trial court failed to give the term "active patient" its usual and plain meaning, because the plain meaning of "active" modifies "patient" to mean a patient "who maintains a continual, ongoing relationship where treatment is obtained on a fee basis," and who has not "changed dentists, moved, refused to schedule appointments, refused treatment, . . . lost insurance, had billing disputes or [died]." Plaintiff asks this Court to find that the trial court erred, and should have found that "active patient" is as Plaintiff claims she understood and intended it to be, such that patients who changed dentists, moved, refused to

schedule appointments, had billing disputes, or died are excluded from the objective tally of patients who have been treated.

Third, Plaintiff asserts that the trial court erred in finding the phrase "active patient" is a term of art in the dental profession.

Fourth, Plaintiff asserts that the trial court erred in considering the Carlson Agreement to find "commonality" among the meaning of "active patient" in the Carlson Agreement, the Agreement at bar, and the ADA definition of "active patient," such that the Carlson Agreement was not evidence that Plaintiff knew the correct meaning of "active patient," as a dental term of art.

Fifth, Plaintiff asserts that the trial court erred in finding there was no genuine issue of material fact concerning Count III, the count pleading fraud as to the condition of office equipment.

As demonstrated below, none of the foregoing arguments has any merit.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT "ACTIVE PATIENTS" MEANS PATIENTS TREATED WITHIN THE PRECEDING TWENTY FOUR MONTHS

The trial court did not err in finding that "active patients" means patients treated within the preceding twenty four months. That is the meaning clearly and unambiguously set forth in the Dependent Clause. It is also the meaning ascribed to "active patient" by the FPC Software, the Carlson Agreement, the ADA, and dental professionals who use "active patient" as a dental term of art. The only proponent of Plaintiff's definition of "active patient" is Plaintiff herself, and Plaintiff's professed belief in her idiosyncratic definition is undercut by her own use of the term in its correct, term-of-art sense in the Carlson Agreement.

A. The Dependent Clause Unambiguously Defines "Active Patients" to Mean Patients Treated Within the Preceding Twenty Four Months

Applying the rules of English grammar, the trial court found that the Dependent Clause defines "active patients" as the number of patients treated in the Dental Practice in the previous 24 months. *See Order*, at p. 6 (A000020). As the trial court found, "active patients" is unambiguously defined by the plain language of the Dependent Clause. The Dependent Clause defines "active patients" to mean patients "who have been treated within the previous twenty four months . . . ." *Id.* The Dependent Clause does not mention patients who changed dentists, moved, lost insurance, refused to schedule appointments, had billing disputes, or died -- let alone exclude them from "active patients."

The fact that the FPC Software is disclosed as the source of the tally of patients treated in the previous twenty-four months does not change the fact that the Dependent Clause tells Plaintiff that which she claims she did not know, namely, that "active patient" is an objective tally of patients treated in the past 24 months – nothing more (or less). The Dependent Clause alone is sufficient reason for this Court to uphold the trial court's ruling. However, lest there be any doubt, the definition of "active patients" in the Dependent Clause is also consistent with: 1) the definition of "active patient" utilized by the FPC Software referenced in the Recital (*see* Ketsdever Aff., at ¶¶20-24 (SA236-37);¶48 (SA239), ¶49, ¶50 (SA240)); 2) the definition of "active patient" as a dental term of art promulgated by the American Dental Association (SA141-43; SA298-SA301; SA341-53); 3) the definition of "active patient" in the Carlson Agreement, an agreement employed by Plaintiff to purchase another dental practice in September 2002 (SA509, SA512); and 4) the definition of "active patient" in general usage among dental professionals, as demonstrated by numerous dental articles and references cited in Defendants' briefs (SA301-02).

B. The Definition of "Active Patients" in the Dependent Clause is Consistent With the Definition of "Active Patient" Utilized by FPC Software

The "approx.[imate]" number of active patients in the Recital, which number was filled in at the closing, is expressly stated to be "according to First Pacific Corporation Software." A000017, A000019, A000025, A000451, A000453-55, A000484-85; A000683-94; A000757-59; A000765-66; A000769-74. The FPC Software defines "active patient" as patients treated in the previous 24 months. Pusateri Aff., ¶28 (SA116); Ketsdever Aff., ¶¶19-24 (SA236-37); Tujetsch Aff., at ¶¶8 (SA412). Plaintiff admits that the FPC Software defines "active patients" to include those patients who had been treated within a 24-month period regardless of whether those patients had subsequently changed dentists, moved, refused to schedule appointments, had billing disputes or were dead. Tujetsch Aff., at ¶8 (SA412). However, Plaintiff suggests that she did not know, and was not placed on inquiry notice of the FPC definition of "active patient" when she signed the Agreement, and is therefore not bound by that definition. SA417.

Because the definition of "active patient" in the Dependent Clause is consistent with the FPC Software, the FPC Software provides no support for Plaintiff's claims. Plaintiff alleges in her Amended Complaint ("Complaint") that Plaintiff, "[a]fter acquiring the Dental Practice, sought to determine the actual number of Active Patients. In this regard, Tujetsch reviewed patient files **and communicated with First Pacific Corporation, a third party provider who administered the patient billing for First Dental**. This review indicates that there were less than 700 active patients that had been treated at the Dental Practice in the two years prior to the sale, compared to the approximately 1200 Active Patients that Pusateri represented and warranted to Tujetsch." Complaint, at ¶30 (emphasis supplied) (A000035).

FPC provided the detailed and comprehensive *Affidavit of Bret Ketsdever*, attached to Defendants motion for summary judgment. SA234-288. That affidavit concludes " . . based on

my expertise and familiarity with the FPC Software, and my review of the facts, it is my conclusion that Dr Pusateri did not overstate the number of active patients as reported by FPC Software, if he indicated in or around April 2004 that the Dental Practice had treated approximately 1,200 patients in the previous 24 months." Ketsdever Aff., at ¶¶85-89; ¶104; SA244-46.

C. The Definition of "Active Patients" In the Dependent Clause is Consistent with the Definition of "Active Patient" As a Dental Term of Art

"Active patient" is a dental term of art that refers to the number of patients treated in a dental practice during a specified number of previous months. "Active patients," as employed by the Recital (and by the FPC Software to which it refers), unambiguously means patients treated in the Dental Practice in the previous 24 months. As stated, the trial court found, in its *Order*, that "active patient" has a well established meaning among dental professionals, and has attained the status of a term of art in that profession, thus eliminating any issue of fact as to its proper definition. *See Order*, A000017 (*citing* Calamari and Perillo, Contracts §3.13 at 155; Grismore, Law of Contracts §106 at 165-66 (1947)). The court found that, as a term of art, the meaning of "active patient" is the definition provided by the American Dental Association ("ADA"). *See Order*, at p. 3-4; A000017-18. *See also* SA293-305.

The trial court correctly found that "active patient" is a term of art commonly used by persons skilled in the dental arts to provide a rough indication of the size of a dental practice based on <u>past</u> experience, *i.e.*, the number of patients treated in a specified number of <u>previous</u> months, usually 24. *See* Def. Mot. Summ. J. As to the Meaning of "Active Patient," *passim* (SA290-SA385). As such, "active patient" is based on historical fact, not speculation. The only variation in the generally accepted definition of "active patient" is the number of months in the

lookback period. For example, some experts utilize a longer lookback for rural practices or practices that engage in cosmetic dentistry and a shorter lookback for practices that are located in urban settings or engaged in general dentistry. However, while the length of the lookback period may vary, there is no generally accepted definition of "active patient" that requires or includes any prediction as to future patient behavior.

Defendants' Motion For Summary Judgment As to the Meaning of "Active Patient" presented overwhelming and uncontradicted evidence that "active patient" is a dental term of art. *Id.* The custom or usage is established by several sources – ADA publications, the FPC Software and Plaintiff herself, inasmuch as Plaintiff used of the term in its correct, term-of-art sense in the Carlson Agreement. Defendants also offered the Affidavit of Bruce J. Lowy, a nationally recognized expert in the field of dental practice evaluations and appraisals. SA376- 383. They also offered numerous ADA publications, and articles. SA301-02; SA338-352. The ADA's definition of "active patients" is widely used in purchase agreements and understood by dentists – including Plaintiff herself, in the Carlson Agreement. SA292-302.

As such, the term-of-art meaning of "active patient," as a historical tally of patients treated, must be preferred over any alternative meaning based on subjective "understanding" or so-called "plain language." It is well settled that the technical meaning of a term of art is preferred over the common meaning. *See. e.g.*, Calamari and Perillo, Contracts § 3.13, at 155 [4th ed.]. *See also* SA293-98. When, as here, the technical meaning and prevailing usage of a term of art has been proven with a superabundance of evidence (*see* Def. Mot. Summ. J. as to the Meaning of "Active Patient," *passim* (SA290-385)), the industry's meaning of a term "has the force of law within the sphere where established and enters into the contracts of those within that sphere who have knowledge of its existence." *Snedden v. Gen. Radiator Div. of Chromalloy Am.*

Corp., 111 Ill. App. 3d 128 (4th Dist), *quoting Kelly v. Carroll*, 223 Ill. App. 309, 315-16 (1921). Thus, the trial court did not err in finding that the proper and controlling meaning of "active patient" is that meaning used throughout the industry.

D. The Definition of "Active Patients" In the Dependent Clause is Consistent With the Definition of "Active Patient" In the Carlson Agreement

The trial court found that Plaintiff had previously purchased several dental practices, and that a purchase agreement for one of the practices included language similar to that of the Agreement in question. *Order*, at p. 4; A000018. *See also* Pusateri Aff., ¶58 (SA121), Exhibit 7 (SA155); A000453; SA056; SA399-409; SA502-03; SA509, SA512; SA552. Specifically, the Carlson Agreement between Plaintiff and Dr. Roy Carlson for the purchase of Dr. Carlson's dental practice provides, "Active patients represents the number of individuals treated within the past 12 month period." *See* SA509, SA512. The Court found that this definition not only conformed to the ADA definition of "active patient," but was also "similar" to the definition of "active patient" in the Agreement at bar, because the only difference was the length of time within which a patient was treated (*i.e.*, 12 months instead of 24). A000018.

II. PLAINTIFF'S IDIOSYNCRATIC DEFINITION OF "ACTIVE PATIENT" IS BASED SOLELY ON HER SUBJECTIVE "UNDERSTANDING AND INTENT" OF THAT TERM

A. Plaintiff Cannot Accuse Defendants of Inaccurately Relaying or Inflating the FPC-Generated Tally of "Active Patients"

Plaintiff does not allege or otherwise contend that Defendants failed accurately to relay, or inflated, in the Recital, the number of "active patients" reported by FPC Software, which number was generated when the FPC Software applied its definition of "active patient" to Dental Practice patients in the FPC data base. Nor does Plaintiff contend that a Defendant "hacked" the FPC Software to modify its definition of "active patient" and thereby deceive Plaintiff. Rather,

Plaintiff contends that Defendants breached the Agreement and committed fraud by failing to alert Plaintiff that the Recital -- and therefore, by extension, the FPC Software -- employed a definition of "active patient" that did not exclude patients who had changed dentists, moved, refused to schedule appointments, had billing disputes or died. Plaintiff asserts that the Recital breached the Agreement and is fraudulent because the definition of "active patient" set forth in the Dependent Clause and employed by the FPC Software does not comport with Plaintiff's subjective "understanding and intent" as to that term. Tujetsch Aff., at ¶¶7-8 (A000249); A000234. That is not the law.

B. Plaintiff Provides No Reason Why She Should Not Be Bound by the Definition Set Forth in the Dependent Clause

Applying the rules of English grammar, the trial court correctly found that the Dependent Clause defines "active patients" as the number of patients treated in the Dental Practice in the previous 24 months. *See Order*, at p. 6 (A000020). However, "defying grammar," Plaintiff counters that the Dependent Clause did not put Plaintiff on actual or inquiry notice of the definition of "active patient" because "[Plaintiff] understood the reference to 'First Pacific Corporation software' was simply the database where the identity of the active patients could be found." *Id.* at ¶7. This makes no sense.

C. Plaintiff Does Not Aver That Any Defendant Was Aware of Her Definition of "Active Patient" on or Before June 27, 2004

Plaintiff does not aver that she made any Defendant aware of her subjective "understanding and intent" as to the meaning of "active patient" before the Agreement was signed. "'[I]ntent' does not invite a tour through [Plaintiff's] cranium, with [Plaintiff] as the guide." *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814-15 (7th Cir. 1987); SA500-01.

III. EVEN IF IT WERE RELEVANT, PLAINTIFF DOES NOT ESTABLISH THAT ANY PATIENT WAS WRONGFULLY INCLUDED IN "ACTIVE PATIENTS"

A. The FPC Software Does Not Support Plaintiff's Claims

Plaintiff alleges in her Amended Complaint ("Complaint") that Plaintiff, "[a]fter acquiring the Dental Practice, sought to determine the actual number of Active Patients. In this regard, Tujetsch reviewed patient files **and communicated with First Pacific Corporation, a third party provider who administered the patient billing for First Dental**. This review indicates that there were less than 700 active patients that had been treated at the Dental Practice in the two years prior to the sale, compared to the approximately 1200 Active Patients that Pusateri represented and warranted to Tujetsch." Complaint, at ¶30 (emphasis supplied); A000035.

The *Affidavit of Bret Ketsdever* ("Ketsdever Aff.") was attached to Defendants' motion for summary judgment. SA234-288. The Ketsdever Affidavit provides a detailed explanation of the functioning of FPC's software. Based on his "expertise and familiarity with the FPC Software, and my review of the facts," Ketsdever concludes that "Dr Pusateri did not overstate the number of active patients as reported by FPC Software, if he indicated in or around April 2004 that the Dental Practice had treated approximately 1,200 patients in the previous 24 months." Ketsdever Aff., at ¶¶85-89, ¶104; SA244-46.

B. Plaintiff's Conclusory Affidavit Presents No Competent, Factual Support for the Notion of Wrongful Inclusion of Patients in the FPC Tally

In response to Defendants' motion for summary judgment, Plaintiff has averred that -- based on her review of patient records at some unspecified time after the closing -- numerous patients treated in the Practice had, prior to the execution of the Agreement, changed dentists, moved, refused to schedule appointments, had billing disputes, lost insurance, or died, and

patients were, according to Plaintiff, first treated in the Practice after the sale to Plaintiff. SA475-93.

Having created the three "Groups," Plaintiff then distributes, by fiat, patients in the three "Groups" among the various categories that she believes are excluded from "active patients." *See* SA415-16; SA417, SA473; SA475-93. Plaintiff's numbers do not "foot." That is, the numbers do not add up properly, because the total "exclusions" for Groups 1 and 2 claimed by Plaintiff exceed the total number of patients in those groups. Plaintiff's categorization of patients suffers from an additional, fatal flaw.

C. Plaintiff's Affidavit – And Its Categories of Patients – Fails to Attach the Documents on which it is Based

The foregoing categorization of patients is purportedly based on Plaintiff's review of patient files. However, the Affidavit of Plaintiff (the "Tujetsch Affidavit") fails to attach a single patient file to substantiate Plaintiff's conclusions. The Tujetsch Affidavit provides a list of names for "Group 3," but no evidence to substantiate the conclusion that any patient in any list had in fact changed dentists, moved, refused to schedule appointments, had billing disputes or died. Because it fails to attach any of the documents purportedly used to compile the lists, the Affidavit fails to comply with Illinois Supreme Court Rule 191. Accordingly, Defendants filed a motion to strike the Affidavit. SA388-493. Judge Mitchell noted at oral argument (R. Vol. 10 (Report of Proceedings), at p.3; SA526) and in his *Order*, at p.2 (A000016), that the Motion to Strike had been filed, but did not rule on it, presumably because the court's ruling on the Motions For Summary Judgment mooted the Tujetsch Affidavit. If the correct definition of "active patient" has nothing to do with death, change of residence, etc., then the categorization of patients attached to the Tujetsch Affidavit is irrelevant. But even if that were not the case, Plaintiff's case fails, for lack of competent evidence in her affidavit.

D. At Bottom, Plaintiff's Disagreement is With FPC, And the Definition of "Active Patient" Employed by the FPC Software, Not With Defendants

At bottom, Plaintiff's claim is based on the undisputed fact that FPC Software -- dental practice management software that is widely distributed throughout the United States (Ketsdever Aff., at ¶¶5-6 (SA234)) -- uses a definition of "active patient" that Plaintiff herself used in the Carlson Agreement, but claims is somehow inapplicable to the Agreement at hand. The Recital defines "active patients" in the Dependent Clause, and discloses that the source of the tally of "active patients" is FPC Software. The Recital's definition of "active patients" is consistent with the definition of "active patient" used by the FPC Software.

To the extent that Plaintiff views the FPC definition of "active patient" as inherently misleading and wrongful, she fails to aver that any Defendant induced FPC to adopt that definition, or knew that Plaintiff had another, disparate definition in mind at the time the Agreement was signed. FPC's definition of "active patients" as patients treated in the previous 24 months was in keeping with the term-of-art meaning of that term promulgated by the ADA and others. The alternate meaning proposed by Plaintiff (and which differs from the definition of "active patient" that she employed in the Carlson Agreement) is hopelessly vague, ambiguous, subjective, and unworkable.

IV. THE TRIAL COURT DID NOT FAIL TO GIVE THE TERM "ACTIVE PATIENT" ITS CORRECT, TERM-OF-ART MEANING

A. The Technical Meaning of a Term of Art Is Preferred Over Any Competing "Plain Meaning"

The trial court correctly found, based on overwhelming and uncontradicted evidence in Defendants' motion for summary judgment, that "active patient" is a dental term of art. As discussed above, custom or usage is established by several sources – including Plaintiff herself.

and Plaintiff's use of the term in its correct, term-of-art sense in the Carlson Agreement. Defendants offered not only the Affidavit of Bruce J. Lowy, a "nationally recognized expert" in the field of dental practice evaluations and appraisals (SA376-385), but also numerous ADA publications (SA341-53), and scholarly articles (SA301-02) confirming the meaning of "active patients."

According to the law of contract interpretation, term-of-art meaning of "active patient," as a historical tally of patients treated, must be preferred over any alternative meaning based on a subjective "understanding" or so-called "plain language." Authorities on the construction of contract language have uniformly stated that when words in a contract have attained, through wide usage in a particular profession or trade, the status of a term of art, the technical meaning of that term of art is preferred over the common or ordinary meaning. *See, e.g.*, Calamari and Perillo, Contracts § 3.13, at 155 [4th ed.]. This rule is also firmly established in Illinois. *See, e.g., Reed v. Hobbs*, 3 Ill. 297, 300-01 (1840); *Cigler v. Keinath*, 185 Ill. App. 353, 357 (1st Dist. 1914), *reversed on other grounds, Cigler v. Keinath*, 265 Ill. 144 (1914) ("[t]he rule of construction . . . is to . . collect the real intention of the parties from the terms used in the contract, taking them in their plain, ordinary and popular sense, unless by the known usage of trade they have acquired a peculiar sense.") (emphasis supplied). *See also Steinke v. Novak*, 109 Ill. App. 3d 1034, 1038 (3d Dist. 1982) ("Words used in a will are to be given their ordinary and natural meaning, but where technical terms are used, they are presumed to be used in their technical meaning."). The superabundance of authority that compels this result is set forth at length in Defendants' motion for summary judgment on the meaning of "active patient." *See* Def. January Mot. Summ. J., at pp. 9-13 (A000688-92).

B. Even If It Were Relevant, Plaintiff's "Plain Meaning" Definition of "Active Patient" Makes No Sense

Even if "active patient" were not a term of art, Plaintiff's "plain meaning" definition makes no sense. Plaintiff contends that "active," as used in the phrase "active patient," modifies "patient" to mean a patient "who maintains a continual, ongoing relationship where treatment is obtained on a fee basis," and who has not "changed dentists, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or [died]." Tujetsch Aff., ¶8 (A000249). According to this argument, one word – "active" – is freighted with all of the following: maintains; a continual, ongoing relationship; where treatment is obtained on a fee basis"; and has not "changed dentists, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or [died]." How does this one word accomplish so much? Plaintiff says "active" must be construed in its plain and ordinary sense. But she cannot point to any other use of "active patient," in the sense she offers, by anyone other than herself.

C. Plaintiff's Definition of "Active Patient" is Impractical, And Unworkable

The absurdity of Plaintiff's "plain meaning" of "active" becomes even more apparent when attempts to use "active," as defined by Plaintiff, to modify other nouns, such as "person." Is an "active person" a person who has not changed, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or died? Is an "active volcano" a volcano that has not changed, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or died? Plaintiff's suggested "plain-meaning" of "active" is not a plain meaning at all. It is nonsensical both generally and in the context of the Recital. If "active patient" is inherently forward-looking and predictive of the number of patients who are

expected to return, then the Dependent Clause -- with its reference to a historical tally of patients by FPC Software – is rendered mere surplusage.

If one substitutes Plaintiff's fanciful definition of "active patient" for the phrase "active patient" in the Recital, it reads as follows:

"Seller has represented that the Dental Practice has ***Approx.*** 1200 [***patients who maintain a continual, ongoing relationship where treatment is obtained on a fee basis, and have not changed dentists, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or died***], who have been treated within the previous ~~twelve months.~~ ***twenty four months according to First Pacific Corporation Software.***"

Plaintiff's definition of "active patients" cannot be substituted for "active patients" in the Recital in a way that does not overwhelm the existing sentence – and it plain meaning. Moreover, no creature lacking god-like omniscience could responsibly recite the number of "active patients" at a closing, if Plaintiff's definition is correct, because no mere mortal could reasonably be expected to know, at the instant the agreement was signed, that no patient treated in the previous 24 months had not changed dentists, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes, or died. A laborious file-by-file review of handwritten entries in patient files might provide clues as to whether the foregoing had occurred, but Plaintiff's definition of active patient raises more questions than it answers. Is the seller of a dental practice required to compare his or her patient list to obituaries on the eve of the sale? If a patient reports a change in their residential address, does seller have to determine how far the new address is from the office? And, if so, how far is too far to be included in "active patients"? If a patient has moved, does it matter that the move was to a residence next door, instead of the next town? And what exactly constitutes a "refusal" to schedule an appointment? If a patient is

busy or out of town on one day suggested, should he or she be immediately be stricken from the list of active patients? The "soft" criteria that Plaintiff suggests as exclusions from "active patient" are vague, ambiguous, and unworkable.

It is well established that courts must construe contracts so as to avoid absurd results. *See, e.g., Rubin v. Laser*, 301 Ill. App. 3d 60 (1st Dist., 1998), *citing Foxfield Realty, Inc. v. Kubala*, 287 Ill.App.3d 519, 524, (2d Dist. 1997) (an "interpretation which makes a rational and probable agreement must be preferred."). Thus, the trial court's interpretation, giving a reasonable meaning to "active patient" is clearly not in error.

D. Plaintiff's Definition of "Active Patient" is Not Based On Plain and Ordinary Meaning

The lengthy and elaborate "definition" of "active" in "active patient" offered by Plaintiff is not the plain and ordinary meaning of "active." The plain and ordinary sense of "active" does not connote "maintains a continual, ongoing relationship where treatment is obtained on a fee basis, and has not changed dentists, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or died." The foregoing laundry list exists only in the imagination of Plaintiff, as a recent fabrication to salvage an otherwise unsalvageable claim.

V. THE TRIAL COURT DID NOT ERR IN FINDING THE PHRASE "ACTIVE PATIENT" IS A TERM OF ART IN THE DENTAL PROFESSION

The June 10, 2011 Order properly granted Defendants' motion for summary judgment as to the meaning of the term "active patients." The ADA definition of "active patient" is a term of art, and the subject of trade custom or usage. "If a usage exists in a particular trade of which both parties either had notice or should have had notice, it is only just and proper that their contract should be interpreted in view of the trade practice." *Chicago Bridge & Iron Co. v. Reliance Insurance Co.*, 46 Ill. 2d 522, 531-32 (1970), *citing Kunglig Jarnvagsstyrelsen v.*

Dexter & Carpenter, Inc., 299 F. 991 (S.D.N.Y. 1924) (Learned Hand, J.)). Defendants' opening brief proved the existence of "active patient" as a term of art in dentistry, and its applicability to the disputed transaction. That brief provide uncontroverted evidence that "active patient" has an existence "so uniform, long-established and generally acquiesced in and so well known as to induce the belief that the parties contract with reference to it." *Kelly v. Carroll*, 223 Ill. App. 309, 315-16 (1921), *quoted in Snedden v. Gen. Radiator Div. of Chromalloy Am. Corp.*, 111 Ill. App. 3d 128 (4th Dist). Indeed, Defendants' briefs demonstrated that Plaintiff herself used the term "active patient" in its term-of-art meaning in the Carlson Agreement. The 1991 American Dental Association ("ADA") House of Delegates Resolution provides that for the purpose of evaluating or appraising the assets of a dental practice the definitions of the terms "active" and "inactive" dental patients of record apply. *See* Def. Mot. Summ. J. as to the Meaning of Active Patient at pp.9-10 (SA298-99). This case concerns the buyer's post-closing evaluation and appraisal of the Dental Practice. The ADA definition of "active patient" therefore applies.

If the representation made by Defendants in the Purchase Agreement was not for the purpose of evaluating or appraising the assets of a dental practice, then what was it for? The notion that the Recital and its statement about "active patients" was somehow made for a purpose unrelated to evaluating or appraising the assets of a dental practice is sheer sophistry – and nonsense.

Plaintiff knew, and may be held to that definition. "In the absence of a stipulation to the contrary persons engaged in the same trade of business are presumed to have contracted *with reference to the particular customs and usages of the trade* and it is proper to resort to such custom and usages to interpret the contract." *Fifteenth Ave. Christian Church v. Moline Heating*

& Cons. Co., 131 Ill. App. 2d 766, 769 (3rd Dist. 1970) (*citing Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co.*, 334 Ill. 281; *De Stefano v. Associated Fruit Co.*, 318 Ill. 345,, *Katz v. Brooks*, 65 Ill. App. 2d 155.) If a party may be charged with knowledge of a trade practice when they are, or should be aware of it, then Plaintiff may be charged with knowledge of the correct meaning of "active patient," because the Carlson Agreement demonstrates that she knew it. *Carlson Agreement*, at ¶¶2, 16; A000459-69.

Even without evidence that Plaintiff had actual knowledge of the industry's term-of-art usage of "active patient," as an experienced purchaser of dental practices, she is, under Illinois law, charged with knowledge of how the term is used.[9] *See Fifteenth Ave. Christian*, 131 Ill. App. 2d at 769. Here, however, there was ample evidence that Plaintiff in fact knew it, and had employed it before in the precise context of this case, in a manner consistent with the ADA definition of the term. In such a case, the industry's meaning of a term "has the force of law within the sphere where established and enters into the contracts of those within that sphere who have knowledge of its existence." *Snedden v. Gen. Radiator Div. of Chromalloy Am. Corp.*, 111 Ill. App. 3d 128 (4th Dist), *quoting Kelly v. Carroll*, 223 Ill. App. 309, 315-16 (1921).

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[9] Since 1989, Plaintiff has purchased five dental practices. Of those five, not one is still in existence. *See* Def. Mot. Summ. J., at pp.1, 2 (SA002-03) and certain Exhibits thereto (SA018-61). Plaintiff has been involved in over twenty civil actions (SA021-22), at least six of which involve Plaintiff's purchase of, or association with a dental practice, in which she accuses another dentist of fraud, breach of contract, or even criminal misconduct. One of those actions, *Tujetsch v. Chang*; Case No. 2008 L 006526, is still pending. Plaintiff is thus clearly chargeable with knowledge of industry practices surrounding the purchase of dental practices.

VI. THE TRIAL COURT DID NOT FAIL TO DISCERN A GENUINE ISSUE OF MATERIAL FACT CONCERNING OFFICE EQUIPMENT

As stated, the Agreement executed on June 27, 2004 states that "all equipment ***is*** working and in good order" (A000043) (emphasis supplied); but does not warrant that equipment will remain in working order thereafter. Section 1.06 of the Agreement provides that "[t]he consummation of the transactions contemplated by [the] Agreement . . . shall take place on July 1, 2004 . . . but Purchaser shall take possession of the Dental Practice on June 30, 2004." A000045. In fact, after Tujetsch and Dr. Pusateri executed the Agreement at the Premises on Sunday, June 27, 2004, Tujetsch gave Pusateri a check for the balance of the $165,000 purchase price and received keys (and unrestricted access) to the Dental Practice. Pusateri Aff., ¶72 (SA123).

Counts II and III of the Complaint allege breach of contract and fraud predicated on both overstatement of "active patients" and misstatement of the functioning capacity of the equipment in the office. Complaint, ¶¶32-35 (A000036); ¶¶46-49 (A000038-39). Plaintiff alleged that at unspecified times after she took possession of the Dental Practice, dental equipment was not in good order, and that Plaintiff incurred substantial expenses in repairing and replacing equipment. Complaint, ¶33 (A000036). Even if true, this is not evidence that equipment was not working at the relevant time -- the date Plaintiff took possession of the Dental Practice. Defendants, on the other hand, provided affidavits of Tina-Buben, a dental assistant (SA209-19), and Jackie Galban, a dental hygienist employed at the dental practice (SA202-08). Both attested that no equipment owned by the Dental Practice was out of order on or around June 27, 2004 or June 30, 2004, the date Tujetsch officially took possession of the Dental Practice. Moreover, as the trial court correctly noted, Plaintiff never mentioned any problems regarding equipment in correspondence with Pusateri in the year following the purchase of the practice." *Order* at p.5 (A000027), *citing*

Def. Mot. Summ. J. at Exhs. 9-11 (SA173-80). Accordingly, the trial court correctly found that Defendants were entitled to summary judgment on both grounds because there was no genuine issue of fact regarding the number of "active patients," when correctly construed, and no triable issue of fact as to whether any of the office equipment was not in working order on the date of the closing. *Order* at p.5 (A000019).

As discussed in the section above, the number of active patients, when properly defined, was not overstated. The Affidavit of Tujetsch failed to detail any problem she had with the office equipment upon the purchase of the Dental Practice – whatever happened thereafter is irrelevant. Thus, no factual issue existed with regard to the condition of the office equipment as of the date of the closing.

The trial court's order was not required to address the allegation that Dr. Pusateri misrepresented that he charged "usual and customary" fees – whatever that means. Regardless of the testimony of Janice Johnson, it is not unusual or outside the bounds of custom for a dental practice to offer promotional discounts on cleanings and dental examinations.

VII. NONE OF PLAINTIFF'S FIVE ASSERTIONS OF ERROR HAS ANY MERIT

As demonstrated above, Plaintiff is bound by definition of "active patient" in the Dependent Clause of the Recital. The notion that Plaintiff can disregard the Dependant Clause because it refers to FPC Software is nonsense. The Dependent Clause cannot reasonably be construed as a reference to the FPC database where the identity of the active patients could be found, instead of what it obviously was -- a definition of "active patient."

The trial court did not fail to give the term "active patient" its proper meaning, because the "active patient" is expressly defined in the Dependent Clause.

The trial court did not err in finding the phrase "active patient" is a term of art in the

dental profession. The briefs set forth the ADA publications and scholarly articles that make this clear.

The trial court did not err in considering the Carlson Agreement to find "commonality" among the meaning of "active patient" in the Carlson Agreement, the Agreement at bar, and the ADA definition of "active patient." As such, the Carlson Agreement was compelling evidence that notwithstanding her professions of ignorance and naivete, Plaintiff knew the correct meaning of "active patient" as a dental term of art.

Finally, the trial court did not err in finding there were no genuine issues of material fact concerning Count III, the count pleading fraud, as to the condition of office equipment. There was no evidence that any equipment was not in working order on or around June 27, 2004.

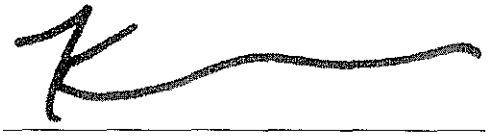
CONCLUSION

For all of the above and foregoing reasons, Plaintiff respectfully requests that that this Court affirm the June 10, 2011 Order denying Plaintiff's motion for summary judgment on Count II, and granting Defendants' motion for summary judgment on Counts I, II and III, and granting Defendants' motion for summary judgment as to the meaning of "active patients."

Dated: April 11, 2012

Respectfully submitted,

TODD C. PUSATERI, FIRST DENTAL, P.C., and FIRST DENTAL OF ORLAND PARK, P.C., Defendants-Appellees



By: Kent Maynard, Jr., Their Attorney

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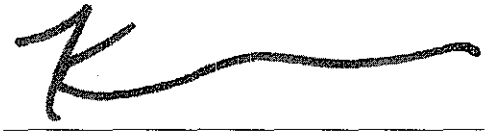
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 36 pages.



Kent Maynard, Jr.

SUPPLEMENTARY APPENDIX

Appended Herewith as Volume I of II of Supplementary Appendix:

Included in Separate Volume II of II of Supplementary Appendix:

No. 11-1965

IN THE

Appellate Court of Illinois

FIRST JUDICIAL DISTRICT

MARY A. TUJETSCH, *Plaintiff-Appellant,* v. **TODD C. PUSATERI, FIRST DENTAL, P.C., and FIRST DENTAL OF ORLAND PARK, P.C.** *Defendants-Appellees*	Circuit Court No.: 2006-CH-11607 (Transferred to Law Division, Commercial Calendar "S") The Honorable Raymond W. Mitchell, Presiding Judge

APPELLEES'
RULE 342 SUPPLEMENTARY APPENDIX

VOLUME I OF II

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	2011 JAN 10 DOROTHY BROWN CLERK OF CIRCUIT COURT LAW DIVISION 06 CH 1607 (Transferred to Law Division) Hon. Charles R. Winkler

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to 735 ILCS 5/2-1005, Defendants move this Court for entry of summary judgment on each Count of the three-count Amended Complaint ("Complaint"). In support of their motion, Defendants state as follows:

INTRODUCTION

This is not the first time that the Plaintiff has cast herself in the role of the victim and accused a fellow dentist of attempting to cheat and deceive her. After years of prevarication, Tujetsch recently admitted, for the first time, that she has been a litigant in 18 lawsuits, at least six of which involve Tujetsch accusing another dentist of fraud, breach of contract,[1] or even criminal misconduct.[2] Tujetsch has repeatedly proven herself incapable of owning and managing her own dental practice. Since 1989, Tujetsch has purchased five dental practices.[3] Not one of those practices was ever re-sold, and not one of them is in existence today. Tujetsch's employment by others has almost invariably ended with her being fired. *See, e.g.*, Exh. B. Given her long record of incompetence and vexatious litigation, Tujetsch is now

[1] The recently disclosed litigation fails to include at least five lawsuits, many of which were filed in Indiana. *See* Lake County report and summary of litigation against other dentists in Group Exh. A, at pp. 12-16

[2] *See* accusations of criminal misconduct directed at Bradley Dental and response in Group Exh. B.

[3] *See* Exh. C, response to Interrogatory no. 3

unemployable. At the culmination of her professional career, Tujetsch has no dental office, and no patients, leaving her plenty of time to flog meritless claims against other dentists who have had the misfortune to cross her path.

In this action, Tujetsch's target is First Dental, P.C., the seller ("Seller") of a dental practice in Orland Park, Illinois ("Dental Practice"). After buying the Dental Practice and running it into the ground (and admitting that the "recipe for disaster" was her own), Tujetsch now accuses Defendants of breaching an asset sale agreement executed June 27, 2004 ("Agreement") by failing to deliver "patient lists," and by making false representations in the Agreement regarding "active patients" and "equipment." *See* Exh. D (Complaint). Tujetsch contends that that the false representations were made in order fraudulently to induce Tujetsch to enter into the Agreement and a five-year lease ("Lease") on office premises occupied by the Dental Practice, and owned by Dr. Pusateri ("Premises"). Id.

Section 9.07 of the Agreement states that "any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing [and] shall be delivered personally . . ." to Dr. Pusateri and his lawyer, Steven Jesser. *See* Id. (Complaint) at its Exh. A, §9.07. Tujetsch has never delivered to Pusateri and Jesser a written notice in conformity with Section 9.07 about "patient lists," "active patients," or "equipment." On October 24, 2005, over 16 months after she took possession of the Dental Practice, Tujetsch sent a letter to Pusateri accusing him of overstating "active patients" in the Agreement. See Exh. E (Affidavit of Pusateri), ¶82, 88. The letter said nothing about missing "patient lists" or faulty "equipment." Tujetsch's first written expression of concern about "equipment" is in the complaint that she filed in this action on June 12, 2006 -- almost two years after she took possession of the Dental Practice. Tujetsch first complains of "missing patient" lists in the

amended complaint that she filed in August 2007.

Not surprisingly, there is no evidence to support any of Tujetsch's claims -- and none can or will be adduced in response to this motion -- because the claims are based on a willful perversion of the facts and the Agreement. As demonstrated below, there is no evidence of any default or misrepresentation in respect of "patient lists," "active patients," or "equipment."

NATURE OF THE CLAIMS

Patient Lists. In Count I, Tujetsch alleges that Seller "[failed] to provide [her] with a list of Active Patients or any other patient lists," thereby breaching a "[performance] obligation to place Tujetsch in 'possession and operating control of' '[a]ll patient lists relating to the Dental Practice '" Exh. D, ¶18. "[A]fter the closing," Tujetsch "requested a patient list identifying 1,200 active patients of the Dental Practice" that she "needed the patient list to contact the Dental Practice's customers "(Id., ¶20; emphasis supplied). Tujetsch "notified defendants of the breach of the Agreement [with respect to "patient lists"] on or about October 24, 2005 " (Id., ¶28). Pusateri "directed [Tujetsch] to contact First Pacific [(Corporation)][4] for a patient list" (Id., ¶22). "Neither Pusateri nor First Pacific provided Tujetsch with access to the records or data that purportedly establish the basis for the number of Active Patients." Id., ¶23.

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[4] In March 2001, Dr. Pusateri outsourced the issuance and collection of patient bills of the Dental Practice to First Pacific Corporation, a specialized third-party service provider headquartered in Salem, Oregon ("FPC"). Pursuant to a written Sales and Service Agreement, the Dental Practice agreed to use a computer system and software package furnished to the Dental Practice by FPC (hereinafter the "FPC Terminal" and "FPC Software"), "[i]n order to facilitate client's sale of accounts receivable to FPC, and as a part of FPC's service and exchange of data." Exh. E, ¶¶14-16.

In addition to acting as a conduit to supply billing information to FPC, the FPC Terminal contained database software that aggregated and stored patient and billing information locally, as entered, and had the capacity to generate reports and patients lists using the stored information. Such reports and patient lists could be generated according to "canned" formats, or user-designated formats customized to provide specifically selected information. The FPC Software could be used mechanically to list all patients in the database, or to cull from the database subsets of patients on the basis of defined criteria. *See* Id. ¶19.

The FPC Terminal and Software remained property of FPC at all times after being placed in the Dental Practice, and therefore was not an asset of Seller that could be sold to Tujetsch. Id., ¶¶18, 50. However, on June 30, 2004, Tujetsch contracted with FPC for continued access to the FPC Terminal and FPC services for the Dental Practice. Id., ¶¶74-75, 77-78.

Active Patients Count II claims that Defendants breached the Agreement by overstating, in the Agreement, the number of "active patients" treated in the Dental Practice in the 24 months prior to its sale (Id., ¶¶30, 31), and misrepresenting, on June 27, 2004, that unspecified "equipment" of the Dental Practice was in working order (Id., ¶¶32, 33) [5]

Fraud in the Inducement. Count III alleges, "on information and belief," that, in order to induce Tujetsch to enter into the Agreement and Lease, Dr. Pusateri, at the time he executed the Agreement on June 27, 2004, knowingly inflated the number of "active patients" of the Dental Practice in the Agreement, and knowingly misrepresented that "equipment" of the Dental Practice was then "working and in good order." Id., ¶40.

STANDARD OF REVIEW

Summary judgment under 735 ILCS 5/2-1005 is a means of resolving litigation where no material fact is at issue. *See* Chubb Ins. Co. v. DeChambre, 349 Ill. App. 3d 56, 59 (1st Dist. 2004). In ruling on a motion to dismiss the Court considers the pleadings and proffered evidence to determine if any material factual dispute exists. If there is no dispute of material fact, the Court considers the facts and the law and determines whether, on the undisputed facts, the moving party is entitled to judgment. *See* Id., 349 Ill. App. 3d at 59.

There are two types of summary judgment motions: 1) a motion affirmatively showing that some element of the case must be resolved in the defendant's favor, requiring the defendant to prove something that it would not be required to prove at a trial, and 2) a motion of the kind recognized by the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), in which a defendant points out the absence of evidence supporting plaintiff's position. Willett v. Cessna Aircraft Co., 366 Ill. App. 3d 360, 368 (1st Dist. 2006).

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[5] Section 1.01-2 of the Agreement states that "Seller represents that all equipment is working and in good order [and that] Seller assumes risk of loss of tangible assets prior to, but not subsequent to, closing."

STATEMENT OF UNDISPUTED FACTS

In April 2004, Tujetsch advised Dr. Pusateri that she was interested in purchasing the Dental Practice, and requested access to the Dental Practice to perform due diligence. On April 18, 2004, Tujetsch executed an agreement in which she agreed to preserve the confidentiality of "[a]ny financial data . . . which may include . . . [p]atient or client lists . . . " Exh. E, ¶46.

As of April 2004, information about all patients treated in the Dental Practice after it first opened its doors in March 1998 was recorded in Patient Charts stored on shelves in the Dental Practice, as required by Section 50 of the Illinois Dental Practice Act, 225 ILCS 25/50 (hereinafter Section 50).[6] *See* Id. at ¶¶20-24. Detailed information about patients of the Dental Practice was also accessible from a redundant, electronic source: the FPC Terminal.[7] *See* Id. at ¶¶24-27. However, the FPC Terminal and the FPC Software were never owned by any Defendant, and were expressly excluded from the assets being conveyed to Tujetsch pursuant to the Agreement. Exh. D, at its Exh. A, §1.02-3; Exh. E, ¶77; Exh. I (Aff. of Ketsdever), ¶¶11, 27.

After signing the April 2004 confidentiality agreement, Tujetsch was entitled to access to books and records of the Dental Practice, including patient and client lists of the Dental Practice, as well as the FPC Terminal. Exh. E at ¶¶46-49. On April 29, 2004, the FPC Terminal was used by Dr. Pusateri to print out two separate "Practice Overview" reports, one as of December 30, 2003, the other as of April 29, 2004. Id. at ¶¶27-34.[8] According to the Practice Overview as of

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[6] Section 50 of the Illinois Dental Practice Act, 225 ILCS 25/50, provides that "[e]very dentist shall make a record of all dental work performed for each patient. The record shall be made in a manner and in sufficient detail that it may be used for identification purposes. Dental records required by this Section shall be maintained for 10 years." 225 ILCS 25/50.

[7] In addition to storing patient information in Patient Charts maintained pursuant to Section 50 (Exh. E, ¶¶20-24, 47), the Dental Practice had, since April 1, 2001, also redundantly stored patient information in the FPC Terminal. Id., ¶48. Tujetsch performed due diligence on the FPC Terminal and contracted for continued access to the FPC Terminal and FPC services on June 30, 2004. Exh. E., ¶¶75-76.

[8] One of the "canned" reports that the FPC Software could generate upon request was a summary report called "Practice Overview." As explained in written documentation of the FPC Software, the Practice Overview

December 30, 2003, the Dental Practice had 1,223 "active patients." Id. According to the Practice Overview dated as of April 29, 2004, the Dental Practice had 1,227 "active patients." Id. Documentation of the First Pacific software defines the number of "active patients" reported in the Practice Overview as the number of patients treated in the practice during the previous 24 months. Id., ¶28; Exh. I, ¶21. This is consistent with the definition of "active patient" promulgated by the American Dental Association. Exh. E, ¶30; Exh. I, ¶22.

On May 1, 2004, Tujetsch send a letter to Dr. Pusateri thanking him for "all of [his] efforts and expertise [and for his] time and cooperation," and stating that she had spent "a considerable amount of time with [her] financial advisors and dental expert;" that her "experts [had] evaluated [the Dental Practice] and . . . informed [Tujetsch] that the practice ha[d] leveled off, with no indication of future growth;" and that "[t]his indicates the potential for financial problems ahead." Tujetsch stated that "[d]espite [the potential for financial problems ahead], [she] believe[d] that the practice could be turned around through hard work," and concluded, "[i]f I am going to invest my time and talent in this venture, it is important that I look at this project in terms of a long term projection." Notwithstanding "the potential for financial problems ahead," Tujetsch stated "[m]y experts have evaluated the practice to be worth an estimated $144,500.00. I am prepared to offer you $150,000.00. I believe this offer to be fair and mutually beneficial." Exh. E, ¶¶51-55.

On Monday, May 10, 2004, Tujetsch increased her offer for the Dental Practice from $150,000, to $165,000:

> I received your fax on Saturday [(May 8, 2004)] and I was able to fax it on to my advisors the same day. I thought I would send my new offer to you as soon as

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provides a month-to-date and year-to-date overview of important information for monitoring a practice, including "the number of active patients," defined as "[t]he number of patients seen within the last two years." Exh. E, ¶¶27-34.

possible. In this way, we could still talk on Wednesday [(May 12, 2004)], as agreed upon, and be one step closer to an agreement.

I have had experience with many dental brokers over the past fifteen years as I have purchased four dental practices to date. I am well aware that for each different broker there will be a different criteria formula, or method of evaluating a practice. Obviously, your broker has your best interest in hand and my broker has my best interest at hand. The truth probably exists somewhere in the middle.

In the interest of moving the process along, I am willing to meet you more than half way. I would like to offer you $165,000.00 with $50,000 of it being cash upfront. The remaining balance would be paid at the current interest rate of 5%. It is my intention to pay the practice off sooner rather than later as I do not like paying interest payments. This deal allows you to make a considerable amount of additional cash in terms of rent and interest payments.

I believe this offer to be fair. I hope that we can agree and move forward with the process.

Exh. E, ¶¶56-58. On May 13, 2004, Tujetsch sent a letter to Dr. Pusateri stating, "We have agreed at a purchase price of $165,000.00 and this $5,000.00 deposit will be subtracted from the $165,000.00 purchase price at closing." Id. at ¶61.

Thereafter, the terms of the Agreement and the Lease were negotiated. By Friday, June 25, 2004, those negotiations were complete, and the parties planned to meet at the Premises and execute the Agreement and the Lease on Sunday, June 27, 2004. The execution copy of the fully-integrated[9] Agreement uses the phrase "active patient" only once, in its first paragraph, wherein it states:

> Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has _____ active patients, who have been treated within the previous twelve months.

The underscored space in the foregoing recital remained blank until Sunday, June 27, 2004,

[9] Section 9.02 of the Agreement provides that "[t]his Agreement and the Schedules and Exhibits referred to herein embody the entire agreement and understanding of the parties and supersede any and all prior agreements, arrangements and understandings relating to matters provided for herein." Exh. D, at its Exh. A, §9.02.

when Tujetsch and Dr. Pusateri met at the Premises to execute the Lease and the Agreement. The blank was first filled in by Dr. Pusateri as he and Tujetsch were executing the Agreement. At that time, Dr. Pusateri consulted the FPC Terminal in the Premises to confirm that the number of active patients previously reported by FPC Software (in the two Practice Overviews downloaded by Dr. Pusateri on April 29, 2004) remained at approximately 1,200. After confirming that, Pusateri modified the recital, in Tujetsch's presence, to read as follows: "Seller has represented that the Dental Practice has ***approx.*** 1200 active patients, who have been treated within the previous ~~twelve months~~ ***twenty four months according to First Pacific Corporation Software***." Dr. Pusateri changed "twelve months" to "twenty four months" to conform the recital to the definition of "active patient" used by the FPC Software, and inserted 1,200 as the number of "active patients" reported by that Software. See Exh. E, ¶64-68.

The modified recital was then initialed by both Tujetsch and Dr. Pusateri. It appears in the fully executed Agreement, as follows:

> Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has approx. 1200 active patients, who have been treated within the previous ~~twelve months~~ twenty four months according to First Pacific Corporation Software.
>
> In consideration of the mutual promises and covenants contained in this Agreement, the parties agree as follows:

Tujetsch has averred in discovery that this was the first representation to her that, according to FPC software, the Dental Practice had treated approximately 1,200 "active patients" in the previous 24 months. *See* Exh. F (Plaintiff's Answer to Defendants' Second Interrogatories), answer to interrogatory no. 1.

The Agreement executed on June 27, 2004 states that "all equipment ***is*** working and in good order" (emphasis supplied); but does not warrant that equipment will remain in working

order thereafter. Section 1.06 of the Agreement provides that "[t]he consummation of the transactions contemplated by [the] Agreement shall take place on July 1, 2004 but Purchaser shall take possession of the Dental Practice on June 30, 2004." In fact, after Tujetsch and Dr. Pusateri executed the Agreement at the Premises on Sunday, June 27, 2004, Tujetsch gave Pusateri a check for the balance of the $165,000 purchase price and received keys (and unrestricted access) to the Dental Practice. Exh. E, ¶72.

Section 1.01 of the Agreement contemplates the delivery to Tujetsch of all of the assets of the Dental Practice at the closing, subject to exceptions specified in the Agreement. Among the assets to be placed in Tujetsch's possession are "patient lists, and patient records." The phrase "patient files" appears once in the Agreement, in Section 1.04, wherein it states that "[a]t time of closing, inactive patient files are to be moved at Seller's expense." The Agreement does not contain any other reference to "patient lists," "patient records," "patient files," or "active patients." It is undisputed that the Dental Practice redundantly maintained patient information in the FPC Terminal before the sale. However, Section 1.02-3 of the Agreement expressly excludes from the assets being transferred to Tujetsch "any property of First Pacific Corporation, including its computers, monitors, keyboards, battery backup, computer speakers, laser printer, color printer, computer software, and computer connections."

In order to retain access to the FPC Terminal and Software, Tujetsch entered into a Sales and Service Agreement with FPC on June 30, 2004. Exh. I, ¶31. Pursuant to that Sales and Service Agreement, Tujetsch contracted, on terms and conditions that she negotiated bilaterally with FPC, for continued access to FPC billing services and an FPC Terminal after the sale. Exh. E, ¶78; Exh. I, ¶¶33-35.

By June 30, 2004 Tujetsch had contracted for continued FPC services and taken

possession of all of the assets of the Dental Practice owned and conveyed by Seller without incident, pursuant to the Agreement and the Lease.[10] Not surprisingly, there is no evidence that any of the professionals employed in the Dental Practice noticed any lack of patient lists (or an inability to contact patients) on or after June 30, 2004. *See* Affidavits of Messrs Purdue, Galban, Buben-Dowling, and Johnson in Group Exhibit G.

Over nine months later, in April 2005, Pusateri received a letter from Tujetsch stating that her "absentee ownership" of the Dental Practice had been a "recipe for disaster," and that she had been thinking of selling the Dental Practice. Tujetsch opined that the Dental Practice would fetch a higher price if it were bundled with the building that housed the Premises. Tujetsch explained that she had advertised the Premises for "Space Sharing" with other dentists, and in response had received "numerous calls regarding dentists wanting to purchase the office."

> These interested dentists forced me to contemplate the option of selling the practice if the money was right. I then went ahead and advertised the office for sale and decided that if the price was right, I would be willing to sell. If the price is not right will keep the office and nothing will change. I have received a lot of interest in the practice and I find myself needing to devote more time to my Chicago practice. When I originally purchased the office, I have anticipated that the office could run itself efficiently with little or no input/time from me. I have come to learn that an absentee owner and is a recipe for disaster.
>
> My question to you is, would you be interested in selling the building at 7714 W. 159th Street? I believe that my chances of selling the practice would be greatly enhanced if I could offer the sale of the building, in addition to my practice. I know that at the time of the purchase, in July 2004, you were open to the idea of selling the building. Have you given it any additional consideration? From your perspective, it would be easier to sell the building with the sale of the dental practice. I understand that the chiropractors' lease is coming to an end so the time could not be more ideal for both of us. The feedback I am getting is that a potential buyer, who is a dentist, would desire the entire office space.
>
> * * *
>
> I ask that you keep all of this letter confidential as I may ultimately option [sic] to

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[10] Section 6.03 of the Agreement provides that "[a]t or before closing, Purchaser shall execute a five-year lease for the offices of the Dental Practice at 7714 159th Street, Orland Park, IL 60462 [(the "Premises")] ." On June 28, 2004, Tujetsch entered into a five-year lease on the Premises, where were owned by Pusateri (hereinafter the "Lease").

keep the practice in the end. I do not want to alarm Dr. Purdue or the staff and patients.

Exh. E, ¶84. The foregoing letter said nothing about a lack of "patient lists," a perceived shortfall in "active patients," or faulty "equipment." It admitted that the "disaster," if there was one, was of Tujetsch' own making, and closed with the salutation, "The best to you always."

On April 6, 2005, Tujetsch sent a second letter to Dr. Pusateri "offering [him] one million ($1,000,000.00) for the purchase of [his] building located at 7714 W. 159th Street, Orland Park, Illinois." Exh. E, ¶86.

Over six months later, in October 2005, Pusateri received another letter from Tujetsch. In the letter, dated October 24, 2005, Tujetsch accused, for the first time,[11] that the Agreement executed by the parties on June 27, 2004 had overstated the number of "active patients" of the Dental Practice:

> Today, 10/24/05, I have been informed that the actual number of active patients, at the time of the sale, was 50% less than what you represented in our signed, legal contract. Please refer to the contract where you note that 1200 active patients of record are involved in the sale of the practice. A detailed report by First Pacific Corporation, your former and current billing agency, indicates that the actual number of active patients, at the sale, was 668. This misrepresentation has created an enormous burden for this office as you are also profiting from a monthly rent of nearly $3,000.00.

Id., ¶88. The foregoing letter said nothing about an inability to contact patients caused by a lack of "patient lists" or faulty "equipment." In response, Pusateri steadfastly denied that he overstated, on June 27, 2004, the number of "active patients" treated in the Dental Practice, as reported by FPC Software, and produced copies of the two FPC Practice Overviews on which he relied.

There is no FPC report that supports the accusation made by the May 24 letter. An FPC

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[11] *See* Amended Complaint at ¶28 ("Tujetsch notified defendants of the breach of the Agreement on or about October 24, 2005").

account manager advised Tujetsch that a list of patients produced by FPC at Tujetsch's request in October 2005 was not complete, and could not be relied to prove that the FPC Practice Overviews issued on April 29, 2004 were inaccurate as to the number of "active patients." Exh. I, ¶¶60-108; Exh. E, ¶¶91-92. On July 6, 2006, by means of a letter "To Whom It May Concern," an officer of FPC confirmed that FPC had never provided any report to Tujetsch that could be relied upon to conclude that the number of active patients of the Dental Practice, as of June 27, 2004, was fewer than 1,200. Exh. E, ¶¶91-92; Exh. I ¶¶75-81. This was later confirmed in responses of FPC to a subpoena from Tujetsch.

On October 31, 2007, Tujetsch gave written notice that she was "terminating the Lease and moving out of the [P]remises immediately due to the Landlord's failure to correct the breaches outlined in [an earlier] letter[12]. . . ."

ARGUMENT

A. There is no Evidence that Tujetsch Failed to Receive "Patient Lists."

There is no evidence that before June 30, 2004 Tujetsch failed to receive access to and the right to copy "patient lists" of the Dental Practice, as contemplated by the April 18, 2004 confidentiality agreement and Section 4.01 of the Agreement,[13] or that on June 27, 2004 or June 30, 2004, Tujetsch failed to receive "patient lists" of the Dental Practice owned by Seller, as contemplated by the Agreement. There is no evidence that the Agreement purported to convey to Tujetsch ownership of the FPC Terminal or any software or data contained therein, inasmuch

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[12] In an earlier letter (dated October 12, 2007), Tujetsch complained that Landlord breached the Lease by failing to document the amount of "Additional Rent," and by violating Tujetsch's right of quiet enjoyment by, among other things, scheduling landscaping maintenance during hours. *See* letters from Tujetsch to Landlord attached hereto as Group Exhibit H.

[13] Section 4.01 of the Agreement provides that "[p]rior to the Closing Date, Seller shall, at Purchaser's request, afford or cause to be afforded to the agents, attorneys, accountants and other authorized representatives of Purchaser reasonable access during normal business hours to all employees, properties, books and records of the Dental Practice and shall permit such persons, at Purchaser's expense, to make copies of such books and records."

as the FPC Terminal and Software were expressly excluded from the sale. There is no evidence that any "patient list" was ever hidden or otherwise withheld from Tujetsch. There is no evidence that before June 30, 2004, the Dental Practice at any time failed to comply with Section 50 of the Dental Practice Act, meaning that all patient information had been updated for each patient, as required by law, at the time of each office visit, and maintained in Patient Charts owned by Seller and located in the Dental Practice. There is no evidence that any of the professionals working in the Dental Practice as of June 30, 2004 noticed any lack of patient lists or inability to contact patients on or after June 27, 2004, or that any equipment was not in working order on that date. *See* Group Exhibit G

Tujetsch never gave written notice to Dr. Pusateri and Steven Jesser about "patient lists" in conformity with Section 9.07 of the Agreement. The first writing that expressed any concern about the Dental Practice was received by Dr. Pusateri in late May 2005, over 16 months after the sale, and concerned the number of active patients, not patient lists. The undisputed facts (and simple common sense) disprove the absurd notion that Tujetsch somehow ran the Dental Practice for over 16 months before first noticing that she was unable to contact its patients, and the equally absurd notion that Seller had both the right[14] and the duty to deliver to Tujetsch -- or retain, for over 16 months after the sale -- a list of "active patients" on an FPC Terminal that Seller never owned, and expressly did not convey to Tujetsch

B. There is No Evidence of Any Misstatement Regarding "Active Patients" or "Equipment."

In Count II, Tujetsch seeks "indemnification" for unspecified losses she suffered in reliance on the June 27, 2004 recital that the Dental Practice had treated approximately 1,200

[14] If Defendants had retained a list of "active patients" no doubt Tujetsch would call that a breach of the Agreement, and evidence of an intent to steal patients.

patients within the previous twenty-four months according to First Pacific Corporation Software. Tujetsch mischaracterizes this citation to FPC Software as a "representation and warranty"[15] of Pusateri, and asserts that it was false when made by Pusateri, because in October 2005 FPC reported fewer than 1,200 "active patients." However, since July 2006 Tujetsch has been on notice that she cannot rely on any report issued by FPC to prove her overstatement theory, and an unspecified review of unspecified "patient files" -- conducted over 16 months after the sale -- is not evidence of what the FPC Software reported as of June 27, 2004 -- let alone that Dr. Pusateri misstated that Exh. I, *passim*. Even if it were, by her own admission, Tujetsch cannot have relied on a representation first made on June 27, 2004 when she made offers of $150,000 and $165,000 for the Dental Practice over a month earlier, on May 1 and May 10, 2004, respectively. There is no evidence to support Tujetsch's overstatement theory, and none can be adduced in response to this motion, inasmuch as the theory is based on obvious distortions of what the Agreement actually says about "active patients."

The June 27, 2004 recital as to "active patients" is as reported by the FPC Software. The undisputed evidence shows that FPC Pacific software reported, in April 2004, that the Dental Practice had treated 1,223 patients in the 24 months before December 2003, and 1,227 patients in the 24 months before April 2003. See Exh. I, ¶¶94-107. There is no evidence that Dr. Pusateri failed accurately to repeat the tally of "active patients" reported by FPC Software in the Practice Overviews-- after reconfirming it, on June 27, 2004 -- at the time he executed the Agreement. The recital does not claim to be based on a physical list of "active patients" owned by Seller and compiled during a manual review of Patient Charts. No manual "review" of unspecified patient

[15] The Representations and Warranties of Seller are set forth in Article III of the Agreement, beginning on page 4 of the Agreement. They do not mention, let alone make any representation and warranty about, "active patients."

files, purportedly first undertaken by Tujetsch over 16 months after the sale, can change this simple, irreducible fact. If Tujetsch wished to contract with FPC to preserve all pre-closing data regarding "active patients" that was entirely up to her. However, her apparent failure to do so does not give rise to any cause of action against Defendants.

C. There Is No Fraud In The Inducement, and No Right to Rescind.

Fraud in the inducement of a contract is a defect that renders the contract voidable at the election of the innocent party. Tower Investors, LLC v. 111 East Chestnut Consultants, Inc., 371 Ill. App. 3d 1019, 1030 (2007). Fraud in the inducement must be proven by clear and convincing evidence. Fox v. Heimann, 375 Ill. App. 3d 35, 47 (1st Dist. 2007). There are only two, mutually exclusive remedies available to a plaintiff with a claim of fraudulent inducement: a) rescission; or b) damages calculated as the difference between the value of the property received and the property promised. Estate of Neprozatis, 62 Ill.App.3d 563, 570 (1st Dist. 1978) (citation omitted).

There is no evidence that any "equipment" of the Dental Practice was not in working order on June 27 2004, the date Tujetsch took possession of the Dental Practice. Likewise, as demonstrated above, there is no evidence of any overstatement of "active patients" as reported by FPC Software. Even if there were, Tujetsch is not entitled to rescission of the Agreement and the Lease, because a plaintiff who elects rescission "must place the other party in status quo ". Neprozatis, 62 Ill.App.3d at 570-571. Restoration of the status quo ante requires that the party seeking rescission promptly restore to the other party the consideration received under the contract. Fogel v. Enter. Leasing Co., 353 Ill. App. 3d 165, 173 (1st Dist. 2004). For over two years after October 2005, the time she purportedly first discovered the "fraud," and over 16 months after filing her June 2006 complaint for "rescission" of the Agreement and the Lease, Tujetsch continued to maintain exclusive possession of the Dental Practice in the Premises

demised by the Lease.

There is no evidence that Tujetsch ever attempted to return Defendants to the status quo ante -- let alone that she attempted to do so promptly after discovering the "fraud." Tujetsch cannot now turn back the clock to return the Dental Practice as of October 2005, when it still existed. Tujetsch' only possible remedy is an affirmation of the Agreement and damages equal to the difference between the value of the dental practice received, and the dental practice promised. Estate of Neprozatis, 62 Ill App.3d at 570. However, there is no evidence that Tujetsch failed to receive the dental practice that she was promised, or that she overpaid for the Dental Practice that she received -- let alone that that she was induced to overpay by means of a purported misrepresentation first made over a month after agreement on price.

CONCLUSION

For the foregoing reasons, Defendants move this Court to enter summary judgment in their favor as to Counts I, II, and III, and providing such other and further relief as the Court deems just and appropriate.

Dated: January 10, 2010

Respectful submitted,

TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.

By:_____
One of Their Attorneys

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KENT MAYNARD & ASSOCIATES LLC
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Chicago, IL 60602
TEL. 312/423-6586
Firm Id. No. 41822

EXHIBIT A

Your search returned 7 case(s) SCROLL DOWN AND CLICK ON CASE NUMBER

Search Criteria

Word verification: pasffe

Before clicking Search button, type the word that you see on this picture in the box provided to the right

Search by case party — Last Name: tujetsch; First Name: mary; Date of Birth (mm-dd-yyyy); Social Security Number

Search by company name — Company Name

Search for specific case — Case Number

Search by traffic ticket number — Ticket Number

Need help paying your traffic ticket?

Additional criteria for all search types — Start Filing Date (mm-dd-yyyy); End Filing Date (mm-dd-yyyy)

Search

Search Results - 7 case(s) returned

Case Number	Party	Case Type	Party Type	D.O.B.	S.S.N.	Status
45D01-0412-CC-00354	MARY A TUJETSCH	Civil Collections D01	Civil Defendant			Redocketed
45D10-0702-MF-00117	MARY TUJETSCH	Mortgage Foreclosure - D10	Civil Defendant			Closed
45D02-0212-PL-00260	MARY TUJETSCH	Plenary E	Civil Defendant			Closed
45D11-0608-MF-00320	Mary Tujetsch	Mortgage Foreclosure - D11	Civil Defendant			Closed
45D12-0511-PL-00037	MARY TUJETSCH	Plenary D12	Plaintiff			Open
45D09-0212-SC-05299	MARY A TUJETSCH	Sm Claims - D9	Civil Defendant			Closed
45D08-0205-PL-02999	MARY A TUJETSCH	Plenary D8	Civil Defendant			Closed

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARY A. TUJETSCH, Plaintiff, vs. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	No. 06 CH 11607 (transferred to Law Division, Commercial Calendar "W") Hon. Charles R. Winkler Room 2304

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' INTERROGATORIES NOS. 5, 7, AND 22

EXHIBIT A

Mary A. Tujetsch was involved and/or remains involved, either as a plaintiff or defendant, in the civil litigation proceedings identified below.

No.	Case Name	Case Number	Forum	Plaintiff(s)	Def(s)	Date Filed
1	*Tujetsch v. Bradley Dental, LLC*	09-CV-05568	N.D. Ill.	Dr. Mary Tujetsch	Bradley Dental, LLC	09/08/2009
2	*Johnson Bell Ltd v. Tujetsch*	2009-M1-500977	Cook County - Civil	Johnson Bell Ltd.	Dr. Mary Tujetsch	07/06/2009
3	*Tujetsch v. Chang*	2008-L-006526	Cook County - Law	Dr. Mary Tujetsch	Dr. Christine Chang	06/16/2008
4	*Tujetsch v. Wood*	2008-M1-147028	Cook County - Civil	Dr. Mary Tujetsch	Susan Wood	06/11/2008
5	*Tujetsch v. Mischer*	2007-L-005640	Cook County - Law	Dr. Mary Tujetsch	Dr. Kenneth Mischer	05/31/2007
6	*Tujetsch v. Fedin*	2007-M1-110745	Cook County - Civil	Dr. Mary Tujetsch	Vlad Fedin	02/13/2007 12/08/2008
7	*Tujetsch v. Pusateri*	2006-CH-11607	Cook County – Law (from Chancery)	Dr. Mary Tujetsch	Dr. Todd Pusateri et al.	06/12/2006
8	*Johnson Bell Ltd v. Tujetsch*	2005-L-50714	Cook County - Law	Johnson Bell Ltd.	Dr. Mary Tujetsch	07/29/2005
9	*Johnson Bell Ltd v. Tujetsch*	2004-M1-164667	Cook County - Civil	Johnson Bell Ltd.	Dr. Mary Tujetsch	09/30/2004
10	*Special Assets Inc v Tujetsch*	2003-M1-700621	Cook County - Civil	Special Assets Inc., Pittsfield Development LLC	Dr. Mary Tujetsch	01/08/2003 01/02/2009
11	*Partnership Concepts Realty v. Tujetsch*	45-D08-0205-SC-2999	Lake County (IN) – Sup. Ct.	Partnership Concepts Realty	Dr. Mary Tujetsch	05/30/2002 06/20/2002
12	*Tujetsch v.*	1998-M1-	Cook	Dr. Mary	John	08/27/1998

No.	Case Name	Case Number	Forum	Plaintiff(s)	Def(s)	Date Filed
	Block	041131	County - Civil	Tujetsch	Block	
13	*Massel v Tujetsch*	1999-M1-161173	Cook County - Civil	Maria Massel	Dr. Mary Tujetsch	12/13/1999
14	*Robert A Green Ltd. v. Tujetsch*	1998-M1-168856	Cook County - Civil	Robert A. Green Ltd.	Dr. Mary Tujetsch	12/30/1998
15	*Dental Preferred v. Mary Tujestch*	1998-M1-134133	Cook County - Civil	Dental Preferred	Dr. Mary Tujetsch	06/25/1998
16	*Tujetsch v. Johns*	1995-M1-40308	Cook County - Civil	Dr. Mary Tujetsch	Alice D. Johns	05/10/1995
17	*Tujetsch v. Esselin*	1995-M1-040309	Cook County - Civil	Dr. Mary Tujetsch	Joe Esselin	02/14/1995
18	*Tujetsch v. Jankowski*	1995-M1-040310	Cook County – Civil	Dr. Mary Tujetsch	Leontine Jankowski	02/14/1995

Document #:921269

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A TUJETSCH, Plaintiff, v TODD C PUSATERI, FIRST DENTAL, P C and FIRST DENTAL OF ORLAND PARK, P C , Defendants	06 CH 11607 (Transferred to Law Division, Commercial Calendar "W") Hon Charles R Winkler Room 2304

DEFENDANTS' MOTION FOR SANCTIONS FOR DISCOVERY ABUSE

Defendants, Dr. TODD C PUSATERI, FIRST DENTAL, P C , and FIRST DENTAL OF ORLAND PARK, P C by and through their attorneys, KENT MAYNARD & ASSOCIATES LLC, hereby move this Court for entry of an Order providing an appropriate sanction for continuing and egregious discovery abuse In support of this motion, Defendants state as follows:

INTRODUCTION

Plaintiff is the purchaser of a dental practice in Orland Park, Illinois ("Dental Practice"), pursuant to an asset sale agreement between Tujetsch and First Dental, PC ("Seller"), executed on June 27, 2004 ("Agreement") She is also a serial and vexatious litigant who has been involved in so much litigation over the past twenty years -- including multiple disputes with other dentists roughly analogous to the instant case -- that it is difficult to list it all in one place That is the inescapable conclusion to be drawn from a supplemental discovery response served by her recently, in response to an interrogatory first served on her over four years ago As a result of Tujetsch's years of stonewalling and discovery abuse, intervention of this Court is now

needed to avoid extreme prejudice to Defendants

FACTUAL BACKGROUND

On June 30, 20004, Plaintiff took possession of the Dental Practice and also entered into a five-year lease on the Dental Practice's office, which was owned by Dr Pusateri Plaintiff abandoned the Dental Practice's leasehold in October 2007, ostensibly because of breaches of the lease agreement involving documentation of "Additional Rent" and interference with her right of quiet enjoyment by, among other things, scheduling landscaping maintenance during business hours [1]

In this action, Plaintiff accuses Defendants of breaching the Agreement by not delivering to her all "patient lists" of the Dental Practice at the closing, and by overstating the number of "active patients" of the Dental Practice in the Agreement [2] Plaintiff first requested a list of the 1,200 "active patients" treated in the Dental Practice in the 24 months before June 1004 after being possession of the practice for about 15 months, in October 2005, and claims to have first given notice of a patient list-related default under the Agreement as of October 24, 2005 *See* Amended Compint, at ¶38 ("Tujetsch notified defendants of the breach of the Agreement on or about October 24, 2005 ")

In response, Defendants have asserted that this action constitutes, at bottom, an attempt to blame Defendants for Plaintiff's incompetent management of the Dental Practice in the three years during which she ran it into the ground (before she abandoned it), and an attempt to blame

[1] See letters from Plaintiff to Landlord attached hereto as Group Exhibit A

[2] As Plaintiff conceded in her deposition, "active patient" is a term of art with a long-accepted definition among dentists, as confirmed by learned publications promulgated by such authorities as the American Dental Association *See* Group Exhibit B However, notwithstanding the fact that Plaintiff has been a licensed dentist since 1989, and had purchased four dental practices before the Dental Practice, she now claims that she is not bound by the definition of "active patient" that she concedes is employed by dental professionals, but may instead substitute her own, subjective understanding of "active patient" for that which is universally accepted in the dental community

Defendants for patients' abandonment of the Dental Practice after Tujetsch acquired it However, the Agreement does not contain a guarantee that patients of the Dental Practice will like Tujetsch and continue to patronize the Dental Practice after Plaintiff acquired it, nor does it guarantee that the Dental Practice will continue to thrive after the change in management Defendants have asserted that if the Dental Practice failed after Plaintiff took it over, that was because Plaintiff failed to manage the Dental Practice competently, and failed to retain and attract patients It is Defendants' view that over a year after she took possession of the Dental Practice, after she had alienated the vast majority of its patients, Tujetsch attempted to obscure her own professional inadequacies by bringing the demonstrably baseless accusations of fraud and wrongdoing in this case

Shortly after this case commenced, Defendants suspected that Plaintiff had a lengthy record of failure as a dentist, both professionally and financially, and that discovery would corroborate the theory that the Dental Practice failed as a result of Plaintiff's own incompetence and mistreatment of patients, as distinct from any wrongdoing of Defendants Defendants further believed that after each of her financial and professional failures, Tujetsch had, in an attempt to avoid the consequences of her own mistakes, accused other dental professionals of egregious acts of fraud and wrongdoing By contrast, Plaintiff contends that the failure of the Dental Practice is the only blemish in an otherwise lengthy, successful, and profitable career

Defendants have, in this litigation, repeatedly sought to discover previous instances in which Plaintiff was the subject of patient complaints or suffered financial losses or professional setbacks (such as being hired and fired from dental positions in a matter of a few months) Accordingly, over four years ago, on October 23, 2006, Defendants propounded their interrogatory number 5 to Plaintiff asking Plaintiff to disclose whether Tujetsch had ever been a

litigant in any civil matter

With full knowledge of the foregoing, Plaintiff and her counsel have knowingly sought to obstruct -- and have in fact wrongfully obstructed for years -- Defendants' access to evidence demonstrating that Plaintiff has a lengthy record of failure as a dentist,[3] and that, as a cover up after each such failure, made wild accusations of fraud and wrongdoing against other dental professionals -- all as a means of avoiding responsibility for her own mistakes On December 8, 2010, Plaintiff suddenly admitted to involvement in 18 litigation matters, many of which involve serial accusations of fraud and even criminal wrongdoing against other dentists Even after this recent admission, Tujetsch still has not produced a single piece of paper related to any of the prior cases

ARGUMENT

I. Tujetsch Lied In Response To Interrogatory 5, and Then Reaffirmed Her Lie, in Response to Interrogatory 22

On January 16, 2007, Tujetsch provided the following response to interrogatory 5:

> 5 Has Mary Tujetsch ever been a litigant in any civil matter before this lawsuit? If yes, please state the name of the parties to said lawsuit(s), the case number(s), the county in which it was filed, the date it was filed and the disposition, if any.
>
> RESPONSE: Plaintiff objects to this interrogatory on the basis of relevance, overbreath and harassment Without waiver of this objection, Plaintiff responds that she was a plaintiff in a suit in the early 1990's related to a car accident, and has as a plaintiff filed a number of small claims suits related to non payment of dental services provided to patients

Thereafter, Plaintiff never seasonably supplemented the foregoing response to interrogatory 5

[3] After over twenty years of practice, and numerous short stints ending with her termination for cause in various dental practices, Plaintiff has now hit "rock bottom" in the dental profession Because she is unemployable in any established dental practice, she now works sporadically as an itinerant dental consultant traveling to senior assisted living and convalescent facilities

and never produced any documents relating to her disputes with the other dentists and dental professional she has associated with, notwithstanding repeated requests from Defendants Defendants pressed for fuller information about prior litigation by propounding their interrogatory 22, which made it clear that Defendants sought disclosure of any proceeding, legal or administrative, in which Tujetsch had been involved On February 1, 2010, Tujetsch and her lawyers reaffirmed Tujetsch' false and incomplete response to interrogatory 5 when they provided the following false and incomplete response to interrogatory 22:

22 Have you ever been a plaintiff or a defendant in, or the subject of any civil, criminal, administrative, or arbitration proceeding, including, without limitation, any formal or informal proceeding or hearing before any licensing body? If so, please provide the following as to each such proceeding:

Case Name	Case Number	Forum	Plaintiff(s)	Defendant(s)

ANSWER: See Answer to Interrogatory No 5 of Defendants' First Interrogatories to Plaintiff Plaintiff does not recall specifics with respect to lawsuits filed prior to this lawsuit

Recently, after this case had been pending for over three years -- and only about one month before the impending discovery cutoff in this case -- Plaintiff had a sudden 11th-hour epiphany about 17 previously undisclosed litigation matters. On December 12, 20010, through her counsel, Tujetsch provided the following "supplemental response" to interrogatory number 5:

Mary A. Tujetsch was involved and/or remains involved, either as a plaintiff or defendant, in the civil litigation proceedings identified below.

No.	Case Name	Case Number	Forum	Plaintiff(s)	Def(s)	Date Filed
1	*Tujetsch v. Bradley Dental, LLC*	09-CV 05568	N.D. Ill.	Dr. Mary Tujetsch	Bradley Dental, LLC	09/08/2009
2	*Johnson Bell Ltd v. Tujetsch*	2009-M1 500977	Cook County - Civil	Johnson Bell Ltd.	Dr. Mary Tujetsch	07/06/2009
3	*Tujetsch v Chang*	2008-L-006526	Cook County - Law	Dr. Mary Tujetsch	Dr. Christine Chang	06/16/2008
4	*Tujetsch v Wood*	2008 M1 147028	Cook County - Civil	Dr. Mary Tujetsch	Susan Wood	06/11/2008
5	*Tujetsch v Mischer*	2007-L-005640	Cook County - Law	Dr. Mary Tujetsch	Dr Kenneth Mischer	05/31/2007
6	*Tujetsch v Fedin*	2007-M1-110745	Cook County - Civil	Dr. Mary Tujetsch	Vlad Fedin	02/13/2007 12/08/2008
7	*Tujetsch v. Pasatieri*	2006-CH-11607	Cook County - Law (from Chancery)	Dr. Mary Tujetsch	Dr. Todd Pasatieri et al.	06/12/2006
8	*Johnson Bell Ltd v Tujetsch*	2005 L 50714	Cook County - Law	Johnson Bell Ltd.	Dr. Mary Tujetsch	07/29/2005
9	*Johnson Bell Ltd v. Tujetsch*	2004-M1-154667	Cook County Civil	Johnson Bell Ltd	Dr. Mary Tujetsch	09/30/2004
10	*Special Assets Inc v. Tujetsch*	2003-M1 700621	Cook County - Civil	Special Assets Inc., Pittsfield Development LLC	Dr. Mary Tujetsch	01/08/2003 01/02/2009
11	*Partnership Concepts Realty v. Tujetsch*	45-D08-0205 SC 2999	Lake County (IN) Sup Ct.	Partnership Concepts Realty	Dr. Mary Tujetsch	05/30/2002 06/20/2002
12	*Tujetsch v.*	1998-M1-	Cook	Dr. Mary	John	08/27/1998

No.	Case Name	Case Number	Forum	Plaintiff(s)	Def(s)	Date Filed
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14	*Robert A. Green Ltd. v. Tujetsch*	1998-M1-168856	Cook County - Civil	Robert A. Green Ltd.	Dr. Mary Tujetsch	12/30/1998
15	*Dental Preferred v Mary Tujetsch*	1998 M1 134133	Cook County Civil	Dental Preferred	Dr. Mary Tujetsch	06/25/1998
16	*Tujetsch v Johns*	1995-M1 40308	Cook County - Civil	Dr. Mary Tujetsch	Alice D Johns	05/10/1995
17	*Tujetsch v. Esselin*	1995-M1-040309	Cook County - Civil	Dr. Mary Tujetsch	Joe Esselin	02/14/1995
18	*Tujetsch v. Jankowski*	1995-M1 040310	Cook County - Civil	Dr. Mary Tujetsch	Leontine Jankowski	02/14/1995

The foregoing avalanche of late disclosed litigation is no trivial matter Misher, Fedin, Chang, and Bradley Dental, listed above as defendants in cases filed by Tujetsch, all appear to be dentists or dental practices sued by Tujetsch and variously accused of fraud, breach of contract, sex and age discrimination and/or conversion The suit against Dr Misher accuses Dr Misher of converting dental equipment owned by Tujetsch Massel, who brought an action against Tujetsch is a former patient of Tujetsch who sought to recover fees paid to Tujetsch for services that were never provided Tujetsch concealed all of the foregoing actions in her response to interrogatory 5, and to date has never produced a single piece of paper relating to any of those cases

A cursory examination of public records available on websites easily accessible to Plaintiff (and her counsel) would have demonstrated that the response to interrogatory 5 was obviously false and incomplete A cursory search of the internet using simple, widely available search tools also demonstrates that the supplemental disclosure provided recently by Tujetsch is

still incomplete, in that it omits an action filed against Tujetsch in the Circuit Court of Cook County by John A Clark (Case No 2009-CH-21858), see Exhibit C, and because it omits at least 6 actions filed against Tujetsch in state courts in Indiana, as follows:

Search Results - 7 case(s) returned

Case Number	Party	Case Type	Party Type	D.O.B.	S.S.N.	Status
45D01-0412-CC-00354	MARY A TUJETSCH	Civil Collections D01	Civil Defendant			Redocketed
45D10-0702-MF-00117	MARY TUJETSCH	Mortgage Foreclosure - D10	Civil Defendant			Closed
45D02-0212-PL-00290	MARY TUJETSCH	Plenary E	Civil Defendant			Closed
45D11-0608-MF-00320	Mary Tujetsch	Mortgage Foreclosure - D11	Civil Defendant			Closed
45D12-0511-PL-00037	MARY TUJETSCH	Plenary D12	Plaintiff			Open
45D09-0212-SC-05299	MARY A TUJETSCH	Sm Claims - D9	Civil Defendant			Closed
45D08-0205-PL-02000	MARY A TUJETSCH	Plenary D8	Civil Defendant			Closed

It could have perhaps been attributed to inadvertence if one or two of the forgoing 25 cases involving Tujetsch as a party had been omitted, inasmuch as Plaintiff has been involved in so much litigation with so many parties over such an extended period to time that it is difficult to keep track of it all But to omit disclosure of all of the 25 cases for over three years is simply inexcusable -- and sanctionable.

The first of the Indiana actions listed above appears to be a collection action filed by Johnson & Bell, one of the countless law firms that have at one time or another represented Tujetsch in litigation; the second is a foreclosure action filed by Wells Fargo Bank Both of these matters are certainly discoverable, inasmuch as they are pertinent to the notion that Plaintiff has always -- when not the victim of fraud -- been successful both financially and professionally

Significantly, Defendants' preliminary investigation of some of the litigation matters now belatedly disclosed suggests that Plaintiff has either sued or been sued by virtually every dentist or dental practice that she has been associated with over the course of her entire career -- even

when her association lasted as little as a month:

Robert A. Green, Ltd., et al. v. Mary A. Tujetsch, DDS; Case No 98 M1 16885 Plaintiff produced in discovery an asset purchase agreement showing that in August 1996 Plaintiff contracted to purchase a dental practice from Robert A Green, D D S for $52,500, payable pursuant to an initial down payment of $12,625, with the balance of $39,375 documented by three Promissory Notes, executed by Tujetsch, in the respective sums of $12,000, $8,000, and $19,375 However, Plaintiff failed to disclose that Dr Green's estate sued Tujetsch after she defaulted in payment of almost half of the purchase price, ostensibly because Dr Green had died before he could personally transition patients of the practice.

On information and belief, the sale occurred at a time when the parties knew that Dr Green was terminally ill The purchase agreement nonetheless contemplated that Dr Green would endeavor to spend time transitioning patients of the practice to Tujetsch, and would be paid for that However, when Green died, Tujetsch characterized his death as a breach of the agreement, and refused to tender any further payment, forcing Green's estate to bring a collection action for payment of the balance of the purchase price The litigation was not resolved until September 2001

Special Assets Inc. v. Tujetsch; Case No 2003-M1-700621 On information and belief, this is a forcible action filed by the Pittsfield Building against Tujetsch when she ceased to pay rent on her office there in 2003 The action culminated in a default judgment, an order of possession, and Tujetsch being locked out of her office In the course of those proceedings, Tujetsch circulated a letter to "Neighbors and Friends" in the Pittsfield Building in which she accused building management and its legal counsel of egregious and malicious acts of deceit

Later, the parties entered into an agreed order providing that Tujetsch would pay

landlord's attorney fees, bring past-due rent current, and negotiate in good faith for a one-year lease. The Special Assets dispute is pertinent to the instant case because it seems to show that by 2003 Tujetsch's dental practice in Chicago was faltering and financially troubled, inasmuch as it was apparently not paying its rent. Defendants are entitled to conduct discovery into the Special Assets case against Plaintiff, but have received nothing thus far, except the 11th-hour admission that the case once existed.

Tujetsch v. Fedin; Case No. 2007-L-005640. In October or November of 2004, Tujetsch moved her Chicago practice out of the Pittsfield Building, where she was no longer well received, to the offices of Dr. Vlad Fedin at 625 N. Michigan Avenue, which she shared with Fedin pursuant to a written agreement. The Fedin case concerns another dispute of Plaintiff with another dentist in which the other dentist is accused of attempting to cheat Tujetsch. On information and belief (no documents regarding the Fedin case have been produced) the dispute arises out of the office-sharing arrangement of Fedin and Tujetsch in which Tujetsch agreed to defray a pro rata share of office expenses. After Fedin declined to renew the arrangement, Tujetsch claimed that Fedin had overcharged her for common expenses, and thereby attempted to cheat her out of $15,000.

Tujetsch v. Misher; Case No. 2007-L-005640. As with all of the other late-disclosed litigation matters, no documents have ever been produced by Tujetsch with respect to the Misher case. However, on information and belief, in Misher Tujetsch accuses Dr. Misher, a dentist, of converting chattels that Tujetsch abandoned in a suit of the Pittsfield Building after moving her practice out of that building to 625 N. Michigan Avenue. Misher and Pittsfield ownership responded that the chattels had been abandoned by Plaintiff, who sought damages in excess of $80,000. In any event, the Misher case is another dispute of Plaintiff involving another dentist

who is accused of trying to cheat her Misher demonstrates that whenever Tujetsch suffers a setback, the cause is invariably a fraud or wrongful act perpetrated by another person -- usually a dentist who has had the misfortune of entering into a business transaction with her

Tujetsch v. Chang; Case No 2008-L-006526 On information and belief, in Chang Tujetsch accuses a dentist of reneging on an oral agreement to permit Tujetsch to practice out of Chang's offices on North Halsted Street in Chicago, and thereafter to purchase Chang's dental practice, thereby causing over $500,000 in damages Within a month of beginning to share office space with Dr Chang, in May 2006, Dr Chang told Tujetsch that she had to leave, and when Tujetsch refused, locked her out of the office Tujetsch accuses Dr Chang of wrongfully converting all of Tujetsch's patient records, and destroying her Chicago-based dental practice, by leaving Tujetsch with no place to see patients Chang is highly pertinent to the instant litigation in that it demonstrates Tujetsch' *modus operandi* of accusing another dentist of fraud and breach in connection with the purported purchase of a dental practice

Tujetsch v. Bradley Dental, LLC This matter involves an EEOC proceeding that Tujetsch filed against Dr Koushan Azad, the owner of Bradley Dental L L C /Dental Dreams Company (EEOC Charge No 440-2008-08288), and an action that she filed in the Northern District of Illinois, Tujetsch v. Bradley Dental, L.L.C., Case No 1:09-cv-05568 Tujetsch has never disclosed the EEOC proceeding, and only recently disclosed Case No 1:09-cv-05568 in her recent supplemental response, over a year after it was filed Both the EEOC proceeding and the action filed against Bradley Dental concern a dispute of Tujetsch with fellow dentists and dental professionals after Tujetsch was fired for incompetence After she was fired by Bradley Dental, Tujetsch followed her usual pattern of striking back with wild accusations of fraud and other egregious wrongdoing by the dental professionals

After the EEOC dismissed Tujetsch' wild charges for lack of probable cause, Tujetsch filed an action in the Northern District Bradley Dental denied the allegations of the complaint, propounded discovery, and sought to depose Tujetsch As in this case, Tujetsch refused to cooperate After multiple motions to compel responses to discovery and produce Tujetsch for a deposition, Tujetsch settled the case for what appears to have been a token amount However, in the course of settling the Bradley Dental matter, Tujetsch expressed concern, in open court, that she had another civil action for damages pending, and did not wish the litigants in this matter to receive any documents pertinent to the Bradley Dental case After Tujetsch's supplemental disclosure to interrogatory, a subpoena was issued to Bradley Dental Similar subpoenas have been issued to Dr Chang, Dr Fedin, and Dr Azad

II Tujetsch Has Never Provided a Complete Work History In Response To Interrogatory 18

On December 15, 2009 Defendants served Tujetsch with their interrogatory no 18, as follows:

18 Please list all of the dental clinics or offices in any state in which Plaintiff has practiced dentistry since she first received a license to practice Dentistry in any state For each listed dental practice please provide the following

Name/Address	Position	Duties of Position	Dates of Employ	Reason for Departure (where applicable)
Name and Address of dental clinic or office	Name and address of supervisor or position	e g independent contractor lessee or employee	From/To	e g terminated by employer, voluntary resignation, expiration of contract

On February 1, 2010, Plaintiff served Defendants with the following response to interrogatory 18, which was never thereafter supplemented:

Name/Address *Name and address of dental clinic or office*	Owner *Name and Address of owner(s) of practice*	Terms of Tenure *e.g., independent contractor/lessee/employee*	Dates of Tenure *From/To*	Reason for Departure (where applicable) *e.g., terminated by practice/voluntary departure/expiration of contract*
Dr Mary Tujetsch	25 E Washington Suite 1903 Chicago, IL; Moved to 55 E Washington in 1998	Self employed	1997 - 1998	Bought second office at 55 E Washington
Dr. Mary Tujetsch	55 E. Washington Suite 3123 Chicago, IL; Moved to 625 N Michigan	Self employed	1998 - 2003(?)	Building converted to condo

Dr Mary Tujetsch		Self-employed	1999	
Dr. Mary Tujetsch	18025 Wentworth Lansing, IL Moved to 1469 Ring Road, Calumet City (2003), then moved to Orland Park (2008?)		2002 - 2008	Business at residence (2002 - 2003)
First Dental (2004 - 2005); Dr Mary Tujetsch, DDS	7714 W. 159th St Orland Pk, IL	Self-employed	7/04 - 11/08	Closed Office
Transition Dental	8080 Utah St Merrillville, IN	Contract Employee	6/7/09 - 10/29/09	Refused to take cut in pay

The foregoing response to interrogatory 18 selectively omits the multiple dental practices that hired and then fired Tujetsch just weeks later -- and that resulted litigation in which Tujetsch accused other dental professionals of fraud

The omitted dental practices include, on information and belief, the following: (i) the

dental offices of Vlad Fedin at 625 N. Michigan Avenue, Chicago, which Tujetsch shared with Fedin from November 2004 though approximately May 2006, when she moved her Chicago dental practice to the offices of Christine Chang at 2500 N Halsted, Chicago; (ii) the dental offices of Christine Chang at 2500 N. Halsted, Chicago, which Tujetsch shared with Chang from late May 2006 until June 28, 2006, when Chang told her to get out and changed the locks; (iii) the offices of Michigan Avenue Dental Associates, at 122 South Michigan Avenue, Chicago, where Tujetsch worked from September 2008 until November 2008; and (iv) the Kankakee office of Bradley Dental, where Tujetsch worked from April 2008 until she was fired in July 2008 Tujetsch omitted to mention any of the foregoing because each ended with her suing a fellow dentist, and accusing him or her of fraud

III. This Court Should Impose a Sanction To Prevent Prejudice

Under Rule 201(k), parties must make reasonable efforts to facilitate the discovery process and to resolve differences without the assistance of the Court Defendants tried for over a year to cajole Tujetsch to produce the litigation history omitted until recently; a complete work history has never been received. In this case, no further consultation with opposing counsel can undo the continuing and egregious discovery abuse outlined above Illinois Supreme Court Rule 219 provides for the imposition of sanctions for discovery misconduct

If any party fails to comply with discovery rules, the court may, in addition to taking other appropriate action, impose on (1) the offending party, (2) that party's attorney, or (3) both, appropriate sanctions, which may include an order to pay the opposing party reasonable expenses and attorneys fees arising out of the misconduct If the misconduct was willful, a monetary penalty may also be imposed. IL Supreme Court R 219(c) In addition to other remedies, the court may order:

(i) that further proceedings be stayed until the order or rule is complied with;

(ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) that the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) that a witness be barred from testifying concerning that issue;

(v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed without prejudice;

(vi) that any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) that in cases where a money judgment is entered against a party subject to sanctions under this paragraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct

IL Supreme Court R. 219(c) At a minimum, Plaintiff should be ordered to produce documents pertinent to her disputes with other dentists and dental practices, and Defendants should be afforded time to depose Dr. Fedin, Dr. Chang, and Dr. Azad

CONCLUSION

Defendants respectfully request that this Court enter an Order imposing appropriate sanctions for Plaintiff's failure timely to disclose her litigation and work history. Counsel had over three years to ensure that Plaintiff's responses to written discovery were reasonably complete, *before* discovery was scheduled to be closed. This Court should not permit counsel's unexplained failure to exercise reasonable diligence and affirmative misstatement of facts to create extreme prejudice on the eve of trial.

Dated: December 20, 2010

Respectfully submitted,

TODD C PUSATERI, FIRST DENTAL, P C and FIRST DENTAL OF ORLAND PARK, P C ,

By:_____
One of Their Attorneys

Kent Maynard, Jr
Eleazar E Calero
KENT MAYNARD & ASSOCIATES LLC
17 North State Street, Suite 1700
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Firm Id. No. 41822

EXHIBIT B

EEOC FORM 131 (5/01)

U.S. Equal Employment Opportunity Commission

Dr. Koushan Azad
Owner
Bradley Dental L.L.C./ Dental Dreams Company
430 W. Erie
Suite 200
Chicago, IL 60610

PERSON FILING CHARGE

Mary Tujetsch

THIS PERSON *(check one or both)*

[X] Claims To Be Aggrieved

[ ] Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

Amended 440-2008-08288

NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

[X] Title VII of the Civil Rights Act

[ ] The Americans with Disabilities Act

[X] The Age Discrimination in Employment Act

[X] The Equal Pay Act

The boxes checked below apply to our handling of this charge:

1. [ ] No action is required by you at this time.

2. [ ] Please call the EEOC Representative listed below concerning the further handling of this charge.

3. [X] Please provide by **26-JAN-09** a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

4. [ ] Please respond fully by to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.

5. [X] EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by **30-DEC-08** to **Mary B. Manzo, ADR Coordinator, at (312) 353-6180**
If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Katarzyna Cychowska,
Investigator
EEOC Representative

Telephone (312) 353-7500

Chicago District Office
500 West Madison St
Suite 2000
Chicago, IL 60661

Enclosure(s): [X] Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN [X] AGE [ ] DISABILITY [ ] RETALIATION [ ] OTHER

See enclosed copy of charge of discrimination.

Date	Name / Title of Authorized Official	Signature
December 15, 2008	John P. Rowe, District Director	

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To:	Agency(ies) Charge No(s):
[ ] FEPA	Amended
[X] EEOC	440-2008-08288

Illinois Department Of Human Rights and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)	Home Phone (Incl. Area Code)	Date of Birth
Mary Tujetsch	(219) 924-8018	10-16-1960

Street Address: 2311 Teakwood Circle, Highland, IN 46322 — City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)

Name	No. Employees, Members	Phone No. (Include Area Code)
BRADLEY DENTAL L.L.C./ Dental Dreams Company/ Doctor Koushan Azad	15 - 100	(312) 274-0308

Street Address: 430 W. Erie, Suite 200, Chicago, IL 60610 — City, State and ZIP Code

Name	No. Employees, Members	Phone No. (Include Area Code)

Street Address: — City, State and ZIP Code

DISCRIMINATION BASED ON (*Check appropriate box(es).*)

[ ] RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN

[X] RETALIATION [X] AGE [ ] DISABILITY [X] OTHER (*Specify below.*)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
04-10-2008	07-27-2008

[ ] CONTINUING ACTION

THE PARTICULARS ARE (*If additional paper is needed, attach extra sheet(s)*):

I was hired by Respondent on April 10, 2008. My most recent position was Doctor of Dental Surgery. Throughout my employment, I was subjected to different terms and conditions of employment which affected my monetary compensation. Throughout my employment I complained to management. On July 27, 2008, I was discharged.

Equal Pay Act of 1963

I believe I have been discriminated against on the basis of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended and because of my age, 48, (Date of birth: October 16, 1960), in violation of the Age Discrimination in Employment Act of 1967. I also believe that I have been retaliated against for engaging in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended and in violation of the Age Discrimination in Employment Act of 1967 (See attached also)

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

12-10-08 — Mary Tujetsch
Date — Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

SA041

5. Please refer to signed, attached contract.

I was one of three doctors hired to treat the patients of Bradley Dental on a full time basis. I am a forty eight (48) year old female dentist with nearly twenty years of experience treating patients in all phases of dentistry. I am a general dentist. The other two full time doctors were young, male, recent graduates with no experience in treating patients. From the start, I was discriminated against, like the two female dentists that were abruptly terminated shortly after I started working. I was subjected to age, gender, and retaliatory discrimination. I was not given the same resources, equipment, support staff, number of operatories, and patient allocation. This treatment directly resulted in lower compensation as I was compensated based on the number of patients I treated and the professional fees generated from the treatments. I was verbally abused, harassed, slandered, defamed, and retaliated against by one of my male colleagues, Dr. Patrick D. In addition, Debbie, the office manager, slandered, defamed, and lied about my performance to my supervisor, Dr. Koushan Azad. From the start, I spoke up about the unfair treatment to both Debbie, Dr. Azad, and my two male colleagues. Dr. Azad both acknowledged the problems and assured me that corrective measures would be taken. This did not happen.

With owner's knowledge and consent, the two male dentists were alleged to have been bribing the office personnel and business staff for patient referrals and insurance and fee-for-service patients. Debbie, the office manager, confirmed that the bribing had been taking place as she, herself, had been given money on the side. Debbie indicated that Dr. Azad was well aware of the bribing in the office. In addition, Cheyanne, Dr. Azad's dental assistant, informed me that she had been a witness to this exchange of money. Many of the dental assistants were aware of this bribing. This caused friction in the office as the two male doctors were giving money to some of the employees and I was not. The result of the bribing was that these male dentists were having patients "funneled" to them. I was being "passed over" for patient referrals and this negatively impacted my ability to make a living in this work environment. I was terminated due to my complaints regarding the misallocation of patients to two male doctors with no experience as well as my complaints about OSHA vioations in the office.

Debbie, the office manager, constantly placed me in a bad situation by taking my confidential conversations and "leaking" information to the younger male dentists. This created animosity between Dr. Patrick D. and myself. The result of Debbie's actions caused harassment issues that were directed from Dr. Patrick D. to myself. This abuse severely affected by ability to do my job. Dr. Oancea, the second of the two male dentists acknowledged that injustices were taking place. Dr. Oancea informed me that Dr. Azad was well aware of what was taking place and he concluded our conversation by stating "He's not going to do anything about it."

I was forced to work with untrained and unqualified dental assistants who did not comply with OSHA requirements. These

violations ranged from appropriate attire to sterilization technique and procedures. When the younger, male dentists refused to work with several of these untrained dental assistants, the office manager would reduce the hours of my assistant, Nancy, and force me to work with the dental assistants that were rejected by the male doctors. These unqualified dental assistants were hired for minimum wage and had no knowledge of OSHA requirements or sterile technique. OSHA standards were violated on a constant basis. This unskilled and inexperienced support staff prevented me from doing my job and earning the same living as my male colleagues. One dental assistant, Tanisha, performed oral surgery on my pediatric patient after I left the operatory. When I was treating my next patient, Tanish informed me, "I got the tooth out for you, doctor." When I told Tanisha that what she had done was illegal and malpractice and I would have to report the incident, she recanted her story and said "the tooth fell out." This created a potential malpractice case for all concerned.

Two dental assistants, Kim and Tanisha, placed extracted teeth that had fallen on the floor, back onto the surgical tray, thus contaminating all of the surgical instruments intended for surgery. These untrained dental assistants did not comprehend when I would inform them that sterilization measures needed to be repeated, surgical set ups needed to be replaced with new set ups, and hand pieces needed to be sterilized after each patient. The fact that my requirements differed than that of my male colleagues created problems with dental assistants. Joleen, a dental assistant, contaminated oral surgery instruments by placing them in a dirty sink prior to setting them up on a surgical tray. When I was forced to reject the instruments for the safety of my patient, the office manager created problems for me and reported me to Dr. Azad. I was never given the opportunity to explain what had occurred. Later, Joleen informed me that Debbie had lied about the situation in order to defame me to Dr. Azad.

Debbie, the office manager, and Sandy, Dr. Azad's assistant, both formulated financial proposals for my patients. These proposals were presented by the doctor to the patients. These financial statements were frought with errors that cost patients additional monies. These plans were found to be in error as I would be presenting them to the patients. These plans would have to be sent back to the business office four to five times per patient before I would eventually have to hand calculate the fees owed. I had to do the job of the business office in order to avoid financial misrepresentations that were charged out under my name and my reputation. These miscalculations took time away from my job and created animosity with Debbie and Sandy. In addition, my patients expressed concern outrage at all of the overcharges and miscalculations. This affected my ability to earn a living at Bradley Dental. A few days prior to my termination, I wrote Sandy a brief note indicating that she had incorrectly charged one of my patients regarding work that had already been completed and paid for. These errors are deducted from my paycheck. Sandy never responded to my note and never corrected a bill she knew to be

in error. Sandy also pressured me to write illegal prescriptions for her personal use. When I refused to jeopardize my license by breaking the law, I was retaliated against. Sandy also informed me that she wanted me to complete full mouth reconstruction on her mouth as she had several missing teeth. She stated she wanted me to come into work hours before my first patient and stay hours after my work was completed in order to complete her dental treatment. She stated that she wanted my skill, expertise, and experience as she did not think the other two male dentists were as qualified or experienced. I did not do as Sandy instructed as I was already working fifty hours per week and then commuting three hours per day for work. Incidentally, I was to complete Sandy's full mouth reconstruction for zero compensation as Sandy did not intend to pay me. Following these instances, Sandy began to speak negatively about me in the office.

Dental assistants were hired with an expectation and promise of full time employment and then reduced to part time employment. In addition, these assistants were not given a scheduled lunch and required breaks. When my main assistant, Nancy, was told she did not get her promised hours, it affected by job. I asked the office manager that Nancy be returned to work, as promised. I was harassed when I spoke out or defended my assistant. Most of the dental assistants were ~~single,~~ uneducated, single mothers on welfare. These assistants would come to me with their grievances regarding Bradley Dental. They felt helpless in terms of going to Debbie as they knew they would lose their jobs. Dr. Azad often threatened the staff by saying "I can replace all of you." I was often caught in the middle of grievances that existed between management and the support staff. These unprofessional dental assistants would disparage the management and Dr. Azad right in front of my patients. They would also complain about the working conditions that they were being subjected to. This created an environment of unprofessionalism and negativity. Several patients asked me "What kind of a place is this?" Many patients did not return for future appointments after hearing the talk in the office. This affected my ability to make a living.

My patients were ignored and given a low priority. It was not unusual for my patients to be left in the waiting room for up to two hours. Many of these patients had to leave after being seated in the operatory as they had other appointments and children to pick up. When the patient would be seated in the operatory, often they were upset with me before treatment even began. This affected my ability to make a living.

I was harassed and defamed when I spoke out about OSHA violations in the office. I was treated differently than my younger, less experienced male colleagues. In the end, I was terminated on a Sunday night via a telephone call from Dr. Azad. Dr. Azad stated that I was being terminated because I was not happy with the way he ran his business. He stated it had nothing to do with my dentistry as my dentistry had been excellent. I was defending myself on the telephone when Dr. Azad interrupted me stating that he had to go as he was getting another call. Dr. Azad indicated that he would call me back. This did not happen. I left several

messages for Dr. Azad as he would not take my call. The following Monday morning, Dr. Azad left a voice-mail on my telephone. I have saved the voice-mail for your review.

I was replaced by a new male graduate from dental school who had no experience. He was in his twenties. This dentist was hired a few weeks prior to my termination. This dentist relied on my experience and expertise to aid him in reading and diagnosing x-rays and formulating treatment plans. After this new doctor had been helped and transitioned into my job, I was terminated and replaced by this individual. Jalynn, a dental assistant, can verify that this doctor was aided by me in the office.

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October 23, 2008

VIA FACSIMILE (312-886-1168) AND U.S. MAIL

Katarzyna Cychowska, Investigator
Equal Employment Opportunity Commission
Chicago District Office
500 West Madison St.
Suite 2000
Chicago, IL 60661

Re: Tujetsch v. Bradley Dental LLC, EEOC Charge No. 440-2008-8288

Dear Ms Cychowska:

This letter shall constitute the position statement of Bradley Dental LLC (hereinafter, "Bradley Dental" or the "Company"), regarding the charge of discrimination filed by Mary Tujetsch on September 11, 2008.

Bradley Dental entered into an independent contractor relationship with Dr. Tujetsch based on her representations that she knew and could perform all necessary dental treatments and procedures. After just a few months at Bradley Dental, it became clear that Dr. Tujetsch not only could not perform all required treatments, but was in fact repeatedly placing her patients at risk of suffering severe health complications. Because of this substandard care and her unprofessional workplace manner, Bradley terminated Dr. Tujetsch's contract. Now, Dr. Tujetsch attempts to obscure her professional inadequacies by filing the instant charge. For the reasons noted below, Dr. Tujetsch's charge is entirely baseless and should be dismissed with a finding of no probable cause.

A. Overview of Bradley Dental, LLC

Bradley Dental is part of a group of dental practices that operate throughout northeastern Illinois. Within each separate location, the group employs dental assistants and administrative staff to support the practice of dentists who are generally retained on an independent contractor basis. Dr. Koushan Azad is formerly a co-owner and manager of Bradley Dental.

Bradley Dental is an equal opportunity employer. It is committed to recruiting, hiring, training, paying, disciplining, and taking all employment actions without regard to an

employee's race, color, age, sex, national origin, disability, religion or other protected characteristics.

B. Dr. Tujetsch's Work at Bradley Dental

On April 22, 2008, Dr. Tujetsch entered into an Independent Contractor Agreement (the "Agreement") to work as a dentist at Bradley Dental at the Company's Kankakee, Illinois-area location.[1] Pursuant to the Agreement, Dr. Tujetsch agreed to provide dental services to Bradley Dental's patients in exchange for a certain percentage of the revenue created by her treatment of those patients. (Agreement at ¶ 3.) The Agreement provided that Dr. Tujetsch was ineligible for employment benefits and would be personally responsible for all applicable payroll taxes. (*Id.* at ¶ 5.) In addition, Dr. Tujetsch was required to procure her own malpractice insurance, but would be eligible for a partial reimbursement of her monthly premiums. (*Id.* at ¶¶ 3-4.) Dr. Tujetsch was expected to exercise her own discretion in performing her duties and was not subject to day-to-day control over the details of her work.

The Agreement was for an initial term of one year, but provided for automatic renewal thereafter unless one of a handful of specifically enumerated termination events occurred. (*Id.* at ¶ 9.) For example, the Agreement provided that either party could terminate the relationship for any reason upon providing sixty days prior written notice. (*Id.* at ¶¶ 9-10.) In addition, Bradley Dental reserved the right to immediately terminate the Agreement in either of the following circumstances:

> "d) In the event [Dr. Tujetsch] shall fail or refuse [to] faithfully or diligently perform the provisions of this Agreement or the usual customary duties of a dentist.
>
> * * *
>
> f) In the event [Dr. Tujetsch] conducts ... herself, either personally or professionally, in a manner that [Bradley Dental] deems inconsistent with or detrimental to achieving the business and professional goals of [the Company]."

(*Id.* at ¶ 9.)

At the time the parties entered into the Agreement, Dr. Azad, who negotiated the Agreement on behalf of Bradley Dental, informed Dr. Tujetsch that she would be expected to be familiar with and to perform a wide variety of dental treatments and techniques, including root canal therapy ("RCT"). Dr. Tujetsch represented that she was familiar with and could perform RCT and all other required treatments. Shortly thereafter, Dr. Tujetsch began seeing Bradley Dental's patients.

[1] A true and correct copy of the Agreement is attached hereto as Exhibit A.

It soon became clear that Dr. Tujetsch had misrepresented her ability to perform RCT. In early May, 2008, one of Bradley Dental's other dentists informed Dr. Azad that he had needed to perform RCT on one of Dr. Tujetsch's patients. When Dr. Azad approached Dr. Tujetsch about the matter, she informed him that at her previous dental practice she had an endodontist perform RCT when necessary and, despite her previous representations, had not performed the procedure herself. Nevertheless, after Dr. Azad reiterated that she was required to perform the procedure on appropriate patients at Bradley Dental, Dr. Tujetsch agreed to perform RCT going forward.

Over the next few months, Dr. Azad received numerous complaints from patients who were dissatisfied with the treatment they had received from Dr. Tujetsch. As a result, Dr. Azad began reviewing Dr. Tujetsch's patient charts and discovered numerous instances in which the treatment she had provided fell far below the standard of care required by Bradley Dental. In particular, Dr. Azad found at least ten instances in which Dr. Tujetsch had placed sedative fillings on patients' teeth when the appropriate treatment would have been RCT. In the majority of those cases, Dr. Tujetsch failed to even inform her patients about RCT, despite the fact that it would have addressed the cause of their problem while her use of sedative fillings was, at best, a stopgap measure. Despite treating more than four hundred patients on behalf of Bradley Dental, Dr. Tujetsch had not performed RCT on a single occasion.

Dr. Azad's review also revealed several instances in which Dr. Tujetsch risked significant harm to patients by failing to monitor their blood pressure during treatment. On one such occasion, a patient who had reported a history of high blood pressure needed to be admitted to the emergency room following her dental treatment after experiencing dangerously elevated blood pressure. Bradley Dental has since learned that Dr. Tujetsch administered a local anesthetic on this patient that, because of an underlying medical condition, clearly should not have been used.

In addition to these problems, several Bradley Dental staff members complained to management that Dr. Tujetsch frequently acted in an unprofessional manner in the workplace and treated them with outright disrespect. When confronted with the complaints, Dr. Tujetsch denied engaging in any inappropriate behavior. Instead, she surmised, incoherently, that the staff members were complaining about her because they were unhappy with their wages.

Both because Dr. Tujetsch's performance fell far below the standard of care required by Bradley Dental and because her workplace behavior was severely disrupting the work environment, Dr. Azad terminated her contract on July 25, 2008. This termination was authorized under either Paragraph 10(d) or 10(f) of the Agreement. Dr. Tujetsch did not complain to Bradley Dental at any point before or after the termination regarding any alleged discriminatory actions or activities.

C. Dr. Tujetsch Was Not Employed By Bradley Dental

Dr. Tujetsch was an independent contractor, not an employee, of Bradley Dental. Consequently, she cannot maintain claims against Bradley Dental for age discrimination, sex discrimination or retaliation.

The Agreement clearly provided that Dr. Tujetsch was an independent contractor of Bradley Dental. As such, she was ineligible to receive employment benefits from Bradley Dental, liable to pay her own payroll taxes and required to obtain her own malpractice insurance. (*Id.* at ¶¶ 4-5.) Importantly, Bradley Dental had no right to control the details of Dr. Tujetsch's work. Instead, Dr. Tujetsch was able to exercise discretion with regard to the manner of her performance.

In general, an entity that has no right to control the details of an individual's work performance, pays no taxes on her behalf and provides her with no employment benefits, is not her employer for purposes of discrimination law. *See Vakharia v. Swedish Covenant Hospital*, 190 F. 3d 799, 805-06 (7th Cir. 1999) (holding that doctor who was self-employed for tax purposes, received no employment benefits, controlled the details of his work and was referred to as an "independent contractor" was not an employee for purposes of Title VII and the ADEA); *Aberman v. J. Abouchar & Sons, Inc.*, 160 F. 3d 1148, 1150-52 (7th Cir. 1998) (holding that entity that had no right to control the details of plaintiff's work, did not withhold taxes from his monthly salary draw and provided no employment benefits was not plaintiff's employer under the ADA). As a result, for the reasons noted above, Dr. Tujetsch was not an employee of Bradley Dental. Consequently, Dr. Tujetsch cannot demonstrate that Bradley Dental discriminated against her in violation of federal law. *See, e.g., Drebing v. Provo Group, inc.*, 519 F. Supp. 2d 811, 827-28 (N.D. Il. 2007) (providing that non-employee cannot maintain an action for Title VII discrimination).

D. Bradley Dental Did Not Illegally Terminate Dr. Tujetsch

Moreover, the decision to terminate the Agreement was based on Dr. Tujetsch's substandard care of Bradley Dental's patients and the unprofessional manner in which she treated its staff members. The decision was made without regard to either her sex or age, or in retaliation for any protected activity. Consequently, without regard to the character of her relationship with Bradley Dental, Dr. Tujetsch simply cannot demonstrate any claims for discrimination or retaliation.[2]

[2] In addition, because Dr. Azad made the decisions to hire and fire her, Dr. Tujetsch cannot demonstrate discrimination without overcoming a presumption of nondiscrimination. *See Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 399 (7th Cir. 1997) (providing that "when an employee is hired and fired by the same decision-maker in a relatively short time span, a presumption, or inference, of nondiscrimination arises"). For the reasons noted herein, Dr. Tujetsch cannot overcome that presumption.

1. **Bradley Dental did not terminate Dr. Tujetsch on account of either her sex or age.**

As explained above, Dr. Tujetsch's performance fell below the standard of care Bradley Dental expected of its dentists. After representing that she knew and was comfortable with RCT, Dr. Tujetsch repeatedly failed to perform it in appropriate circumstances or to educate her patients about its benefits. To the contrary, she treated patients with palliative measures that did not address the cause of their problems. Even more significantly, she placed her patients' health at risk by failing to monitor their blood pressure during treatment. On one occasion, this failure led to an emergency room visit for a patient suffering from dangerously elevated blood pressure.

An employee who cannot prove that she satisfied her employer's minimum performance expectations cannot satisfy a prima facie case of discrimination. *See Lim v. The Trustees of Indiana University*, 297 F.3d 575, 581 (7th Cir. 2002) (holding that individual could not demonstrate prima facie case of sex discrimination where she failed to meet the performance standards set by her employer). As a result, because of her litany of performance problems, Dr. Tujetsch cannot satisfy a prima facie case.

Moreover, Dr. Tujetsch also cannot demonstrate discriminatory termination because she has neither alleged nor proffered any evidence that Bradley Dental treated her less favorably than a similarly situated individual outside of her protected class.[3] *See Gates v. Caterpillar, Inc.*, 513 F.3d 680, 690 (7th Cir. 2008) (providing that an employee cannot satisfy a prima facie case of sex discrimination unless she demonstrates that one or more similarly situated employees "outside the protected class were more favorably treated"); *Scaife v. Cook County*, 446 F.3d 735, 741 (7th Cir. 2006) (holding that employee could not demonstrate illegal discrimination where he failed to produce evidence sufficient to demonstrate that his employer treated similarly situated employees outside of his protected class more favorably than him).

Finally, Dr. Tujetsch cannot demonstrate that Bradley Dental's nondiscriminatory reasons for terminating the Agreement – her significantly substandard performance and her unprofessional workplace behavior - were pretextual. *See Jones v. Union Pacific Railroad Co.*, 302 F.3d 735, 742-43 (7th Cir. 2002) (holding that a former employee did not establish pretext where he failed to show that the employer's stated reason for taking adverse employment action was false, or that he was actually terminated in violation of the law). For this additional reason, her claims will fail.

Consequently, Dr. Tujetsch cannot satisfy a prima facie case of age or sex discrimination or establish that Bradley Dental's reason for terminating the Agreement was pretextual. As a result, she cannot succeed on her claims under federal law.

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[3] In fact, Bradley Dental ultimately replaced Dr. Tujetsch with another female dentist, Dr. Nadia Mirza.

2. Bradley Dental did not terminate the Agreement in retaliation for any complaint made by Dr. Tujetsch.

Despite her vague contention that she "complained to management" throughout her relationship with Bradley Dental, Dr. Tujetsch never complained about any alleged mistreatment on account of her age, sex or any other protected classification. Rather, as noted above, the complaints that Bradley Dental received were from its staff members *about Dr. Tujetsch*. Dr. Tujetsch has neither alleged nor proffered any evidence that she engaged in any other type of protected activity while working at Bradley Dental.

An individual who cannot demonstrate that she engaged in protected activity in opposition to her employer's alleged discriminatory practices cannot prove that her employer illegally retaliated against her. *See Hernandez v. HCH Miller Park Joint Venture*, 418 F.3d 732, 737 (7th Cir. 2005) (providing that an employee could not prove that her former employer illegally retaliated against her where she could not demonstrate that she "complained about conduct that is prohibited by Title VII"); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1147 (7th Cir. 1997) (holding that a former employee failed to prove retaliation where she could not demonstrate that she "opposed conduct prohibited by Title VII, or at a minimum that she had a 'reasonable belief' she was challenging such conduct" while still employed). Accordingly, Dr. Tujetsch cannot demonstrate her claim for retaliation.

Additionally, for the reasons noted in the previous subsection, Dr. Tujetsch also cannot demonstrate that Bradley Dental's proffered reason for terminating the Agreement was pretextual. Consequently, she cannot succeed on a claim for retaliatory discharge. *See Luebbehusen v. Wal-Mart Stores, Inc.*, 2006 WL 3590638, at * 3 (7th Cir. Dec. 11, 2006) (holding that plaintiff who could not demonstrate that employer's proffered reason for her termination was pretextual could not prove retaliatory discharge); *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 772-73 (7th Cir. 2002) (holding that plaintiff who failed to satisfy a prima facie case of retaliation could not demonstrate retaliatory discharge).

E. Dr. Tujetsch Was Not Subject To Different Terms And Conditions In Her Relationship With Bradley Dental

Furthermore, Bradley Dental paid Dr. Tujetsch *at the same rate* that it paid its other independent contractors. All contractors earned 30% of the revenues generated by Bradley Dental as a direct result of the services they rendered to its patients minus 30% of the laboratory fees attributed to that treatment.[4] Dr. Tujetsch received pay at this rate for every day that she worked at Bradley Dental.

[4] Pursuant to the Agreement, Dr. Tujetsch was also entitled to receive a minimum of $480 for every day she worked, the same minimum guarantee offered to dentists working at Bradley locations in the Chicago area. Although, Bradley Dental offered other dentists working at the Kankakee location a higher minimum guarantee in order to entice them to move their practice there from the Chicago area, Dr. Tujetsch was

An individual who cannot demonstrate that she was making less money than a similarly situated employee cannot prove a prima facie case of discriminatory unequal pay. *See Patt v. Family Health Systems, Inc.*, 280 F.3d 749, (7th Cir. 2002) (holding that employee who could not demonstrate that she was paid less than a similarly situated employee outside of her protected class could not satisfy a prima facie case of discrimination). Because there are no similarly situated contractors who were paid at a higher rate, Dr. Tujetsch cannot demonstrate a prima facie case of unequal pay discrimination.

F. Conclusion

For all the foregoing reasons, Bradley Dental LLC respectfully requests that Dr. Tujetsch's charge be dismissed with a finding of no probable cause. If you need additional information prior to dismissing this charge, please do not hesitate to contact me at (312) 849-8100.

Sincerely,

John C. Gardner

cc: Dr. Koushan Azad
David Wolle
Michael R. Phillips, Esq.

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originally slated to work in Chicago and ended up at the Kankakee location only after she specifically requested to work there because she felt that her commute would be better. Regardless, Dr. Tujetsch earned more than her daily minimum every day that she worked at Bradley Dental

EXHIBIT C

1/16/07

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	Case No. 06 CH 11607

RESPONSE TO DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF

Plaintiff, Mary A. Tujetsch, by and through her attorneys, Varga Berger Ledsky Hayes & Casey, respond to Defendants' First Interrogatories as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to defendants' interrogatories to the extent they request information protected from the disclosure by the attorney-client privilege or attorney work product doctrine.

2. Plaintiff objects to defendants' interrogatories to the extent they impose obligations beyond those required by the Illinois Code of Civil Procedure and the Illinois Supreme Court Rules.

3. Plaintiff's General Objections are incorporated into and made a part of each specific response to defendants' interrogatories.

RESPONSES TO INTERROGATORIES

1. State the full name, current residential address, date of birth, driver's license number and social security numbers of Mary A. Tujetsch.

RESPONSE: Mary Ann Tujetsch; 2311 Teakwood Circle, Condo C, Highland, Indiana, 46322; date of birth 10/16/60; driver's license # DLN0630-61-0815; Social Security No. 485-74-6721.

2. State the date Mary A. Tujetsch was licensed to practice dentistry in Illinois.

RESPONSE: 1989 (see attached license certificates).

3. Not including the Dental Practice involved in the current lawsuit, state the name(s), address(es), date(s) and amounts of all other Illinois dental practices which Mary A. Tujetsch has purchased at any time after she was first licensed to practice medicine in Illinois.

RESPONSE: Plaintiff objects to this interrogatory on the basis of relevance, overbreath and harassment. Further, Plaintiff has not been licensed to "practice medicine," but rather has been licensed to practice dentistry in Illinois. Without waiver of the foregoing objections, Plaintiff responds that she has purchased interests in four other dental practices, as follows: 1991 – Dr Francis Schwartz, 25 E. Washington, Suite 1903, Chicago, IL; 1996 – Dr. Robert Green, 55 E. Washington, Suite 2121, Chicago, IL; 1999 – Dr. Joanna Baranovskis, 55 E. Washington, Suite 1620, Chicago, IL; 2002 – Dr. Roy Carlson, 18025 Wentworth Avenue, Lansing, IL.

4. Not including the Dental Practice involved in the current lawsuit, state the name(s), address(es), date(s) and amounts of all other Illinois dental practices which Mary A. Tujetsch has sold at any time after she was first licensed to practice medicine in Illinois.

RESPONSE: None.

5. Has Mary Tujetsch ever been a litigant in any civil matter before this lawsuit? If yes, please state the name of the parties to said lawsuit(s), the case number(s), the county in which it was filed, the date it was filed and the disposition, if any.

RESPONSE: Plaintiff objects to this interrogatory on the basis of relevance, overbreath and harassment. Without waiver of this objection, Plaintiff responds that she was a plaintiff in a suit in the early 1990's related to a car accident, and has as a plaintiff filed a number of small claims suits related to non-payment of dental services provided to patients.

6. State the date(s) and amounts which Plaintiff paid to Defendants for monthly rent payments for June of 2004 – June 2006.

RESPONSE: See attached sheet.

7. Other than the case at present, has Mary A. Tujetsch been named as a defendant in a civil lawsuit other than this lawsuit. If so, state the nature of the lawsuit that was filed, the name of

the adverse party, the county, caption(s) and docket number(s) in which the case(s) was filed, and the disposition(s) of that case.

RESPONSE: No.

8. Pursuant to Illinois Supreme Court Rule 213(f)(1), provide the name and address of each opinion witness who will testify at trial and state the subject of each witness' testimony.

RESPONSE: Plaintiff has not yet determined which, if any, Rule 213(f)(1) witness(es) she may call as a trial witness, but reserves the right to supplement her response to this interrogatory and disclose such witness(es) as permitted by the applicable court rules and scheduling orders entered in this case.

9. Pursuant to Illinois Supreme Court Rule 213(f)(2), please provide the name and address of each independent expert witness who may offer any testimony and state:

(a) The subject matter on which the opinion witness(es) will testify;

(b) The conclusions and/or opinions of the opinion witness and the basis therefore, including reports of the witness, if any.

RESPONSE: Plaintiff has not yet determined which, if any, Rule 213(f)(2) witness(es) she may call as a trial witness, but reserves the right to supplement her response to this interrogatory and disclose such witness(es) as permitted by the applicable court rules and scheduling orders entered in this case.

10. Pursuant to Illinois Supreme Court Rule 213(f)(3), provide the name and address of each controlled expert witness who will offer any testimony and state:

(a) The subject matter on which the opinion witness(es) will testify;

(b) The conclusions and/or opinions of the opinion witness and the basis therefore, including reports of the witness, if any;

(c) The qualifications of each opinion witness, including a curriculum vitae and/or of the resume, if any; and

(d) The identity of any written reports of the opinion witnesses regarding this occurrence.

RESPONSE: Plaintiff has not yet determined which, if any, Rule 213(f)(3) witness(es) she may call as a trial witness, but reserves the right to supplement her response to this interrogatory and disclose such witness(es) as permitted by the applicable court rules and scheduling orders entered in this case.

11. Please state the specific equipment of Defendants that was allegedly defective as of June 27, 2004 alleged in Paragraph 25. For each such statement please state the item involved, the condition of each item and the cost to repair any such item.

RESPONSE: Dental Chair, Cuspidor; Light-nonfunctional - $7,600.00

X Ray Developer; non functional - $3,200.00

Autoclave; nonfunctional - $6,300.00

Ultrasonic Cleaner; nonfunctional - $260.00

Stereo System/Speakers; nonfunctional - $1,600.00

Copier/Fax; nonfunctional - $680.00

Phone System; nonfunctional - $250.00

Stained Carpet; yet to be replaced – estimated at $6,400.

12. List the names and addresses of all other persons (other than yourself and persons heretofore listed) who have knowledge of the facts of the occurrence and/or the damages claimed to have resulted therefrom.

RESPONSE: Other than Plaintiff and Defendant Pusateri, the following have knowledge of facts at issue in this suit:

First Pacific Corporation
P.O. Box 3000
Salem, Oregon

Sue Miller
5653 S. Kimbrough Ave.
Springfield, MO 65810

Eliza Cano
7714 W. 159th Street
Orland Park, IL 60462

13. Identify any statements, information, and/or documents known to you and requested by any of the foregoing interrogatories which you claim to be work product or subject to any common law or statutory privilege, and with respect to each interrogatory, specify the legal basis for the claim as required by Illinois Supreme Court Rule 201(n).

RESPONSE: Other than communications between Plaintiff and her retained counsel in this action (which are protected by the attorney-client and work product privileges), none.

DATED: January 16, 2007

MARY A. TUJETSCH

By: Michael D. Hayes
One of Her Attorneys

Michael D. Hayes
Julie F. Grosch
VARGA BERGER LEDSKY HAYES & CASEY
A Professional Corporation
224 South Michigan Avenue, Suite 350
Chicago, Illinois 60604
(312) 341-9400
(312) 341-2900 (fax)

State of Illinois

7185051

Department of Professional Regulation

The person, firm or corporation whose name appears on this certificate has complied with the provisions of the Illinois Statutes and/or rules and regulations and is hereby authorized to engage in the activity as indicated below.

LICENSE NO.
019-021789

EXPIRES
09/30/90

VOID

LICENSED DENTIST

MARY ANN TUJEISCH DDS
9916 ROANOAK DR
ROCKFORD IL 61107

DIRECTOR

Issued under the authority of The State of Illinois
Department of Professional Regulation

State of Illinois

7171258

Department of Professional Regulation

The person, firm or corporation whose name appears on this certificate has complied with the provisions of the Illinois Statutes and/or rules and regulations and is hereby authorized to engage in the activity as indicated below.

LICENSE NO.
003-019-021789-1

EXPIRES
09/30/90

VOID

LICENSED DENTIST
CONTROLLED SUBSTANCE
C II IIN III IIIN IV V

MARY ANN TUJEISCH DDS
ROCKFORD DENTAL CARE
1301 N ALPINE RD
ROCKFORD IL 61107

DIRECTOR

Issued under the authority of The State of Illinois
Department of Professional Regulation

6.)Rent Payments:

5/13/04	$5000.00
6/27/04	$2775.00
6/27/04	$2400.00
8/01/04	$2775.00
8/25/04	$2775.00
10/01/04	$2775.00
11/01/04	$2775.00
11/25/04	$2775.00
1/03/05	$2775.00
1/28/05	$2775.00
2/22/05	$2775.00
3/22/05	$2398.50
4/16/05	$376.50
4/26/05	$2775.00
6/01/05	$338.43
6/01/05	$2775.00
6/28/05	$2775.00
7/26/05	$3015.00
8/25/05	$2895.00
9/25/05	$2895.00
10/31/05	$2895.00
12/01/05	$2895.00
12/28/05	$2895.00
2/01/06	$2895.00
3/14/06	$2895.00
4/01/06	$2895.00
5/01/06	$2895.00
6/01/06	$2895.00
6/27/06	$2895.00

EXHIBIT D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARY A. TUJETSCH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 06CH11607
	)	
TODD C. PUSATERI,	)	JURY TRIAL DEMANDED
FIRST DENTAL, P.C.	)	
and FIRST DENTAL	)	
OF ORLAND PARK, P.C.	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

Mary A. Tujetsch, by her attorneys, Williams Montgomery & John Ltd., states her Complaint against Defendants, Todd C. Pusateri, First Dental, P.C., and First Dental of Orland Park, P.C., follows:

NATURE OF THE ACTION

1. The Defendants in this case made false representations, breached their contract and warranties to Plaintiff in the sale of their dental practice, and fraudulently induced Plaintiff to lease an office suite in Orland Park, Illinois owned by Defendants. This suit seeks 1) damages and equitable relief for breach of contract, breach of the representations and warranties in the contract, fraud; and 2) cancellation of the lease entered into pursuant to the agreement.

THE PARTIES

2. Plaintiff, Mary A. Tujetsch ("Tujetsch"), is a dentist licensed to practice in Illinois.

3. Defendant, Todd C. Pusateri ("Pusateri"), is a dentist licensed to practice in Illinois.

4. Defendant, First Dental, P.C. ("First Dental"), is a corporation incorporated in Illinois. Pusateri is the President and Secretary of First Dental, and upon information and belief, the sole shareholder of First Dental.

5 Defendant, First Dental of Orland Park, P.C. ("FDOP"), was incorporated in Illinois in 1998 and involuntarily dissolved by the Illinois Secretary of State in May, 2000. Upon information and belief, Pusateri was an officer, director, and sole shareholder of FDOP.

ALLEGATIONS COMMON TO ALL COUNTS

6. On or about June 27, 2004, Tujetsch (as Purchaser) and First Dental (as Seller) entered into an Asset Purchase Agreement ("Agreement") pursuant to which First Dental sold to Tujetsch substantially all of the assets of a dental practice ("Dental Practice") located in Cook County, Illinois at 7714 159th Street, Orland Park, Illinois ("Orland Park Office") Pusateri signed the Agreement on behalf of First Dental. A copy of the Agreement is attached hereto as Exhibit A.

7. On or about June 28, 2004, and as required in §6.03 of the Agreement, Tujetsch (as Tenant) and FDOP (purportedly as Landlord) entered into a certain lease ("the Lease") concerning the Orland Park Office. Entry into this Lease agreement was a necessary, substantial, and material aspect of performance of the Agreement. Pusateri signed the Lease on behalf of FDOP A copy of the Lease is attached hereto as Exhibit B.

8. Prior to the execution of the Agreement, Pusateri represented to Tujetsch that the Dental Practice had approximately 1,200 active patients ("Active Patients") that had been treated

within the 24 months prior to the sale. Tujetsch relied on Pusateri's representation in entering into the Agreement and Lease.

9. The Agreement identifies the "Seller" as First Dental. (Exhibit A, p. 1.) The Agreement further identifies the Seller as the Lessor of the Orland Park Office and sets forth the rent and other terms of the Lease. (Exhibit A, §6.03.) The Lease identifies FDOP as the Landlord. (Exhibit B, Lease Cover Sheet.) Pusateri signed the Lease as FDOP's President, knowing FDOP had been dissolved in 2000.

10. At the time the Agreement and Lease were signed, Pusateri knew that neither First Dental nor FDOP were the Owner or Lessor of the Orland Park Office. Instead, Pusateri, individually was and is the owner of the Orland Park Office leased to Tujetsch pursuant to the Agreement.

11. Pusateri, as the sole owner of both FDOP and First Dental, disregarded each entities' corporate form and structure while conducting their business affairs. Tujetsch relied on Pusateri's personal representations in entering into the Agreement and Lease.

12. In §3.11 of the Agreement, defendants guaranteed the accuracy of all representations and warranties as follows:

> **Accuracy of Representations and Warranties.** None of the representations or warranties of Seller contains or will contain any untrue statement of any material fact or omits or misstates a material fact necessary to make the statements contained in this Agreement not misleading. Seller does not know of any fact that has resulted or that, in the reasonable judgment of Seller will result, in any material adverse change in Seller's business, results of operation, financial condition or prospects that has not been set forth in this Agreement.

(Exhibit A, §3.11.)

13. Defendants acknowledged and understood that Tujetsch reasonably relied on all of Seller's representations and warranties set forth in the Agreement: §3.10 "Reliance. Seller recognizes and agrees that, notwithstanding any investigation by [Tujetsch], [Tujetsch] is relying upon the representations and warranties made by Seller in this Agreement." (Exhibit A, §3.10.)

14. One of Seller's representations included: "Seller has represented that the Dental Practice has approximately 1200 active patients, who have been treated within the previous twenty-four months according to First Pacific Corporation." (Exhibit A, p. 1.)

15. The Seller agreed to indemnify and hold Tujetsch harmless for "any and all loss, liability, deficiency, or damage suffered or incurred by [Tujetsch] by reason of any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Seller contained in this Agreement." (Exhibit A, Section 4.05(c).) The Seller further agreed to indemnify and hold [Tujetsch] harmless for all "costs, and expenses, including, without limitation, legal fees and expenses ... incurred in [Tujetsch's] successful enforcement of [the] indemnity." (Exhibit A, §4.05(e).)

COUNT I – BREACH OF CONTRACT (PERFORMANCE)

16. Tujetsch repeats and re-alleges paragraphs 1 through 15 as and for paragraph 16 of this Count I.

17. Under the Agreement, Seller agreed to, "without further consideration, take all steps reasonably necessary to place Purchaser in possession and operating control of the Assets... ." (Exhibit A, §1.05.) The Agreement expressly defines Assets to include "[a]ll patient lists, equipment, files and patient records, and all operating data and records relating to the Dental Practice ." (Exhibit A, §1.01-1.)

18. Seller never provided Tujetsch with any patient lists. Seller's failure to provide Tujetsch with a list of Active Patients or any other patient lists, constitutes a breach of the obligation to place Tujetsch in "possession and operating control of" "[a]ll patient lists relating to the Dental Practice...." (Exhibit A, §§1.01-1 and 1.05.)

19. Pursuant to the Agreement, Seller represented that "[n]o consent, approval or authorization of ... any other entity or person not a party to this Agreement is required for the consummation of the transactions described in this Agreement...." (Exhibit A, §3.08.)

20. Shortly after the closing of the Agreement and repeatedly thereafter, Tujetsch began contacting Pusateri and requested the patient list identifying the 1200 patients of the Dental Practice. Tujetsch needed the patient list to contact the Dental Practice's customers. Without the patient list the Dental Practice has little value.

21. Pusateri never provided Tujetsch with a patient list for 1200 Active Patients in breach of the Agreement.

22. Instead of providing Tujetsch with the patient list, Pusateri directed Tujetsch to contact the Dental Practice's billing agency, First Pacific Corporation ("First Pacific").

23. Tujetsch repeatedly contacted First Pacific and Pusateri and requested information (and the dental records) regarding the alleged 1200 Active Patients of the Dental Practice represented in the Agreement. Neither Pusateri nor First Pacific provided Tujetsch with access to the records or data that purportedly establish the basis for the number of Active Patients. Upon information and belief, Pusateri permitted First Pacific Corporation to delete a substantial portion of First Dental's patient records relating to the Dental Practice and the number of Active Patients.

(a) Judgment and order that Defendants (First Dental and Todd Pusateri) breached the Agreement between Mary A. Tujetsch and Defendant First Dental;

(b) Cancellation of the Lease between Mary A. Tujetsch and Defendants (FDOP and Todd Pusateri);

(c) Judgment and order that requires Defendants (First Dental and Todd Pusateri) pay Mary A. Tujetsch all damages arising out of defendant's breaches of the Agreement in an amount to be determined at trial but over $75,000;

(d) Judgment and order that requires Defendants (First Dental and Todd Pusateri) to pay Mary A. Tujetsch all damages relating to the Lease in an amount to be determined at trial but over $75,000;

(e) An award of all litigation expenses, including attorneys fees, in accordance with Section 4.05(c) and 4.05(e) of the Agreement;

(f) An award of prejudgment interest for damages arising out of Defendants breaches dating from October 24, 2005;

(g) Such other and further relief as the Court deems just and equitable.

COUNT II – BREACH OF CONTRACT
(ACCURACY OF REPRESENTATIONS AND WARRANTIES)

29 Tujetsch repeats and re-alleges paragraphs 1 through 15 as and for paragraph 29 of this Count II.

30. After acquiring the Dental Practice, Tujetsch sought to determine the actual number of Active Patients. In this regard, Tujetsch reviewed patient files and communicated with First Pacific Corporation, a third party provider who administered the patient billing for First Dental. This review indicates that there were less than 700 active patients that had been treated at the Dental Practice in the two years prior to the sale, compared to the approximately 1200 Active Patients that Pusateri represented and warranted to Tujetsch.

31. The inaccuracy of the representations relating to the number of Active Patients constitutes a breach of the Agreement's guarantee with regard to the accuracy of all

representations and warranties and the guarantee that no representations contained in the Agreement, were misleading. (Exhibit A, §3.11.)

32. Additionally, the Agreement expressly states that "Seller represents that all equipment is working and in good order." (Exhibit A, §1.01-2.)

33. The dental equipment was not in good order, as represented by Pusateri and in the Agreement. Tujetsch incurred substantial expenses repairing and replacing equipment transferred to Tujetsch as part of the Agreement.

34. The inaccuracy of the representations relating to the condition of the equipment constitutes a breach of the Agreement's guarantee with regard to the accuracy of all representations and warranties. (Exhibit A, §3.11.)

35. Had Tujetsch been aware that the foregoing breaches would occur, she would not have entered into the Agreement or the Lease.

36. Defendants' breaches of the Agreement have caused Tujetsch substantial damages pursuant to her entry into the Agreement and Lease.

37. Under §4.05, Indemnification by Seller, Seller agreed to indemnify and hold Tujetsch harmless for: "(c) any and all loss, liability, deficiency, or damage suffered or incurred by [Tujetsch] by reason of any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Seller contained in this Agreement . . ." (Exhibit A, §4.05(c)).

38 Seller's breaches of its representations and warranties to Tujetsch as described above, resulted in Tujetsch bringing this action. Pursuant to §4.05(e), Purchaser is entitled to all "costs, and expenses, including without limitation, legal fees and expenses" for damages resulting from "any untrue representation [or] breach of warranty." Pursuant to §7.01 and §7.02 of the Agreement, Seller's breaches entitle Purchaser to terminate the agreement, recover

damages, and secure a release from all "obligations arising under this Agreement." Tujetsch notified defendants of the breach of the Agreement on or about October 24, 2005.

PRAYER FOR RELIEF (Count II)

WHEREFORE, the Plaintiff, Mary A. Tujetsch, respectfully requests that this Court grant the following relief:

(a) Judgment and order that Defendants (First Dental and Todd Pusateri) breached the Agreement between Mary A. Tujetsch and Defendant First Dental;

(b) Cancellation of the Lease between Mary A. Tujetsch and Defendants (FDOP and Todd Pusateri);

(c) Judgment and order that requires Defendants (First Dental and Todd Pusateri) pay Mary A. Tujetsch all damages arising out of defendant's breaches of the Agreement in an amount to be determined at trial but over $75,000;

(d) Judgment and order that requires Defendants (First Dental and Todd Pusateri) to pay Mary A. Tujetsch all damages relating to the Lease in an amount to be determined at trial but over $75,000;

(e) An award of all litigation expenses, including attorneys fees, in accordance with Section 4.05(c) and 4.05(e) of the Agreement;

(f) An award of prejudgment interest for damages arising out of Defendants breaches dating from October 24, 2005;

(g) Such other and further relief as the Court deems just and equitable.

COUNT III – FRAUD IN THE INDUCEMENT

39. Tujetsch repeats and re-alleges paragraphs 1 through 15 as and for paragraph 39 of this Count III.

40. Upon information and belief, at the time Pusateri made representations to Tujetsch regarding the number of Active Patients, Pusateri knew or should have known that such representation was false. Pusateri knew the Dental Practice did not contain 1200 patient files

and, therefore, could not have had 1200 Active Patients as told to Tujetsch and represented in the Agreement.

41. Pusateri made the representations regarding the number of active patients, as President of First Dental, to fraudulently induce Tujetsch to enter into the Agreement and the Lease.

42. Tujetsch relied upon Defendant's representations regarding the number of active patients in electing to enter into the Agreement and the Lease. Pusateri was aware of Tujetsch's reliance on these specific representations.

43. Following the sale of the Dental Practice, Pusateri prevented Tujetsch from obtaining a true and correct number of active patients by failing to provide Tujetsch with a patient list.

44. Under the Agreement, the Seller guaranteed the accuracy of all representations, including the number of Active Patients, and further guaranteed that no representations contained in the Agreement, were misleading. The Agreement further provides that the Seller recognizes and agrees to Buyer's reliance on all representations made in the Agreement.

45. After acquiring the Dental Practice, Tujetsch sought to determine the actual number of Active Patients. In this regard, Tujetsch has reviewed patient files and communicated with First Pacific Corporation, a third party provider who administered the patient billing for First Dental. This review indicates there were less than 700 active patients that had been treated at the Dental Practice in the two years prior to the sale, compared to the approximately 1200 Active Patients that Pusateri reported to Tujetsch.

46. Prior to the execution of the Agreement, Pusateri represented to Tujetsch that all of the dental equipment, which would be transferred to Tujetsch as part of the Agreement, was in

good working condition. The Agreement expressly states that "Seller represents that all equipment is working and in good order." (Exhibit A, §1.01-2.)

47. Defendant, Pusateri's representations regarding the condition of the medical equipment further induced Tujetsch to enter into the Agreement

48. The dental equipment was not in good condition, as represented by Pusateri and in the Agreement. Tujetsch incurred substantial expenses repairing and replacing equipment transferred to Tujetsch as part of the Agreement.

49. Tujetsch would not have entered into the Agreement, if she had knowledge of the true number of Active Patients and/or the true condition of the dental equipment. The Agreement as proposed was not economically feasible under the true facts. Tujetsch reasonably relied upon Defendants representations in electing to proceed with the Agreement and the Lease.

50. Because Tujetsch would not have entered into the Agreement, had she known the true number Active Patients, she also would not have entered into the Lease, as required by Section 6.03 of the Agreement.

51. Defendants' fraudulent acts and omissions have caused Tujetsch substantial damages arising out of the Agreement and the Lease.

52. Plaintiff notified Defendants of her estimate of the number of active patients and the substantial discrepancy with the representations in the Agreement on or about October 24, 2005.

PRAYER FOR RELIEF (Count III)

WHEREFORE, the Plaintiff, Mary A. Tujetsch, respectfully requests that this Court grant the following relief:

(a) Judgment and order that Defendants fraudulently induced Mary A. Tujetsch to enter into the Agreement and the Lease;

(b) Cancellation of the Lease between Mary A. Tujetsch and Defendants (FDOP and Todd Pusateri);

(c) Judgment and order that requires Defendants (First Dental and Todd Pusateri) pay Mary A. Tujetsch all damages, including restitution, arising out of Defendant's fraudulent representations of the Agreement;

(d) Judgment and order that requires Defendants (First Dental and Todd Pusateri) to pay Mary A. Tujetsch all damages relating to the Lease;

(e) An award of Attorneys Fees;

(f) An award of prejudgment interest;

(g) Such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all issues so triable

MARY A. TUJETSCH

By: _____
One of her Attorneys

David E. Stevenson (#6181112)
Williams, Montgomery & John, Ltd.
20 North Wacker Drive – Suite 2100
Chicago, IL 60606
312.443.3200 (Phone)
312.630-8500 (Fax)
Firm I.D. #04933

Document #: 748750

EXHIBIT A

ASSET PURCHASE AGREEMENT

between

MARY A. TUJETSCH, DDS
"PURCHASER"

and

FIRST DENTAL, PC
"SELLER"

Dated June 27, 2004

SA076

limitation contracts with third payers, dentists or other professionals, and under any contracts, agreements, commitments, understandings, purchase orders, documents or instruments entered into between the date hereof and the Closing Date and expressly assumed by Purchaser in writing on the Closing Date, other than to the extent such items have terminated, expired or been disposed of by Seller prior to the Closing Date without breach of this Agreement (collectively, the Contracts);

1.01-4 All assignable rights to all telephone lines and numbers used in the conduct of the Dental Practice; and

1.01-5 For one year subsequent to closing, Purchaser may use the name "First Dental of Orland Park," but only for the purpose of marketing the Dental Practice within a 20-mile radius of it. Purchaser shall not use any other name which includes the words "First Dental" No later than eighteen months subsequent to closing, Purchaser shall cease and desist using the name "First Dental of Orland Park".

1.01-6 The assets include the following equipment: eight waiting room chairs, Canon copier, Telecheck-credit card terminal, calculator, stapler, tape dispenser, file cabinet under copier, patient chart cabinet, corner desk in business front area, two office chairs, three business 4-line phones, one business 2-line phones, network hub, two waste cans, shredder, vacuum, microwave, card table and two chairs, three folding chairs in operatories, TV/VCR in operatory #4. The assets do not include the following equipment: any property of Innovative Chiropractic, fax machine, end table in waiting room, decorative pictures, refrigerator, large garbage can in furnace room, stereo, any property of Seller-Landlord, ladder, broom, mop, light bulb changing stick.

1.02 **Excluded Assets.** The Assets shall not include the following:

1.02-1 All cash assets of the Dental Practice, notes and accounts receivable, automobiles, real estate, and personal items of Seller. Re-do's of work originally performed before closing and completed subsequent to closing may be charged and collected by Purchaser, and do not constitute accounts receivable. Completion of work subsequent to closing which was originally begun prior to closing may be charged and collected by Purchaser, and do not constitute accounts receivable.

1.02-2 No liabilities of Seller whatsoever, whether in tort or contract or otherwise, are being transferred to or acquired by Purchaser hereunder, unless specifically assumed and scheduled hereunder. Buyer does not assume and will not be responsible for any known, unknown, or contingent liabilities of Seller incurred by any means including, but not limited to, professional malpractice or personal injury of any nature, including liabilities related to Seller's employees prior to closing. Seller is responsible for all payroll, tax liability, sales tax liability, if any, prior to closing.

1.02-3 The assets do not include the following: any property of Innovative Chiropractic, file cabinet next to copier machine, shelves containing vitamins, cabinet under fax machine, cabinetry in operatory, cabinetry in sterilization area, cabinetry at front desk, carpets, light fixtures, countertops, window treatments, ceiling speakers, TV and computer monitor mounts, bathroom fixtures, and magazine rack. The assets do not include any property of First Pacific Corporation, including its computers, monitors, keyboards, battery backup, computer speakers, laser printer, color printer, computer software, and computer connections.

1.02-4 Plants, trees, decorations, and pictures may be changed by Purchaser in cooperation with Innovative Chiropractic or other current tenant.

1.03 **Purchase Price**. The purchase price for the Assets (the Purchase Price) shall be the following:

1.03-1 One Hundred Sixty Five Thousand and 00/100ths ($165,000.00) Dollars is the full purchase price. The sum of Five Thousand ($5,000.00) Dollars has been deposited, and represents Purchaser's earnest money deposit ("Earnest Money"). The full purchase price minus the Earnest Money shall be paid by Purchaser to Seller at closing, by certified or official check.

1.04 **Instruments of Conveyance and Transfer**. The sale of the Assets, and the conveyance, assignment, transfer and delivery of all of the Assets shall be affected by Seller's execution and delivery to Purchaser, on the Closing Date, of a bill of sale in substantially the form of the Assignment and Bill of Sale attached hereto as Exhibit A. At time of closing, personal property, bio-hazardous property, and inactive patient files are to be moved at Seller's expense.

1.05 **Further Assurances**. Seller agrees that, at any time and from time to time on and after the Closing Date, they will, upon the request of Purchaser and without further consideration, take all steps reasonably necessary to place Purchaser in possession and operating control of the Assets and will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all further acts, deeds, assignments, conveyances, transfers, or assurances as reasonably required to sell, assign, convey, transfer, grant, assure and confirm to Purchaser, or to aid and assist in the collection of or reducing to possession by Purchaser of, all of the Assets, or to vest in Purchaser good, valid and marketable title to the Assets.

1.06 **Closing**. The consummation of the transactions contemplated by this Agreement (the Closing) shall take place on July 1, 2004, or at another date, time and place agreed upon in writing by the parties (the Closing Date), but Purchaser shall take possession of the Dental Practice on June 30, 2004.

1.07 **Allocation of Purchase Price**. The Purchase Price shall be allocated among the Assets as follows, and Purchaser and Seller shall be bound by that allocation in reporting the transactions contemplated by this Agreement to any governmental authority (including without limitation the Internal Revenue Service):

(a) Twenty-Five Thousand ($25,000.00) Dollars for dental equipment;

(b) Four Thousand ($4,000.00) Dollars for hand instruments and dental supplies;

(c) Five Thousand ($5,000.00) Dollars for furniture and office equipment;

(d) One Hundred Thirty One ($131,000.00) Dollars for goodwill;

ARTICLE II
Representations and Warranties of Purchaser

Purchaser, represents and warrants to Seller as follows:

2.01 **Authorization.** This Agreement has been duly executed and delivered by Purchaser and is binding upon and enforceable against her in accordance with its terms;

2.02 **Compliance.** The execution, delivery and performance of this Agreement by Purchaser, the compliance by Purchaser with the provisions of this Agreement and the consummation of the transactions described in this Agreement will not conflict with or result in the breach of any of the terms or provisions of or constitute a default under:

2.02-1 any note, indenture, mortgage, deed of trust, loan agreement, lease or other agreement or instrument to which Purchaser is a party or by which Purchaser is bound; or

2.02-2 any statute or any order, rule, regulation or decision of any court or regulatory authority of governmental body applicable to Purchaser.

2.03 **Consents.** Except for the consent of Purchaser's principal bank, no consent, approval, authorization, order, designation or declaration of any court or regulatory authority or governmental body, federal or other, or third person is required to be obtained by Purchaser for the consummation of the transactions described in this Agreement.

2.04 **Accuracy of Representations & Warranties.** None of the representations or warranties of Purchaser contains or will contain any untrue statement of any material fact or omits or misstates a material fact necessary to make the statements contained in this Agreement not misleading.

ARTICLE III
Representations and Warranties of Seller

3.01 **Corporate Existence; Authority.** Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois, and has all necessary corporate power and authority to own, lease and operate the property and assets and to carry on the business as now conducted and as proposed to be conducted. Seller owns all of the assets of the Dental Practice. Seller has full power and authority to enter into this Agreement and to carry out its terms. This Agreement has been duly and validly executed and delivered by Seller and is binding upon and enforceable against Seller in accordance with its terms.

3.02 **No Adverse Consequences.** Neither the execution and delivery of this Agreement by Seller nor the consummation of the transactions contemplated by this Agreement will

3.02-1 result in the creation or imposition of any lien, charge or encumbrance on the Seller's assets or property,

3.02-2 violate or conflict with any provision of Seller's articles of incorporation or bylaws,

3.02-3 violate any law, judgment, order, injunction, decree, rule, regulation or ruling of any governmental authority applicable to Seller, or

3.02-4 either alone or with the giving of notice or the passage of time or both, conflict with, constitute grounds for termination or acceleration of, result in the breach of the terms, conditions

or provisions of, result in the loss of any benefit to Seller under or constitute a default under any agreement, instrument, license or permit to which Seller is a party or is bound.

3.03 **Brokers and Finders.** Purchaser acknowledges and understands that no brokers or finders have been used in this transaction or are otherwise entitled to any fee.

3.04 **Litigation.** There is no claim, litigation, proceeding or investigation of any kind pending or threatened by or against the Dental Practice, and, to the best knowledge of Seller, there is no basis for any such claim, litigation, proceeding or investigation.

3.05 **Compliance with Laws.** Seller has at all relevant times conducted the Dental Practice in compliance with their respective articles of incorporation and bylaws and all applicable laws and regulations. The Dental Practice is not subject to any outstanding order, writ, injunction or decree, and have not been charged with, or threatened with a charge of, a violation of any provision of federal, state or local law or regulation.

3.06 **Employment Matters.**

3.06-1 **Employment Agreements.** Each of the employees of the Dental Practice is an at-will employee. There are no written employment, commission or compensation agreements of any kind between Seller and any of its employees at the Dental Practice.

3.07 **Permits and Licenses.** Seller and the shareholders of Seller hold and at all times have held, all licenses, permits, franchises, easements and authorizations (collectively, Permits) necessary for the lawful conduct of the Dental Practice pursuant to all applicable statutes, laws, ordinances, rules and regulations of all governmental bodies, agencies and other authorities having jurisdiction over it or any part of its operations, and there are no claims of violation by any such party of any Permit.

3.08 **Consents and Approvals.** No consent, approval or authorization of any court, regulatory authority, governmental body, or any other entity or person not a party to this Agreement is required for the consummation of the transactions described in this Agreement by Seller. Seller has obtained, or shall have obtained prior to the Closing, all consents, authorizations or approvals of any third parties required in connection with the execution, delivery or performance of this Agreement by Seller or the consummation of the transaction contemplated by this Agreement. Seller has made all registrations or filings with any governmental authority required for the execution or delivery of this Agreement or the consummation of the transaction contemplated hereby.

3.09 **Records.** The books of account of Seller and the Professional Corporation is complete and accurate in all material respects, and there have been no transactions involving the business of Seller and the Professional Corporation which properly should have been set forth therein and which have not been accurately so set forth. Complete and accurate copies of such books have been made available to Purchaser.

3.10 **Reliance.** Seller recognizes and agrees that, notwithstanding any investigation by Purchaser, Purchaser is relying upon the representations and warranties made by Seller in this Agreement

3.11 **Accuracy of Representations and Warranties.** None of the representations or warranties of Seller contains or will contain any untrue statement of any material fact or omits or

misstates a material fact necessary to make the statements contained in this Agreement not misleading. Seller does not know of any fact that has resulted or that, in the reasonable judgment of Seller will result, in any material adverse change in Seller's business, results of operation, financial condition or prospects that has not been set forth in this Agreement.

ARTICLE IV
Covenants

4.01 Access to Properties, Books and Records. Prior to the Closing Date, Seller shall, at Purchaser's request, afford or cause to be afforded to the agents, attorneys, accountants and other authorized representatives of Purchaser reasonable access during normal business hours to all employees, properties, books and records of the Dental Practice and shall permit such persons, at Purchaser's expense, to make copies of such books and records. Purchaser shall treat, and shall cause all of their agents, attorneys, accountants and other authorized representatives to treat, all information obtained pursuant to this Section 4.01 as confidential. No investigation by Purchaser or any of her authorized representatives pursuant to this Section 4.01 shall affect any representation, warranty or closing condition of any party hereto or Purchaser's rights to indemnification.

4.02 Negative Covenants. Except as otherwise permitted by this Agreement or with the prior written consent of Purchaser, prior to the Closing Date, Seller shall not, in connection with the Dental Practice:

4.02-1 Mortgage, pledge, otherwise encumber or subject to lien any of its assets or properties, tangible or intangible, or commit itself to do any of the foregoing;

4.02-2 Except in the ordinary and usual course of its business and in each case for fair consideration, dispose of, or agree to dispose of, any of its assets or lease or license to others, or agree so to lease or license, any of its assets;

4.02-3 Acquire any assets which would be material to the Dental Practice other than assets acquired in the ordinary and usual course of business and consistent with past practices;

4.02-4 Enter into any transaction or contract or make any commitment to do the same;

4.02-5 Increase the wages, salaries, compensation, pension or other benefits payable, or to become payable by it, to any of its employees or agents, including without limitation any bonus payments or severance or termination pay, other than increases in wages and salaries required by employment arrangements existing on the date hereof or otherwise in the ordinary and usual course of its business;

4.02-6 Agree or commit to do any of the foregoing.

4.03 Affirmative Covenants. Except as otherwise permitted by this Agreement or with the prior written consent of Purchaser, prior to the Closing Date, Seller shall:

4.03-1 Operate the Dental Practice, including collecting receivables and paying payables, as presently operated and only in the ordinary course and consistent with past practices;

4.03-2 Advise Purchaser in writing of any litigation or administrative proceeding that challenges or otherwise materially affects the transactions contemplated hereby;

4.03-3 Use its best efforts to maintain all of the Tangible Personal Property in good operating condition, reasonable wear and tear excepted, consistent with past practices, and take all steps reasonably necessary to maintain their intangible assets;

4.03-4 Not cancel or change any policy of insurance (including self-insurance) or fidelity bond or any policy or bond providing substantially the same coverage;

4.03-5 Maintain, consistent with past practices, all inventories, spare parts, office supplies and other expendable items;

4.03-6 Use its best efforts to retain all employees;

4.03-7 Maintain its books and records in accordance with past practices;

4.03-8 Pay and discharge all taxes, assessments, governmental charges and levies imposed upon it, its income or profits or upon any property belonging to it, in all cases prior to the date on which penalties attach thereto; and

4.03-9 Comply with all laws, rules and regulations applicable to the Dental Practice.

4.04 **Employees.** Seller shall be responsible for and shall pay and discharge all obligations to such employees arising out of or in connection with their employment prior to Closing.

4.05 Indemnification by Seller

Seller indemnifies and agrees to defend, indemnify, and hold Purchaser harmless from, against, and in respect of the following:

(a) any and all debts, liens, liabilities, or obligations of Seller, direct or indirect, fixed, contingent, or otherwise existing before the Closing Date, including, but not limited to, any liabilities arising out of any act, transaction, circumstance, state of facts, actions or inactions of employees, or violation of law that occurred or existed before the Closing Date, whether or not then known, due, or payable, and irrespective of whether the existence thereof is disclosed to Purchaser in this Agreement or any schedule hereto;

(b) any and all loss, liability, deficiency, or damage suffered or incurred by Purchaser as a result of any default by Seller existing on the Closing Date, or any event of default occurring prior to the Closing Date that with the passage of time would constitute a default, under any material contract or other agreement assumed by Purchaser under this Agreement;

(c) any and all loss, liability, deficiency, or damage suffered or incurred by Purchaser by reason of any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Seller contained in this Agreement or in any certificate, document, or instrument delivered to Purchaser hereunder or in connection herewith;

(d) any claim for a finder's fee or brokerage or other commission by any person or entity for services alleged to have been rendered at the instance of Seller with respect to this

Agreement or any of the transactions contemplated hereby; and

(e) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs, and expenses, including, without limitation, legal fees and expenses, incident to any of the foregoing or incurred in purchaser's successful enforcement of this indemnity.

(f) any violations of municipal, state, or federal law committed prior to closing.

4.06 Indemnification by Purchaser

Purchaser hereby agrees to indemnify and hold Seller harmless from, against, and in respect of:

(a) any and all debts, liabilities, or obligations of Purchaser, direct or indirect, fixed, contingent, or otherwise accruing after the Closing Date;

(b) any and all loss, liability, deficiency, or damage suffered or incurred by Seller resulting from any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Purchaser contained in this Agreement or in any certificate, document, or instrument delivered to Seller pursuant hereto or in connection herewith;

(c) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs, and expenses, including, without limitation, legal fees and expenses, incident to any of the foregoing or incurred in Seller's successful enforcement of this indemnity, except those resulting from Seller's duties and obligations as landlord of Purchaser's leased premises.

4.07. Third-Party Claims

(a) In order for Purchaser or Seller, as the case may be, to be entitled to any indemnification provided for hereunder, in respect of, arising out of, or involving a claim made by any person, firm, governmental authority, or corporation other than the Purchaser or Seller, or their respective successors, assigns, or affiliates, against the indemnified party, the indemnified party must notify the indemnifying party in writing of such third-party claim promptly after receipt by the indemnified party of written notice of the third-party claim, and the indemnified party shall deliver to the indemnifying party, within 20 days after receipt by the indemnified party, copies of all notices relating to the third-party claim.

(b) If a third-party claim as set forth in subsection (a) hereof is made against an indemnified party, the indemnifying party will be entitled to participate in the defense thereof and, if it so chooses, to assume the defense thereof with counsel selected by the indemnifying party, provided such counsel is not reasonably objected to by the indemnified party. Should the indemnifying party elect to assume the defense of such a third-party claim, the indemnifying party will not be liable to the indemnified party for any legal expenses subsequently incurred by the indemnified party in connection with the defense thereof. If the indemnifying party elects to assume the defense of such a third-party claim, the indemnified party will cooperate fully with the indemnifying party in connection with such defense.

(c) If the indemnifying party assumes the defense of a third-party claim, then in no event will the indemnified party admit any liability with respect to, or settle, compromise, or discharge, any third-party claim without the indemnifying party's prior written consent, and the indemnified party will agree to any settlement, compromise, or discharge of a third-party claim that the indemnifying party may recommend that releases the indemnified party completely in connection with the third-party claim.

(d) In the event the indemnifying party shall assume the defense of any third-party claim, the indemnified party shall be entitled to participate in, but not control, the defense with its own counsel at its own expense. If the indemnifying party does not assume the defense of any such third-party claim, the indemnified party may defend the claim in a manner as it may deem appropriate, and the indemnifying party will reimburse the indemnified party promptly;

ARTICLE V
Joint Covenants

Purchaser and Seller covenant and agree that they will act in accordance with the following:

5.01 Governmental Consents. Promptly following the execution of this Agreement, the parties will proceed to prepare and file with the appropriate governmental authorities any requests for approval or waiver, if any, that are required from governmental authorities in connection with the transactions contemplated hereby, and the parties shall diligently and expeditiously prosecute and cooperate fully in the prosecution of such requests for approval or waiver and all proceedings necessary to secure such approvals and waivers. Purchaser is not responsible for obtaining governmental consents regarding the physical structure of the building owned by Seller.

5.02 Best Efforts; No Inconsistent Action. Each party will use its best efforts to effect the transactions contemplated by this Agreement and to fulfill the conditions to the obligations of the other parties set forth in Article 6 or 7 of this Agreement. No party will take any action inconsistent with its obligations under this Agreement or that could hinder or delay the consummation of the transactions contemplated by this Agreement, except that nothing in this Section 5.02 shall limit the rights of the parties under Articles 6, 7 and 8.

ARTICLE VI
Conditions to Obligations of Seller

The obligations of Seller under Article I are, at their option, subject to satisfaction, at or prior to the Closing, of each of the following conditions:

6.01 Representations, Warranties and Covenants.

6.01-1 All representations and warranties of Purchaser made in this Agreement shall in all material respects be true and complete on and as of the Closing Date with the same force and effect as if made on and as of that date.

6.01-2 All of the terms, covenants and conditions to be complied with and performed by Purchaser on or prior to the Closing shall in all material respects have been complied with or performed by Purchaser.

6.02 Adverse Proceedings.

No suit, action, claim or governmental proceeding shall have been instituted or threatened

against, and no order, decree or judgment of any court, agency or other governmental authority shall have been rendered against, Purchaser or Seller to restrain or prohibit this Agreement or the transactions contemplated by this Agreement.

6.03 Lease

At or before closing, Purchaser shall execute a five-year lease for the offices of the Dental Practice at 7714 159th Street, Orland Park, IL 60462, at which Seller is Lessor. Initial monthly rent shall be Two Thousand Four Hundred ($2,400.00) Dollars, and monthly rent will increase each year by a Five Per Cent (5%) increment over the previous year's monthly rent. The said required lease will also provide that Purchaser-Lessee shall pay monthly supplemental rent of Three Hundred Seventy-Five ($375.00) Dollars for reimbursement to Lessor of common area maintenance expenses, including but not limited to, lessee's pro-rata share of utility and other expenses for the entire building. Seller-Lessor shall account to Purchaser-Lessee at least semi-annually for such common area expenses, and shall either reimburse Purchaser for any over-payments made by Purchaser toward pro-rata common area maintenance expenses, or shall bill Purchaser for any such under-payments made by Purchaser, which billing Purchaser shall pay by its due date.

ARTICLE VII
Termination

7.01 Right of Parties to Terminate. This Agreement may be terminated:

7.01-1. by Purchaser, if any of the authorizations, consents, approvals, filings or registrations described above shall have been denied, not permitted to go into effect or obtained on terms not reasonably satisfactory to Purchaser and all reasonable final appeals shall have been exhausted;

7.01-2 by Purchaser, if Seller shall have breached any of their obligations hereunder in any material respect;

7.01-3 by Seller, if Purchaser shall have breached any of its obligations hereunder in any material respect; or

7.02 Effect of Termination. If either Purchaser or Seller decides to terminate this Agreement, such party shall promptly give written notice to the other party to this Agreement of such decision. In the event of a termination, the parties hereto shall be released from all liabilities and obligations arising under this Agreement, with respect to the matters contemplated by this Agreement, other than for damages arising from a breach of this Agreement.

ARTICLE VII
Confidentiality; Press Releases

8.01 Confidentiality.

8.01-1 No information concerning Seller not previously disclosed to the public or in the public domain that has been furnished to or obtained by Purchaser under this Agreement or in connection

with the transactions contemplated hereby shall be disclosed to any person other than in confidence to employees, legal counsel, financial advisers or independent public accountants of Purchaser or used for any purpose other than as contemplated herein. If the transactions contemplated by this Agreement are not consummated, Purchaser shall hold such information in confidence for a period of four years from the date of any termination of this Agreement, and all such information that is in writing or embodied on a diskette, tape or other tangible medium shall be promptly returned to Seller.

8.01-2 No information concerning Purchaser not previously disclosed to the public or in the public domain that has been furnished to or obtained by Seller under this Agreement or in connection with the transactions contemplated hereby shall be disclosed to any person other than in confidence to the employees, legal counsel, financial advisers or independent public accountants of Seller or used for any purpose other than as contemplated herein. If the transactions contemplated by this Agreement are not consummated, Seller shall hold such information in confidence for a period of four years from the date of any termination of this Agreement, and all such information that is in writing or embodied on a diskette, tape or other tangible medium shall be promptly returned to Purchaser.

8.01-3 Notwithstanding the foregoing, such obligations of Purchaser and of Seller shall not apply to information

(a) that is, or becomes, publicly available from a source other than Purchaser or Seller, as the case may be;

(b) that was known and can be shown to have been known by Purchaser at the time of its receipt from Seller, or by Seller at the time of its receipt from Purchaser, as the case may be;

(c) that is received by Purchaser from a third party without breach of this Agreement by Purchaser, or is received by Seller from a third party without breach of this Agreement by Seller, as the case may be;

(d) that is required by law to be disclosed; or

(e) that is disclosed in accordance with the written consent of Purchaser or of Seller, as the case may be.

ARTICLE IX
Other Provisions

9.01 Benefit and Assignment. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns forever. No party hereto may voluntarily or involuntarily assign such party's interest under this Agreement without the prior written consent of the other parties.

9.02 Entire Agreement. This Agreement and the Schedules and Exhibits referred to herein embody the entire agreement and understanding of the parties and supersede any and all prior agreements, arrangements and understandings relating to matters provided for herein.

9.03 **Fees and Expenses.** Purchaser shall be solely responsible for all costs and expenses incurred by her, and Seller shall be solely responsible for all costs and expenses incurred by Seller, in connection with the negotiation, preparation and performance of and compliance with the terms of this Agreement.

9.04 **Amendment, Waiver, etc.** The provisions of this Agreement may be amended or waived only by an instrument in writing signed by the party against which enforcement of such amendment or waiver is sought. Any waiver of any term or condition of this Agreement or any breach hereof shall not operate as a waiver of any other such term, condition or breach, and no failure to enforce any provision hereof shall operate as a waiver of such provision or of any other provision hereof.

9.05 **Headings.** The headings are for convenience only and will not control or affect the meaning or construction of the provisions of this Agreement.

9.06 **Governing Law.** The construction and performance of this Agreement will be governed by the laws of the State of Illinois.

9.07 **Notices.** Any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing; shall be delivered personally, including by means of telecopy, or mailed by registered or certified mail, postage prepaid and return receipt requested; shall be deemed given on the date of personal delivery or on the date set forth on the return receipt; and shall be delivered or mailed to the addresses or telecopy numbers set forth on the first page of this Agreement or to such other address as any party may from time to time direct, with copies to:

In the case of Seller:

(847) 212-5620 cell
(847) 424 0200-office

Steven H. Jesser
790 Frontage Road
Suite 110
Northfield, Illinois 60093
Facsimile: (800) 330-9710

Todd C. Pusateri, DDS
8 West Gartner
Naperville, IL 60540

In the case of Purchaser:

Mary A. Tujetsch, DDS
55 E. Washington Suite 2121
Chicago IL 60602
312-782-1396

9.08 **Breach; Equitable Relief.** The parties acknowledge that the Dental Practice and rights of the parties described in this Agreement are unique and that money damages alone for breach of this Agreement may be inadequate. Any party aggrieved by a breach of the provisions hereof may bring an action at law or suit in equity to obtain redress, including specific performance, injunctive relief or any other available equitable remedy. Time and strict performance are of the essence in this Agreement.

9.09 **Attorneys' Fees.** If suit or action is filed by any party to enforce the provisions of this Agreement or otherwise with respect to the subject matter of this Agreement, each party shall bear its own legal fees, costs, and expenses.

9.10 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same instrument.

9.11 **Covenant Not to Compete.**

9.11-1. For a period of five (5) years after date of this Covenant, Seller shall not, in any capacity, own, manage, operate, control, participate in, be employed by, or be connected in any manner with the ownership, management, operation, control, or practice of any dental practice within a five (5) mile radius of 7714 159th Street, Orland Park, IL 60462.

9.11-2 During and after the closing as set forth in the Asset Purchase Agreement, Seller shall not disclose to any person or entity the names and addresses of any patients or suppliers or confidential or proprietary information of Purchaser, shall not disparage Purchaser, or solicit patients previously treated at the address set forth above, including those patients whose names were provided to Purchaser upon closing. Seller will cooperate in attempting to refer active and inactive patients of the Dental Practice to Purchaser, and will not refer such patients to other dentists.

9.11-3. Seller acknowledges that the restrictions imposed by this Covenant are fully

understood and will not preclude it from the gainful practice of dentistry.

9.11-4. Seller agrees that this Covenant is intended to protect and preserve legitimate business interests of Purchaser. It is further agreed that any breach of this Covenant may render irreparable harm to Purchaser. In the event of a breach by Seller, Purchaser shall have available to it all remedies provided by law or equity, including, but not limited to, temporary or permanent injunctive relief to restrain Seller and its past or former dentists from violating this Agreement. If Seller is found to be in breach of any part of the Covenant Not to Compete, Seller must immediately cease practicing at the site wherein the breach is occurring, and Purchaser may seek all injunctive, equitable, and/or legal remedies available to it under law, including damages.

9.11-7. This Covenant Not to Compete constitutes the entire agreement between the parties hereto with respect to the restrictive covenant herein. No change, modification, or amendment shall be valid unless the same is in writing, signed by the parties hereto; and specifically provides for amendment, change, or modification of this Agreement. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the party to be charged.

9.11-8. If any portion of this Covenant shall be, for any reason, declared invalid or unenforceable, the remaining portion or portions shall nevertheless be valid, enforceable, and carried into effect to the fullest extent permitted, and the invalid or unenforceable portion shall be reformed, if possible, so as to be valid and enforceable.

9.11-9 This Covenant shall be subject to and governed by the laws of the State of Illinois.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first written above.

PURCHASER: Mary A. Duetsch, DDS

SELLER: First Dental, PC

By: _____
Todd C. Puseteri, DDS, Its President

EXHIBIT A
ASSIGNMENT AND BILL OF SALE

Pursuant to the Asset Purchase Agreement dated June 21, 2004, (the Agreement) between Mary A. Tujetsch, DDS (Purchaser), and First Dental, PC (Seller), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller does hereby sell to Purchaser, all of Seller's right, title and interest in and to the Assets (as defined in the Agreement) and do hereby transfer, convey, grant and assign to Purchaser, all of Seller's right, title and interest in and to all of the Purchased Assets.

Seller hereby transfers the foregoing Assets free and clear of all liens, claims and encumbrances of every type whatsoever. This instrument will vest in Purchaser good and marketable title to the foregoing Assets, free and clear of all liens, claims and encumbrances.

IN WITNESS WHEREOF, Seller has caused this Assignment and Bill of Sale to be executed and delivered effective as of the close of business on June 30, 2004.

First Dental, PC
By: _____
Todd C. Pusateri, DDS, Its President

EXHIBIT B

LEASE

Dated as of June 28, 2004

by and between

First Dental of Orland Park, PC

LANDLORD

and

Mary A. Tuietsch, DDS

TENANT

7714 159TH STREET, ROOMS __ AND __
ORLAND PARK, ILLINOIS 60462

LEASE COVER SHEET

For purposes of the Lease of which this Lease Cover Sheet is a part, the terms used therein shall have the following meanings:

Landlord:	First Dental of Orland Park, PC
Landlord's Address:	8 West Gartner Naperville, IL 60540
Tenant:	Mary A. Tujetsch, DDS
Tenant's Address:	55 East Washington Street, Suite 2121 Chicago, IL 60602
Leased Premises:	As delineated and described in **Exhibit A** hereto.
Common Address of Premises:	7714 159th Street, ~~Rooms __ and __~~ 110 & 112 Orland Park, IL 60462
Commencement Date:	July 1, 2004
Termination Date:	June 30, 2009

Renewal Options: Provided that Tenant is not in default in the performance of this lease, Tenant shall have the option to renew the lease for an additional term of one (1) or three (3) years commencing at the expiration of the initial lease term. All of the terms and conditions of the lease shall apply during the renewal term except that the base monthly rent shall be determined by landlord. The option shall be exercised by written notice given to Landlord specifying a one (1) or three (3) year term not less than one hundred eighty (180) days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

Additional Rental Option: Provided that Tenant is not in default in the performance of this lease and the co-tenant chiropractic practice does not renew their lease, Tenant shall have the option to lease the entire private space and common space leased by the co-tenant chiropractic practice at the expiration of their lease on mutual terms and conditions, including, but not limited to, landlords base rent for the space.

Purchase Options: If and when Landlord should decide to sell the building, co-tenant chiropractic practice will be offered the first opportunity to purchase the building, upon mutual terms and conditions including, but not limited to, Landlord's price for the

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building, which price is within his sole judgment and determination. If the co-tenant chiropractic practice does not purchase the building, Tenant shall have the next opportunity to purchase the building, upon mutual terms and conditions including, but not limited to , Landlord's price for the building, which price is within his sole judgement and determination. The option shall be exercised by written notice given to Landlord not greater than fourteen (14) days after option to purchase building is given to Tenant. If notice is not given in the manner provided herein within the time specified, this option shall expire.

Base Monthly Rent:

Lease Year	Monthly Rent	
7/1/04-6/30/05	$2,400.00	
7/1/05-6/30/06	2,520.00	
7/1/06-6/30/07	2,646.00	
7/1/07-6/30/08	2,778.00	
7/1/08-6/30/09	2,917.00	

Security Deposit: $2,400.00 plus $2,400.00 deposit of first month's rent plus $375.00 deposit of first month's additional rent.

Exhibit/Schedules: Exhibit A – Description of Premises

License of Illinois Dental Institute: Tenant shall allow access to the leased office space and operatories twelve times yearly to the Illinois Dental Institute (IDI) , which is licensed to utilize said leased premises to present educational seminars. IDI will accommodate Tenant's scheduling, and will not schedule seminars for the times which Tenant schedules patients. IDI will provide Tenant at least sixty days notice of the dates and times at which it will use the premises, during which times no patients of Tenant are to be treated.

IDI will provide, on dates to be mutually agreed, coronal polishing or pit & fissure sealant certification training for up to twelve staff members of Tenant yearly, at no charge to tenant.

Vacation of Leased Premises: At the end of Tenant's lease term, Tenant will remove all of its dental equipment, and repair all holes in walls, floors, or ceilings; professionally cap and close all plumbing, repair any exposed wiring, electrical outlets, or plumbing.

LEASE

This lease, including by this reference its Lease Cover Sheet ("Lease"), is made this 28th day of June, 2004, by and between Landlord and Tenant, who hereby mutually covenant and agree as follows:

I.
GRANT AND TERM

1.0 Grant. Landlord, for and in consideration of the rents herein reserved and the covenants and agreements herein contained on the part of the Tenant to be performed, hereby leases to Tenant, and Tenant hereby lets from Landlord, ~~Rooms __ and __~~ at 7714 159th Street, Orland Park, IL 60462, delineated on **Exhibit A** attached hereto (the "Leased Premises").

1.1 Term. The term of the Lease (the "Term") shall commence on the Commencement Date and shall end on the Termination Date (the "Initial Term"), unless sooner terminated as herein set forth.

II.
POSSESSION

2.0 Possession. Landlord shall deliver possession of the Leased Premises to Tenant on or before the Commencement Date in its condition as of the execution and delivery hereof, reasonable wear and tear excepted. Tenant has examined and inspected the Leased Premises and knows and understands its condition. No representations as to the condition and repair thereof, and no agreements to make any alterations, repairs or improvements in or about the Leased Premises have been made by Landlord, who makes no representations or warranties of any kind or nature whatsoever, whether written or oral, concerning the suitability of the Leased Premises for Tenant's intended use thereof as permitted by the terms of this Lease. Tenant has solely and exclusively relied on its independent investigation and evaluation of all such matters in entering into this Lease.

2.1 Signage. Tenant may place sign of similar material and matching lettering to the top half of existing outside free standing sign. If outside freestanding sign is replaced, Tenant will have first option for sign placement if multiple positions are available.

III.
PURPOSE

3.0 Purpose. The Leased Premises shall be used and occupied only for the operation of a dental practice and incidental office uses and for no other purpose whatsoever.

3.1 Uses Prohibited. Tenant shall not use or occupy the Leased Premises, or permit the Leased Premises to be used or occupied, contrary to any statute, rule, order, ordinance, requirement or regulation applicable thereto, in any manner which would violate any certificate of occupancy affecting the same, cause structural injury to the improvements, cause the value or usefulness of the Leased Premises, or any part thereof, to diminish, or constitute a public or private nuisance or waste.

IV.
RENT

4.0 Rent. Beginning with the Commencement Date, and continuing on the first day of each Month during the Initial Term and during any Renewal Term, as the case may be, hereof, Tenant shall pay the Monthly Rent to Landlord, at such place or places as Landlord may designate in writing from time to time, and in default of such designation then at the Landlord's Address. Any Monthly Rent which is not paid by the fifth day of each month shall bear interest at a rate equal to eighteen percent (18%) per annum from the due date until paid and a late fee of 5% of the Monthly Rent shall become payable as Additional Rent. Landlord's right to receive the interest and late fee described in this Section 4.0 shall not, in any way, limit any of Landlord's other remedies available under this Lease, at law or in equity.

4.1 Additional Rent. For Tenant's proportionate share of common expenses of the building, including but not limited to office cleaning and supplies, all utilities including water, janitorial services, gas and electric, waste removal, snow removal and lawn and landscape maintenance, Tenant shall pay to landlord estimated additional rent of $375.00 per month with the regular monthly rent and shall be subject to the same late payment terms as set forth above. Additional rent shall be analyzed every six months and any overpayment or underpayment shall be determined and paid between the parties. Copies of all bills used in calculating additional rent will be provided to tenant upon written request. The Tenant shall provide her own phone system and all other usual and customary office equipment.

4.2 Shared Expenses: Tenant will share in the expense of the following building expenses, by reimbursing Sharing Tenant 50% of their total expenditure: light bulbs, paper towels, toilet paper, facial tissue, garbage bags, hand soap.

V.
SECURITY DEPOSIT

5.0 Security Deposit. Tenant shall deposit with Landlord, upon the execution of this Lease, the Security Deposit as security for the full and faithful performance by Tenant of each and every term, provision, covenant, and condition of this Lease. If Tenant defaults in respect to any of the terms, provisions, covenants and conditions of this Lease including, but not limited to, payment of the Monthly Rent and Additional Rent, Landlord may use, apply, or retain the whole or any part of the Security Deposit for the payment of any such Monthly Rent or Additional Rent which is not paid when due, or for any other sum which the Landlord may expend or be required to expend by reason of Tenant's default including, without limitation, any damages or deficiency in the reletting of the Leased Premises, whether such damages or deficiency shall have accrued before or after any re-entry by Landlord. If any of the Security Deposit shall be so used, applied or retained by Landlord at any time or from time to time, Tenant shall promptly, in each such instance, on written demand therefor by Landlord, pay to Landlord such additional sum as may be necessary to restore the Security Deposit to the original amount set forth in the first sentence of this paragraph. If Tenant shall fully and faithfully comply with all the terms, provisions, covenants, and conditions of this Lease, the Security Deposit, or any balance thereof, shall be returned to Tenant within thirty (30) days after all of the following has occurred:

(a) the time fixed as the expiration of the Initial Term or the last Renewal Term, whichever the case may be; and

(b) the removal of Tenant and its property from the Leased Premises; and

(c) the surrender of the Leased Premises by Tenant to Landlord in accordance with this Lease; and

(d) All Additional Rent due hereunder has been computed by Landlord and paid by

Tenant.

VI.

INSURANCE

6.0 Tenant's Insurance Coverage.

(a) Tenant shall maintain general commercial liability insurance covering loss, cost or expense by reason of injury to or death of persons or damage to or destruction of property by reason of the use and occupancy of the Leased Premises by Tenant or Tenant's contractors, suppliers, employees, agents, customers, business invitees, subtenants, licensees and concessionaires ("Tenant's Invitees"). Such insurance shall have limits of at least $1,000,000 for each occurrence of bodily injury and for each occurrence of property damage.

6.1 Policy Requirements. All insurance required to be maintained by Tenant shall be issued by insurance companies authorized to do insurance business in the State of Illinois and reasonably acceptable to Landlord. A certificate of insurance evidencing the insurance required under this Article VI shall be delivered to Landlord prior to Tenant taking possession of the Leased Premises. No such policy shall be subject to cancellation or modification without thirty (30) days prior written notice (or such shorter period as is required by law in the event of cancellation for nonpayment of premiums) to all Interest Holders (as defined in Section 6.2). Tenant shall furnish Landlord with a replacement certificate with respect to any insurance not less than thirty (30) days prior to the expiration of the then current policy.

6.2 Additional Insured/Loss Payee. Landlord and any mortgagee or other interest holder designated in writing by Landlord ("Interest Holders") shall be named as a named insured party under Tenant's policies of general commercial liability insurance for the Leased Premises. Landlord shall be named the loss payee under Tenant's property insurance covering the improvements on the Leased Premises.

6.3 Increases in Insurance Coverage. Landlord may, from time to time during the term, upon not less than thirty (30) days prior written notice to Tenant, require Tenant to provide increased amounts of insurance coverage under the types of insurance policies described in this Article VI, only if such additional amounts of insurance are required by any lender holding a mortgage or similar security interest in the Leased Premises.

6.4 Mutual Waiver of Subrogation. Landlord and Tenant and their successors in interest hereby waive any legal rights each may later acquire against the other party for the loss of or damage to their respective property or to property in which they may have an interest, which loss or damage is caused by an insured hazard arising out of or in connection with the Building during the term.

6.5 Indemnification of Interest Holders. Tenant shall defend and save the Interest Holders (as defined in Section 6.2) harmless from any and all losses which may occur with respect to any person, entity, property or chattels on or about the Building, or to any other property, resulting from Tenant's acts or omissions, except (i) when such loss results from the

willful conduct, misconduct or gross negligence of Landlord, its agents, employees or contractors, or (ii) to the extent of any insurance proceeds received by Landlord or payable under Landlord's insurance.

VII.
DAMAGE OR DESTRUCTION

7.0 Restoration of the Leased Premises. If the improvements on the Leased Premises are partially damaged or destroyed during the Term, except during the last year of the Term, then, except as otherwise provided in Section 7.1 herein below, (i) Landlord, at its expense, shall repair, restore or rebuild the Building, excluding Tenant's Improvements and the improvements of the Building's other tenants, to substantially the condition it was in immediately prior to such damage or destruction; and (ii) Tenant, at its expense, shall repair, restore or rebuild the Tenant Improvements to substantially the condition they were in immediately prior to such damage or destruction, if such repairs are required due to her acts or omissions, and not that of Landlord or third parties. Tenant's rent and other charges due under this Lease shall abate on a proportionate basis to the extent that the Leased Premises are rendered unusable during any such period of damage, destruction, repair or restoration, until such time as Landlord has completed its repair, restoration or rebuilding. All such repair, restoration or rebuilding shall be performed with due diligence in a good and workmanlike manner and in accordance with applicable law and plans and specifications for such work reasonably approved by Landlord. Notwithstanding the foregoing, if the Building is damaged in an amount equal to fifty percent (50%) or more of the replacement cost of the Building, Landlord may terminate this Lease by giving Tenant written notice of termination within ninety (90) days of the occurrence of such damage or destruction. If the Leased Premises are partially damaged or destroyed during the last year of the Term, Landlord may terminate this Lease as of the date of the damage or destruction by giving Tenant at least thirty (30) days written notice of such termination of the Lease.

7.1 Option Not to Restore. Notwithstanding Section 7.0 hereinabove, if during the last year of the Term, or during the last year of any new term, the Leased Premises are damaged in an amount equal to fifty percent (50%) or more of the replacement cost of the Tenant Improvements, Tenant may terminate this Lease by giving Landlord written notice of termination within thirty (30) days after the occurrence of such damage or destruction. Upon termination of this Lease by Tenant, Landlord shall be entitled to receive any insurance proceeds paid with respect to the leasehold improvements on the Leased Premises under the property insurance policy required under Section 6.0(b) hereinabove.

VIII.
CONDEMNATION

8.0 Condemnation. If the whole of the Leased Premises shall be taken or condemned for a public or quasi-public use or purpose by any competent authority or if a portion of the Leased Premises shall be so taken and, as a result thereof, the balance cannot be used for the purpose as provided for in Article III, then in either of such events, the Lease term shall terminate upon delivery of possession to the condemning authority and any award, compensation or damage

(hereinafter sometimes called the "Award"), shall be paid to and be the sole property of Landlord whether such award shall be made as compensation for diminution of the value of the leasehold or the fee of the Leased Premises or otherwise and Tenant hereby assigns to Landlord all of Tenant's right, title, and interest in and to any and all such award.

IX.
MAINTENANCE AND REPAIRS

9.0 Maintenance. Landlord, at its expense, shall maintain the Building in good repair and condition during the term. Any maintenance or repair work by Landlord shall be performed in such manner as will minimize undue interference with Tenant's normal operations. Tenant shall provide Landlord with prompt notice of any damage to, or defective condition in, any part or appurtenance of the Building. Tenant will be responsible to change extinguished light bulbs in private area.

9.1 Alterations. Tenant shall not create any openings in the roof or exterior walls, nor shall Tenant make any material alterations or additions to the Leased Premises without the prior written consent of Landlord. Upon completion of any work by or on behalf of Tenant, Tenant shall provide Landlord with such documents as Landlord reasonably may require (including, without limitation, sworn contractor's statements and supporting lien waivers) evidencing payment in full for such work.

X.
ASSIGNMENT AND SUBLETTING

10.0 Consent Required. Tenant may not, without Landlord's prior written consent, which consent will not be unreasonably withheld (a) assign, convey, or mortgage this Lease or any interest under this Lease; (b) allow any transfer thereof or any lien upon Tenant's interest voluntarily, involuntarily, or by operation of law; (c) sublet the Leased Premises or any part thereof; or (d) permit the use or occupancy of the Leased Premises or any part thereof by anyone other than Tenant and its employees. No permitted assignment or subletting shall relieve Tenant of Tenant's covenants and agreements hereunder and Tenant shall continue to be liable as principal, and not as a guarantor or surety, to the same extent as though no assignment or subletting had been made. Landlord's consent to any assignment, subletting or transfer shall not constitute a waiver of Landlord's right to withhold its consent to any future assignment, subletting or transfer.

XI.
LIENS AND ENCUMBRANCES

11.0 Encumbering Title. Tenant shall not do any act which shall in any way encumber the title of Landlord in and to any claim by way of lien or encumbrance, whether by operation of law or by virtue of any express or implied contract by Tenant. Any claim to, or lien upon, the Leased Premises arising from any act or omission of Tenant shall accrue only against the leasehold estate of Tenant and shall be subject and subordinate to the paramount title and rights

of Landlord in and to the Leased Premises.

11.1 Liens and Right to Contest. Tenant shall not permit the Leased Premises to become subject to any mechanics', laborers', or materialmen's lien on account of labor or material furnished to Tenant of claimed to have been furnished to Tenant in connection with work or any character performed or claimed to have been performed on the Leased Premises by, or at the direction or sufferance of, Tenant; provided, however, that Tenant shall have the right to contest, in good faith and with reasonable diligence, the validity of any such lien or claimed lien; provided, however, that on final determination of the lien or claim for lien, Tenant shall immediately pay any judgment rendered with all proper costs and charges and shall have the lien released and any judgment satisfied.

XII.
INDEMNITY AND WAIVER

13.0 Indemnity. Tenant will protect, indemnify, and hold harmless Landlord from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and expenses imposed upon or incurred by or asserted against Landlord by reason of any accident, injury to, or death of persons or loss of or damage to property occurring on or about the Leased Premises or any part thereof or the adjoining properties, sidewalks, curbs, streets or ways, or resulting from any act or omission of Tenant or anyone claiming by, through, or under Tenant.

Indemnity. Landlord will protect, indemnify, and hold harmless Tenant from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and expenses imposed upon or incurred by or asserted against Tenant by reason of any accident, injury to, or death of persons or loss of or damage to property occurring on or about the Leased Premises or any part thereof or the adjoining properties, sidewalks, curbs, streets or ways, or resulting from any act or omission of Landlord or anyone claiming by, through, or under Landlord.

13.1 Waiver of Certain Claims. Tenant waives all claims it may have against Landlord for damage or injury to person or property sustained by Tenant or any persons claiming through Tenant or by any occupant of the Leased Premises, or by any other person, resulting from any part of the Leased Premises or any of its improvements, equipment, or appurtenances becoming out of repair, or resulting from any accident on or about its improvements, equipment, or appurtenances becoming out of repair or resulting from any accident on or about the Leased Premises or resulting directly or indirectly from any act or neglect of any person, other than Landlord. All personal property belonging to Tenant or any occupant of the Leased Premises that is in or on any part of the Leased Premises shall be there at the risk of Tenant or of such other person only and Landlord shall not be liable for any damage thereto or for the theft or misappropriation thereof.

VIII
RIGHTS RESERVED TO LANDLORD

14.0 Rights Reserved to Landlord. Without limiting any other rights reserved or available to Landlord under this Lease, at law or in equity, Landlord, on behalf of itself and its agents, reserves the following rights, to be exercised at Landlord's election:

(a) To conduct reasonable inspections of the Leased Premises during normal business hours of Tenant;

(b) To show the Leased Premises to prospective purchasers, mortgagees, or other persons having a legitimate interest in viewing the same, and, at any time within one (1) year prior to the expiration of the Term, to persons wishing to rent the Leased Premises; and

(c) During the last thirty (30) days of the Term, if during or prior to that time Tenant vacates the Leased Premises, to decorate, remodel, repair, alter, or otherwise prepare the Leased Premises for new occupancy.

Landlord may enter upon the Leased Premises for any and all of the said purposes and may exercise any and all of the foregoing rights hereby reserved without being deemed guilty of an eviction or disturbance of Tenant's use or possession of the Leased Premises and without being liable in any manner to Tenant.

XIV.
QUIET ENJOYMENT

15.0 Quiet Enjoyment. So long as no event of default shall have occurred and be continuing under this Lease, except as specifically permitted thereunder, Tenant's quiet and peaceable enjoyment of the Leased Premises shall not be disturbed or interfered with by Landlord or by any person claiming by, through, or under Landlord.

XV.
SUBORDINATION OR SUPERIORITY

16.0 Subordination or Superiority. The rights and interest of Tenant under this Lease shall be subject and subordinate to any mortgage or trust deed creating a mortgage that may be placed upon the Leased Premises by Landlord and to any and all advances to be made thereunder, and to the interest thereon, and all renewals, replacements, and extensions thereof, if the mortgagee or trustee named in any such mortgage or trust deed shall elect to subject or subordinate the rights and interest of Tenant under this Lease to the lien of its mortgage or trust deed and shall agree to recognize this Lease of Tenant in the event of foreclosure if Tenant is not in default (which agreement may, at such mortgagee's option, require attornment by Tenant). Any such mortgagee or trustee may elect to give the rights and interest of Tenant under this Lease priority over the lien of its mortgage or deed of trust. In the event of either such election and upon notification by such mortgagee or trustee to Tenant to that effect, the rights and interest of Tenant under this Lease shall be deemed to be subordinate to, or to have priority over, as the case

XVII.
REMEDIES

18.0 Defaults. Tenant further agrees that any one or more of the following events shall be considered events of default, as such term is used herein, that is to say, if:

(a) Tenant shall be adjudged an involuntary bankrupt, or a decree or order approving, as properly filed, a petition or answer filed against Tenant asking reorganization of Tenant under the Federal bankruptcy law as now or hereafter amended, or under the laws of any State, shall be entered and any such decree or judgment or order shall not have been vacated or set aside within sixty (60) days from the date of the entry or granting thereof; or

(b) Tenant shall file or admit the jurisdiction of the court, and the material allegations contained in, any petition in bankruptcy or any petition pursuant or purporting to be pursuant to the Federal bankruptcy laws as now or hereafter amended or Tenant shall institute any proceedings or shall give its consent to the institution of any proceedings for any relief of Tenant under any bankruptcy or insolvency laws or any laws relating to the relief of debtors, or readjustment of indebtedness; or

(c) Tenant shall make any assignment for the benefit of creditors or shall apply for or consent to the appointment of a receiver for Tenant or any of the property of Tenant; or

(d) A decree or order appointing a receiver of the property of Tenant shall be made and such decree or order shall not have been vacated or set aside within sixty (60) days from the date of entry or granting thereof; or

(e) Tenant shall default in any payments of Monthly Rent or Additional Rent or in any other payment required to be made by Tenant hereunder when due as herein provided and such default shall continue for five (5) days after notice thereof in writing to Tenant; or

(f) Tenant shall fail to contest the validity of any lien or claimed lien or, having commenced to contest the same, shall fail to prosecute such contest with diligence, or shall fail to have the same released and satisfy any judgment rendered thereon and such default shall continue for thirty (30) days after notice thereof in writing to Tenant; or

(g) Tenant shall default in any of the other covenants and agreements herein contained to be kept, observed, and performed by Tenant and such default shall continue for thirty (30) days after notice thereof in writing to Tenant.

18.1 Remedies. Upon the occurrence of any one or more of such events of default,

Landlord may, at its election, terminate this Lease or terminate Tenant's right to possession only, without terminating the Lease. Upon termination of this Lease or of Tenant's right to possession, Landlord may re-enter the Leased Premises with or without process of law using such force as may be necessary and remove all persons, fixtures, and chattels therefrom and Landlord shall not be liable for any damages resulting therefrom. Upon termination of the Lease, or upon any termination of Tenant's right to possession without termination of the Lease, Tenant shall surrender possession and vacate the Leased Premises immediately and deliver possession thereof to the Landlord and Tenant hereby grants to Landlord the full and free right, without demand or notice of any kind to Tenant (except as hereinabove expressly provided for), to enter into and upon the Leased Premises in such event with or without process of law and to repossess the Leased Premises as Landlord's former estate and to expel or remove Tenant and any others who may be occupying or within the Leased Premises without being deemed in any manner guilty of trespass, eviction, or forcible entry or detainer and without incurring any liability for any damage resulting therefrom and without relinquishing Landlord's rights to rent or any other right given to Landlord hereunder or by operation of law. Upon termination of this Lease, Landlord shall be entitled to recover as damages all rent and other sums due and payable by Tenant on the date of termination, plus (1) an amount equal to the value of the rent and other sums provided herein to be paid by Tenant for the residue of the Term hereof, less the fair rental value of the Leased Premises for the residue of the Term (taking into account the time and expenses necessary to obtain a replacement tenant or tenants, including expenses hereinafter described relating to recovery of the Leased Premises, preparation for reletting, and for reletting itself), and (2) the cost of performing any other covenants to be performed by Tenant. If Landlord elects to terminate Tenant's right to possession only, without terminating this Lease, Landlord may, at Landlord's option, enter into the Leased Premises, remove Tenant's signs and other evidences of tenancy, and take and hold possession thereof as hereinabove provided, without such entry and possession terminating this Lease or releasing Tenant, in whole or in part, from Tenant's obligations to pay the rent hereunder for the full term or from any other of its obligations under this Lease. Landlord shall use its reasonable efforts to relet all or any part of the Leased Premises for such rent and upon terms as shall be satisfactory to Landlord (including the right to relet the Leased Premises for a term greater or lesser than that remaining under the Term, and the right to relet the Leased Premises as a part of a larger area and the right to change the character or use made of the Leased Premises). For the purpose of such reletting, Landlord may decorate or make any repairs, changes, alterations, or additions in or to the Leased Premises that may be necessary or convenient. If Landlord does not relet the Leased Premises, after having undertaken its reasonable efforts to do so, Tenant shall pay to Landlord on demand damages equal to the amount of the rent and other sums provided herein to be paid by Tenant for the remainder of the Term. If the Leased Premises are relet and a sufficient sum shall not be realized from such reletting, after paying all of the expenses of such decorations, repairs, changes, alterations, additions, the expenses of such reletting and the collection of the rent accruing therefrom (including, but not by way of limitation, attorneys' fees and brokers' commissions), to satisfy the rent herein provided to be paid for the remainder of the Term, Tenant shall pay to Landlord on demand any deficiency and Tenant agrees that Landlord may file suit to recover any sums falling due under the terms of this Section from time to time.

18.2 Remedies Cumulative. No remedy herein or otherwise conferred upon or reserved

to Landlord shall be considered to exclude or suspend any other remedy but the same shall be cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute, and every power and remedy given by this Lease to Landlord may be exercised from time to time and so often as occasion may arise or as may be deemed expedient.

18.3 No Waiver. No delay or omission of Landlord to exercise any right or power arising from any default shall impair any such right or power or be construed to be a waiver of any such default or any acquiescence therein. No waiver or any breach of any of the covenants of this Lease shall be construed, taken, or held to be a waiver of any other breach or waiver, acquiescence in, or consent to any further or succeeding breach of the same covenant. The acceptance by Landlord of any payment of rent or other charges hereunder after the termination by Landlord of this Lease or of Tenant's right to possession hereunder shall not, in the absence of agreement in writing to the contrary by Landlord, be deemed to restore this Lease or Tenant's right to possession hereunder, as the case may be, but shall be construed as a payment on account, and not in satisfaction, of damages due from Tenant to Landlord.

18.4 Costs Relating to Default. The Tenant shall pay, upon demand, all of Landlord's costs, charges, and expenses, including, but not limited to attorney's fees, agents and others retained by Landlord in connection to performance or enforcement of any of Tenant's obligations under this Lease relating to any litigation, negotiation, or transaction in which Tenant causes the Landlord to become involved or concerned.

XVIII.
TENANT'S OBLIGATIONS

19.0 Compliance with Laws. Tenant shall, at its sole expense, comply with and conform to all of the requirements of all governmental authorities having jurisdiction over the Building which relate in any way to the condition, use and occupancy of the Leased Premises throughout the entire Term of this Lease, including but not limited to obtaining any license or permit which may be required. Without limitation of the foregoing, Tenant covenants and agrees not to bring into the Leased Premises or to use, store, treat or dispose, or permit the use, storage, treatment or disposal, in the Leased Premises of (i) any hazardous substance or regulated materials as defined under any present or future federal, state or local law, rule or regulation or (ii) any explosives or any flammable substances, including, but not limited to, gasoline, liquefied petroleum gas, turpentine, kerosene and naphtha (the substances and materials referred to in clauses (i) and (ii) hereof are collectively referred to herein as "Hazardous Materials").

XIX.
MISCELLANEOUS

20.0 Estoppel Certificates. Tenant shall, at any time and from time to time upon not less than five (5) days prior written request from Landlord, execute, acknowledge, and deliver to Landlord, in form reasonably satisfactory to Landlord and/or Landlord's mortgagee, a written statement certifying, if true, that Tenant has accepted the Leased Premises, that this Lease is

unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), that Landlord and Tenant are not in default hereunder, the date to which the rental and other charges have been paid in advance, if any, or such other accurate certification as may reasonably be required by Landlord or Landlord's mortgagee; and agreeing to give copies to any mortgagee of Landlord of all notices by Tenant to Landlord. It is intended that any such statement delivered pursuant to this subsection may be relied upon by any prospective purchaser or mortgagee of the Building and their respective successors and assigns.

20.1 Landlord's Right to Cure. Landlord may, but shall not be obligated to, cure any default by Tenant (specifically including, but not by way of limitation, Tenant's failure to obtain insurance, make repairs, or satisfy lien claims); and whenever Landlord so elects, all costs and expenses paid by Landlord in curing such default, including without limitation reasonable attorneys' fees, shall be so much Additional Rent due on the next rent date after such payment.

20.2 Amendments Must Be In Writing. None of the covenants, terms, or conditions of this Lease, to be kept and performed by either party shall in any manner be altered, waived, modified, amended, changed, or abandoned except by a written instrument, duly signed, acknowledged, and delivered by the other party.

20.3 Notices. All notices to or demands upon Landlord or Tenant, desired or required to be given under any of the provisions hereof, shall be in writing. Any notices or demands from Landlord to Tenant shall be deemed to have been duly and sufficiently given if: (i) personally delivered, to Tenant at Tenant's Address; or (ii) transmitted by confirmed facsimile transmission to Tenant's Fax Number, and/or mailed by United States registered or certified mail in an envelope properly stamped and addressed to Tenant's Address, or at such address or fax number as Tenant may theretofore have furnished by written notice to Landlord, and any notices or demands from Tenant to Landlord shall be deemed to have been duly and sufficiently given if: (i) personally delivered to Landlord at Landlord's Address, or (ii) transmitted by confirmed facsimile transmission to Landlord's Fax Number and/or mailed by United States registered or certified mail in an envelope properly stamped and addressed to Landlord at Landlord's Address or at such other address or fax number as Landlord may theretofore have furnished by written notice to Tenant. The effective date of such notice, if mailed in the manner aforesaid, shall be three (3) days after delivery of the same to the United States Postal Service.

20.4 Relationship of Parties. Nothing contained herein shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership, or of joint venture by the parties hereto, it being understood and agreed that no provisions contained in this Lease nor any acts of the parties hereto shall be deemed to create any relationship other than the relationship of Landlord and Tenant.

20.5 Captions. The captions of this Lease are for convenience only and are not to be construed as part of this Lease and shall not be construed as defining or limiting in any way the scope or intent of the provisions hereof.

20.6 Severability. If any term or provision of this Lease shall to any extent be held invalid or unenforceable, the remaining terms and provisions of this Lease shall not be affected thereby but each term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

20.7 Law Applicable. This Lease shall be construed and enforced in accordance with the laws of the State of Illinois.

20.8 Covenants Binding on Successors. All of the covenants, agreements, conditions, and undertakings contained in this Lease shall extend and inure to and be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties hereto the same as if they were in every case specifically named and wherever in this Lease reference is made to either of the parties hereto, it shall be held to include, and apply to, wherever applicable, the heirs, executors, administrators, successors and assigns of such party. Nothing herein contained shall be construed to grant or confer upon any person or persons, firm, corporation or governmental authority other than the parties hereto, their heirs, executors, administrators, successors and assigns, any right, claim or privilege by virtue of any covenant, agreement, condition or undertaking in this Lease contained.

20.9 Landlord Means Owner. The term "Landlord", as used in this Lease, so far as covenants or obligations on the part of Landlord are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Building, and in the event of any transfer or transfers of the title to such fee, Landlord herein named (and in case of any subsequent transfer or conveyances, the then grantor) shall be automatically freed and relieved, from and after the date of such transfer or conveyance, of all liability as respects the performance of any covenants or obligations on the part of Landlord contained in this Lease thereafter to be performed; provided that any funds in the hands of such Landlord or the then grantor at the time of such transfer, in which Tenant has an interest, shall be turned over to the grantee, and any amount then due and payable to Tenant by Landlord or the then grantor under any provisions of this Lease, shall be paid to Tenant.

20.10 Attorneys' Fees: In case suit should be brought for recovery of the premises, or for any sum due hereunder, or because of any act which may arise out oif the possession of the premises, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including reasonable attorneys' fees.

20.11 Common Space: This Lease contemplates the use of private offices by the Lessee of approximately 750 square feet, and the shared use of common area, including reception, hallways, and bathrooms, which common area total approximately 1,050 square feet. Tenant agrees to assist in maintaining the common areas in a neat and clean condition. Lessee will lock doors and windows, reset the thermostat, turn off lights and equipment after her work day, if she completes her appointments after other tenants have vacated the Premises for the day.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease the day and year first above written.

TENANT:

Mary A. Fujetsch, DDS

LANDLORD:

First Dental of Orland Park, PC by Todd C. Pusateri, DDS, President

EXHIBIT E

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	06 CH 11607 (Transferred to Law Division) Hon. Charles R. Winkler

AFFIDAVIT OF DR. TODD C. PUSATERI

Dr. Todd C. Pusateri, being of the age of majority, and being first placed under oath, deposes and states as follows:

1. I am authorized to furnish this Affidavit and competent to testify to the matters set forth in this Affidavit.

2. The facts set forth in this Affidavit are within my personal knowledge.

3. If called upon as a witness, I would and could competently testify to all facts stated in this Affidavit.

4. I am a dentist, and have been licensed to practice dentistry in the State of Illinois since July 1994, and in the State of Florida since March 2006.

5. In the 16 years since I first become a licensed dentist, I have opened and successfully operated three dental practices in the Chicago area, and one dental practice in Fort Lauderdale, Florida.

6. In October 1996, I opened and established a dental practice at 8 W. Gartner Road in Naperville, Illinois (the "Naperville Practice")

7. In March 1998, I opened and established a dental practice at 7714 W. 159th Street in Orland Park, Illinois -- the dental practice that is the subject of this legal action (hereinafter

the "Dental Practice").

8. In early 2000, I opened and established a dental practice at 129 S. Roselle Road in Schaumburg (the "Schaumburg Practice").

9 In October 2006, I opened and established a dental practice at 2500 East Commercial Boulevard in Fort Lauderdale, Florida (the "Fort Lauderdale Practice").

10. I sold the Schaumburg Practice to Dr. Richard Purdue in the summer of 2005

11. The Schaumburg Practice remains owned by Dr. Purdue and continues to operate as a viable, going concern.

12. The Fort Lauderdale Practice and Naperville Practice are still owned by me, and still exist as profitable, going concerns.

13 All of the four dental practices that I founded continue to exist as profitable, going concerns except the Dental Practice, which I sold to the Plaintiff in June 2004, and which appears to have been abandoned, in or around October 2007.

14. On March 31, 2001, I contracted to outsource the issuance and collection of patient bills for the Naperville, Orland Park, and Schaumburg Practices to First Pacific Corporation, a specialized third-party service provider headquartered in Salem, Oregon ("FPC")

15. A true and correct copy of the contract with FPC is attached hereto as Exhibit 1

16 Pursuant to the Sales and Service Agreement, "[i]n order to facilitate [the Practice's] sale of accounts receivable to FPC, and as a part of FPC's service and exchange of data," the three Chicago-area Practices agreed to use a computer system and software package furnished by FPC. See Id.

17. Pursuant to the Sales and Service Agreement, FPC placed a computer terminal in each of the three Chicago-area Practices into which information about patients and patient

treatment -- such as contact and billing information for patients, and date and type of treatments rendered, was entered, and stored.

18. At all times, the FPC computer terminals ("FPC Terminals") and FPC Software running thereon remained the exclusive property of FPC.

19. In addition to acting as a conduit for third party billing, contained database software that aggregated and stored patient information locally, and had the capacity to generate virtually unlimited patient lists and reports based on that information.

20. Information about patients and treatment of patients in the three Chicago-area Practices, including the Dental Practice, was also maintained in files that were stored on the Premises, as required by the Illinois Dental Practice Act (the "Act").

21. As required by the Act, information about any treatment rendered in the Dental Practice was entered, in sufficient detail for identification purposes, into non-electronic, paper files ("Patient Charts").

22. Each Patient Chart also contained a Patient Information Sheet providing the patient's name, address, telephone number, insurance information, and pertinent medical and dental history.

23. At all times before Tujetsch paid the balance of the purchase price and received keys to the Dental Practice on June 27, 2004, and officially took possession of the Dental Practice, on June 30, 2004, a Patient Chart for each patient who had received dental care in the Dental Practice was stored on shelves in the Dental Practice.

24. After FPC services began, on April 1, 2001, Patient Charts in the Dental Practice were updated and maintained, as required by Section 50, but were not manually reviewed in

order to compile patient lists, generate fee statements, or generate reports about such things as aggregate patient traffic, production, or fees billed.

25. The FPC Terminal in the Dental Practice provided ready, electronic access to patient lists, fee statements, and reports about such things as aggregate patient traffic, production, and fees billed, all based on the patient data and patient treatment data that had been entered therein.

26. The FPC Terminal in the Dental Practice could be queried to generate lists of all patients treated in the Dental Practice or subsets of patients, based on selective criteria.

27. The FPC Terminal in the Dental Practice could also be queried to generate various reports, including a report called "Practice Overview," that included a count of "active patients."

28. Documentation of the First Pacific software states that the number of "active patients" in the Practice Overview as of a given date is the number of patients treated in the practice during the previous 24 months.

29. A true and correct copy of the documentation defining "active patient" as used by the FPC Software is attached hereto as Exhibit 2.

30. The definition of active patient used by the FPC Software is consistent with the definition of "active patient" accepted and promulgated by the American Dental Association. Exh 3.

31. On April 29, 2004, I used the FPC computer terminal in the Orland Park Office to generate two "Practice Overviews" as of two dates, December 31, 2003 and April 29, 2004.

32 A true and correct copy of those Practice Overviews is attached hereto as Exhibit 4

33. According to the Practice Overview as of December 30, 2003, the Dental Practice had 1,223 "active patients," meaning that the Dental Practice had treated 1,223 patients in the 24 months before December 2003.

34. According to the Practice Overview as of April 29, 2004, the Dental Practice had 1,227 "active patients," meaning that the Dental Practice had treated 1,227 patients in the 24 months before April 2004.

35. As of June 2004, the Dental Practice employed a dental hygienist (Jackie Galban), one dentist (Dr. Richard Purdue), a receptionist (Janice Johnson), a dental assistant (Tina Buben-Dowling), and an office bookkeeper (Marge Kelly).

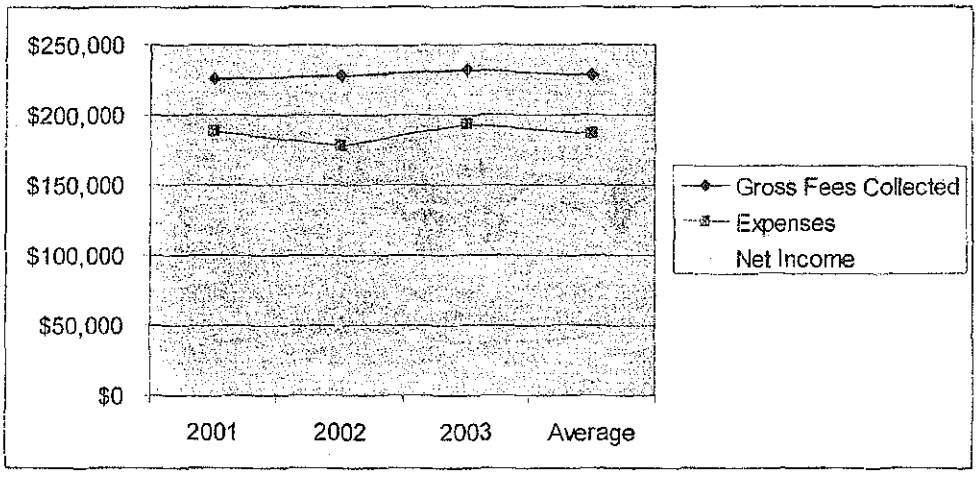
36. By 2004, the Dental Practice was consistently collecting stabilized patient fees of approximately a quarter of a million dollars a year, as it had done in the three preceding years.

37. After expenses (averaging $186,117 in those three years), the Dental Practice yielded average annual net income, after payments to Dr. Purdue, of approximately $40,000:

	2001	2002	2003	Average
Total Income (Patient Fees Collected)	$225,037	$227,497	$231,508	$228,014
Total Expenses	$187,521	$177,557	$193,273	$186,117
Net Income	$37,516	$49,940	$38,235	$41,897

38. The average monthly total income for 2001 through 2003 was $19,001.17.

39. The consistency of the year-to-year performance of the Dental Practice in the three years leading up to its sale to Tujetsch can be represented graphically, as follows:



40. By the year 2000, I had established, and was managing the Naperville Practice, the Dental Practice, and the Schaumburg Practice.

41. By 2004, I was considering moving my family residence to Florida, and establishing a new dental practice there.

42. By 2004, I wished to reduce the number of my Chicago-area dental practices because I did not want to manage three dental practices in Chicago, and a fourth practice in Florida.

43. I therefore decided, in early 2004, to sell at least one of the three Chicago-area Practices.

44. In early 2004, I listed the Dental Practice for sale.

45. In April 2004, Tujetsch saw an advertisement for the sale of the Dental Practice and expressed an interest in purchasing it.

46. On April 18, 2004, Tujetsch executed a confidentiality agreement in which she agreed to preserve the confidentiality of books and records of the Dental Practice, including "[a]ny financial data . . . which may include such items as value of practice under consideration . . . [or] [p]atient or client lists made known to me during negotiations." See Exh. 5

47. As of April 18, 2004, information about all patients treated in the Dental Practice since it first opened its doors in March 1998 was recorded in Patient Charts stored on shelves in the Dental Practice, as required by law.

48. Information about all patients of the Dental Practice and detailed information about all patient treatments rendered after March 30, 2001, was also accessible from the FPC Terminal.

49 After signing the April 18, 2004 confidentiality agreement, Tujetsch was given access to books and records of the Dental Practice, including the FPC Terminal and all Patient Charts.

50. Because the FPC Terminal and FPC Software remained at all times property of FPC, it was expressly excluded from the assets being conveyed by Seller to Tujetsch pursuant to the Agreement.

51. By means of a letter dated Saturday, May 1, 2004, Tujetsch advised me that she was willing to offer $150,000 for the Dental Practice, based on her evaluation of the Dental Practice, and her consultation with financial and dental experts.

52. Tujetsch's letter stated that Tujetsch's goal in buying the Dental Practice was to "grow" the practice and expand it.

53 Tujetsch's letter expressed concern that the practice had "leveled off, with no indication of future growth," and that this suggested potential "financial problems" for the Practice in the future

54 However, Tujetsch indicated that she believed that the Dental Practice could be "turned around" through her hard work

55. Notwithstanding her professed concerns about the Practice's lack of growth and potential for "financial problems ahead," Tujetsch offered to pay $150,000 for the Practice:

> Thank you for coordinating with your father in order to allow my father to view First Dental. I have spent a considerable amount of time with my financial advisors and dental experts. At this point in time, I am prepared to make an offer to purchase your dental practice.
>
> My experts have evaluated First Dental and I have been informed that the practice has leveled off, with no indication of future growth. This indicates the potential for financial problems ahead. Despite this fact, I believe that the practice could be turned around through hard work. If I am going to invest my time and talent in this venture, it is important that I look at this project in terms of a long term projection. My experts have evaluated the practice to be worth an estimated $144,500.00. I am prepared to offer you $150,000.00. I believe this offer to be fair and mutually beneficial.
>
> I am concerned about a number of issues in the practice. They are the configuration of the operatories, lack of sinks in the operatories, carpet in the operatories, percentage of wasted rental space in the office floor plan, lack of personal office, lack of prosthetic services being rendered; and inability for growth in existing floor plan.
>
> If I am to purchase the office and proceed with my long term goal, I would like to rent 50% or 1200 feet of the new office addition. This would allow for a more efficient floor plan and office design. It is very confusing and inefficient with the chiropractors occupying the perimeter of the, office area. In addition, the chiropractors occupy the prime space in the office, despite the fact that they are paying identical rent. By renting the space in the new addition currently under construction, I could foresee myself as a long term tenant in your building. Given the current situation, I would have to seriously consider relocating the dental office after a few years. I am a loyal person and I would prefer to be honest with you from the beginning and try to establish a long lasting business relationship. Obviously, I would prefer giving the rent to you.
>
> My long term goal is to grow the practice and expand, eventually adding specialists to the practice. The current set up would not allow for a good flow of traffic as we would be very congested in this space.
>
> If you are interested in proceeding further, we can negotiate payment terms and interest. I am requesting a timely response as I need to finalize my decision. Please contact me at (219) 924-8018. I look forward to hearing from you soon. I appreciate all of your efforts and expertise. Thank you for your time and cooperation.

Exh. 6.

56. On Monday, May 10, 2004, Tujetsch sent me letter in which she increased her offer for the Dental Practice from $150,000, to $165,000.

57. A true and correct copy of the May 10, 2004 letter is attached hereto as Exhibit 7.

58. The May 10 letter states, in pertinent part, as follows:

> I hope your weekend was enjoyable. I received your fax on Saturday [(May 8, 2004)] and I was able to fax it on to my advisors the same day. I thought I would send my new offer to you as soon as possible. In this way, we could still talk on Wednesday [(May 12, 2004)], as agreed upon, and be one step closer to an agreement.
>
> I have had experience with many dental brokers over the past fifteen years as I have purchased four dental practices to date. I am well aware that for each different broker there will be a different criteria formula, or method of evaluating a practice. Obviously, your broker has your best interest in hand and my broker has my best interest at hand. The truth probably exists somewhere in the middle.
>
> In the interest of moving the process along, I am willing to meet you more than half way. I would like to offer you $165,000.00 with $50,000 of it being cash upfront. The remaining balance would be paid at the current interest rate of 5%. It is my intention to pay the practice off sooner rather than later as I do not like paying interest payments. This deal allows you to make a considerable amount of additional cash in terms of rent and interest payments.
>
> I believe this offer to be fair. I hope that we can agree and move forward with the process. Please contact me at (219) 924-8018 at your earliest convenience. I need to come to a final decision this week. Have a great week. I know you have "a lot of irons in the fire." Talk to you soon. Thank you for your time and consideration.

59. On May 12, 2004, Tujetsch and I spoke by telephone, as previously agreed, and Tujetsch offered to pay $165,000 in cash for the Dental Practice.

60. I accepted that offer.

61. On May 13, 2004, Tujetsch sent me a letter stating "[w]e have agreed at a purchase price of $165,000.00 and this $5,000.00 deposit will be subtracted from the $165,000.00 purchase price at closing."

62. Thereafter, the terms of the Agreement, and the Lease were negotiated

63. By Friday, June 25, 2004, negotiations were complete, and Tujetsch and I planned to meet at the Premises and execute the Agreement and the Lease on Sunday June 27, 2004

64. The Agreement employs the phrase "active patient" only once, in its first paragraph, wherein it states:

> Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has _____ active patients, who have been treated within the previous twelve months.

65 The underscored space in the foregoing recital remained blank until Sunday, June 27, 2004, when Tujetsch and I met at the Premises in order to execute the Lease and the Agreement.

66. At that time, I consulted the FPC Terminal in the Premises to confirm that the number of active patients previously reported by FPC Software (in the two Practice Overviews that I downloaded on April 29, 2004) remained at approximately 1,200

67. After confirming that, in Tujetsch's presence, I modified the recital to read as follows:

> Seller has represented that the Dental Practice has ***approx.*** 1200 active patients, who have been treated within the previous ~~twelve months~~ ***twenty four months according to First Pacific Corporation Software***.

68. I struck "twelve months" and inserted "twenty four months" to conform the recital to the definition of "active patient" used by the FPC Software, and inserted 1,200 as the number of "active patients" reported by that Software in the April 29, 2004 Practice Overviews, as confirmed on June 27, 2004 by consulting the FPC Terminal

69. The modified recital was then initialed by both Tujetsch and myself; it appears in the fully executed Agreement, as follows:

> Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assigned, and none of its shares of stock. Seller has represented that the Dental Practice has ~~two~~ 1200 active patients, who have been treated within the previous ~~twelve months~~ twenty four months according to First Pacific Computer Software.
>
> In consideration of the mutual promises and covenants contained in this Agreement, the parties agree as follows:

70 A true and correct copy of the Agreement as executed by me and Tujetsch is attached hereto as Exhibit 8.

71 It was my understanding that pursuant to the Agreement, Tujetsch was entitled to take possession of the Dental Practice on June 30, 2004, and that she was then entitled to receive all of the assets of the Dental Practice, including "patient lists and patient records."

72 In fact, after Tujetsch and I executed the Agreement at the Premises on Sunday, June 27, 2004, Tujetsch gave me a check for the balance of the $165,000 purchase price and I gave her keys to the Dental Practice.

73. The FPC Terminal and Software were specifically excluded from the assets being sold and delivered to Tujetsch.

74 Section 1.02-3 of the Agreement therefore expressly excludes from the assets being transferred to Tujetsch "any property of First Pacific Corporation, including its computers, monitors, keyboards, battery backup, computer speakers, laser printer, color printer, computer software, and computer connections."

75. However, the FPC Terminal and Software remained in the Dental Practice until June 30, 2004, the date that Tujetsch contracted for continuing access to an FPC Terminal and Software.

76. On June 27, 2004, and again on June 30, 2004, when Tujetsch officially took possession of the Dental Practice, Tujetsch received all patient lists of the Dental Practice that were then in existence.

77. Seller could not convey ownership of the FPC Terminal or Software to Tujetsch because that was owned by FPC.

78. However, it is my understanding that on or around June 30, 2004 Tujetsch separately contracted with FPC to receive continued access to an FPC Terminal on terms and conditions that she negotiated with FPC.

79. Tujetsch received access to all of the Patient Charts stored in the Dental Practice after she signed the confidentiality agreement on April 18, 2004.

80. Thereafter, no Patient Chart was removed from the Dental Practice at any time before the sale.

81. No incident or objection under the Agreement was raised by Tujetsch on June 27, 2004 or June 30, 2004, the date she officially received exclusive possession of the Dental Practice pursuant to the Agreement.

82. Thereafter, for over 16 months I received no complaint about any deficiency in respect of any asset delivered by Seller into Tujetsch's possession on June 27, 2004 or June 30, 2004.

83. Nine months after the sale, in April 2005, I received a letter from Tujetsch dated April 5, 2005 in which Tujetsch stated that her "absentee ownership" of the Dental Practice had

been a "recipe for disaster," and that she was thinking of selling the Dental Practice.[1]

84. Tujetsch felt the Dental Practice would fetch a higher price if it were bundled with the building that housed the Premises. Tujetsch explained that she had advertised the Premises for "Space Sharing" with other dentists, and in response

> Dear Todd:
>
> Hi! I trust that all is well with you. Congratulations on the new baby on the way!
>
> I called your office in order to talk to you directly, but you were seeing patients today. When Lindsey stated that you would be out of the office for the rest of the week, I thought it best to write to you.
>
> Some time ago, I advertised for "Space Sharing" at the Orland Park location. When I ran the ad, I began getting numerous calls regarding dentists wanting to purchase the office. These interested dentists forced me to contemplate the option of selling the practice if the money was right. I then went ahead and advertised the office for sale and decided that if the price was right, I would be willing to sell. If the price is not right will keep the office and nothing will change. I have received a lot of interest in the practice and I find myself needing to devote more time to my Chicago practice. When I originally purchased the office, I have anticipated that the office could run itself efficiently with little or no input/time from me. **I have come to learn that an absentee owner is a recipe for disaster.**
>
> My question to you is, would you be interested in selling the building at 7714 W. 159th Street? I believe that my chances of selling the practice would be greatly enhanced if I could offer the sale of the building, in addition to my practice. I know that at the time of the purchase, in July 2004, you were open to the idea of selling the building. Have you given it any additional consideration? From your perspective, it would be easier to sell the building with the sale of the dental practice. I understand that the chiropractors' lease is coming to an end so the time could not be more ideal for both of us. The feedback I am getting is that a potential buyer, who is a dentist, would desire the entire office space so you would not want to renew the chiropractors' lease. The chiropractors could relocate to the new addition as they do not have plumbing issues and this would take care of their needs.
>
> * * *
>
> **I ask that you keep all of this letter confidential as I may ultimately option**

---

[1] 1. It now appears that, beginning in January 2005, Tujetsch had begun to advertise the Practice for sale in the Chicago Dental Society *Review*. An advertisement that Tujetsch she placed for publication on January 9, 2005, stated:

ORLAND PARK: 100% Fee-for-Service, great location in lucrative area. Four modern, fully equipped operatories and panorex. Ample parking, free-standing building on ground level. Call (219) 924-8018

[sic] to keep the practice in the end. I do not want to alarm Dr. Purdue or the staff and patients.

See Exh. 9 (emphasis supplied).

85. The foregoing letter closed with the salutation, "The best to you always," which was consistent with the lack of any complaint about the Dental Practice voiced by Tujetsch up until that time.

86. On April 6, 2005, Tujetsch sent me a second letter stating as follows:

> I am offering you one million ($1,000,000.00) for the purchase of your building located at 7714 W 159th Street, Orland Park, Illinois. This offer includes a down payment of $50,000.00 and then subsequent monthly payments in the amount of $7500.00 at a finance rate of 5% to you. Acceptance of this offer would guarantee an immediate $50,000.00 down payment in the form of a cashier's check or money order.
>
> I have done a fair amount of inquiry regarding real estate in Orland Park. My advisors have informed me that my offer of one million dollars is very fair as the dental building across the street had an asking price of 1.2 million and less was accepted in the end. The building, across the street, contained more square footage, more land, more parking, and a full basement. The store front also added more value to the building.
>
> Acceptance of this offer would also guarantee a swift closing as opposed to months of delay. This offer will expire at 5:00 p.m. central standard time, today, as I am interested in another business opportunity. This offer is subject to a full inspection and attorney approval. Please contact me at (708) 429-9200. Thanks, Todd. Have a nice break from dentistry!

Exh. 10

87. I did not accept the foregoing offer.

88. Six months later, in October 2005, I received another letter from Tujetsch, dated October 24, 2005, in which Tujetsch claimed, for the first time, that the Agreement executed on June 27, 2004 had overstated the number of "active patients" of the Dental Practice, as reported by the FPC Software:

> Today, 10/24/05, I have been informed that the actual number of active patients, at the time of the sale, was 50% less than what you represented in our signed,

> legal contract. Please refer to the contract where you note that 1200 active patients of record are involved in the sale of the practice A detailed report by First Pacific Corporation, your former and current billing agency, indicates that the actual number of active patients, at the sale, was 668. This misrepresentation has created an enormous burden for this office as you are also profiting from a monthly rent of nearly $3,000 00.

Exh. 11.

89. In response, I denied that I had misstated, on June 27, 2004, the number of "active patients" treated in the Dental Practice, as reported by FPC Software, and produced copies of the two Practice Overviews that I downloaded from the FPC Terminal on April 29, 2004

90. I also contacted FPC and asked whether FPC had provided a report to Tujetsch contradicting the number of active patient counts set forth in the Patient Overviews that I had generated with the FPC Terminal on April 29, 2004, and confirmed on June 27, 2004

91. FPC advised that Tujetsch's claim was based on a misunderstanding, as later confirmed by means of a letter "to whom it may concern," in which FPC denied that it provided a report to Tujetsch that could be relied upon to conclude that the actual number of active patients of the Dental Practice, as of June 27, 2004, was 668, instead of approximately 1,200, as reported in Practice Overviews downloaded in April and viewed in June 2004

92. A true and correct copy of FPC's letter and a related email produced by FPC is attached hereto as Exh 12.

93. Section 9 07 of the Agreement states that "any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing; shall be delivered personally, including by means of telecopy, or mailed by registered or certified mail, postage prepaid and return receipt requested; shall be deemed to given on that date of personal delivery or on the date set forth on the return receipt; and shall be delivered or mailed to the

addresses or telecopy numbers set forth on the first page of this Agreement or to such other address as any party may from time to time direct."

94. No notice sent by Tujetsch said anything about equipment being out of order on June 27, 2004 or June 30, 2004 -- or about missing "patient lists."

95. On June 12, 2006, while she continued to own and operate the Dental Practice in the Premises, Tujetsch filed her initial complaint in this action.

96. In the complaint, Tujetsch complained, for the first time, that equipment delivered into her possession on June 27, 2004 and June 30, 2004 was not in working order.

97. On October 31, 2007, Tujetsch gave written notice that she was "terminating the Lease . . and moving out of the [P]remises immediately due to the Landlord's failure to correct the breaches outlined in [an earlier] letter . . ."

98. Documents produced by Tujetsch in discovery suggest that during the first six months after the sale, collections of fees for patient treatment and cash flow of the Dental Practice continued at a pace roughly consistent with results of the Dental Practice under my ownership.

99. During the nine months before the sale, from October 2003 through June 2004, the Dental Practice had generated gross patient fees averaging $20,075 per month.

100. As noted above, monthly gross patient fees for 2001 through 2003 averaged $19,001.

101. In the first six months after Tujetsch acquired the Practice, the Practice reportedly generated gross patient fees averaging $20,176 per month.

FURTHER AFFIANT SAYETH NAUGHT

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct

Dr. Todd C Pusateri

EXHIBIT 1

(b) "Patient" shall refer to a person(s) who has elected to purchase services of client regardless of who shall be the actual recipient of such services

(c) "Transaction" shall mean that event whereby client sells services and patient elects to purchase such services.

(d) "Accounts Receivable" shall mean all accounts, contract rights, including insurance / trust benefit claims, arising out of or in connection with transactions and all subsequent transactions entered into between the client and his patients.

(e) "Patient Balance Owing" shall refer to the total of all purchased accounts receivable with a patient balance owing which excludes accounts with credit balances.

(f) "Contingency Account" is a non-liquid bookkeeping entry that provides FPC and the client limited protection against future uncollected accounts.

(g) "In-Office Accounts" shall refer to only those accounts that do not qualify for purchase by FPC. FPC will not provide certain services, including but not limited to funding, billing and collection services.

2 SALE AND PURCHASE OF ACCOUNTS RECEIVABLE: Client agrees to sell and FPC agrees to buy all client's current and future accounts receivable. FPC will purchase the accounts receivable, excluding in-office accounts, in accordance with the terms set forth herein. Client shall not sell, assign, or otherwise encumber his accounts receivable.

3 PAYMENT FOR ACCOUNTS RECEIVABLE: The following terms and conditions are applicable to any and all sales and purchases of accounts receivable, excluding in-office accounts, by and between client and FPC:

(a) Upon the initial purchase of the client's accounts receivable: FPC will pay to client an amount not to exceed 40%, less a conversion fee of $5,000, of the balance of the accounts receivable, and less a $500 software licensing fee (non-refundable) per office. The actual amount paid to the client will be determined by FPC during the conversion process based upon the quality of the client's accounts receivable.

(b) Payment for all future accounts receivable: FPC will pay the client weekly for accounts receivable created during that week less an amount described in section 3(c) below. FPC reserves the right to adjust the amount it is willing to pay for an account it deems either an unacceptable account or uncollectible.

(c) Reductions in weekly payments to client: FPC will decrease the amounts paid to the client for the following reasons:

(i) A weekly service fee charge on total patient balances owing will be deducted weekly in accordance with service fees described in paragraph 4

(ii) FPC may redirect to the contingency account a part or all of FPC's weekly payment to the client in order to maintain the contingency account at its required level. (See paragraphs 5 and 6 below).

(iii) Any patient payments received on FPC accounts receivable and kept by client may be subtracted from FPC's weekly payment to client. FPC may choose to temporarily waive its rights and/or remedies, see section 7(d).

(iv) FPC may deduct an account to be reassigned from FPC's weekly payment to client

(v) The client will be provided a summary of all additions and deductions with each weekly check

4 FEES:

(a) Service fees:

(i) A weekly service fee will be assessed on all patient balances owing. This service fee covers the cost of providing a computer, maintenance, staff training, patient and insurance billings, postage, patient and insurance forms and statements, a service team for support of the client's office, including a 1-800 phone number, a personal account representative and limited collection follow-up

(ii) The weekly service fee will be assessed in accordance with the fee schedule established by FPC. FPC's current service fees are as follows:

Patient Balances Owing	Weekly Fee
$0 - $49,999	.01209 (minimum monthly service fee of $750)
$50,000 - $99,999	.00997
$100,000 - $249,999	.00808
$250,000 – above	.00612

*The above fees will be assessed at one half the designated amount for the first 3 months, as long as the client continues with our service for at least one year from the date of this agreement. If the client leaves the system in less than one year, the client will then be responsible to pay the previously waived amount of service fees.

(b) Additions or reductions to the service fee:

(i) FPC agrees to rebate monthly to client all interest charges assessed by the client on accounts receivable, less uncollected interest.

(ii) If the client maintains the contingency account at a level higher than required, FPC will issue a credit, against the service fee on the amount over the required level.

(c) Other fees:

(i) FPC is authorized to assess late payment charges monthly on patient accounts when payments are not received at FPC by the due dates published in the patients billing statement. All late payment charges will be retained by FPC and the client is responsible for uncollected late payment charges.

(ii) FPC may charge the client monthly, an additional fee (.0029 weekly) on the amount the clients' contingency account is below the required levels to cover FPC's additional administration costs.

(d) FPC reserves right to either increase or decrease any fees upon 30 days written notice to the client.

5 REASSIGNMENT: In the event FPC in its sole discretion considers an account to be uncollectible under FPC's normal collection procedure, or if the account fails to meet the client's warranties (see paragraph 7), then the client agrees to repurchase the outstanding balance on that account. When accounts are to be repurchased, FPC may, in lieu of requiring direct repayment, charge the uncollected account against the contingency account or deduct the amount from FPC's weekly payment to the client. If the client breaches any term or warranty of this agreement, the client agrees to repurchase all accounts receivable and pay all amounts owed to FPC.

6 CONTINGENCY ACCOUNT: The contingency account is a non-liquid bookkeeping entry that provides FPC and the client limited protection against future uncollected patient accounts. The contingency account is a percentage of the patient balance owing. The percentage will be established by FPC at its sole discretion at the time of converting to FPC system and may be changed by FPC during the life of this agreement based upon the quality of the accounts receivable. In the event that the contingency account falls below the required percentage, FPC will maintain the required level by reducing the weekly amount paid to client.

7 CLIENT'S REPRESENTATIONS AND WARRANTIES: As to accounts receivable purchased by FPC hereunder and while this agreement is in effect, client represents and warrants as follows:

(a) All accounts receivable arose from a bonafide sale of services by client in the ordinary course of client's business and that all services have been performed by the client.

(initials) (b) That as to the accounts receivable client has free and clear title unencumbered by any sale, assignment or security interest of any nature (unless FPC is notified in writing) and will notify FPC in writing immediately of any actions in the future that would jeopardize FPC's clear title to the accounts receivable purchased from client. (e.g. a tax lien, bankruptcy)

(c) That the patient has authority and capacity to contract at the time of purchasing services represented by accounts receivable.

(d) Client acknowledges that all amounts paid on patient balance owing, including all payments from insurers, are owned by FPC. The client agrees to promptly forward any and all payments to FPC. Client also agrees to immediately forward a check to FPC covering any cash and credit card payments received on accounts receivable owned by FPC.

(initials) (e) That all applicable laws and regulations of any local, state or federal government entity, including those pertaining to consumer credit protection have been observed and adhered to by client in each applicable transaction; client agrees to provide all appropriate disclosures and obtain necessary patient signatures, and agrees to take all action necessary to conform with all laws with respect to accounts receivable.

(f) That client will continue to maintain all necessary business licenses and business association, partnership or corporation qualifications as may be required by law. The client will immediately notify FPC if there are changes to the business structure, ownership, dental license, change in association, or dental licenses used for insurance billing.

(g) If the client breaches any term or warranty of this agreement, the client agrees to repurchase all accounts receivable and pay all amounts owed to FPC.

8 SALE OF ACCOUNT BY COMPUTER:

(a) Use of FPC's computer: In order to facilitate client's sale of accounts receivable to FPC, and as a part of FPC's service and exchange of data hereunder, client will use a computer system and software package that are furnished to client by FPC. FPC shall at all times be the owner of the

lost profits.

(c) Termination: FPC may terminate the client's use of computer hardware and software supplied by FPC on thirty days (30) notice either orally or in writing. However, if client breaches any term of this agreement, then FPC may immediately terminate client's use of the said hardware and software. Client shall be liable for any damages to the computer, ordinary wear and tear excepted until the computer is returned to FPC

(d) Use of off-the-shelf software packages: The client may operate off-the-shelf software packages purchased elsewhere under the following conditions:

(i) The software package must be compatible and function properly with the FPC hardware configuration and FPC will be notified before such software is used
(ii) The client will not make modifications to FPC hardware and/or software.
(iii) FPC will not provide program support or be responsible for problems arising from the use of the off-the-shelf software packages, and client agrees to hold FPC harmless from any such claim.

9. REMEDIES: In the event client shall breach any of the terms of this agreement or client or any guarantor thereof becomes insolvent, becomes subject to or commences any proceeding under Federal Bankruptcy Act or any insolvency or debtor's relief law or dies, or if any property of any of them in the possession of FPC or obligation of FPC to any of them is attempted to be levied upon by any writ or otherwise, or any notice of such levy or notice of sale is given or any sale is made of any property of any of them, except in ordinary course of business, or default is made in the payment of any other indebtedness of any item to FPC, then FPC shall have the following rights and remedies and shall be cumulative

(a) To declare all amounts due FPC at once due and payable or FPC may elect at its sole discretion to implement corrective action to eliminate the breach(s) of this contract, without waiving any of its rights and/or remedies.
(b) To foreclose on any security provided to FPC.
(c) To exercise any and all remedies available under law to FPC, including the rights and remedies of a secured party under the Uniform Commercial Code as enacted in the state where the debtor's office is located.
(d) In the event of default, client agrees to cooperate in connection with FPC's foreclosure on its security, including, but not limited to, permitting FPC to review the client's patient records and notifying insurance companies and patients to make payments on accounts receivable directly to FPC

10. TERMINATION: Client, or FPC, may decide to terminate this agreement for any reason by providing 30 days written notice to the other. In the event of such notice, the client shall repurchase the accounts receivable previously sold to FPC on the following basis:

(a) By paying FPC a sum equal to the patient balance owing on such accounts receivable, plus any unpaid fees under paragraph 4, less the amount of the contingency account and patient credit balances; or
(b) By electing that FPC continue to collect the accounts receivable for a period not to exceed three months for a weekly fee as described in paragraph 4. After termination, all finance charges collected by FPC on accounts receivable will be credited to the amount owed FPC. At such time as the total patient balance owing is equal to the balance in the contingency account plus patient credit balances, the remaining accounts receivable will be assigned to the client.
(c) Upon termination, FPC may charge interest on all monies due and owing FPC using the Wells Fargo Bank, N.A. published prime rate, plus 2 percent.
(d) Not withstanding termination of this agreement, until FPC is paid in full for its purchased accounts and for any other obligation to FPC under this agreement, the provisions of this agreement shall remain in full force and effect, including but not limited to the rights of FPC to require the repurchase of accounts under paragraph 5 above.

11. SECURITY INTEREST: To secure all of client's obligations hereunder, client grants to FPC a security interest in all inventory, existing and future accounts, accounts receivable, contract rights, chattel paper, intangibles, all of debtor's rights as a seller of goods under Article 2 of the UCC, all goods returned to or repossessed in connection therewith, all equipment, together with all accessories, substitutions, additions, replacements, parts, accessions affixed or used in connection therewith, whether now owned or hereafter acquired or arising, and the proceeds and products thereof, and wherever located. Client hereby agrees to execute any financing statements and other documents reasonably required to perfect FPC's security interest

12. ADJUSTMENT OF PATIENT DISPUTES: If any patient disputes any transaction involving an account receivable sold by client to FPC and before FPC has requested repurchase of said account receivable by the client in the manner described in paragraph 5, client will attempt to resolve any such dispute directly with the patient. Client shall promptly notify FPC of any such adjustments or disputes

13 POWER OF ATTORNEY: Client shall execute assignments with respect to all accounts receivable so as to vest in FPC full title to all accounts receivable. FPC shall have the right to collect from the patient all amounts due or to become due on said accounts receivable unless and until the accounts receivable is repurchased by client in the manner provided in paragraph 10 above Client hereby grants to FPC client's power of attorney for the purpose of endorsing client's name to any remittance received by FPC in payment of any accounts receivable held by FPC after purchase from client. FPC shall have the right to pledge the accounts receivable at any bank or financial institution subject to the rights of the client pursuant to this agreement

14. GUARANTY: In the event client is a corporation, then it is agreed all stockholders of said corporation, by signing below, hereby agrees to be jointly and severally, personally and unconditionally, bound by the terms of this agreement and guarantee its performance. In the event client is a member of a partnership, but signing in his or her individual capacity, then the partnership, by signing below, agrees to be unconditionally bound by the terms of this agreement and hereby guarantees its performance. Each guarantor is jointly and severally liable for attorneys' fees incurred by FPC in enforcing the guaranty, whether or not a suit is filed, including any attorneys' fees incurred in any bankruptcy proceeding

15. INDEMNIFICATION: Client hereby agrees to indemnify, defend and hold FPC harmless from any and all liabilities, judgments, obligations, losses, claims, actions, damages, penalties, interest, cost or expenses, including attorneys' fees, arising out of any claims filed by any patient of client arising out of or in connection with the performance of any services performed by client represented by the accounts receivable purchased by FPC from the client in accordance with the terms of this Agreement

16. GENERAL PROVISIONS:

(a) Client will execute and deliver to FPC any instruments or documents and do all things necessary and/or convenient to carry into effect the provisions of this agreement and facilitate the collection of accounts receivable herein assigned.
(b) This agreement may not be altered or amended except in writing and signed by authorized representatives of both parties
(c) Any provision of this agreement found to be invalid shall not invalidate the remainder thereof
(d) Waiver by FPC of any default by client shall not constitute a waiver of any subsequent default
(e) Notwithstanding the above, the client shall not assign any of his or her rights or obligations under this Agreement without the prior written consent of FPC.
(f) Client is responsible for all collection agency fees incurred by FPC in attempting to collect damages or amounts due from patient.
(g) In the event of any dispute arising out of this Agreement between FPC and Client, including arbitration or bankruptcy proceeding, FPC shall be entitled to recover from Client reasonable attorney's fees and costs, including any costs and fees incurred in any appeal.

IN WITNESS WHEREOF, the parties have signed this agreement the day and year above written

FIRST PACIFIC CORPORATION

By: _____

Title: CLIENT ACCOUNTS MANAGER

CLIENT: Todd C. Pusateri, D.D.S.

By: _____
Todd C. Pusateri, D D S

CLIENT: First Dental, P.C.

By: _____ President
Todd C. Pusateri, President

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ADDENDUM TO

First Pacific Corporation's

SALES AND SERVICE AGREEMENT

This ADDENDUM ("Addendum") is effective 4/14/2003, and amends and is made part of the SALES AND SERVICE AGREEMENT dated 3/30/2001. ("Agreement") by and between FIRST PACIFIC CORPORATION ("Business Associate") and First Dental ("Dental Practice").

Dental Practice and Business Associate mutually agree to modify Agreement to incorporate the terms of this Addendum into the Agreement, to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 and it implementing regulations (45 C F R Parts 160-64)

DEFINITIONS

"Individual" shall have the same meaning as the term "individual" in 45 C F R § 164 502 (g)

"Law" shall mean all applicable Federal and State statutes and all relevant regulations hereunder

"Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C F R. Part 160 and Part 164, Subparts A and E

"Protected Health Information" shall have the same meaning as the term "Protected Health Information" in 45 C.F.R. § 164 501, limited to the information created or received by Business Associate from or on behalf of Health Care Practice.

"Secretary" shall mean the Secretary of the Department of Health and Human Services or his designee

OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

A. Business Associate agrees not to use or disclose Protected Health Information other than as permitted or required by this Agreement or by Law.

B. Business Associate agrees to use reasonable safeguards to prevent the use or disclosure of the Protected Health Information other than as provided for by this Agreement

C. Business Associate agrees to report to Health Care Practice any use or disclosure of Protected Health Information not provided for by this Agreement after Business Associate has actual knowledge of such use or disclosure

D. Business Associate agrees to include in any written agreement with any agent, including a subcontractor, to whom it provides Protected Health Information, a requirement that such agent agrees to restrictions and conditions with such information that are at least as restrictive as those that apply through this Addendum to Business Associate

E. Upon reasonable notice, Business Associate agrees to make Protected Health Information and books and records relating to the use and disclosure of Protected Health Information available to the Secretary at the

Health Care Practice's expense in a reasonable time and manner, for purposes of the Secretary determining Health Care Practice's compliance with the Privacy Rule

F. Business Associate agrees to comply with each applicable requirement of 45 Code of Federal Regulations Part 162 regarding Standard Transactions

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PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

A. Except as otherwise limited in this Addendum, Business Associate may use or disclose Protected Health Information (i) as is reasonably necessary to perform functions, activities, or services for, or on behalf of Health Care Practice as specified in the Agreement; (ii) for the proper management and administration of the Business Associate; (iii) as may otherwise be required by Law; and (iv) except as provided otherwise in this Addendum, as may be permitted by Law, provided that Business Associate obtains reasonable assurances from any person to whom the information is disclosed that (A) such information will remain confidential and used or further disclosed only as required by Law or for the purpose for which it was disclosed to the person, and (B) that the person will notify the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached

B. Beginning April 14, 2003, or the date of this Addendum, whichever is later, Business Associate shall refer to Health Care Practice all requests by individuals for information about or accounting of disclosures of Protected Health Information in accordance with 45 C.F.R. § 164.528.

C. Beginning April 14, 2003, or the date of this Addendum, whichever is later, Business Associate agrees to document disclosures of Protected Health Information, other than for treatment, payment or healthcare operations or disclosures that are incidental to another permissible disclosure, to the extent required for Dental Practice to respond to a request by an individual for an accounting of disclosures of Protected Health Information in accordance with 45 C.F.R. § 164.528. Such documentation shall include (i) the disclosure date; (ii) the name and (if known) the address of the person or entity to whom Business Associate made the disclosure; (iii) a brief description of the Protected Health Information disclosed; and (iv) a brief statement of the purpose of the disclosure

D. Beginning April 14, 2003, or the date of the Addendum, whichever is later, Business Associate shall provide Health Care Practice information collected in accordance with section C above to the extent required to permit Health Care Practice to respond to a request by an individual for an accounting of disclosures of Protected Health Information in Accordance with 45 C.F.R. § 164.528. The parties agree to work together in good faith to resolve any disagreement over the requirements of 45 C.F.R. § 164.528.

E. Business Associate may use Protected Health Information to report violations of law to appropriate Federal and State authorities, consistent with 42 C.F.R. § 164.502 (j)(1)

OBLIGATIONS OF HEALTH CARE PRACTICE

A. Health Care Practice agrees not to use or disclose Protected Health Information other than as permitted or required by this Addendum or applicable Law

B. Health Care Practice agrees to use reasonable safeguards to prevent use or disclosure of Protected Health Information other than as provided by this Addendum

C. Health Care Practice shall notify Business Associate of any changes in Health Care Practice's notice of privacy practices that may affect Business Associate's use or disclosure of Protected Health Information. Business Associate shall have a reasonable period of time to act on such notices

D. Health Care Practice shall provide Business Associate with any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, if such changes affect Business Associate's permitted or required uses and disclosure thereof. Business Associate shall have a reasonable period of time to act on such notice

E. Health Care Practice shall notify Business Associate of any restriction on the use or disclosure of Protected Health Information prior to acceptance of such restriction by Dental Practice in accordance with 45 C.F.R. §164.522 so that Business Associate can determine whether it is infeasible to comply with such restriction Once agreed to, Business Associate shall have a reasonable period of time to act on such notice

F Health Care Practice represents and warrants to Business Associate that Health Care Practice will not disclose any Protected Health Information to Business Associate unless Health Care Practice has obtained any consents and authorizations that may be required by Law or otherwise necessary for such disclosure.

G Health Care Practice shall have access to Business Associate's information pursuant to the terms and conditions of the Agreement and this Addendum The information shall remain confidential and proprietary information. The information shall not be disclosed to any third person, business or corporation, including any person who serves as Health Care Practice's agent, except as otherwise agreed to in writing by Business Associate Nothing in this Addendum shall be construed as granting Health Care Practice any rights by license or any other intellectual property rights to the information

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PERMISSIBLE REQUESTS BY DENTAL PRACTICE

Health Care Practice warrants that it shall not request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under applicable Law if done by Health Care Practice.

RATIFICATION OF SALES AND SERVICE AGREEMENT

Except as modified by this Addendum, the Agreement is hereby ratified, confirmed and declared to be in full force and effect.

IN WITNESS WHEREOF, Business Associate and Dental Practice have caused this Addendum to be executed in their respective names the day and year first herein above written

BUSINESS ASSOCIATE:

First Pacific Corporation

by: Diane Reeves

Name: Diane Reeves

Its: EVP, Customer Service

Date: April 8, 2003

DENTAL PRACTICE:

First Dental

by:

Its: President

Date: 4-15-03

EXHIBIT 2

Practice Overview Explanation

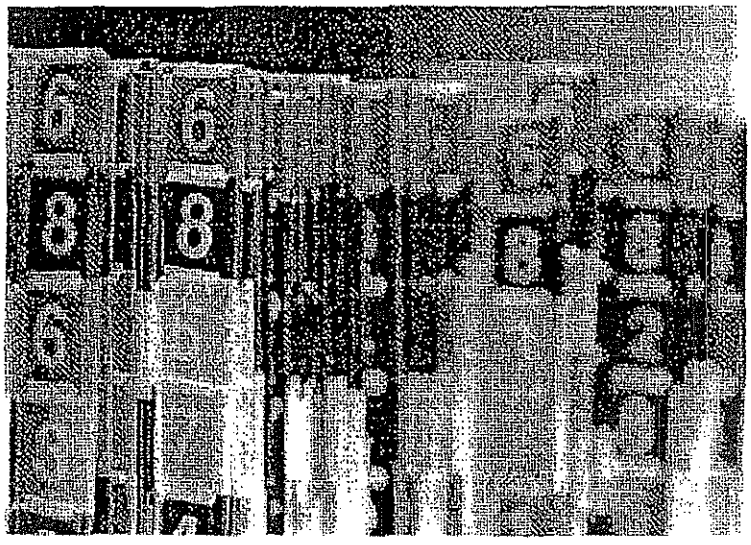
Active Pt defines

This report is a month-to-date (MTD) and year-to-date (YTD) overview of the practice information for monitoring a practice.

- **Production:** *MTD and YTD totals for each associate and for the total practice.*
- **Days Worked:** *The number of days worked, MTD and YTD, for each associate. Th completed if the appointment scheduler is utilized.*
- **Production Per Hour:** *Hourly production, MTD and YTD, for each associate and th columns are only completed if the appointment scheduler is utilized.*
- **A/R Collection:** *Accounts receivable collections, MTD and YTD, categorized by FPC patient payments, FPC insurance payments and office payments.*
- **Reassignment:** *MTD and YTD dollar amounts reassigned.*
- **Number of New Patients:** *The MTD and YTD number of new patients that have been seen or have future scheduled appointments.*
- **Number of Patients Referred by Referral Source:** *The number of new patients, MTD and YTD, referred by the categories of patient, doctor and other.*
- **Number of Active Patients:** *The number of patients seen within the last two years.*
- **Number of Patients with Recall:** *This number will always be different than the Number of Active Patients because this number represents all the patients listed in the computer. The patients will be categorized by:*
  - **Current:** *Includes those patients who have a future recall date.*
  - **Overdue:** *Includes the patients who have a past recall date.*
  - **Without:** *Includes those patients who have never had a recall appointment.*
- **Number of Patients with Diagnosed Treatment:** *The number of patients who have diagnosed treatment and are categorized as:*
  - **Scheduled:** *Those patients who have scheduled appointments for completion of their diagnosed treatment. Recall appointments are included in this number.*
  - **Unscheduled:** *Those patients who have not scheduled an appointment to complete their diagnosed treatment.*

EXHIBIT 3

Dental Records



American Dental Association
www.ada.org

Council on Dental Practice
Division of Legal Affairs

Seven out of ten dentists are members of the ADA

2007

Dental Records

Acknowledgments

This publication was developed by the Council on Dental Practice and the Division of Legal Affairs

The Mission of the Council on Dental Practice is to recommend policies and provide resources to empower our members to continue development of the dental practice, and to enhance their personal and professional lives for the betterment of the dental team and the patients they serve

Disclaimer

This ADA publication is designed especially for dentists and the dental team to provide helpful information about the dental record. This publication is not intended or offered as legal or other professional advice Laws vary from state to state and thus, readers should consult with their personal legal counsel and malpractice insurer to access the applicable laws in their state *Dental Records* is based in part on questions frequently asked by our members It is our hope that dentists and their team members will find this publication, helpful but in no way a substitute for actual legal advice given by an attorney in your state

EXHIBIT 4

Date: 12/30/2008
Time: 10:20 PM

PRACTICE OVERVIEW

O.P.

111039 - FIRST DENTAL

Production				
AA - PUSATERI DDS, TODD C.	$	6,299.00	$	28,539.82
CC - COLLECTIONS	$	0.00	$	419.12
D2 - BABBITT, MONICA S.	$	0.00	$	38.00
D3 - PURDUE, RICHARD D.	$	12,715.00	$	142,647.10
D4 - BRITESMILE, BRITESMILE	$	0.00	$	70.00
H2 - GALBAN, JACKIE	$	8,513.60	$	78,848.26
PR - PRODUCTS	$	70.00	$	1,112.00
XX - X, X	$	0.00	$	1,433.29
ZZ - DOUBLE BOOK	$	0.00	$	2,838.00
Total Production	$	28,567.60	$	254,022.58
Days Worked				
AA - PUSATERI DDS, TODD C.		2		38
CC - COLLECTIONS		0		0
D2 - BABBITT, MONICA S.		0		28
D3 - PURDUE, RICHARD D.		10		142
D4 - BRITESMILE, BRITESMILE		0		0
H2 - GALBAN, JACKIE		10		121
PR - PRODUCTS		0		0
XX - X, X		0		0
ZZ - DOUBLE BOOK		0		87
Production Per Hour				
AA - PUSATERI DDS, TODD C.	$	447.78	$	127.88
CC - COLLECTIONS	$	0.00	$	0.00
D2 - BABBITT, MONICA S.	$	0.00	$	0.21
D3 - PURDUE, RICHARD D.	$	192.66	$	181.64
D4 - BRITESMILE, BRITESMILE	$	0.00	$	0.00
H2 - GALBAN, JACKIE	$	86.69	$	101.97
PR - PRODUCTS	$	0.00	$	0.00
XX - X, X	$	0.00	$	0.00
ZZ - DOUBLE BOOK	$	0.00	$	5.25
Total Production Per Hour	$	756.13	$	306.95
A/R Collection				
Patient Payments PPC	$	447.20	$	5,738.93
Insurance Payments PPC	$	7,090.47	$	83,789.65
Office Payments	$	14,908.10	$	135,386.86
Reassignment	$	0.00	$	1,840.39
Number of New Patients		40		338
Number of Patients Referred by Referral Sources				
Patients		0		0
Doctors		0		0
Other		0		0
Number of Active Patients		1,223		

PRACTICE OVERVIEW

111089 - FIRST DENTAL

Recall Status of All Patients	
Number with Current Recall	355
Number with Overdue Recall	749
Number Without Recall	948

Number of Patients with Diagnosed Treatment (other than Prophy Codes)	
Scheduled	364
Unscheduled	427
Total	791

Date: 4/29/2004
Time: 10:17 PM

PRACTICE OVERVIEW

Page: 1

O.P.

111088 FIRST DENTAL

	Month-to-Date	Year-to-Date
Production		
AA - FUSATERI DDS, TODD C.	$ 276.00	$ 13,276.04
CC - COLLECTIONS	$ 40.00	$ 179.65
D2 - BABBITT, MONICA S.	$ 0.00	$ 0.00
D3 - PURDUE, RICHARD D.	$ 11,052.20	$ 43,021.30
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 35.00
H2 - GALBAN, JACKIE	$ 6,476.00	$ 26,555.80
PR - PRODUCTS	$ 0.00	$ 34.00
XX - X, X	$ 181.60	$ 784.60
ZZ - DOUBLE BOOK	$ 870.00	$ 1,810.00
Total Production	$ 18,877.80	$ 86,088.39
Days Worked		
AA - FUSATERI DDS, TODD C.	6	17
CC - COLLECTIONS	0	0
D2 - BABBITT, MONICA S.	0	0
D3 - PURDUE, RICHARD D.	11	43
D4 - BRITESMILE, BRITESMILE	0	0
H2 - GALBAN, JACKIE	11	43
PR - PRODUCTS	0	0
XX - X, X	0	0
ZZ - DOUBLE BOOK	0	0
Production Per Hour		
AA - FUSATERI DDS, TODD C.	$ 7.89	$ 118.47
CC - COLLECTIONS	$ 0.00	$ 0.00
D2 - BABBITT, MONICA S.	$ 0.00	$ 0.00
D3 - PURDUE, RICHARD D.	$ 151.49	$ 152.02
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 0.00
H2 - GALBAN, JACKIE	$ 88.74	$ 94.83
PR - PRODUCTS	$ 0.00	$ 0.00
XX - X, X	$ 0.00	$ 0.00
ZZ - DOUBLE BOOK	$ 0.00	$ 0.00
Total Production Per Hour	$ 248.03	$ 361.42
A/R Collection		
Patient Payments FPO	$ 957.60	$ 3,039.41
Insurance Payments FPO	$ 6,781.90	$ 37,688.43
Office Payments	$ 11,195.36	$ 44,544.53
Reassignment	$ 85.00	$ 85.00
Number of New Patients	23	89
Number of Patients Referred by Referral Sources		
Patients	0	0
Doctors	0	0
Other	0	0
Number of Active Patients	1,227	

PRACTICE OVERVIEW

111089 - FIRST DENTAL

Recall Status of All Patients	
Number with Current Recall	382
Number with Overdue Recall	798
Number Without Recall	972

Number of Patients with Diagnosed Treatment (other than Prophy Codes)	
Scheduled	397
Unscheduled	194
Total	591

EXHIBIT 5

First Dental

Naperville - Orland Park - Schaumburg

Client recognizes that any confidential information provided to them by First Dental or its representatives regarding professional practices could, if disclosed, cause damage to the individual(s) disclosing the information and to First Dental Therefore, client agrees that they will not divulge, communicate, or otherwise disclose any confidential material proved by First Dental, its representatives, or clients of First Dental to anyone, including employees, customers, clients, or prospective clients, with the exception of their bonafide counsel Client further agrees that their bonafide council will maintain the confidentiality of the material as well All confidential material given to client for accountant and counsel review must be returned within two weeks if offer on said practice is not placed

Confidential information shall include, but is not limited to, the following:

1 A professional's intent to buy, sell, or associate

2 Any financial data provided Client by First Dental, its representatives, or clients, which may include such items as value of practice under consideration, income statements or balance sheets, Internal Revenue Service returns, and any other personal financial data

3 Any personal information provided client by First Dental, its representatives, or clients, which may include such items as data regarding lawsuits, pending lawsuits, malpractice actions, or other items personally pertaining to the principals in these transactions

4 Patient or client lists made known to me during negotiations

IN WITNESS HEROF, THE PARTIES HERE TO HAVE HEREUNTO SET THEIR HANDS AND SEALS THE DAY AND YEAR FIRST ABOVE WRITTEN

Client Signature — Date 4-18-04

Print Name

Street Address — City — Zip

Telephone

First Dental Representative

EXHIBIT 6

DR. MARY A. TUJETSCH
COSMETIC AND GENERAL DENTISTRY
55 E WASHINGTON, SUITE 2121
CHICAGO, IL 60602
(312) 782-1396
(312) 236-2543

May 1, 2004

FPL 1-800-574-2412

Dr. Todd Pusateri
First Dental
7714 159th Street
Orland Park, IL

PRACTA TRANS. 888-789-1085
Sue
key Copy Eastern

Dear Todd:

I trust that all is well with you. Thank you for coordinating with your father in order to allow my father to view First Dental. I have spent a considerable amount of time with my financial advisors and dental expert. At this point in time, I am prepared to make an offer to purchase your dental practice.

My experts have evaluated First Dental and I have been informed that the practice has leveled off, with no indication of future growth. This indicates the potential for financial problems ahead. Despite this fact, I believe that the practice could be turned around through hard work. If I am going to invest my time and talent in this venture, it is important that I look at this project in terms of a long term projection. My experts have evaluated the practice to be worth an estimated $144,500.00. I am prepared to offer you $150,000.00. I believe this offer to be fair and mutually beneficial.

I am concerned about a number of issues in the practice. They are the configuration of the operatories, lack of sinks in the operatories, carpet in the operatories, percentage of wasted rental space in the office floor plan, lack of personal office, lack of prosthetic services being rendered, and inability for growth in existing floor plan.

If I am to purchase the office and proceed with my long term goal, I would like to rent 50% or 1200 feet of the new office addition. This would allow for a more efficient floor plan and office design. It is very confusing and inefficient with the chiropractors occupying the perimeter of the office area. In addition, the chiropractors occupy the prime space in the office, despite the fact that they are paying identical rent. By renting the space in the new addition currently under construction, I could foresee myself as a long term tenant in your building. Given the current situation, I would have to seriously consider relocating the dental office after a few years. I am a loyal person and I would prefer to be honest with you from the beginning and try to establish a long lasting business relationship. Obviously, I would prefer giving the rent to you.

My long term goal is to grow the practice and expand, eventually adding specialists to the practice. The current set up would not allow for a good flow of traffic as we would be very congested in this space.

SA152

DR. MARY A. TUJETSCH
COSMETIC AND GENERAL DENTISTRY
55 E WASHINGTON, SUITE 2121
CHICAGO, IL 60602
(312) 782-1396
(312) 236-2543

If you are interested in proceeding further, we can negotiate payment terms and interest. I am requesting a timely response as I need to finalize my decision. Please contact me at (219)924-8018. I look forward to hearing from you soon. I appreciate all of your efforts and expertise. Thank you for your time and cooperation.

Yours truly,

Dr. Mary A. Tujetsch

EXHIBIT 7

DR. MARY A. TUJETSCH
COSMETIC AND GENERAL DENTISTRY
55 E. WASHINGTON, SUITE 2121
CHICAGO, IL 60602
(312) 782-1396
(312) 236-2543

165 100% DN
170 50% DN

2yr/3yr
6% 7%

May 10, 2004

Dr. Todd Pusateri
First Dental
7714 159th Street
Orland Park, IL

Dear Todd:

I hope your weekend was enjoyable. I received your fax on Saturday and I was able to fax it on to my advisors the same day. I thought I would send my new offer to you as soon as possible. In this way, we could still talk on Wednesday, as agreed upon, and be one step closer to an agreement.

I have had experience with many dental brokers over the past fifteen years as I have purchased four dental practices to date. I am well aware that for each different broker there will be a different criteria formula, or method of evaluating a practice. Obviously, your broker has your best interest at hand and my broker has my best interest at hand. The truth probably exists somewhere in the middle.

In the interest of moving the process along, I am willing to meet you more than half way. I would like to offer you $165,000.00 with $50,000.00 of it being cash upfront. The remaining balance would be paid at the current interest rate of 5%. It is my intention to pay the practice off sooner rather than later as I do not like paying interest payments. This deal allows you to make a considerable amount of additional cash in terms of rent and interest payments.

I believe this offer to be fair. I hope that we can agree and move forward with the process. Please contact me at (219)924-8018 at your earliest convenience. I need to come to a final decision this week. Have a great week. I know you have "a lot of irons in the fire." Talk to you soon. Thank you for your time and consideration.

Yours truly,

Dr. Mary A. Tujetsch

EXHIBIT 8

ASSET PURCHASE AGREEMENT

between

MARY A. TUJETSCH, DDS
"PURCHASER"

and

FIRST DENTAL, PC
"SELLER"

Dated June 27, 2004

ASSET PURCHASE AGREEMENT

DATED: June 27, 2004

BETWEEN: Mary A. Tujetsch, DDS, "Purchaser"
55 East Washington Street, Suite 2121
Chicago, IL 60602

AND: First Dental, PC, an Illinois professional corporation, "Seller"
8 West Gartner, Suite 124
Naperville, IL 60540

Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has ~~1100~~ 1200 active patients, who have been treated within the previous ~~twelve months~~ twenty four months according to First Practice Corporation Software

In consideration of the mutual promises and covenants contained in this Agreement, the parties agree as follows:

ARTICLE I
Purchase and Sale of Assets

1.01 Purchase and Sale. Subject to all the terms and conditions of this Agreement and for the consideration herein stated, on the Closing Date, as that term is defined in Section 1.06, Seller agrees to sell, convey, assign, transfer and deliver to Purchaser, free and clear of all encumbrances, and Purchaser agrees to purchase and accept from Seller, all of the assets, properties and rights of Seller (other than the assets specified in Section 1.02), tangible and intangible, wherever located, that are used or useful to maintain and operate the Dental Practice, which assets (the Assets) shall include without limitation:

1.01-1 All patient lists, equipment , files and patient records, and all other operating data and records relating to the Dental Practice, including without limitation financial, accounting and credit records, correspondence, budgets, engineering and facility records and other similar documents and records. Inactive records are to be returned to Seller two years after closing.

1.01-2 All other items of tangible personal property of Seller used in connection with or associated with the Dental Practice, including furniture, fixtures, equipment, supplies, inventory and spare and replacement items therefor, and all such items acquired by Seller after the date hereof and on or before the Closing Date, other than to the extent such items are disposed of by Seller prior to the Closing Date in the ordinary cause of practice. Seller represents that all equipment is working and in good order. Seller asserts that all equipment is in compliance with municipal, county, state, and federal laws. Seller assumes risk of loss of tangible assets prior to, but not subsequent to, closing.

1.01-3 All rights, benefits and interests of the Dental Practice under the contracts and agreements specifically assumed by Purchaser for provision of dentistry services including without

limitation contracts with third payers, dentists or other professionals, and under any contracts, agreements, commitments, understandings, purchase orders, documents or instruments entered into between the date hereof and the Closing Date and expressly assumed by Purchaser in writing on the Closing Date, other than to the extent such items have terminated, expired or been disposed of by Seller prior to the Closing Date without breach of this Agreement (collectively, the Contracts);

1.01-4 All assignable rights to all telephone lines and numbers used in the conduct of the Dental Practice; and

1.01-5 For one year subsequent to closing, Purchaser may use the name "First Dental of Orland Park," but only for the purpose of marketing the Dental Practice within a 20-mile radius of it. Purchaser shall not use any other name which includes the words "First Dental". No later than eighteen months subsequent to closing, Purchaser shall cease and desist using the name "First Dental of Orland Park".

1.01-6 The assets include the following equipment: eight waiting room chairs, Canon copier, Telecheck-credit card terminal, calculator, stapler, tape dispenser, file cabinet under copier, patient chart cabinet, corner desk in business front area, two office chairs, three business 4-line phones, one business 2 line phones, network hub, two waste cans, shredder, vacuum, microwave, card table and two chairs, three folding chairs in operatories, TV/VCR in operatory #4. The assets do not include the following equipment: any property of Innovative Chiropractic, fax machine, end table in waiting room, decorative pictures, refrigerator, large garbage can in furnace room, stereo, any property of Seller-Landlord, ladder, broom, mop, light bulb changing stick.

1.02 Excluded Assets. The Assets shall not include the following:

1.02-1 All cash assets of the Dental Practice, notes and accounts receivable, automobiles, real estate, and personal items of Seller. Re-do's of work originally performed before closing and completed subsequent to closing may be charged and collected by Purchaser, and do not constitute accounts receivable. Completion of work subsequent to closing which was originally begun prior to closing may be charged and collected by Purchaser, and do not constitute accounts receivable.

1.02-2 No liabilities of Seller whatsoever, whether in tort or contract or otherwise, are being transferred to or acquired by Purchaser hereunder, unless specifically assumed and scheduled hereunder. Buyer does not assume and will not be responsible for any known, unknown, or contingent liabilities of Seller incurred by any means including, but not limited to, professional malpractice or personal injury of any nature, including liabilities related to Seller's employees prior to closing. Seller is responsible for all payroll, tax liability, sales tax liability, if any, prior to closing.

1.02-3 The assets do not include the following: any property of Innovative Chiropractic, file cabinet next to copier machine, shelves containing vitamins, cabinet under fax machine, cabinetry in operatory, cabinetry in sterilization area, cabinetry at front desk, carpets, light fixtures, countertops, window treatments, ceiling speakers, TV and computer monitor mounts, bathroom fixtures, and magazine rack. The assets do not include any property of First Pacific Corporation, including its computers, monitors, keyboards, battery backup, computer speakers, laser printer, color printer, computer software, and computer connections.

1.02-4 Plants, trees, decorations, and pictures may be changed by Purchaser in cooperation with Innovative Chiropractic or other current tenant.

1.03 **Purchase Price**. The purchase price for the Assets (the Purchase Price) shall be the following:

1.03-1 One Hundred Sixty Five Thousand and 00/100ths ($165,000.00) Dollars is the full purchase price. The sum of Five Thousand ($5,000.00) Dollars has been deposited, and represents Purchaser's earnest money deposit ("Earnest Money"). The full purchase price minus the Earnest Money shall be paid by Purchaser to Seller at closing, by certified or official check.

1.04 **Instruments of Conveyance and Transfer**: The sale of the Assets, and the conveyance, assignment, transfer and delivery of all of the Assets shall be affected by Seller's execution and delivery to Purchaser, on the Closing Date, of a bill of sale in substantially the form of the Assignment and Bill of Sale attached hereto as Exhibit A. At time of closing, personal property, bio-hazardous property, and inactive patient files are to be moved at Seller's expense

1.05 **Further Assurances.** Seller agrees that, at any time and from time to time on and after the Closing Date, they will, upon the request of Purchaser and without further consideration, take all steps reasonably necessary to place Purchaser in possession and operating control of the Assets and will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all further acts, deeds, assignments, conveyances, transfers, or assurances as reasonably required to sell, assign, convey, transfer, grant, assure and confirm to Purchaser, or to aid and assist in the collection of or reducing to possession by Purchaser of, all of the Assets, or to vest in Purchaser good, valid and marketable title to the Assets.

1.06 **Closing**. The consummation of the transactions contemplated by this Agreement (the Closing) shall take place on July 1, 2004, or at another date, time and place agreed upon in writing by the parties (the Closing Date), but Purchaser shall take possession of the Dental Practice on June 30, 2004.

1.07 **Allocation of Purchase Price**. The Purchase Price shall be allocated among the Assets as follows, and Purchaser and Seller shall be bound by that allocation in reporting the transactions contemplated by this Agreement to any governmental authority (including without limitation the Internal Revenue Service):

(a) Twenty-Five Thousand ($25,000.00) Dollars for dental equipment;

(b) Four Thousand ($4,000.00) Dollars for hand instruments and dental supplies;

(c) Five Thousand ($5,000.00) Dollars for furniture and office equipment;

(d) One Hundred Thirty One ($131,000.00) Dollars for goodwill;

ARTICLE II
Representations and Warranties of Purchaser

Purchaser, represents and warrants to Seller as follows;

2.01 **Authorization.** This Agreement has been duly executed and delivered by Purchaser and is binding upon and enforceable against her in accordance with its terms;

2.02 **Compliance.** The execution, delivery and performance of this Agreement by Purchaser, the compliance by Purchaser with the provisions of this Agreement and the consummation of the transactions described in this Agreement will not conflict with or result in the breach of any of the terms or provisions of or constitute a default under:

2.02-1 any note, indenture, mortgage, deed of trust, loan agreement, lease or other agreement or instrument to which Purchaser is a party or by which Purchaser is bound; or

2.02-2 any statute or any order, rule, regulation or decision of any court or regulatory authority or governmental body applicable to Purchaser.

2.03 **Consents.** Except for the consent of Purchaser's principal bank, no consent, approval, authorization, order, designation or declaration of any court or regulatory authority or governmental body, federal or other, or third person is required to be obtained by Purchaser for the consummation of the transactions described in this Agreement.

2.04 **Accuracy of Representations & Warranties.** None of the representations or warranties of Purchaser contains or will contain any untrue statement of any material fact or omits or misstates a material fact necessary to make the statements contained in this Agreement not misleading.

ARTICLE III
Representations and Warranties of Seller

3.01 **Corporate Existence; Authority.** Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois, and has all necessary corporate power and authority to own, lease and operate the property and assets and to carry on the business as now conducted and as proposed to be conducted. Seller owns all of the assets of the Dental Practice. Seller has full power and authority to enter into this Agreement and to carry out its terms. This Agreement has been duly and validly executed and delivered by Seller and is binding upon and enforceable against Seller in accordance with its terms.

3.02 **No Adverse Consequences.** Neither the execution and delivery of this Agreement by Seller nor the consummation of the transactions contemplated by this Agreement will

3.02-1 result in the creation or imposition of any lien, charge or encumbrance on the Seller's assets or property,

3.02-2 violate or conflict with any provision of Seller's articles of incorporation or bylaws,

3.02-3 violate any law, judgment, order, injunction, decree, rule, regulation or ruling of any governmental authority applicable to Seller, or

3.02-4 either alone or with the giving of notice or the passage of time or both, conflict with, constitute grounds for termination or acceleration of, result in the breach of the terms, conditions

or provisions of, result in the loss of any benefit to Seller under or constitute a default under any agreement, instrument, license or permit to which Seller is a party or is bound.

3.03 **Brokers and Finders.** Purchaser acknowledges and understands that no brokers or finders have been used in this transaction or are otherwise entitled to any fee.

3.04 **Litigation.** There is no claim, litigation, proceeding or investigation of any kind pending or threatened by or against the Dental Practice, and, to the best knowledge of Seller, there is no basis for any such claim, litigation, proceeding or investigation.

3.05 **Compliance with Laws.** Seller has at all relevant times conducted the Dental Practice in compliance with their respective articles of incorporation and bylaws and all applicable laws and regulations. The Dental Practice is not subject to any outstanding order, writ, injunction or decree, and have not been charged with, or threatened with a charge of, a violation of any provision of federal, state or local law or regulation.

3.06 **Employment Matters.**

3.06-1 **Employment Agreements.** Each of the employees of the Dental Practice is an at-will employee. There are no written employment, commission or compensation agreements of any kind between Seller and any of its employees at the Dental Practice.

3.07 **Permits and Licenses.** Seller and the shareholders of Seller hold and at all times have held, all licenses, permits, franchises, easements and authorizations (collectively, Permits) necessary for the lawful conduct of the Dental Practice pursuant to all applicable statutes, laws, ordinances, rules and regulations of all governmental bodies, agencies and other authorities having jurisdiction over it or any part of its operations, and there are no claims of violation by any such party of any Permit.

3.08 **Consents and Approvals.** No consent, approval or authorization of any court, regulatory authority, governmental body, or any other entity or person not a party to this Agreement is required for the consummation of the transactions described in this Agreement by Seller. Seller has obtained, or shall have obtained prior to the Closing, all consents, authorizations or approvals of any third parties required in connection with the execution, delivery or performance of this Agreement by Seller or the consummation of the transaction contemplated by this Agreement. Seller has made all registrations or filings with any governmental authority required for the execution or delivery of this Agreement or the consummation of the transaction contemplated hereby.

3.09 **Records.** The books of account of Seller and the Professional Corporation is complete and accurate in all material respects, and there have been no transactions involving the business of Seller and the Professional Corporation which properly should have been set forth therein and which have not been accurately so set forth. Complete and accurate copies of such books have been made available to Purchaser.

3.10 **Reliance.** Seller recognizes and agrees that, notwithstanding any investigation by Purchaser, Purchaser is relying upon the representations and warranties made by Seller in this Agreement.

3.11 **Accuracy of Representations and Warranties.** None of the representations or warranties of Seller contains or will contain any untrue statement of any material fact or omits or

misstates a material fact necessary to make the statements contained in this Agreement not misleading. Seller does not know of any fact that has resulted or that, in the reasonable judgment of Seller will result, in any material adverse change in Seller's business, results of operation, financial condition or prospects that has not been set forth in this Agreement

ARTICLE IV
Covenants

4.01 Access to Properties, Books and Records. Prior to the Closing Date, Seller shall, at Purchaser's request, afford or cause to be afforded to the agents, attorneys, accountants and other authorized representatives of Purchaser reasonable access during normal business hours to all employees, properties, books and records of the Dental Practice and shall permit such persons, at Purchaser's expense, to make copies of such books and records. Purchaser shall treat, and shall cause all of their agents, attorneys, accountants and other authorized representatives to treat, all information obtained pursuant to this Section 4.01 as confidential. No investigation by Purchaser or any of her authorized representatives pursuant to this Section 4.01 shall affect any representation, warranty or closing condition of any party hereto or Purchaser's rights to indemnification

4.02 Negative Covenants. Except as otherwise permitted by this Agreement or with the prior written consent of Purchaser, prior to the Closing Date, Seller shall not, in connection with the Dental Practice:

4.02-1 Mortgage, pledge, otherwise encumber or subject to lien any of its assets or properties, tangible or intangible, or commit itself to do any of the foregoing;

4.02-2 Except in the ordinary and usual course of its business and in each case for fair consideration, dispose of, or agree to dispose of, any of its assets or lease or license to others, or agree so to lease or license, any of its assets;

4.02-3 Acquire any assets which would be material to the Dental Practice other than assets acquired in the ordinary and usual course of business and consistent with past practices;

4.02-4 Enter into any transaction or contract or make any commitment to do the same;

4.02-5 Increase the wages, salaries, compensation, pension or other benefits payable, or to become payable by it, to any of its employees or agents, including without limitation any bonus payments or severance or termination pay, other than increases in wages and salaries required by employment arrangements existing on the date hereof or otherwise in the ordinary and usual course of its business;

4.02-6 Agree or commit to do any of the foregoing.

4.03 Affirmative Covenants. Except as otherwise permitted by this Agreement or with the prior written consent of Purchaser, prior to the Closing Date, Seller shall:

4.03-1 Operate the Dental Practice, including collecting receivables and paying payables, as presently operated and only in the ordinary course and consistent with past practices;

4.03-2 Advise Purchaser in writing of any litigation or administrative proceeding that challenges or otherwise materially affects the transactions contemplated hereby;

4.03-3 Use its best efforts to maintain all of the Tangible Personal Property in good operating condition, reasonable wear and tear excepted, consistent with past practices, and take all steps reasonably necessary to maintain their intangible assets;

4.03-4 Not cancel or change any policy of insurance (including self-insurance) or fidelity bond or any policy or bond providing substantially the same coverage;

4.03-5 Maintain, consistent with past practices, all inventories, spare parts, office supplies and other expendable items;

4.03-6 Use its best efforts to retain all employees;

4.03-7 Maintain its books and records in accordance with past practices;

4.03-8 Pay and discharge all taxes, assessments, governmental charges and levies imposed upon it, its income or profits or upon any property belonging to it, in all cases prior to the date on which penalties attach thereto; and

4.03-9 Comply with all laws, rules and regulations applicable to the Dental Practice.

4.04 **Employees.** Seller shall be responsible for and shall pay and discharge all obligations to such employees arising out of or in connection with their employment prior to Closing.

4.05 **Indemnification by Seller**

Seller indemnifies and agrees to defend, indemnify, and hold Purchaser harmless from, against, and in respect of the following:

(a) any and all debts, liens, liabilities, or obligations of Seller, direct or indirect, fixed, contingent, or otherwise existing before the Closing Date, including, but not limited to, any liabilities arising out of any act, transaction, circumstance, state of facts, actions or inactions of employees, or violation of law that occurred or existed before the Closing Date, whether or not then known, due, or payable, and irrespective of whether the existence thereof is disclosed to Purchaser in this Agreement or any schedule hereto;

(b) any and all loss, liability, deficiency, or damage suffered or incurred by Purchaser as a result of any default by Seller existing on the Closing Date, or any event of default occurring prior to the Closing Date that with the passage of time would constitute a default, under any material contract or other agreement assumed by Purchaser under this Agreement;

(c) any and all loss, liability, deficiency, or damage suffered or incurred by Purchaser by reason of any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Seller contained in this Agreement or in any certificate, document, or instrument delivered to Purchaser hereunder or in connection herewith;

(d) any claim for a finder's fee or brokerage or other commission by any person or entity for services alleged to have been rendered at the instance of Seller with respect to this

Agreement or any of the transactions contemplated hereby; and

(e) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs, and expenses, including, without limitation, legal fees and expenses, incident to any of the foregoing or incurred in purchaser's successful enforcement of this indemnity.

(f) any violations of municipal, state, or federal law committed prior to closing.

4.06 Indemnification by Purchaser

Purchaser hereby agrees to indemnify and hold Seller harmless from, against, and in respect of:

(a) any and all debts, liabilities, or obligations of Purchaser, direct or indirect, fixed, contingent, or otherwise accruing after the Closing Date;

(b) any and all loss, liability, deficiency, or damage suffered or incurred by Seller resulting from any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Purchaser contained in this Agreement or in any certificate, document, or instrument delivered to Seller pursuant hereto or in connection herewith;

(c) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs, and expenses, including, without limitation, legal fees and expenses, incident to any of the foregoing or incurred in Seller's successful enforcement of this indemnity, except those resulting from Seller's duties and obligations as landlord of Purchaser's leased premises.

4.07. Third-Party Claims

(a) In order for Purchaser or Seller, as the case may be, to be entitled to any indemnification provided for hereunder, in respect of, arising out of, or involving a claim made by any person, firm, governmental authority, or corporation other than the Purchaser or Seller, or their respective successors, assigns, or affiliates, against the indemnified party, the indemnified party must notify the indemnifying party in writing of such third-party claim promptly after receipt by the indemnified party of written notice of the third-party claim, and the indemnified party shall deliver to the indemnifying party, within 20 days after receipt by the indemnified party, copies of all notices relating to the third-party claim.

(b) If a third-party claim as set forth in subsection (a) hereof is made against an indemnified party, the indemnifying party will be entitled to participate in the defense thereof and, if it so chooses, to assume the defense thereof with counsel selected by the indemnifying party, provided such counsel is not reasonably objected to by the indemnified party. Should the indemnifying party elect to assume the defense of such a third-party claim, the indemnifying party will not be liable to the indemnified party for any legal expenses subsequently incurred by the indemnified party in connection with the defense thereof. If the indemnifying party elects to assume the defense of such a third-party claim, the indemnified party will cooperate fully with the indemnifying party in connection with such defense.

(c) If the indemnifying party assumes the defense of a third-party claim, then in no event will the indemnified party admit any liability with respect to, or settle, compromise, or discharge, any third-party claim without the indemnifying party's prior written consent, and the indemnified party will agree to any settlement, compromise, or discharge of a third-party claim that the indemnifying party may recommend that releases the indemnified party completely in connection with the third-party claim.

(d) In the event the indemnifying party shall assume the defense of any third-party claim, the indemnified party shall be entitled to participate in, but not control, the defense with its own counsel at its own expense. If the indemnifying party does not assume the defense of any such third-party claim, the indemnified party may defend the claim in a manner as it may deem appropriate, and the indemnifying party will reimburse the indemnified party promptly;

ARTICLE V
Joint Covenants

Purchaser and Seller covenant and agree that they will act in accordance with the following:

5.01 Governmental Consents. Promptly following the execution of this Agreement, the parties will proceed to prepare and file with the appropriate governmental authorities any requests for approval or waiver, if any, that are required from governmental authorities in connection with the transactions contemplated hereby, and the parties shall diligently and expeditiously prosecute and cooperate fully in the prosecution of such requests for approval or waiver and all proceedings necessary to secure such approvals and waivers. Purchaser is not responsible for obtaining governmental consents regarding the physical structure of the building owned by Seller.

5.02 Best Efforts; No Inconsistent Action. Each party will use its best efforts to effect the transactions contemplated by this Agreement and to fulfill the conditions to the obligations of the other parties set forth in Article 6 or 7 of this Agreement. No party will take any action inconsistent with its obligations under this Agreement or that could hinder or delay the consummation of the transactions contemplated by this Agreement, except that nothing in this Section 5.02 shall limit the rights of the parties under Articles 6, 7 and 8.

ARTICLE VI
Conditions to Obligations of Seller

The obligations of Seller under Article I are, at their option, subject to satisfaction, at or prior to the Closing, of each of the following conditions:

6.01 Representations, Warranties and Covenants.

6.01-1 All representations and warranties of Purchaser made in this Agreement shall in all material respects be true and complete on and as of the Closing Date with the same force and effect as if made on and as of that date.

6.01-2 All of the terms, covenants and conditions to be complied with and performed by Purchaser on or prior to the Closing shall in all material respects have been complied with or performed by Purchaser.

6.02 Adverse Proceedings.

No suit, action, claim or governmental proceeding shall have been instituted or threatened

against, and no order, decree or judgment of any court, agency or other governmental authority shall have been rendered against, Purchaser or Seller to restrain or prohibit this Agreement or the transactions contemplated by this Agreement

6.03 *Lease*

At or before closing, Purchaser shall execute a five-year lease for the offices of the Dental Practice at 7714 159th Street, Orland Park, IL 60462, at which Seller is Lessor. Initial monthly rent shall be Two Thousand Four Hundred ($2,400.00) Dollars, and monthly rent will increase each year by a Five Per Cent (5%) increment over the previous year's monthly rent. The said required lease will also provide that Purchaser-Lessee shall pay monthly supplemental rent of Three Hundred Seventy-Five ($375.00) Dollars for reimbursement to Lessor of common area maintenance expenses, including but not limited to, lessee's pro-rata share of utility and other expenses for the entire building. Seller-Lessor shall account to Purchaser-Lessee at least semi-annually for such common area expenses, and shall either reimburse Purchaser for any over-payments made by Purchaser toward pro-rata common area maintenance expenses, or shall bill Purchaser for any such under-payments made by Purchaser, which billing Purchaser shall pay by its due date.

ARTICLE VII
Termination

7.01 **Right of Parties to Terminate** This Agreement may be terminated:

7.01-1 by Purchaser, if any of the authorizations, consents, approvals, filings or registrations described above shall have been denied, not permitted to go into effect or obtained on terms not reasonably satisfactory to Purchaser and all reasonable final appeals shall have been exhausted;

7.01-2 by Purchaser, if Seller shall have breached any of their obligations hereunder in any material respect;

7.01-3 by Seller, if Purchaser shall have breached any of its obligations hereunder in any material respect; or

7.02 **Effect of Termination** If either Purchaser or Seller decides to terminate this Agreement, such party shall promptly give written notice to the other party to this Agreement of such decision. In the event of a termination, the parties hereto shall be released from all liabilities and obligations arising under this Agreement, with respect to the matters contemplated by this Agreement, other than for damages arising from a breach of this Agreement.

ARTICLE VII
Confidentiality; Press Releases

8.01 Confidentiality

8.01-1 No information concerning Seller not previously disclosed to the public or in the public domain that has been furnished to or obtained by Purchaser under this Agreement or in connection

with the transactions contemplated hereby shall be disclosed to any person other than in confidence to employees, legal counsel, financial advisers or independent public accountants of Purchaser or used for any purpose other than as contemplated herein. If the transactions contemplated by this Agreement are not consummated, Purchaser shall hold such information in confidence for a period of four years from the date of any termination of this Agreement, and all such information that is in writing or embodied on a diskette, tape or other tangible medium shall be promptly returned to Seller.

8.01-2 No information concerning Purchaser not previously disclosed to the public or in the public domain that has been furnished to or obtained by Seller under this Agreement or in connection with the transactions contemplated hereby shall be disclosed to any person other than in confidence to the employees, legal counsel, financial advisers or independent public accountants of Seller or used for any purpose other than as contemplated herein. If the transactions contemplated by this Agreement are not consummated, Seller shall hold such information in confidence for a period of four years from the date of any termination of this Agreement, and all such information that is in writing or embodied on a diskette, tape or other tangible medium shall be promptly returned to Purchaser.

8.01-3 Notwithstanding the foregoing, such obligations of Purchaser and of Seller shall not apply to information

(a) that is, or becomes, publicly available from a source other than Purchaser or Seller, as the case may be;

(b) that was known and can be shown to have been known by Purchaser at the time of its receipt from Seller, or by Seller at the time of its receipt from Purchaser, as the case may be;

(c) that is received by Purchaser from a third party without breach of this Agreement by Purchaser, or is received by Seller from a third party without breach of this Agreement by Seller, as the case may be;

(d) that is required by law to be disclosed; or

(e) that is disclosed in accordance with the written consent of Purchaser or of Seller, as the case may be.

ARTICLE IX
Other Provisions

9.01 **Benefit and Assignment.** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns forever. No party hereto may voluntarily or involuntarily assign such party's interest under this Agreement without the prior written consent of the other parties.

9.02 **Entire Agreement.** This Agreement and the Schedules and Exhibits referred to herein embody the entire agreement and understanding of the parties and supersede any and all prior agreements, arrangements and understandings relating to matters provided for herein.

9.03 **Fees and Expenses.** Purchaser shall be solely responsible for all costs and expenses incurred by her, and Seller shall be solely responsible for all costs and expenses incurred by Seller, in connection with the negotiation, preparation and performance of and compliance with the terms of this Agreement.

9.04 **Amendment, Waiver, etc.** The provisions of this Agreement may be amended or waived only by an instrument in writing signed by the party against which enforcement of such amendment or waiver is sought. Any waiver of any term or condition of this Agreement or any breach hereof shall not operate as a waiver of any other such term, condition or breach, and no failure to enforce any provision hereof shall operate as a waiver of such provision or of any other provision hereof.

9.05 **Headings.** The headings are for convenience only and will not control or affect the meaning or construction of the provisions of this Agreement.

9.06 **Governing Law.** The construction and performance of this Agreement will be governed by the laws of the State of Illinois.

9.07 **Notices** Any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing; shall be delivered personally, including by means of telecopy, or mailed by registered or certified mail, postage prepaid and return receipt requested; shall be deemed given on the date of personal delivery or on the date set forth on the return receipt; and shall be delivered or mailed to the addresses or telecopy numbers set forth on the first page of this Agreement or to such other address as any party may from time to time direct, with copies to:

In the case of Seller:

(847) 212-5620 fell
(847) 424 0200-office

Steven H. Jesser
790 Frontage Road
Suite 110
Northfield, Illinois 60093
Facsimile: (800) 330-9710

Todd C. Pusateri, DDS
8 West Gartner
Naperville, IL 60540

In the case of Purchaser:

Mary A. Tujetsch, DDS
55 E. Washington Suite 2121
Chicago IL 60602
312-782-1396

9.08 **Breach; Equitable Relief.** The parties acknowledge that the Dental Practice and rights of the parties described in this Agreement are unique and that money damages alone for breach of this Agreement may be inadequate. Any party aggrieved by a breach of the provisions hereof may bring an action at law or suit in equity to obtain redress, including specific performance, injunctive relief or any other available equitable remedy. Time and strict performance are of the essence in this Agreement

9.09 **Attorneys' Fees.** If suit or action is filed by any party to enforce the provisions of this Agreement or otherwise with respect to the subject matter of this Agreement, each party shall bear its own legal fees, costs, and expenses.

9.10 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same instrument.

9.11 **Covenant Not to Compete.**

9.11-1. For a period of five (5) years after date of this Covenant, Seller shall not, in any capacity, own, manage, operate, control, participate in, be employed by, or be connected in any manner with the ownership, management, operation, control, or practice of any dental practice within a five (5) mile radius of 7714 159th Street, Orland Park, IL 60462.

9.11-2 During and after the closing as set forth in the Asset Purchase Agreement, Seller shall not disclose to any person or entity the names and addresses of any patients or suppliers or confidential or proprietary information of Purchaser, shall not disparage Purchaser, or solicit patients previously treated at the address set forth above, including those patients whose names were provided to Purchaser upon closing. Seller will cooperate in attempting to refer active and inactive patients of the Dental Practice to Purchaser, and will not refer such patients to other dentists.

9.11-3. Seller acknowledges that the restrictions imposed by this Covenant are fully

understood and will not preclude it from the gainful practice of dentistry

9.11-4. Seller agrees that this Covenant is intended to protect and preserve legitimate business interests of Purchaser. It is further agreed that any breach of this Covenant may render irreparable harm to Purchaser. In the event of a breach by Seller, Purchaser shall have available to it all remedies provided by law or equity, including, but not limited to, temporary or permanent injunctive relief to restrain Seller and its past or former dentists from violating this Agreement. If Seller is found to be in breach of any part of the Covenant Not to Compete, Seller must immediately cease practicing at the site wherein the breach is occurring, and Purchaser may seek all injunctive, equitable, and/or legal remedies available to it under law, including damages.

9.11-7. This Covenant Not to Compete constitutes the entire agreement between the parties hereto with respect to the restrictive covenant herein. No change, modification, or amendment shall be valid unless the same is in writing, signed by the parties hereto, and specifically provides for amendment, change, or modification of this Agreement. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the party to be charged.

9.11-8. If any portion of this Covenant shall be, for any reason, declared invalid or unenforceable, the remaining portion or portions shall nevertheless be valid, enforceable, and carried into effect to the fullest extent permitted, and the invalid or unenforceable portion shall be reformed, if possible, so as to be valid and enforceable.

9.11-9 This Covenant shall be subject to and governed by the laws of the State of Illinois.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first written above.

PURCHASER: Mary A. Tujetsch, DDS

SELLER: First Dental, PC

By: _____
Todd C. Poseteri, DDS, Its President

EXHIBIT A
ASSIGNMENT AND BILL OF SALE

Pursuant to the Asset Purchase Agreement dated June 27, 2004, (the Agreement) between Mary A. Tujetsch, DDS (Purchaser), and First Dental, PC (Seller), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller does hereby sell to Purchaser, all of Seller's right, title and interest in and to the Assets (as defined in the Agreement) and do hereby transfer, convey, grant and assign to Purchaser, all of Seller's right, title and interest in and to all of the Purchased Assets.

Seller hereby transfers the foregoing Assets free and clear of all liens, claims and encumbrances of every type whatsoever. This instrument will vest in Purchaser good and marketable title to the foregoing Assets, free and clear of all liens, claims and encumbrances.

IN WITNESS WHEREOF, Seller has caused this Assignment and Bill of Sale to be executed and delivered effective as of the close of business on June 30, 2004.

First Dental, PC
By: _____
Todd C. Pusateri, DDS, Its President

24 - 15

EXHIBIT 9

DR. MARY A. TUJETSCH
COSMETIC AND GENERAL DENTI
55 E WASHINGTON, SUITE 21
CHICAGO, IL 60602
(312) 782-1396
(312) 236-2543

2

April 5, 2005

First Dental
Attention: Dr. Todd Pusateri
8 W. Gartner, Suite 124
Naperville, IL 60540

Dear Todd:

Hi! I trust that all is well with you. Congratulations on the new baby on the way!

I called your office in order to talk to you directly, but you were seeing patients today. When Lindsey stated that you would be out of the office for the rest of the week, I thought it best to write to you.

Some time ago, I advertised for "Space Sharing" at the Orland Park location. When I ran the ad, I began getting numerous calls regarding dentists wanting to purchase the office. I thought that this was odd as I had not advertised the office for sale. These interested dentists forced me to contemplate the option of selling the practice if the money was right. I then went ahead and advertised the office for sale and decided that if the price was right, I would be willing to sell. If the price is not right, I will keep the office and nothing will change. I have received a lot of interest in the practice and I find myself needing to devote more time to my Chicago practice. When I originally purchased the office, I had anticipated that the office could run itself efficiently with little or no input/time from me. I have come to learn that an absentee owner is a recipe for disaster.

My question to you is, would you be interested in selling the building at 7714 W. 159th Street? I believe that my chances of selling the practice would be greatly enhanced if I could offer the sale of the building, in addition to my practice. I know that at the time of the purchase, in July 2004, you were open to the idea of selling the building. Have you given it any additional consideration? From your perspective, it would be easier to sell the building with the sale of the dental practice. I understand that the chiropractors' lease is coming to an end so the time could not be more ideal for both of us. The feedback I am getting is that a potential buyer who is a dentist would desire the entire office space so you would not want to renew the chiropractors' lease. The chiropractors could relocate to the new addition as they do not have plumbing issues and this would take care of their needs.

04/05/2005 18:10 FAX

DR. MARY A. TUJETSCH

COSMETIC AND GENERAL DENTISTRY

55 E WASHINGTON, SUITE 2121
CHICAGO, IL 60602
(312) 782-1396
(312) 236-2543

I would be willing to market and show your building, along with my practice, for a 6% commission which is standard in the business. This would allow me to cover my time and expenses which are considerable.

Please contact me as soon as possible regarding this proposal. Only the most serious buyer would be forwarded to you after being screened by me.

I ask that you keep all of this letter confidential as I may ultimately option to keep the practice in the end. I do not want to alarm Dr. Purdue or the staff and patients.

Thank you for your time and consideration. I think this would be a terrific opportunity for both of us if you are interested.

The best to you always.

Yours truly,

Dr. Mary Tujetsch

EXHIBIT 10

DR. MARY A. TUJETSCH

COSMETIC AND GENERAL DENTISTRY

55 E WASHINGTON, SUITE 2121
CHICAGO, IL 60602
(312) 782-1396
(312) 236-2543

April 6, 2005

First Dental
Attention: Dr. Todd Pusateri
8 W. Gartner, Suite 124
Naperville, IL 60540

Dear Todd:

I am offering you one million ($1,000,000.00) for the purchase of your building located at 7714 W. 159th Street, Orland Park, Illinois. This offer includes a down payment of $50,000.00 and then subsequent monthly payments in the amount of $7500.00 at a finance rate of 5% to you. Acceptance of this offer would guarantee an immediate $50,000.00 down payment in the form of a cashier's check or money order.

I have done a fair amount of inquiry regarding real estate in Orland Park. My advisors have informed me that my offer of one million dollars is very fair as the dental building across the street had an asking price of 1.2 million and less was accepted in the end. The building, across the street, contained more square footage, more land, more parking, and a full basement. The stone front also added more value to the building.

Acceptance of this offer would also guarantee a swift closing as opposed to months or delay. This offer will expire at 5:00 p.m. central standard time, today, as I am interested in another business opportunity. This offer is subject to a full inspection and attorney approval. Please contact me at (708)429-9200. Thanks, Todd. Have a nice break from dentistry!

Yours truly.

Mary A. Tujetsch, D.D.S.

PUSRRP001577

SA177

EXHIBIT 11

FIRST DENTAL
7714 W 159TH STREET
ORLAND PARK, IL 60462
(708) 429-9200

October 24, 2005

First Dental
Dr. Todd Pusateri
8 W. Gartner, Suite 124
Naperville, IL 60540

Dear Dr. Todd Pusateri:

As you know, approximately one year ago, I purchased your former dental office at 7714 W. 159th Street, Orland Park, Illinois. Due to ongoing financial discrepancies, I was advised to complete an audit of your former office. A thorough audit of this practice has brought a number of disturbing facts to light. Today, 10/24/05, I have been informed that the actual number of active patients, at the time of the sale, was 50% less than what you represented in our signed, legal contract. Please refer to the contract where you note that 1200 active patients of record are involved in the sale of the practice. A detailed report by First Pacific Corporation, your former and current billing agency, indicates that the actual number of active patients, at the sale, was 668. This misrepresentation has created an enormous burden for this office as you are also profitting from a monthly rent of nearly $3000.00. In addition, you have failed to compensate me for your failed dental work which required remakes. These remakes have been at my expense. While you have acknowledged that you are the responsible party, no compensation has been forthcoming, per our agreement. I have mentioned other problems associated with your misrepresentation of the office and you have been unconcerned.

Needless to say, I am stunned and upset by what I am learning. I ask that you consult your attorney and ask that he contact me at the telephone number listed above. This problem represents a

FIRST DENTAL

7714 W 159TH STREET
ORLAND PARK, IL 60462
(708) 429-9200

serious breach in our contract. I will provide your legal counsel with the 668 names and addresses associated with the actual number of active patients, at the time of the sale. I will also authorize First Pacific Corporation to cooperate with your attorney regarding this matter. Thank you for your cooperation in this matter.

Yours truly,

Mary A. Tujetsch, D.D.S.

EXHIBIT 12

FPC
FIRST PACIFIC
CORPORATION
Together we do more

July 6, 2006

RE: Dr Mary Tujetsch 110140, Dr. Todd Pusateri 111089

To Whom It May Concern:

On or about July 1, 2004, Dr. Mary Tujetsch purchased the dental practice of Dr Todd Pusateri, located at 7714 W 159th St, Orland Park, IL 60462-5036 Dr Pusateri was already a client of First Pacific Corporation (FPC) at the time of the sale, and Dr Tujetsch became an FPC client at the time of the sale

As part of that sale, FPC generated a copy of the database created during Dr. Pusateri's tenure with FPC, and set it up for Dr. Tujetsch's use This database included account information (names, addresses, phone numbers, etc...), but did not include any financial data or account history for the patient accounts. Lacking financial data, Dr. Tujetsch's database also lacked the ability to report Active Patients prior to her posting of new financial transactions.

In the fall of 2005, at Dr Tujetsch's request, FPC generated a report of Active Patients from Dr. Tujetsch's database However, the report parameters requested by Dr. Tujetsch pre-dated her tenure as an FPC client Upon presenting the report to her and learning of her intended use, our Account Executive cautioned her that the report would be inaccurate for her stated purpose of comparing the number of Active Patients on the report to the number of Active Patients stated in her sales agreement with Dr. Pusateri.

As part of the sale, Dr. Pusateri agreed to allow Dr Tujetsch access to his database, which encompassed financial transactions on patient accounts, for 90 days after the sale of the practice. Although she had access to Dr. Pusateri's database for three months following her purchase of the practice, we have no records that indicate she requested or generated a report of Active Patients from Dr Pusateri's database. Once we deleted Dr. Pusateri's database from the computer in the office, Dr Tujetsch had no access to Active Patient information prior to July 1, 2004.

At this time, FPC has deleted both Dr. Pusateri's database and Dr. Tujetsch's database from our system, and we have no record of Active Patients for either database.

If you have any questions, please call me at 503-588-1411, extension 2208

Best regards,

Bret Ketsdever
Client Accounts Manager

Matthew,

Please review and give me a call when you get a chance to discuss

Thanks,

Michael Wood
Regional Service Manager
First Pacific Corporation
1-800-544-2345

From: Katie Lucitt
Sent: Sunday, June 18, 2006 8:00 PM
To: Mike Wood
Subject: Dr. Pusateri / Dr. Tujetsch

Mike,

When Dr Tujetsch was still a client with FPC she asked me to pull up a report showing active patients for a certain time period. I called client services and they walked me through pulling up a custom report showing the active number of patients. I provided this report to Dr. Tujetsch. She later explained she wanted this report to compare it to the number of "Active Patients" that was listed in her contract when she purchased the practice from Dr. Pusateri. I informed her the report I gave her was inaccurate since she provided me with dates when she wasn't with FPC. The report I pulled up was for dates prior to her being an FPC client. I explained to Dr. Tujetsch that the report she had was inaccurate and we couldn't pull "Active" patients from her system for dates prior to her becoming a client. She explained to me she understood, but she stated she still felt that she was misrepresented in the sale by Dr. Pusateri.

Dr. Pusateri is requesting something in writing for his attorney stating FPC provided Dr. Tujetsch this report based on her doctor number, not his old doctor number He is looking for FPC to state that none of his information from his old doctor number would have showed up under her doctor number.

Please let me know if you need any additional information

Katie Lucitt
Account Executive
First Pacific Corporation
(800) 544-2345 x 4137

Date: 12/30/2003
Time: 10:20 PM

PRACTICE OVERVIEW

O.P.

111089 - FIRST DENTAL

Production				
AA - PUSATERI DDS, TODD C.	$	5,269.00	$	28,590.82
CC - COLLECTIONS	$	0.00	$	419.12
D2 - BABBITT, MONICA S.	$	0.00	$	35.00
D3 - PURDUE, RICHARD D.	$	12,715.00	$	142,647.10
D4 - BRITESMILE, BRITESMILE	$	0.00	$	70.00
H2 - GALBAN, JACKIE	$	9,513.80	$	78,848.26
PR - PRODUCTS	$	70.00	$	1,112.00
XX - X, X	$	0.00	$	1,453.29
ZZ - DOUBLE BOOK	$	0.00	$	2,835.00
Total Production	$	25,567.80	$	254,022.58
Days Worked				
AA - PUSATERI DDS, TODD C.		2		38
CC - COLLECTIONS		0		0
D2 - BABBITT, MONICA S.		0		28
D3 - PURDUE, RICHARD D.		10		142
D4 - BRITESMILE, BRITESMILE		0		0
H2 - GALBAN, JACKIE		10		121
PR - PRODUCTS		0		0
XX - X, X		0		0
ZZ - DOUBLE BOOK		0		87
Production Per Hour				
AA - PUSATERI DDS, TODD C.	$	447.79	$	127.88
CC - COLLECTIONS	$	0.00	$	0.00
D2 - BABBITT, MONICA S.	$	0.00	$	0.21
D3 - PURDUE, RICHARD D.	$	192.65	$	181.64
D4 - BRITESMILE, BRITESMILE	$	0.00	$	0.00
H2 - GALBAN, JACKIE	$	98.69	$	101.57
PR - PRODUCTS	$	0.00	$	0.00
XX - X, X	$	0.00	$	0.00
ZZ - DOUBLE BOOK	$	0.00	$	5.25
Total Production Per Hour	$	739.13	$	306.98
A/R Collection				
Patient Payments FPC	$	447.20	$	5,738.33
Insurance Payments FPC	$	7,090.47	$	83,769.85
Office Payments	$	14,505.10	$	135,380.86
Reassignment	$	0.00	$	1,840.39
Number of New Patients		40		338
Number of Patients Referred by Referral Sources				
Patients		0		0
Doctors		0		0
Other		0		0
Number of Active Patients		1,223		

PRACTICE OVERVIEW

111089 - FIRST DENTAL

Recall Status of All Patients	
Number with Current Recall	358
Number with Overdue Recall	749
Number Without Recall	949

Number of Patients with Diagnosed Treatment (other than Prophy Codes)	
Scheduled	304
Unscheduled	427
Total	731

Date: 4/29/2004
Time: 10:17 PM

PRACTICE OVERVIEW

O.P.

111089 - FIRST DENTAL

	Month-to-Date	Year-to-Date
Production		
AA - PUSATERI DDS, TODD C.	$ 278.00	$ 13,278.04
CC - COLLECTIONS	$ 40.00	$ 179.65
D2 - BABBITT, MONICA B.	$ 0.00	$ 0.00
D3 - PURDUE, RICHARD D.	$ 11,052.20	$ 43,021.30
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 35.00
H2 - GALBAN, JACKIE	$ 6,478.00	$ 28,864.80
PR - PRODUCTS	$ 0.00	$ 94.00
XX - X, X	$ 101.80	$ 784.60
ZZ - DOUBLE BOOK	$ 870.00	$ 1,810.00
Total Production	$ 18,577.80	$ 88,068.39
Days Worked		
AA - PUSATERI DDS, TODD C.	5	17
CC - COLLECTIONS	0	0
D2 - BABBITT, MONICA B.	0	0
D3 - PURDUE, RICHARD D.	11	43
D4 - BRITESMILE, BRITESMILE	0	0
H2 - GALBAN, JACKIE	11	43
PR - PRODUCTS	0	0
XX - X, X	0	0
ZZ - DOUBLE BOOK	0	0
Production Per Hour		
AA - PUSATERI DDS, TODD C.	$ 7.89	$ 114.47
CC - COLLECTIONS	$ 0.00	$ 0.00
D2 - BABBITT, MONICA B.	$ 0.00	$ 0.00
D3 - PURDUE, RICHARD D.	$ 151.40	$ 152.02
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 0.00
H2 - GALBAN, JACKIE	$ 59.74	$ 84.93
PR - PRODUCTS	$ 0.00	$ 0.00
XX - X, X	$ 0.00	$ 0.00
ZZ - DOUBLE BOOK	$ 0.00	$ 0.00
Total Production Per Hour	$ 248.03	$ 351.42
A/R Collection		
Patient Payments FPC	$ 557.60	$ 3,039.41
Insurance Payments FPC	$ 6,791.00	$ 37,689.44
Office Payments	$ 11,795.30	$ 44,544.33
Reassignment	$ 85.00	$ 85.00
Number of New Patients	23	89
Number of Patients Referred by Referral Sources		
Patients	0	0
Doctors	0	0
Other	0	0
Number of Active Patients	1,227	

PRACTICE OVERVIEW

111089 - FIRST DENTAL

Recall Status of All Patients		
Number with Current Recall	392	
Number with Overdue Recall	756	
Number Without Recall	972	

Number of Patients with Diagnosed Treatment (other than Prophy Codes)		
Scheduled	397	
Unscheduled	194	
Total	591	

EXHIBIT F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARY A. TUJETSCH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 06 CH 11607
	)	
TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.,	)	Judge Henry
	)	
Defendants.	)	

PLAINTIFF'S ANSWERS TO DEFENDANTS' SECOND INTERROGATORIES

NOW COMES the plaintiff, MARY A. TUJETSCH, by and through her attorneys, WILLIAMS MONTGOMERY & JOHN LTD., and in answer to Defendants' Second Interrogatories, states:

1. State the date Pusateri represented to Tujetsch that there were approximately 1,200 active patients that had been treated at Dental Practice within the two years prior to the sale as alleged in paragraph 8 of the Complaint.

ANSWER: June 27, 2004

2. State whether the enclosed documents attached as Exhibits "A" and "B" were provided by Pusateri to Tujetsch prior to executing the Asset Purchase Agreement dated June 27, 2004. If so, please state the date the documents were provided and whether Pusateri provided Tujetsch with any other documents to substantiate the patient count before the Asset Purchase Agreement was executed.

ANSWER: Dr. Tujetsch did not receive the documents attached as Exhibits "A" and "B" prior to the sale. Dr. Tujetsch will produce all documents, in her possession and not previously produced, that she received from the defendant before and after the sale of the business.

3. State whether Tujetsch contacted any representative of First Pacific Corporation before July 1, 2004. If so, please state the date of the contact, how the contact was made (whether by phone, electronically, fax, writing or in person), who Tujetsch contacted and what, if any, information was provided to Tujetsch.

ANSWER: No.

4. If Tujetsch did not contact First Pacific Corporation until after July 1, 2004, please state the date of the first contact, how the contact was made (whether by phone, electronically, fax, writing or in person), who Tujetsch contacted and what, if any, information was provided to Tujetsch.

ANSWER: Tujetsch objects to this interrogatory as overly broad, unduly burdensome and requiring a narrative response which is better suited for a deposition. Without waiving the foregoing, Tujetsch states that she spoke to the following First Pacific Corporation employees after July 1, 2004 via phone:

1. Ann Watt;
2. Kevin Brady;
3. Connie Hayes;
4. Scott (last name unknown);
5. Brett (last name unknown); and
6. Katie Lucitt.

Dr. Tujetsch has also produced a list of her contacts at First Pacific Corporation (T01186-T01187) via letter dated November 9, 2007.

MARY A. TUJETSCH, Plaintiff

By: _____
One of her attorneys

David E. Stevenson
Eric R. Lifvendahl
WILLIAMS MONTGOMERY & JOHN LTD.
Attorneys for Plaintiff
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Chicago, Illinois 60606
(312) 443-3200
Firm I.D. 04933
#755600

STATE OF ILLINOIS)
) SS
COUNTY OF C OO K)

AFFIDAVIT OF SERVICE

I, Lorraine M. Casiello, being first duly sworn on oath, state that I caused a copy of the **Plaintiff's Answers to Defendants' Second Interrogatories,** to be served upon the person(s) to whom the Notice is addressed via U.S. Mail by depositing same in the U.S. Mail chute located at Twenty North Wacker Drive, Chicago, Illinois, 60606, with proper postage prepaid, by 5:00 p.m. on November 13, 2007.

Lorraine M. Casiello

Subscribed and Sworn to
before me this 13th day
of November, 2007.

Notary Public

"OFFICIAL SEAL"
DONNA M. WROBEL
Notary Public, State of Illinois
My Commission Expires 08/10/08

EXHIBIT G

AFFIDAVIT OF DR. RICHARD PURDUE

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH,	))	
Plaintiff,	))	
v.	)	06 CH 11607
TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.,	)	(Transferred to Law Division)
	))	Hon. Charles R. Winkler
Defendants.		

AFFIDAVIT OF DR. RICHARD PURDUE

I, Richard Purdue, being of the age of majority, and first being placed under oath, depose and state as follows:

1. I am authorized to furnish this Affidavit and competent to testify to the matters set forth in this Affidavit.

2. The facts set forth in this Affidavit are within my personal knowledge.

3. If called upon as a witness, I could competently testify to the facts stated in this Affidavit.

4. I am a dentist, and have been licensed to practice dentistry in the State of Illinois since 1978.

5. Previously, I was an associate dentist in a dental practice established by Dr. Todd Pusateri ("Pusateri") at 7714 W. 159th Street in Orland Park, Illinois (the "Dental Practice").

6. I was a dentist associate in the Dental Practice from 2001 until approximately June 2005, when I left the practice.

7. In 2006 I purchased from Dr. Pusateri a dental practice located in Schaumburg, Illinois.

8. The dental practice in Schaumburg that I purchased from Dr. Pusateri continues to exist as a profitable practice.

9. It is my understanding that Dr. Tujetsch purchased the Dental Practice from Todd Pusateri around the end of June 2004.

10. In June 2004, the Dental Practice employed me, a dental hygienist (Jackie Galban), a dental assistant (Tina Buben-Dowling), a receptionist (Janice Johnson), and a bookkeeper (Marge Kelly).

11. It is my recollection and belief that around the end of June 2004 ownership of the Dental Practice transferred from Dr. Pusateri to Dr. Tujetsch.

12. It is also my recollection that the dental work I did in June 2004 was paid to me by Dr. Pusateri and the work I did in July 2004 was paid by Dr. Tujetsch. I don't remember talk of myself or the other employees still working for Dr. Pusateri or not yet working for Dr. Tujetsch after the practice sale. It was my recollection and belief that we were working for Dr. Tujetsch after the sale.

13. During my tenure at the Dental Practice, I had access to Patient Charts and the information included in them and was familiar with the condition of its equipment.

14. During my tenure at the Dental Practice, my duties as a dentist required me to use equipment in the Dental Practice in order to provide patient care.

15. To the best of my recollection and belief, the equipment in the Dental Practice was in the same or very similar working order when I last left the office before Sunday, June 27, 2004 as it was on or around June 30, 2004.

16. To the best of my recollection and belief, during my tenure as a dental associate of the Dental Practice the Dental Practice consistently created and maintained Patient Charts for patients treated in the Dental Practice.

17. The various Patient Charts contained detailed contact information, pertinent medical and dental histories, and treatment notes for patients treated in the Dental Practice.

18. To the best of my recollection and belief, Patient Charts could be accessed in the Dental Practice before the sale of the Dental Practice to Dr. Tujetsch and after the sale.

19. I don't recall missing Patient Charts being an issue before or after the sale.

20. However, Patient Charts were not the only source of patient information in the Dental Practice.

21. Although I did not personally use the computer, to the best of my recollection, the girls looked up patient information on the computer from time to time per my request before and after the sale of the Dental Practice.

22. I assume a patient list could have been downloaded from the computer software.

23. It seems like the software would have been pretty useless if it could not be used to generate a patient list.

24. I would be surprised if Dr. Pusateri or Dr. Tujetsch would have used software that could not generate a patient list.

25. It is my recollection that Dr. Pusateri used FPC Software and Dr. Tujetsch also used it after she purchased the Dental Practice.

26. It is my recollection that the same computer and the same computer software remained in the Dental Practice after it was purchased by Dr. Tujetsch.

27. I am advised that in this law suit against Dr. Pusateri, Dr. Tujetsch claims that she did not receive patient lists when she bought the Dental Practice; that Dr. Pusateri overstated the number of "active patients" reported by FPC Software around the time of the sale, and that some equipment of the Dental Practice was not working on the day the sale agreement was signed, which I am told was June 27, 2004.

28. Although I don't recall patient lists lying around nor do I recall asking for a patient list before or after the sale of the Dental Practice, I also don't recall talk of hiding or withholding patient lists from Dr. Tujetsch.

29. I do not recall during my tenure as a dentist of the Dental Practice that I experienced the inability to contact patients of the Dental Practice.

30. During my tenure as a dentist in the Dental Practice I do not recall those associated with the Dental Practice -- including Dr. Tujetsch -- complaining of a lack of patient lists or an inability to contact patients of the Dental Practice for lack of patient lists, or complaining of a lack of patient information.

31. It is my recollection that, after the sale, by the time I left in 2005, there was a noticeable slow down of patients.

32. When Dr. Tujetsch purchased the Dental Practice she purchased used equipment.

33. It's been my experience through life that even new purchases sometimes need repairs.

34. I don't recall dental equipment repairs that were a major expense to the Dental Practice, after it was purchased by Dr. Tujetsch.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.

Richard Duane Purdue, DMD

March 8, 2009

To Dr. Todd Pusateri:

Recently you requested that I write a letter explaining some of the changes that took place at the Orland Park dental office after you sold the practice to Dr. Mary Tujetsch. In the outline you gave me, you specifically asked me to discuss the changes in the style of the practice once Dr. Tujetsch took over. Some examples of possible changes you wondered about and asked about were Dr. Tujetsch doing treatment plans instead of me, charging for broken appointments, verbal arguments with patients, and patient reactions to the changes. You also asked if I observed problems with the dental equipment.

I worked for Dr. Tujetsch as a dentist associate for about one year, (approximately June 04 to June 05) in the Orland Park practice. The following were some of my observations, the best I can remember, during that time.

1) The practice was noticeably slower by the end of the first year.
2) You had charged a more than reasonable fee for an exam and cleaning. I can understand why Dr. Tujetsch wanted to raise that fee, but I think it was hard for non-insurance patients to get used to.
3) I believe many patients would be naturally uncomfortable with a new dentist, a new practice owner and new policies.
4) Dr. Tujetsch elected to do many of the exams and quite a bit of the of the treatment planning. Since I had been there longer, the patients knew me better and because of that, in some cases, I believe weren't as comfortable with her treatment planning.
5) There did seem to be more disagreements that came up with patients.
6) Dr. Tujetsch sometimes charged for missed appointments. I do not think she charged for all missed appointments, but when she did, it was something, some of the O.P. patients did not accept well.
7) I do remember a few equipment repairs, but don't remember repairs of major costs to the practice.

Hopefully these thoughts help explain the changes you asked about.

I would also like to share some observations about your exceptionally good character and how well you have treated me in our business dealings since we first met in 2000. Our first business agreement was to share office space and major equipment, my practice and yours, for about 6 and a half years in Schaumburg before you sold me your Schaumburg practice in 2006. I didn't

know you at all before sharing space with you, so in some ways, I took a chance because we usually were not there at the same time and you had access to my supplies, (they were not locked up), and you could have tried to persuade my patients to your practice. I have not regretted sharing space with you and your staff. You and they treated me very well and with high integrity. Also, while working for you as an associate in O.P. from 2001 until June 04, I appreciated how you treated me more like a partner than an employee. You were fair to me and the patients. We trusted and respected each other. Since buying your practice in Schaumburg, I feel like the price was quite fair and reasonable. The purchase has been a great blessing to me and I have not regretted buying it.

I look forward to continuing what I consider to be an excellent business relationship.

Thank you,

Richard Purdue

Richard Purdue, D.M.D.

AFFIDAVIT OF JACKIE GALBAN, RDH, LDH

SA202

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	06 CH 11607 (Transferred to Law Division) Hon. Charles R. Winkler

AFFIDAVIT OF JACKIE GALBAN, RDH, LDH

I, Jackie Galban, being of the age of majority, and first being placed under oath, depose and state as follows:

1. The facts set forth in this affidavit are within my personal knowledge.

2. If called upon as a witness, I would and could competently testify to all facts stated in this Affidavit.

3. I am licensed as a dental hygienist in various states, including Illinois.

4. I now reside in Arkansas, where I continue to work as a dental hygienist.

5. Previously, I was employed as a dental hygienist in a dental practice established by Dr. Todd Pusateri at 7714 W. 159th Street in Orland Park, Illinois (the "Dental Practice").

6. I was employed by the Dental Practice from February 26 of ~~2001~~ 2002 until September 2004, when I resigned.

7. I resigned because after the Dental Practice was sold in June 2004, the new owner, Dr. Mary Tujetsch ("Tujetsch"), started to provide dental hygiene care to the patients that I would have otherwise seen, and told me that I no longer worked fixed hours in the Dental Practice, but would be called on an "as-needed" basis.

8. I suspected that Tujetsch had put me on an "as-needed" basis because she was providing dental hygiene care to my patients.

9 Accordingly, in or around September 2004, I went unannounced to the Dental Practice to determine whether that was in fact the case

10 When I arrived at the Dental Practice, I saw that in fact Tujetsch was providing dental hygiene care to one of my patients, and I promptly quit.

11. It is my understanding that Tujetsch signed a purchase agreement, paid the purchase price for the Dental Practice, and received keys to the Dental Practice on or around Sunday, June 27, 2004.

12. As of June 2004, the Dental Practice employed me, a dentist (Dr. Richard Purdue), a dental assistant (Tina Buben-Dowling), a receptionist (Janice Johnson), and an office bookkeeper (Marge Kelly).

13. While I was working at the Dental Practice before the sale, it had a steady stream of patients, and seemed to be both profitable and consistent financially.

14. It is my recollection and belief that by June 30, 2004, everyone employed in the Dental Practice understood that Tujetsch had on that date officially taken exclusive possession and ownership of the Dental Practice.

15. During my tenure at the Dental Practice, I was familiar with the sources of patient information stored in the Dental Practice, and the condition of its equipment.

16 During my tenure at the Dental Practice, my duties as a dental hygienist required me to use equipment in the Dental Practice in order to provide patient care.

17. To the best of my recollection and belief, all of the equipment in the Dental Practice was in working order when I last left the office before Sunday, June 27, 2004, and remained in working order thereafter, on or around June 30, 2004

18. To the best of my recollection and belief, during my tenure as an employee of the Dental Practice the Dental Practice consistently created and maintained Patient Charts for all patients treated in the Dental Practice.

19 The various Patient Charts contained detailed contact information, pertinent medial and dental histories, and treatment notes for all patients treated in the Dental Practice.

20. To the best of my recollection and belief, Patient Charts created in the Dental Practice had been stored on shelves in the Dental Practice before June 30, 2004, the sale of the Dental Practice to Tujetsch, where they remained, undisturbed, on the date that Tujetsch received exclusive possession of the Dental Practice.

21. However, Patient Charts were not the only source of patient information in the Dental Practice.

22 A few years before the sale, Dr. Pusateri contracted to outsource the issuance and collection of patient bills for the Dental Practice to First Pacific Corporation ("FPC").

23 After contracting with FPC, the Dental Practice had, in addition to Patient Charts, a second source of information about patients: a computer terminal in the Dental Practice (the "FPC Terminal") that was owned and provided by First Pacific Corporation ("FPC").

24. After outsourcing its billing to FPC, the Dental Practice used the FPC Terminal to input information that was needed by FPC in order to issue patient bills.

25. As a result of its relationship with FPC, in addition to storing patient information in Patient Charts, the Dental Practice also had, beginning in 2001, patient information stored in the FPC Terminal.

26 That information included, among other things, patient names, addresses, and telephone numbers.

27. It is my recollection that Tujetsch arranged for continued access to an FPC Terminal and FPC billing services on or around the time she bought the Dental Practice, because we still had access to that Terminal and those services after the sale.

28 It is my recollection that an FPC Terminal remained in the Dental Practice after it was purchased by Tujetsch.

29. Before and after June 30, 2004, the FPC Terminal could be used to review or print out lists of patients of the Dental Practice, on demand, including contact information of patients such name, address, and telephone number.

30. To the best of my recollection and belief, after June 27, 2004 until I resigned in September 2004, anyone in the Dental Practice needing contact information about a patient of the Dental Practice could obtain that information from a Patient Chart, or, alternatively, from the patient's electronic record in the FPC Terminal.

31. It is my general recollection that after the sale of the Dental Practice the flow of returning patients continued at roughly the same pace as before, but that flow seemed gradually to diminish after patients met Dr. Tujetsch for the first time

32. By the time I quit, in September 2004, it appeared to me that the Dental Practice was in decline as a result of patient abandonment that began after Tujetsch became involved in the day to day management of the Dental Practice.

33. I am advised that in this law suit against Dr. Pusateri, Tujetsch claims that she did not receive patient lists when she bought the Dental Practice; that Dr. Pusateri overstated the number of "active patients" reported by FPC Software around the time of the sale, and that some equipment of the Dental Practice was not working on the day the sale agreement was signed, which I understand was June 27, 2004.

34. I was not involved in tracking the number of active patients of the Dental Practice, although I recall that the FPC Terminal could be queried to generate that number in a summary report.

35. As for patient lists, I am not aware of any patient list owned by the Dental Practice that was not delivered to Tujetsch.

36. To the best of my knowledge, all patient lists in existence in the Dental Practice before June 27, 2004, remained in place after June 27, 2004, and also remained in place on June 30, 2004, the date that Tujetsch officially took possession and control of the Dental Practice.

37. At no time during my tenure as a dental hygienist of the Dental Practice did I personally experience any lack of patient lists or inability to contact patients of the Dental Practice.

38. At no time during my tenure as a dental hygienist in the Dental Practice do I recall anyone in the Dental Practice -- including Tujetsch -- complain of a lack of patient lists or an inability to contact patients of the Dental Practice for lack of patient lists, or complain of a lack of patient information.

39. To the best of my recollection and belief, no patient list owned by the Dental Practice and in existence on or before the sale was withheld from Tujetsch, or otherwise not provided to her.

40. To best of my recollection and belief, no equipment owned by the Dental Practice was out of order on or around June 27, 2004 or June 30, 2004, the date Tujetsch officially assumed exclusive possession and control of the Dental Practice.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.

Jackie Galban RDH, LDH
Jackie Galban, RDH, LDH

AFFIDAVIT OF TINA BUBEN-DOWLING

SA209

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division) Hon. Charles R. Winkler

AFFIDAVIT OF TINA BUBEN-DOWLING

I, Tina Buben-Dowling, being of the age of majority, and first being placed under oath, depose and state as follows:

1. The facts set forth in this affidavit are within my personal knowledge.

2. If called upon as a witness, I would and could competently testify to all facts stated in this Affidavit.

3. I was employed as a dental assistant in a dental practice established by Dr. Todd Pusateri at 7714 W. 159th Street in Orland Park, Illinois (the "Dental Practice").

4. I first became an employee of the Dental Practice in or around January 1999.

5. Thereafter, I continued to work in the Dental Practice until March 2005, when I resigned.

6. My tenure as a dental assistant in the Dental Practice continued for about 8 months after the Dental Practice was sold to Dr. Mary Tujetsch ("Tujetsch"), in June 2004.

7. It is my understanding that Tujetsch signed a purchase agreement, paid the purchase price for the Dental Practice, and received keys to the Dental Practice on or around Sunday, June 27, 2004.

8. As of June 2004, the Dental Practice employed me, a dentist (Dr. Richard Purdue), a dental hygienist (Jackie Galban), a receptionist (Janice Johnson), and an office bookkeeper (Marge Kelly).

9. It is my recollection and belief that by the end of June 2004, everyone employed in the Dental Practice understood that Tujetsch had on that date officially taken exclusive possession and ownership of the Dental Practice

10 During my tenure at the Dental Practice, I was familiar with the sources of patient information stored in the Dental Practice, and the condition of its equipment.

11. During my tenure at the Dental Practice, my duties as a dental assistant required me regularly to monitor and use equipment in the Dental Practice in order to take and develop x-rays, seat patients, sterilize instruments, and turn the dental compressor and vacuum on and off, among other things.

12. Generally, if any equipment in the Dental Practice malfunctioned, it was my responsibility to investigate the problem, and, subject to approval, arrange for a replacement or repair.

13. To the best of my recollection and belief, all of the equipment in the Dental Practice was in working order when I last left the office before Sunday, June 27, 2004, and remained in working order thereafter, on June 30, 2004.

14. I have no recollection of any equipment failure at the time the Dental Practice was sold.

15. To the best of my recollection and belief, from January 1999 through the date of the sale to Tujetsch, the Dental Practice created and maintained Patient Charts for all patients treated in the Dental Practice.

16. The various Patient Charts contained detailed contact information (including name, address, and telephone number), pertinent medial and dental histories, and treatment notes for all patients treated in the Dental Practice.

17. To the best of my recollection and belief, all Patient Charts ever created in the Dental Practice were stored on shelves in the Dental Practice before the sale of the Dental Practice to Tujetsch, where they remained when Tujetsch received exclusive possession of the Dental Practice.

18. After the sale, and before I resigned, in March 2005, Tujetsch opined, from time to time, that some of the Patient Charts in the Dental Practice pertained to patients who were unlikely to return to the Dental Practice for treatment.

19. When Tujetsch identified such a Patient Chart, she asked me to send it to Dr Pusateri to be stored.

20 Patient Charts were not the only source of patient information in the Dental Practice

21. In 2001, Dr. Pusateri contracted to outsource the issuance and collection of patient bills for the Dental Practice to First Pacific Corporation ("FPC").

22. After FPC services began, the Dental Practice had, in addition to Patient Charts, a second source of information about patients: a computer terminal (the "FPC Terminal") provided by First Pacific Corporation ("FPC").

23. The Dental Practice used the FPC Terminal to input information that was needed by FPC in order to issue patient bills.

24 Information about each patient was entered into the FPC Terminal including name, address, and telephone number

25. As a result of its relationship with FPC, in addition to storing patient information in Patient Charts, the Dental Practice had, after March 2001, also stored patient information electronically, in the FPC Terminal.

26. It is my recollection that an FPC Terminal remained in the Dental Practice after the sale to Dr. Tujetsch because Dr. Tujetsch contracted with FPC for continued access to an FPC Terminal and FPC billing services after the sale.

27. Before and after the sale to Tujetsch, the FPC Terminal could be used to review or print out lists of patients of the Dental Practice, including names, addresses, and telephone numbers, on demand.

28 To the best of my recollection and belief, after FPC services began, in 2001, until I resigned in March 2005, anyone in the Dental Practice needing contact information about a patient of the Dental Practice could obtain that information from the Patient Chart, or, alternatively, from the patient's electronic record on the FPC Terminal.

29. It is my recollection that for about six months after the sale of the Dental Practice, the flow of returning patients continued at roughly the same pace as before, but that flow seemed gradually to diminish as patients met Dr. Tujetsch for the first time

30. I believe that patient abandonment occurred after the sale to Tujetsch for the reasons set forth in the statement that I provided in this case previously, which is attached hereto as Exhibit 1

31. I am advised that in this law suit against Dr. Pusateri, Tujetsch claims that she did not receive patient lists when she bought the Dental Practice; that Dr. Pusateri overstated the number of "active patients" reported by FPC Software around the time of the sale, and that some

equipment of the Dental Practice was not working on the day the sale agreement was signed, which I understand was June 27, 2004.

32. I was not involved in tracking the number of active patients of the Dental Practice, although I recall that the FPC Terminal could be queried to generate that number in a summary report.

33 I am not aware of any patient list owned by the Dental Practice that was not delivered to Tujetsch.

34 To the best of my knowledge, all patient lists in existence in the Dental Practice before June 27, 2004, remained in place thereafter, and were in place after Tujetsch officially took possession of the Dental Practice.

35. At no time during my tenure as a dental assistant of the Dental Practice did I personally experience any lack of patient lists or inability to contact patients of the Dental Practice.

36. At no time during my tenure as a dental assistant in the Dental Practice do I recall hearing anyone working in the Dental Practice -- including Dr. Tujetsch -- complain of a lack of patient lists or an inability to contact patients of the Dental Practice for lack of patient lists, or complaining of a lack of patient information.

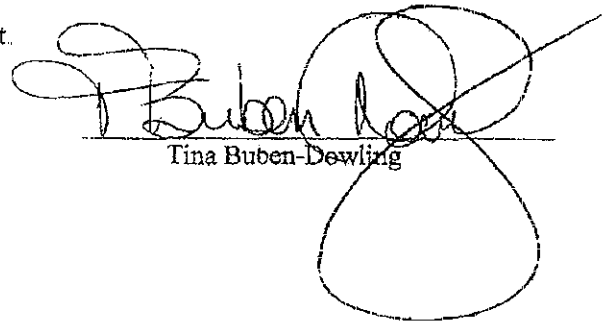
37 To the best of my recollection and belief, no patient list owned by the Dental Practice and in existence on or before the sale was withheld was withheld from Tujetsch, or otherwise not provided to her.

38. To best of my recollection and belief, no equipment of the Dental Practice was out of order on or around the time that Tujetsch officially assumed exclusive possession and control of the Dental Practice.

39. To best of my recollection and belief, Dr. Tujetsch never advised me of any equipment failure in the Dental Practice as of the date Tujetsch officially assumed exclusive possession and control of the Dental

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.



Tina Buben-Dowling

EXHIBIT 1

To whom it may concern,

My name is Tina Dowling and I worked for both Dr.Pusateri and Dr.. Tujetsch. I worked for Dr.Pusateri for approximately 6 years .I worked for Dr.. Tujetsch from approximately June 2004 to about February or March of 2005. I didn't work for Dr. Tujetsch for very long for various reasons..

When I worked for Dr.Pusateri I felt like the patient's came first. He would work with anyone who couldn't pay up front for there treatment all at once. We came up with an affordable payment plan. The fees in my opinion were reasonable. The patient's liked our hygienist, staff and Doctors. The equipment worked just fine and we had a steady flow of patients.

Soon after Dr.. Tujetsch took over she made drastic changes. This resulted in the patients were leaving. Our hygienist was fired. The fees were raised. We no longer included the exam or the fluoride treatment in the fee for the cleanings. If a patient was 5-10 minutes late she would make them reschedule. Then she would charge them for a broken/missed appointment. I believe the fee for that was $35.00 for every 30 minutes. Patients would call requesting a copy of their records and would not release them until they paid to have them copied. She would argue with patients on the phone or in person in the reception area, when other patients were present, or in the treatment area. I recall at least 2 occasions that the Orland Park Police were called. The patients were very unhappy. A lot of the patients could not afford the treatment or the payment plan, she recommended. Patients would say they were not back because they were unhappy with her services. I had to call the IRS to get her to send me my W2 form for taxes. I received a letter from Dr.. Tujetsch in regards to Dr.. Pusateri's office keys, threatening to pursue legal actions against me if I did not return the keys to her. I returned the keys to Dr.Pusateri who owned the building, were the practice was. I have enclosed this letter.. In my opinion Dr. Tujetsch's attitude and some of her actions were very unprofessional and it was a hostile and uncomfortable place to work. Any other questions or concerns please contact me, by the information on the following page.

Sincerely,
Tina Dowling

Tina Dowling
14435 Lamon Ct
Midlothian, Il 60445
Home #708/597/1192
Cell#708/983/8584

FIRST DENTAL
7214 W 159TH STREET
ORLAND PARK, IL 60462
(708) 429-9200

June 7, 2005

Ms. Tina Dowling
15623 Millard
Markham, IL 60426

Dear Ms. Tina Dowling:

Please be advised that this letter will serve as my final attempt and notification to you regarding my office keys. Please be advised that unless my office keys are returned immediately, I will seek all legal remedies in order to secure my business and confidential records.

As you are well aware, both Dr. Richard Purdue and I have made countless telephone calls to both your residence and your cell phone. You have acknowledged receiving these calls and acknowledged your own failure to return these calls. This type of behavior is shocking, disturbing, and unprofessional. In order to avoid legal problems and a court appearance, I am requesting the return of my office keys immediately.

Please be advised that you are officially forbidden to enter my office with the use of these keys. Any person/persons using the keys in your possession will be legally charged, as well. We ask that you hand deliver my keys to the office and you will be provided with a receipt for the return of my keys. Do not leave the keys in a mail slot or tin box as they will be lost. My employees are able to issue you this receipt. Thank you for your cooperation in this matter.

Yours truly,

Dr. Mary A. Tujetsch
First Dental, Owner

SA219

AFFIDAVIT OF JANICE JOHNSON

SA220

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A TUJETSCH, Plaintiff, v. TODD C PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division) Hon. Charles R. Winkler

AFFIDAVIT OF JANICE JOHNSON,

I, Janice Johnson, being of the age of majority, and first being placed under oath, depose and state as follows:

1. The facts set forth in this affidavit are within my personal knowledge.

2. If called upon as a witness, I would and could competently testify to all facts stated in this Affidavit.

3. I was employed as a receptionist in a dental practice established by Dr. Todd Pusateri at 7714 W. 159th Street in Orland Park, Illinois (the "Dental Practice")

4. To the best of my recollection, I was first employed by the Dental Practice in the year 2000 and continued to work there until some time before March 2005, when I felt that there was no reason for me to be there, because by then there were no patients.

5. At that time, Dr. Tujetsch did not fire me, but I chose not to return, because I felt it would be wrong to collect a salary as a receptionist if there were no patients for me to call or receive.

6. At the time I left the Practice, the only personnel who remained working in the Dental Practice were Dr. Purdue, Tina Buben-Dowling, me, and Dr. Tujetsch, but Dr. Tujetsch was generally not seeing any patients.

7 After the Dental Practice was sold to Dr Tujetsch, an increasing number of patients seemed unwilling to return for treatment when I called them to schedule appointments.

8. Many patients told me that they would not return for treatment in the Dental Practice because they were uncomfortable with Dr. Tujetsch, and did not like her.

9 Others complained that Dr. Tujetsch would not treat them unless they paid for root planing and scaling, an expensive teeth-cleaning procedure that they could not afford.

10. Still others were offended because Dr Tujetsch had refused to see them if they were a few minutes late, and then sent them a bill for a missed appointment

11. My tenure as a receptionist in the Dental Practice continued for at least six months after the Dental Practice was sold to Dr. Tujetsch, in June 2004.

12. During that time I saw the flow of returning patients decrease gradually to virtually none, with the exception of some of Dr Purdue's patients, who continued to return to see him.

13. During my tenure at the Dental Practice, I was familiar with the patient information stored in the Dental Practice, and familiar with the condition of its office equipment including its telephones.

14 I was familiar with the patient information stored in the Dental Practice because it was my job to manage routine communications with patients and do such things as call patients to remind them of upcoming appointments, and schedule or reschedule appointments as necessary

15. During my tenure at the Dental Practice, my duties as receptionist required me regularly to use office equipment in the Dental Practice in order to make telephone calls and photocopies, among other things

16. In carrying out the duties of my job, I had two sources of patient information

17. The Dental Practice created and maintained Patient Charts for all patients treated in the Dental Practice.

18 The various Patient Charts contained detailed contact information (including name, address, and telephone number), pertinent medical and dental histories, and treatment notes for all patients treated in the Dental Practice

19. To the best of my recollection and belief, all Patient Charts ever created in the Dental Practice were stored on shelves in the Dental Practice before the sale of the Dental Practice to Tujetsch, where they remained when Tujetsch bought the Dental Practice.

20 However, Patient Charts were not the only source of patient information in the Dental Practice.

21. There also a computer that had patient information.

22. It came from First Pacific Corporation ("FPC").

23. Every time a patient was treated, the information was put in the computer.

24. However, handwritten dentist notes about patient treatments were in the Patient Charts, not the computer.

25. I could pull up a patient's records from the computer, and it would show all of the procedures, and the contact information

26. But I preferred to use the Patient Charts when I called patients, because I could write notes in the Charts as to how the patient responded

27. It is my recollection that after Dr Tujetsch bought the Dental Practice we continued to have access to the same patient information, including patient contact information, as we had before.

28. I do not recall noticing any change in the ability to contact patients, only that patients did not seem to want to return if and when they were contacted.

29. Before and after the sale to Dr. Tujetsch, the computer could be used to review or print out lists of all patients of the Dental Practice, on demand, including names, addresses, and telephone numbers

30. To the best of my recollection and belief, from the time I joined the Dental Practice until I resigned, in early 2005, whenever I needed to contact a patient of the Dental Practice I could obtain the necessary information electronically from the computer

31 I believe that patient abandonment of the Dental Practice occurred for the reasons set forth in the statement that i provided in this case previously, which is attached hereto as Exhibit i.

32 I am advised that in this law suit against Dr Pusateri, Tujetsch claims that she did not receive patient lists when she bought the Dental Practice; that Dr Pusateri overstated the number of patients of the Dental Practice at the time of the sale, and that some equipment of the Dental Practice was not working

33. I am not aware of any patient list that was not delivered to Dr. Tujetsch.

34 Dr Pusateri left everything in the Dental Practice up to the date of the sale.

35 At no time during my tenure as the receptionist of the Dental Practice did I personally experience any lack of patient lists or inability to contact patients of the Dental Practice.

36 At no time during my tenure as the receptionist of the Dental Practice do I recall anyone in the Dental Practice -- including Dr Tujetsch -- complain of a lack of patient lists or an

inability to contact patients of the Dental Practice for lack of patient lists, or complain of a lack of patient information.

37 To the best of my recollection and belief, no patient list was withheld from Dr Tujetsch, or otherwise not provided to her

38 To best of my recollection and belief, no equipment of the Dental Practice was out of order on or around the time the Dental Practice was sold.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.

Janice R Johnson

Janice Johnson

EXHIBIT 1

March 10, 2009

To whom it may concern, I (Jan Johnson) held the position of receptionist for Dr. Todd Pusateri at First Dental in Orland Park, Illinois, from 2000 until 2004. My Position as receptionist was to greet patients, make appointments, and handle patient billing. During that period of time, First Dental had a diverse patient base. Dr. Pusateris patients were very good at keeping appointments and scheduling regular cleaning and operative appointments.

While working for Dr. Pusateri, I always, as well as the rest of the staff, treated patients with respect and caring. Dr. Pusateri always greeting his patients with a smile and provided them with excellent care, regardless of their financial status. He always provided the patient with payment options and never refused to treat them. While I worked for Dr. Pusaten, I never one experienced what I thought was a dissatisfied patient.

Dr. Pusateri always worked with the patient to determine what the best treatment plan would be. If the patient did not have insurance or the proper finances to pay for treatment, he would arrange for the most urgent care to be done first, followed by a workable plan for successive treatments. Also Dr. Pusateri rarely charged a patient for a missed appointment and never charged a patient for being late.

In July of 2004, Dr. Pusateri sold the practice to Dr. Mary Tujetsch. From that moment on office procedures changed. I felt that Dr. Tujetsch was not accommodating to the patients. For Instance she would refuse to see patients who arrived late for their appointments. I also felt that she showed unprofessional demeanor when dealing with some of the patients as well as the office staff. For instance, she would refuse to treat a patient unless they paid to have a deep cleaning done first. On occasion she also would become argumentative with patients in the office and on the phone, usually over late fees.

It is my opinion that First Dental lost patients after Dr. Mary Tujetsch took over the practice. I believe it was her office practices and personality that drove patients to leave and find new dental practices.

Sincerely

Janice Johnson

Janice K Johnson

EXHIBIT H

Williams Montgomery & John Ltd.

A Firm of Trial Lawyers

Eric R. Lifvendahl
312-443-3230
Fax: 312-630-8530
eri@willmont.com

October 31, 2007

VIA FACSIMILE

Mr. David G. Wentz
101 North Washington Street
Naperville, Illinois 60540-4511

Re: Lease for 774 159th Street
Orland Park, IL

Dear David:

Please be advised that Dr. Mary Tujetsch is terminating the Lease dated June 28, 2004 and moving out of the premises immediately due to the Landlord's failure to correct the breaches outlined in my letter to you dated October 11, 2007.

Further, your client has an obligation to mitigate any possible damages by taking all reasonable and necessary steps to relet the premises.

Contact me if you have any questions.

Regards,

Eric R. Lifvendahl

ERL:dem

cc: Mary Tujetsch

Williams Montgomery & John Ltd.

A Firm of Trial Lawyers

Eric R. Lifvendahl
312-443-3230
Fax: 312-630-8530
erl@willmont.com

October 12, 2007

VIA FACSIMILE
Mr. David G. Wentz
101 North Washington Street
Naperville, Illinois 60540-4511

Dear Mr. Wentz:

As a follow-up to our recent conversation, this letter sets forth (a) my clients request for an accounting; and (b) your clients breaches of the lease dated June 28, 2004 ("Lease") between First Dental of Orland Park, P.C. ("Landlord") and Mary A. Tujetsch, DDS ("Tenant").

1. Request for Bills

Pursuant to Section 4.1 of the Lease, Tenant hereby requests the Landlord's analysis of "Additional Rent" for each six month period, for which such an analysis has been performed. In addition, Tenant requests copies of all bills, including but not limited to, office cleaning and supplies, all utilities, janitorial services, gas and electric, waste removal, snow removal, and lawn and landscape maintenance, since July 1, 2004.

As you are aware, Landlord is required to make a calculation every six months based on the above requested documents and provide Tenant with an over or under payment statement. "Additionally rent shall be analyzed ever six months and any overpayment or underpayment shall be determined and paid between the parties." (Lease ¶ 4.1) Landlord's refusal to provide this information will constitute a breach of the Lease.

2. Violation of Tenant's Quiet Enjoyment

Section 15 of the Lease provides that "Tenant's quiet and peaceable enjoyment of the Leased Premises shall not be disturbed or interfered with by Landlord or by any person claiming by, through, or under Landlord." Although the Lease specifically recognizes that Tenant's "co-tenant" shall be a chiropractic practice, Landlord has allowed a law firm and Magna Wealth Management, Ltd to occupy the building (the law firm and Magna Wealth Management collectively referred to as "Co-Tenants"). The Landlord through the Co-Tenants has violated

EXHIBIT I

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division) Hon. Charles R. Winkler

AFFIDAVIT OF BRET KETSDEVER

I, Bret Ketsdever, being of the age of majority, and first being placed under oath, depose and state as follows:

1. I am authorized to furnish this Affidavit and competent to testify to the matters set forth in this Affidavit.

2. The facts set forth in this affidavit are within my personal knowledge.

3. If called upon as a witness, I would and could competently testify to all facts stated in this Affidavit.

4. I am a Client Accounts Manager with First Pacific Corporation, an Oregon corporation with its principal place of business located at 5121 Skyline Village Loop S, Salem, Oregon 97306 ("FPC").

5. For over forty years, FPC has been engaged in providing various specialized practice-management services to dentists and dental practices throughout the United States.

6. One of the practice-management services provided by FPC permits a dental practice to use computer technology to outsource the issuance of its fee statements and the collection of its dental fees.

7. On or about March 31, 2001, FPC entered into a contract to issue and collect patient bills for three dental practices, located in Naperville, Orland Park, and Schaumburg, Illinois, respectively, operated by an entity called First Dental P.C. ("First Dental").

8. The principal of First Dental is Dr. Todd C. Pusateri.

9. A copy of FPC's contract with First Dental is attached hereto as Exh. 1.

10. Pursuant to the Sales and Service Agreement, "[i]n order to facilitate [the] sale of accounts receivable to FPC, and as a part of FPC's service and exchange of data," the three Chicago-area Practices of First Dental P.C. agreed to use a computer system and software package furnished by FPC.

11. The computer system and software package furnished by FPC is a computer terminal (hereinafter the "FPC Terminal") that is placed in dental practices by FPC, but remains at all times the property of FPC.

12. Pursuant to the Sales and Service Agreement, FPC placed FPC Terminals in each of the three Chicago-area Practices of First Dental, including the practice in Orland Park (hereinafter the "Dental Practice"), which I understand is the subject of the above-captioned litigation.

13. It was agreed that information about patients would be entered into and stored in the FPC Terminals by First Dental.

14. In addition to acting as a conduit for third party billing, the FPC Terminal has the capacity to generate patient lists and reports based on that information.

15. The FPC software running on the FPC Terminal includes a database designed to store what FPC refers to as "static data" -- *i.e.*, patient names, addresses, telephone numbers, other contact information, and information about insurance/usual source of payment.

16. As patients are treated in a dental practice that has contracted for accounts receivable management services from FPC, "financial data" -- *i.e.*, data about the date and type of treatment afforded to a particular patient, and the charges assessed therefor -- are entered into the FPC Terminal.

17. The FPC Terminal is designed to permit dental practice managers to easily generate various practice-management reports and patient lists.

18. For example, a practice manager can query the database to generate a list of all patients treated in the practice since the practice became an FPC customer, or a subset of those patients.

19. The FPC software running on the FPC Terminal is also capable of generating summary reports.

20. One summary report, entitled "Practice Overview," provides a practice's number of "active patients."

21. Documentation of the FPC Software defines the term "active patient," as used in the Practice Overview, as the number of patients treated in the practice during the previous 24 months. Exh. 2.

22. This definition of "active patients" is employed by the Practice Overview because a headcount of the patients treated in a practice during the previous 24 months is often used as a rough indication of the size of a dental practice.

23. The Practice Overview is the most accurate way of generating a count of "active patients" using the FPC Software, because it reviews actual, "hard-wired" "financial data" to cull out patients who were charged for treatment during the defined, 24-month period.

24. By "hard-wired" "financial data," I mean that the Practice Overview generates the number of active patients objectively, based on an actual review of historical charge-related data, without reference to any database field that can be changed by a database user to reflect a subjective judgment of that user.

25 However, if financial data are not in the database for the 24-month period in question, the Practice Overview cannot generate a count of active patients

26 In June 2004, FPC was advised that Dr. Pusateri was selling the "Dental Practice" to Mary Tujetsch

27. Because the FPC Terminal and Software remains at all times the property of FPC, Dr. Pusateri was not at liberty to sell the FPC Terminal to Dr. Tujetsch, the buyer.

28 However, before her purchase of the Dental Practice was consummated, Tujetsch advised FPC that she wished to contract with FPC for outsourced patient billing services on a going-forward basis, commencing on the date of her purchase of the Orland Park Practice.

29. To my knowledge, no financial data for any period before July 1, 2004 was transferred to the database in the FPC Terminal located in Dr. Tujetsch's offices

30. That is because Dr. Tujetsch did not purchase the accounts receivable of the Dental Practice that were in existence before July 1, 2004.

31. On June 30, 2004, Dr. Tujetsch entered into a Sales and Service Agreement with FPC.

32 A true and correct copy of that Agreement is attached hereto as Exh. 3.

33. Pursuant to that Agreement, Tujetsch agreed to use the computer system and software package furnished to Tujetsch by FPC (the FPC Terminal) to issue patient bills

34. In order to fulfill its going-forward obligations to Tujetsch under the Sales and Service Agreement, FPC installed in the Dental Practice a new computer terminal with a new and unique client number (110140) (hereinafter "Terminal 110140").

35. Because FPC was advised that Tujetsch had purchased the Dental Practice, but not its then-existing accounts receivable, on or around June 30, 2004, FPC copied data from Terminal 111089 (the pre-sale FPC Terminal in the Dental Practice) onto Terminal 110140 in a process FPC refers to as "static transfer."

36. When all of the assets of a dental practice -- including existing accounts receivable -- are purchased, and the new owner wishes to continue an existing FPC billing relationship, FPC transfers both static data and financial data to a new FPC Terminal set up for the new owner.

37. When the buyer of an existing dental practice does not purchase the accounts receivable of the practice, but wishes to continue an existing FPC outsourcing relationship as to new receivables, FPC transfers only "static data" -- or patient contact and payment information -- to the new FPC Terminal set up for the new owner.

38. That is because a transfer of "financial data" to a non-owner of the corresponding accounts receivable would create duplicative accounts receivable on FPC's systems, leading to double-counting (and double billing) of those accounts.

39. FPC was advised that, in the sale of the Orland Park Practice from Pusateri to Tujetsch, no accounts receivable were being conveyed to Tujetsch.

40 In order to carry out its collection and reporting obligations to Pusateri in respect of accounts receivable of the Orland Park Practice existing as of June 30, 2004, FPC removed

Terminal 111089 from the Dental Practice and took it to the offices of another dental practice owned by Dr. Pusateri at 8 W. Gartner Road in Naperville, Illinois.

41. However, before removing FPC Terminal 111089 from the Dental Practice, FPC technicians installed FPC Terminal 110140, a new FPC Terminal, in the Premises and transferred to FPC Terminal 110140 all "static data" contained on Terminal 111089

42. A "static transfer" is analogous to photocopying and setting up patient files for a newly purchased practice, without copying the treatment and billing-related contents of the files.

43. When FPC performs a static transfer and creates a new patient database for a new user, the detailed financial history of discrete patient accounts (posted transactions) is not transferred

44. However, a field entitled "Last visit date" is included among "static data" fields, and is therefore transferred to the new database in a "static transfer."

45. Dr. Tujetsch's database, as it was initially set up on Terminal 110140 in the Dental Practice, contained all "static data" of the Dental Practice in existence as of June 30, 2004 -- including the name, address, telephone number, insurance information, and "Last visit date" of each patient.

46. The "Last visit date" field included in "static data" is automatically populated with a new date every time a patient charge for treatment is posted.

47. The new date that automatically populates the "Last visit date" field is the date the charge for treatment is posted

48. The number of "active patients," as generated by the Practice Overview, is generated based on detailed patient charge history included in "financial data," and is generated based on each patient's posted charge history

49. The data used by the Practice Overview to generate a count of active patients is not subject to manual modification of the database.

50. By contrast, the "Last visit date" can be modified manually by anyone in the dental practice with access to the database, at any time.

51 As a result, the Practice Overview is regarded as the gold standard for generation of "active patient" counts, because it is not dependent on a manually modifiable field, and is based on an electronic review of detailed patient charges history

52. When a Practice Overview cannot be used to generate "active patients, the database can be prompted to generate a list of patients with a "Last visit date" within a defined, 24-month range.

53 However, this method is not reliable as a means of quantifying the number of active patients in remote periods, for multiple reasons

54. First, the "Last visit date" is not "hard wired" and can be changed at will by anyone with access to the database, by contrast to the "financial data" used by the Practice Overview for a count of "active patients."

55. Second, and more importantly, the "Last visit date" is a field that is automatically populated with a new date whenever a charge for treatment is posted to an individual patient

56. This means that a list of patients with a "Last visit date" in a range that is remote in time is likely to be underinclusive, to the extent that patients treated within the range return for treatment thereafter.

57. During 2005, a fee dispute arose between FPC and Tujetsch, in which Tujetsch claimed that FPC had agreed to waive its fees for a substantial period of time.

58. When the fee dispute could not be resolved, on or about October 6, 2005 FPC sent to Tujetsch by certified mail a letter giving Tujetsch 30 days' notice of termination of her account

59. A true and correct copy of that letter is attached hereto as Exh. 4.

60. On about October 24, 2005, shortly before the termination of her FPC account was to become effective, Tujetsch asked Katie Lucitt, an FPC Account Executive, to generate a report listing "active patients" for the 24-month period from July 2002 through July 2004.

61 June 30, 2004 is the date that Tujetsch first became a customer of FPC

62. Tujetsch had not received, on the FPC Terminal in her office, a transfer of "financial data" for any period before June 30, 2004.

63. As a result, the "gold standard" of accuracy for active patient counts -- the Practice Overview -- could not be utilized to generate a count of active patients for any period before June 30, 2004.

64 However, Lucitt generated a custom report that would foreseeably list some, but not necessarily all of the patients who had been charged for treatment in the Dental Practice from July 2002 through 2004.

65. Based on my review of the List, it appears that Lucitt did that by prompting the FPC Terminal to list all patients who satisfied two criteria: i) a "Last visit date" falling in the period from July 2002 through July 2004, and ii) an "active" field that had not been manually altered to indicate that a patient was inactive

66. Both the "Last visit date" and "active" fields included among the "static data" fields are accessible to database users in the field, and can be changed at any time, for any reason -- or no reason at all.

67. For example, anyone with access to the database in the Dental Practice after June 30, 2004 could have changed the "active" field in the record of a patient who had been treated in the 24 months through June 2004 to indicate, based on a subjective belief, that a patient had become "inactive."

68. Similarly, anyone with access to the database in the Dental Practice after June 30, 2004 could have changed the "Last visit date" field in the record of any patient to a date outside the defined range.

69. Such patients would have been excluded from the List, even if he or she had in fact been treated in the Dental Practice in the 24 months through June 2004

70. In any event, Lucitt printed out the List of patients with a) a "Last visit date" falling in the period from July 2002 through July 2004 and b) an "active" field that had not been manually designated as inactive and provided the List to Tujetsch

71. Later, Lucitt learned that Tujetsch wanted the List in order to compare the number of patients in the List to the number of "Active Patients" that was recited in the contract as reported by FPC Software when Tujetsch purchased the Dental Practice from Dr. Pusateri

72. Upon learning the foregoing, Lucitt informed Tujetsch that the List could not be relied upon for the stated purpose, and could not be meaningfully compared to the number of active patients generated by a Practice Overview.

73. The count of active patients generated by the Practice Overview is based solely on objective and historical patient-charge histories, and is not subject to any user-controlled field such as "active" or "Last visit date."

74. By contrast, the List was based solely on two user-controlled fields -- "active" and "Last visit date" -- and did not include or account for any objective and historical patient-charge histories.

75 Lucitt explained that FPC could not accurately quantify or list all "active patients" from Tujetsch's database for dates prior to June 30, 2004, the date Tujetsch became an FPC client.

76. I personally investigated and confirmed the foregoing in a letter "to whom it may concern" that I issued as of July 6, 2006.

77. A true and correct copy of that letter is attached hereto as Exh. 5.

78 In my letter of July 6, 2006, I reported that after her purchase of the Dental Practice, "[l]acking financial data, Dr. Tujetsch's database also lacked the ability to report Active Patients prior to her posting of new financial transactions."

79. The number of active patients as of June 2004 could not be generated in October 2005 by using the Practice Overview, because the FPC Terminal in Dr. Tujetsch's office had never received "financial data" for any period before July 1, 2004.

80. The List was therefore necessarily generated in reference to two user-controlled database fields, as a list of patients a) not manually designated as inactive and b) with a "Last visit date" falling within the 24 months through July 2004.

81 As such, the List is not an accurate substitute for a count of active patients by the Practice Overview because of the nature of the "Last visit date" field, and the subjective nature of the "active" field.

82 Any patient who was treated both in the 24 months through July 2004 and after August 1, 2004 would <u>not</u> appear in the List (unless the "Last visit date" was manually modified)

83. Any patient who was manually and subjectively designated as inactive after June 30, 2004 would not appear in the List.

84 Patients treated after August 1, 2004 would be excluded from the List because their "Last visit date" would have been automatically populated with the date of their most recent treatment, thereby pulling patients treated after August 1, 2004 out of the List

85. I am in receipt of a list of 668 patients (the "List") that Dr. Tujetsch has interpreted as contradicting the count of active patients set forth in the Practice Overviews submitted by Dr Pusateri

86. A true and correct copy of the List is attached hereto as Exh 6.

87. It is my understanding that Dr. Tujetsch has interpreted the List as indicating that the Dental Practice had only 668 active patients as of June or July 2004.

88. To the extent that my understanding of Dr Tujetsch's interpretation of the List is correct, her interpretation is not correct.

89. Dr Tujetsch's interpretation of the List is incorrect because any patient of the Dental Practice identified by a Practice Overview as an "active patient" as of June 2004 would not appear on the List if that patient had been manually designated as inactive or was charged for treatment after June 30, 2004.

90. As a result of the automatic nature of the "Last visit date" field, a larger number of patients returning for treatment after June 30, 2004 would actually cause the List to include a smaller number of "active patients" for the 24-month period through that date

91 Correctly interpreted, the List does not indicate that the Dental Practice had only 668 "active patients" as of June 2004

92. Comparing the List to the Practice Overview is like comparing apples to oranges

93. The List and Practice Overview use different data and different methods to arrive at different results.

94. Dr. Pusateri has represented that on April 29, 2004 he generated with the FPC Terminal in the Dental Practice two Practice Overviews, one as of December 30, 2003, the other as of April 29, 2004.

95. Dr. Pusateri has submitted hard copies of two Practice Overviews.

96. A true and correct copy of the Practice Overviews submitted is attached hereto as Exh. 7.

97. The two Practice Overviews submitted by Dr. Pusateri are in the format of Practice Overviews generated by FPC Software, and bear all the earmarks of Practice Overviews generated by an FPC Terminal.

98. According to the Practice Overview as of December 30, 2003, the Dental Practice had 1,223 "active patients," meaning that, according to the FPC Software, the Dental Practice had treated 1,223 patients in the 24 months through December 2003.

99. According to the Practice Overview as of April 29, 2004, the Dental Practice had 1,227 "active patients," meaning that, according to the FPC Software, the Dental Practice had treated 1,227 patients in the 24 months through April 2004.

100. That number of active patients appears consistent with the gross billings generated by the Dental Practice and processed by FPC.

101. That number of active patients in the Practice Overview is based solely on a review of objective, historical patient charge data -- not user-controlled fields accessible to manipulation and subjectivity.

102 If Dr. Pusateri represented to a third party that FPC Software reported that the Dental Practice had treated 1,227 patients in the 24 months through April 2004, this would be a true and accurate characterization of the April 29, 2004 Practice Overview.

103 If Dr. Pusateri represented to a third party that FPC Software reported that the Dental Practice had treated 1,223 patients in the 24 months through December 2004, this would be a true and accurate characterization of the Practice Overview as of December 31, 2004

104. FPC deletes data associated with inactive client files (including patient files) as a matter of policy and procedure.

105 FPC deleted data associated with FPC Terminal 111089 from FPC systems on October 5, 2004.

106. However, based on my expertise and familiarity with the FPC Software, and my review of the foregoing facts, it is my conclusion that Dr. Pusateri did not overstate the number of active patients as reported by FPC Software, if he indicated in or around April 2004 that the Dental Practice had treated approximately 1,200 patients in the previous 24 months

107. Further, it is my conclusion that the List, generated in October 2005, is not comparable to the Practice Overview, and cannot be relied upon to contradict the Practice Overviews upon which Dr. Pusateri relied.

108. That is because the List is based on two user-controlled fields (one of which is highly subjective), instead of objective bookkeeping entries arising out of actual patient charges, and because the "Last visit date" would exclude patients from the List if they received treatment after the end of the defined range.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.

B. Ket 1-6-11

Bret Ketsdever

EXHIBIT 1

(b) "Patient" shall refer to a person(s) who has elected to purchase services of client regardless of who shall be the actual recipient of such services.

(c) "Transaction" shall mean that event whereby client sells services and patient elects to purchase such services.

(d) "Accounts Receivable" shall mean all accounts, contract rights, including insurance / trust benefit claims, arising out of or in connection with transactions and all subsequent transactions entered into between the client and his patients.

(e) "Patient Balance Owing" shall refer to the total of all purchased accounts receivable with a patient balance owing which excludes accounts with credit balances.

(f) "Contingency Account" is a non-liquid bookkeeping entry that provides FPC and the client limited protection against future uncollected accounts.

(g) "In-Office Accounts" shall refer to only those accounts that do not qualify for purchase by FPC. FPC will not provide certain services, including but not limited to funding, billing and collection services.

2. SALE AND PURCHASE OF ACCOUNTS RECEIVABLE: Client agrees to sell and FPC agrees to buy all client's current and future accounts receivable. FPC will purchase the accounts receivable, excluding in-office accounts, in accordance with the terms set forth herein. Client shall not sell, assign, or otherwise encumber his accounts receivable.

3. PAYMENT FOR ACCOUNTS RECEIVABLE: The following terms and conditions are applicable to any and all sales and purchases of accounts receivable, excluding in-office accounts, by and between client and FPC:

(a) Upon the initial purchase of the client's accounts receivable: FPC will pay to client an amount not to exceed 40%, less a conversion fee of $5,000, of the balance of the accounts receivable, and less a $500 software licensing fee (non-refundable) per office. The actual amount paid to the client will be determined by FPC during the conversion process based upon the quality of the client's accounts receivable.

(b) Payment for all future accounts receivable: FPC will pay the client weekly for accounts receivable created during that week less an amount described in section 3(c) below. FPC reserves the right to adjust the amount it is willing to pay for an account it deems either an unacceptable account or uncollectible.

(c) Reductions in weekly payments to client: FPC will decrease the amounts paid to the client for the following reasons:

(i) A weekly service fee charge on total patient balances owing will be deducted weekly in accordance with service fees described in paragraph 4.

(ii) FPC may redirect to the contingency account a part or all of FPC's weekly payment to the client in order to maintain the contingency account at its required level. (See paragraphs 5 and 6 below).

(iii) Any patient payments received on FPC accounts receivable and kept by client may be subtracted from FPC's weekly payment to client. FPC may choose to temporarily waive its rights and/or remedies, see section 7(d).

(iv) FPC may deduct an account to be reassigned from FPC's weekly payment to client.

(v) The client will be provided a summary of all additions and deductions with each weekly check.

4. FEES:

(a) Service fees:

(i) A weekly service fee will be assessed on all patient balances owing. This service fee covers the cost of providing a computer, maintenance, staff training, patient and insurance billings, postage, patient and insurance forms and statements, a service team for support of the client's office, including a 1-800 phone number, a personal account representative and limited collection follow-up.

(ii) The weekly service fee will be assessed in accordance with the fee schedule established by FPC. FPC's current service fees are as follows:

Patient Balances Owing	Weekly Fee
$0 - $49,999	.01209 (minimum monthly service fee of $750)
$50,000 - $99,999	.00997
$100,000 - $249,999	.00808
$250,000 – above	.00612

*The above fees will be assessed at one half the designated amount for the first 4 months, as long as the client continues with our service for at least one year from the date of this agreement. If the client leaves the system in less than one year, the client will then be responsible to pay the previously waived amount of service fees.

(b) Additions or reductions to the service fee:

(i) FPC agrees to rebate monthly to client all interest charges assessed by the client on accounts receivable, less uncollected interest.

(ii) If the client maintains the contingency account at a level higher than required, FPC will issue a credit, against the service fee on the amount over the required level.

(c) Other fees:

(i) FPC is authorized to assess late payment charges monthly on patient accounts when payments are not received at FPC by the due dates published in the patients billing statement. All late payment charges will be retained by FPC and the client is responsible for uncollected late payment charges.

(ii) FPC may charge the client monthly, an additional fee (.0029 weekly) on the amount the clients' contingency account is below the required levels to cover FPC's additional administration costs.

(d) FPC reserves right to either increase or decrease any fees upon 30 days written notice to the client.

5. REASSIGNMENT: In the event FPC in its sole discretion considers an account to be uncollectible under FPC's normal collection procedure, or if the account fails to meet the client's warranties (see paragraph 7), then the client agrees to repurchase the outstanding balance on that account. When accounts are to be repurchased, FPC may, in lieu of requiring direct repayment, charge the uncollected account against the contingency account or deduct the amount from FPC's weekly payment to the client. If the client breaches any term or warranty of this agreement, the client agrees to repurchase all accounts receivable and pay all amounts owed to FPC.

6. CONTINGENCY ACCOUNT: The contingency account is a non-liquid bookkeeping entry that provides FPC and the client limited protection against future uncollected patient accounts. The contingency account is a percentage of the patient balance owing. The percentage will be established by FPC at its sole discretion at the time of converting to FPC system and may be changed by FPC during the life of this agreement based upon the quality of the accounts receivable. In the event that the contingency account falls below the required percentage, FPC will maintain the required level by reducing the weekly amount paid to client.

7. CLIENT'S REPRESENTATIONS AND WARRANTIES: As to accounts receivable purchased by FPC hereunder and while this agreement is in effect, client represents and warrants as follows:

(a) All accounts receivable arose from a bonafide sale of services by client in the ordinary course of client's business and that all services have been performed by the client.

(initials) (b) That as to the accounts receivable client has free and clear title unencumbered by any sale, assignment or security interest of any nature (unless FPC is notified in writing) and will notify FPC in writing immediately of any actions in the future that would jeopardize FPC's clear title to the accounts receivable purchased from client. (e.g. a tax lien, bankruptcy)

(c) That the patient has authority and capacity to contract at the time of purchasing services represented by accounts receivable.

(d) Client acknowledges that all amounts paid on patient balance owing, including all payments from insurers, are owned by FPC. The client agrees to promptly forward any and all payments to FPC. Client also agrees to immediately forward a check to FPC covering any cash and credit card payments received on accounts receivable owned by FPC.

(initials) (e) That all applicable laws and regulations of any local, state or federal government entity, including those pertaining to consumer credit protection have been observed and adhered to by client in each applicable transaction; client agrees to provide all appropriate disclosures and obtain necessary patient signatures, and agrees to take all action necessary to conform with all laws with respect to accounts receivable.

(f) That client will continue to maintain all necessary business licenses and business association, partnership or corporation qualifications as may be required by law. The client will immediately notify FPC if there are changes to the business structure, ownership, dental license, change in association, or dental licenses used for insurance billing.

(g) If the client breaches any term or warranty of this agreement, the client agrees to repurchase all accounts receivable and pay all amounts owed to FPC.

8. SALE OF ACCOUNT BY COMPUTER:

(a) Use of FPC's computer: In order to facilitate client's sale of accounts receivable to FPC, and as a part of FPC's service and exchange of data hereunder, client will use a computer system and software package that are furnished to client by FPC. FPC shall at all times be the owner of the

lost profits.

(c) Termination: FPC may terminate the client's use of computer hardware and software supplied by FPC on thirty days (30) notice either orally or in writing. However, if client breaches any term of this agreement, then FPC may immediately terminate client's use of the said hardware and software. Client shall be liable for any damages to the computer, ordinary wear and tear excepted until the computer is returned to FPC.

(d) Use of off-the-shelf software packages: The client may operate off-the-shelf software packages purchased elsewhere under the following conditions:

(i) The software package must be compatible and function properly with the FPC hardware configuration and FPC will be notified before such software is used.
(ii) The client will not make modifications to FPC hardware and/or software.
(iii) FPC will not provide program support or be responsible for problems arising from the use of the off-the-shelf software packages, and client agrees to hold FPC harmless from any such claim.

9. REMEDIES: In the event client shall breach any of the terms of this agreement or client or any guarantor thereof becomes insolvent, becomes subject to or commences any proceeding under Federal Bankruptcy Act or any insolvency or debtor's relief law or dies, or if any property of any of them in the possession of FPC or obligation of FPC to any of them is attempted to be levied upon by any writ or otherwise, or any notice of such levy or notice of sale is given or any sale is made of any property of any of them, except in ordinary course of business, or default is made in the payment of any other indebtedness of any item to FPC, then FPC shall have the following rights and remedies and shall be cumulative.

(a) To declare all amounts due FPC at once due and payable or FPC may elect at its sole discretion to implement corrective action to eliminate the breach(s) of this contract, without waiving any of its rights and/or remedies.
(b) To foreclose on any security provided to FPC.
(c) To exercise any and all remedies available under law to FPC, including the rights and remedies of a secured party under the Uniform Commercial Code as enacted in the state where the debtor's office is located.
(d) In the event of default, client agrees to cooperate in connection with FPC's foreclosure on its security, including, but not limited to, permitting FPC to review the client's patient records and notifying insurance companies and patients to make payments on accounts receivable directly to FPC.

10. TERMINATION: Client, or FPC, may decide to terminate this agreement for any reason by providing 30 days written notice to the other. In the event of such notice, the client shall repurchase the accounts receivable previously sold to FPC on the following basis:

(a) By paying FPC a sum equal to the patient balance owing on such accounts receivable, plus any unpaid fees under paragraph 4, less the amount of the contingency account and patient credit balances; or
(b) By electing that FPC continue to collect the accounts receivable for a period not to exceed three months for a weekly fee as described in paragraph 4. After termination, all finance charges collected by FPC on accounts receivable will be credited to the amount owed FPC. At such time as the total patient balance owing is equal to the balance in the contingency account plus patient credit balances, the remaining accounts receivable will be assigned to the client.
(c) Upon termination, FPC may charge interest on all monies due and owing FPC using the Wells Fargo Bank, N.A. published prime rate, plus 2 percent.
(d) Not withstanding termination of this agreement, until FPC is paid in full for its purchased accounts and for any other obligation to FPC under this agreement, the provisions of this agreement shall remain in full force and effect, including but not limited to the rights of FPC to require the repurchase of accounts under paragraph 5 above.

11. SECURITY INTEREST: To secure all of client's obligations hereunder, client grants to FPC a security interest in all inventory, existing and future accounts, accounts receivable, contract rights, chattel paper, intangibles, all of debtor's rights as a seller of goods under Article 2 of the UCC, all goods returned to or repossessed in connection therewith, all equipment, together with all accessories, substitutions, additions, replacements, parts, accessions affixed or used in connection therewith, whether now owned or hereafter acquired or arising, and the proceeds and products thereof, and wherever located. Client hereby agrees to execute any financing statements and other documents reasonably required to perfect FPC's security interest.

12. ADJUSTMENT OF PATIENT DISPUTES: If any patient disputes any transaction involving an account receivable sold by client to FPC and before FPC has requested repurchase of said account receivable by the client in the manner described in paragraph 5, client will attempt to resolve any such dispute directly with the patient. Client shall promptly notify FPC of any such adjustments or disputes.

13. POWER OF ATTORNEY: Client shall execute assignments with respect to all accounts receivable so as to vest in FPC full title to all accounts receivable. FPC shall have the right to collect from the patient all amounts due or to become due on said accounts receivable unless and until the accounts receivable is repurchased by client in the manner provided in paragraph 10 above. Client hereby grants to FPC client's power of attorney for the purpose of endorsing client's name to any remittance received by FPC in payment of any accounts receivable held by FPC after purchase from client. FPC shall have the right to pledge the accounts receivable at any bank or financial institution subject to the rights of the client pursuant to this agreement.

14. GUARANTY: In the event client is a corporation, then it is agreed all stockholders of said corporation, by signing below, hereby agrees to be jointly and severally, personally and unconditionally, bound by the terms of this agreement and guarantee its performance. In the event client is a member of a partnership, but signing in his or her individual capacity, then the partnership, by signing below, agrees to be unconditionally bound by the terms of this agreement and hereby guarantees its performance. Each guarantor is jointly and severally liable for attorneys' fees incurred by FPC in enforcing the guaranty, whether or not a suit is filed, including any attorneys' fees incurred in any bankruptcy proceeding.

15. INDEMNIFICATION: Client hereby agrees to indemnify, defend and hold FPC harmless from any and all liabilities, judgments, obligations, losses, claims, actions, damages, penalties, interest, cost or expenses, including attorneys' fees, arising out of any claims filed by any patient of client arising out of or in connection with the performance of any services performed by client represented by the accounts receivable purchased by FPC from the client in accordance with the terms of this Agreement.

16. GENERAL PROVISIONS:

(a) Client will execute and deliver to FPC any instruments or documents and do all things necessary and/or convenient to carry into effect the provisions of this agreement and facilitate the collection of accounts receivable herein assigned.
(b) This agreement may not be altered or amended except in writing and signed by authorized representatives of both parties.
(c) Any provision of this agreement found to be invalid shall not invalidate the remainder thereof.
(d) Waiver by FPC of any default by client shall not constitute a waiver of any subsequent default.
(e) Notwithstanding the above, the client shall not assign any of his or her rights or obligations under this Agreement without the prior written consent of FPC.
(f) Client is responsible for all collection agency fees incurred by FPC in attempting to collect damages or amounts due from patient.
(g) In the event of any dispute arising out of this Agreement between FPC and Client, including arbitration or bankruptcy proceeding, FPC shall be entitled to recover from Client reasonable attorney's fees and costs, including any costs and fees incurred in any appeal.

IN WITNESS WHEREOF, the parties have signed this agreement the day and year above written.

FIRST PACIFIC CORPORATION

By: _____

Title: CLIENT ACCOUNTS MANAGER

CLIENT: Todd C. Pusateri, D.D.S.

By: _____
Todd C. Pusateri, D.D.S.

CLIENT: First Dental, P.C.

By: _____ President
Todd C. Pusateri, President

111089

ADDENDUM TO

First Pacific Corporation's

SALES AND SERVICE AGREEMENT

This ADDENDUM ("Addendum") is effective 4/14/2003, and amends and is made part of the SALES AND SERVICE AGREEMENT dated 3/30/2001. ("Agreement") by and between FIRST PACIFIC CORPORATION ("Business Associate") and First Dental ("Dental Practice")

Dental Practice and Business Associate mutually agree to modify Agreement to incorporate the terms of this Addendum into the Agreement, to comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 and it implementing regulations (45 C.F.R. Parts 160-64)

DEFINITIONS

"Individual" shall have the same meaning as the term "individual" in 45 C.F.R. § 164.502 (g)

"Law" shall mean all applicable Federal and State statutes and all relevant regulations hereunder

"Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Part 160 and Part 164, Subparts A and E

"Protected Health Information" shall have the same meaning as the term "Protected Health Information" in 45 C.F.R. § 164.501, limited to the information created or received by Business Associate from or on behalf of Health Care Practice

"Secretary" shall mean the Secretary of the Department of Health and Human Services or his designee

OBLIGATIONS AND ACTIVITIES OF BUSINESS ASSOCIATE

A. Business Associate agrees not to use or disclose Protected Health Information other than as permitted or required by this Agreement or by Law

B. Business Associate agrees to use reasonable safeguards to prevent the use or disclosure of the Protected Health Information other than as provided for by this Agreement.

C. Business Associate agrees to report to Health Care Practice any use or disclosure of Protected Health Information not provided for by this Agreement after Business Associate has actual knowledge of such use or disclosure

D. Business Associate agrees to include in any written agreement with any agent, including a subcontractor, to whom it provides Protected Health Information, a requirement that such agent agrees to restrictions and conditions with such information that are at least as restrictive as those that apply through this Addendum to Business Associate

E. Upon reasonable notice, Business Associate agrees to make Protected Health Information and books and records relating to the use and disclosure of Protected Health Information available to the Secretary at the

Health Care Practice's expense in a reasonable time and manner, for purposes of the Secretary determining Health Care Practice's compliance with the Privacy Rule

F Business Associate agrees to comply with each applicable requirement of 45 Code of Federal Regulations Part 162 regarding Standard Transactions.

PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

A. Except as otherwise limited in this Addendum, Business Associate may use or disclose Protected Health Information (i) as is reasonably necessary to perform functions, activities, or services for, or on behalf of Health Care Practice as specified in the Agreement; (ii) for the proper management and administration of the Business Associate; (iii) as may otherwise be required by Law; and (iv) except as provided otherwise in this Addendum, as may be permitted by Law, provided that Business Associate obtains reasonable assurances from any person to whom the information is disclosed that (A) such information will remain confidential and used or further disclosed only as required by Law or for the purpose for which it was disclosed to the person, and (B) that the person will notify the Business Associate of any instances of which it is aware in which the confidentiality of the Information has been breached

B. Beginning April 14, 2003, or the date of this Addendum, whichever is later, Business Associate shall refer to Health Care Practice all requests by Individuals for information about or accounting of disclosures of Protected Health Information in accordance with 45 C.F.R. § 164.528.

C Beginning April 14, 2003, or the date of this Addendum, whichever is later, Business Associate agrees to document disclosures of Protected Health Information, other than for treatment, payment or healthcare operations or disclosures that are incidental to another permissible disclosure, to the extent required for Dental Practice to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 C F R § 164.528. Such documentation shall include (i) the disclosure date; (ii) the name and (if known) the address of the person or entity to whom Business Associate made the disclosure; (iii) a brief description of the Protected Health Information disclosed; and (iv) a brief statement of the purpose of the disclosure

D. Beginning April 14, 2003, or the date of the Addendum, whichever is later, Business Associate shall provide Health Care Practice information collected in accordance with section C above to the extent required to permit Health Care Practice to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in Accordance with 45 C.F.R. § 164.528 The parties agree to work together in good faith to resolve any disagreement over the requirements of 45 C F.R § 164 528

E. Business Associate may use Protected Health Information to report violations of law to appropriate Federal and State authorities, consistent with 42 C F R § 164 502 (j)(1)

OBLIGATIONS OF HEALTH CARE PRACTICE

A. Health Care Practice agrees not to use or disclose Protected Health Information other than as permitted or required by this Addendum or applicable Law.

B Health Care Practice agrees to use reasonable safeguards to prevent use or disclosure of Protected Health Information other than as provided by this Addendum

C. Health Care Practice shall notify Business Associate of any changes in Health Care Practice's notice of privacy practices that may affect Business Associate's use or disclosure of Protected Health Information Business Associate shall have a reasonable period of time to act on such notices

D. Health Care Practice shall provide Business Associate with any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, if such changes affect Business Associate's permitted or required uses and disclosure thereof Business Associate shall have a reasonable period of time to act on such notice.

E. Health Care Practice shall notify Business Associate of any restriction on the use or disclosure of Protected Health Information prior to acceptance of such restriction by Dental Practice in accordance with 45 C.F.R. §164.522 so that Business Associate can determine whether it is infeasible to comply with such restriction. Once agreed to, Business Associate shall have a reasonable period of time to act on such notice.

F. Health Care Practice represents and warrants to Business Associate that Health Care Practice will not disclose any Protected Health Information to Business Associate unless Health Care Practice has obtained any consents and authorizations that may be required by Law or otherwise necessary for such disclosure

G Health Care Practice shall have access to Business Associate's information pursuant to the terms and conditions of the Agreement and this Addendum. The information shall remain confidential and proprietary information. The information shall not be disclosed to any third person, business or corporation, including any person who serves as Health Care Practice's agent, except as otherwise agreed to in writing by Business Associate. Nothing in this Addendum shall be construed as granting Health Care Practice any rights by license or any other intellectual property rights to the information.

PERMISSIBLE REQUESTS BY DENTAL PRACTICE

Health Care Practice warrants that it shall not request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under applicable Law if done by Health Care Practice.

RATIFICATION OF SALES AND SERVICE AGREEMENT

Except as modified by this Addendum, the Agreement is hereby ratified, confirmed and declared to be in full force and effect.

IN WITNESS WHEREOF, Business Associate and Dental Practice have caused this Addendum to be executed in their respective names the day and year first herein above written.

BUSINESS ASSOCIATE:

First Pacific Corporation

by: Diane Reeves

Name: Diane Reeves

Its: EVP, Customer Service

Date: April 8, 2003

DENTAL PRACTICE:

First Dental

by:

Its: President

Date: 4-15-03

SA255

EXHIBIT 2

Practice Overview Explanation

This report is a month-to-date (MTD) and year-to-date (YTD) overview of the practice that provides important information for monitoring a practice.

- **Production:** MTD and YTD totals for each associate and for the total practice.
- **Days Worked:** The number of days worked, MTD and YTD, for each associate. These columns are only completed if the appointment scheduler is utilized.
- **Production Per Hour:** Hourly production, MTD and YTD, for each associate and the total practice. These columns are only completed if the appointment scheduler is utilized.
- **A/R Collection:** Accounts receivable collections, MTD and YTD, categorized by FPC patient payments, FPC insurance payments and office payments.
- **Reassignment:** MTD and YTD dollar amounts reassigned.
- **Number of New Patients:** The MTD and YTD number of new patients that have been seen or have future scheduled appointments.
- **Number of Patients Referred by Referral Source:** The number of new patients, MTD and YTD, referred by the categories of patient, doctor and other.
- **Number of Active Patients:** The number of patients seen within the last two years.
- **Number of Patients with Recall:** This number will always be different than the Number of Active Patients because this number represents all the patients listed in the computer. The patients will be categorized by:
  - **Current:** Includes those patients who have a future recall date.
  - **Overdue:** Includes the patients who have a past recall date.
  - **Without:** Includes those patients who have never had a recall appointment.
- **Number of Patients with Diagnosed Treatment:** The number of patients who have diagnosed treatment and are categorized as:
  - **Scheduled:** Those patients who have scheduled appointments for completion of their diagnosed treatment. Recall appointments are included in this number.
  - **Unscheduled:** Those patients who have not scheduled an appointment to complete their diagnosed treatment.

EXHIBIT 3

First Pacific Corporation
SALES AND SERVICE AGREEMENT

THIS AGREEMENT is made this 30th day of June, 2004, by and between **FIRST PACIFIC CORPORATION**, (hereinafter called "FPC"), and Mary A. Tuletsch, D.D.S., (hereinafter called the "Client"), whose office is located at 7714 W. 159th St., Orland Park, IL 60462, whose residence is located at 55 E. Washington, Chicago, IL 60602.

1. **SALE AND PURCHASE OF ACCOUNTS RECEIVABLE:**
   (a) Client agrees to sell and FPC agrees to buy all of Client's current and future accounts receivable, excluding in-office accounts in accordance with the terms set forth herein.
   (b) Client agrees to use FPC's insurance billing procedures for all transactions covered by some form of Patient insurance coverage. Client further agrees to keep on file an original signed Patient authorization, allowing the Client and/or FPC to provide information to the Patient's insurer relating to the Patient's insurance claim.
   (c) The sale of an individual Patient's accounts receivable to FPC is considered to have taken place at the point FPC receives the accounts receivable data at FPC's corporate office.
   (d) Client shall not sell or assign accounts receivable purchased by FPC to a third party.
   (e) Client will use the computer system and software package furnished to Client by FPC. Client agrees that use of FPC's software is for the Client's sole use. FPC maintains ownership of the computer hardware and software provided by FPC.
   (f) The Client shall provide insurance protection for hardware provided by FPC, from fire, theft or other casualty damage and is responsible for any personal property or use tax if applicable. Client agrees to install or provide suitable electrical and telephone sources, carriers, cabling and outlets required for computer system and network operation

2. **CLIENT'S REPRESENTATIONS AND WARRANTIES:** Client represents and warrants:
   (a) That Client is fully licensed and authorized to provide the professional services reflected in the accounts receivable.
   (b) That the services represented by the accounts receivable have been provided to the patient and fully performed.
   (c) That each account receivable is valid and not subject to dispute by the patient or any other party.
   (d) That none of the accounts receivable has or will be pledged to any other party, unless FPC is immediately notified in writing.
   (e) That all amounts paid on accounts receivable purchased by FPC, including all payments from insurers, cash, and credit card payments received in office, are owned by FPC. Client agrees to promptly forward any and all such payments to FPC.
   (f) That Client abides by all applicable laws and regulations of the local, state or federal government entity.
   (g) That Client maintains all necessary business licenses as may be required by law.
   (h) That Client will immediately notify FPC of any changes to the business structure, ownership, business name, tax ID, and dental license used for insurance billing

Initial Initial

3. **PAYMENT TO CLIENT FOR ACCOUNTS RECEIVABLE:** The following terms and conditions are applicable to any and all sales and purchases of accounts receivable, excluding in-office accounts, by and between Client and FPC:
   (a) **Initial Funding to Client:** FPC will make available to Client an amount not to exceed 80% of the accounts receivable, or $8,000 whichever is lower, less the set up fee described in paragraph 4(b) below.
   (b) **Weekly Funding (Production Check):** FPC will pay the Client, via a weekly production check, for the Net Purchased by FPC during that week, less an amount described in paragraph 3(c) below
   (c) **Reductions to Client's weekly production check:** FPC will decrease the amount paid to the Client for the following:
      (i) The weekly service fee or other fees as described in paragraph 4 below.
      (ii) Deferred funding of a part or all of the Client's weekly production check in order to maintain the contingency receivable at its required minimum percentage (see paragraph 5 below) and/or the amount owed to FPC by Client does not exceed $8,000.
      (iii) Any account receivable purchased that week which FPC deems unacceptable or any purchased account receivable that FPC deems uncollectible (see paragraph 7 below).

4. **FEES:**
   (a) **Conversion fee: :** FPC will waive the standard conversion fee in exchange for Client's commitment to remain with FPC for at least 18 months from the date of conversion. FPC will assess a fee of 10% of all converted accounts receivable, excluding any credit balances (minimum $2,600), if either FPC or Client receives notice of termination prior to fulfillment of Client's commitment to remain with FPC for at least 18 months from the date of conversion.
   (b) **Setup fee:** $3000 setup fee (all software licensing and HIPAA transaction compliancy)
   (c) **Weekly service fees:** FPC will assess a weekly service fee on all purchased accounts receivable, in accordance with the fee schedule established below:

Accounts Receivable	Weekly Fee Factor
$0 - $49,999	.01063
$50,000 - $99,999	.00915
$100,000 - $249,999	.00772
$250,000 – above	.00592
Minimum monthly service fee of $825	

FPC will waive the Minimum Service Fee and Contingency Receivable Deficiency Fee for 10 months, as long as the Client continues with our service for at least 18 months from the date of conversion. If the Client leaves the system in less than 18 months, the client will then be responsible to pay the previously waived amount of Minimum Service and Deficiency Fees.

   (d) Other fees:
      (i) Client authorizes FPC to assess late payment charges monthly on Patient accounts when payments are not received at FPC by the due dates published in the Patients' billing statement. FPC retains all late payment charges. The Client is responsible for uncollected late payment charges.
      (ii) FPC may charge Client an additional fee (.0125 monthly) based on contingency receivable deficiency (see paragraph 5) on the first production check each month.

First Pacific Corporation
SALES AND SERVICE AGREEMENT

THIS AGREEMENT is made this 30th day of June 2004, by and between FIRST PACIFIC CORPORATION, (hereinafter called "FPC"), and Mary A. Tujetsch, D.D.S., (hereinafter called the "Client"), whose office is located at 7714 W. 159th St., Orland Park, IL 60462, whose residence is located at 55 E. Washington, Chicago, IL 60602.

1. **SALE AND PURCHASE OF ACCOUNTS RECEIVABLE:**
   (a) Client agrees to sell and FPC agrees to buy all of Client's current and future accounts receivable, excluding in-office accounts in accordance with the terms set forth herein.
   (b) Client agrees to use FPC's insurance billing procedures for all transactions covered by some form of Patient insurance coverage. Client further agrees to keep on file an original signed Patient authorization, allowing the Client and/or FPC to provide information to the Patient's insurer relating to the Patient's insurance claim.
   (c) The sale of an individual Patient's accounts receivable to FPC is considered to have taken place at the point FPC receives the accounts receivable data at FPC's corporate office.
   (d) Client shall not sell or assign accounts receivable purchased by FPC to a third party.
   (e) Client will use the computer system and software package furnished to Client by FPC. Client agrees that use of FPC's software is for the Client's sole use. FPC maintains ownership of the computer hardware and software provided by FPC.
   (f) The Client shall provide insurance protection for hardware provided by FPC from fire, theft or other casualty damage and is responsible for any personal property or use tax if applicable. Client agrees to install or provide suitable electrical and telephone sources, carriers, cabling and outlets required for computer system and network operation.

2. **CLIENT'S REPRESENTATIONS AND WARRANTIES:** Client represents and warrants:
   (a) That Client is fully licensed and authorized to provide the professional services reflected in the accounts receivable.
   (b) That the services represented by the accounts receivable have been provided to the patient and fully performed.
   (c) That each account receivable is valid and not subject to dispute by the patient or any other party.
   (d) That none of the accounts receivable has or will be pledged to any other party, unless FPC is immediately notified in writing.
   (e) That all amounts paid on accounts receivable purchased by FPC, including all payments from insurers, cash, and credit card payments received in office, are owned by FPC. Client agrees to promptly forward any and all such payments to FPC.
   (f) That Client abides by all applicable laws and regulations of the local, state or federal government entity.
   (g) That Client maintains all necessary business licenses as may be required by law.
   (h) That Client will immediately notify FPC of any changes to the business structure, ownership, business name, tax ID, and dental license used for insurance billing.

3. **PAYMENT TO CLIENT FOR ACCOUNTS RECEIVABLE:** The following terms and conditions are applicable to any and all sales and purchases of accounts receivable, excluding in-office accounts, by and between Client and FPC:
   (a) **Initial Funding to Client:** FPC will make available to Client an amount not to exceed 60% of the accounts receivable, or $8,000 whichever is lower, less the set up fee described in paragraph 4(b) below.
   (b) **Weekly Funding (Production Check):** FPC will pay the Client, via a weekly production check, for the Net Purchased by FPC during that week, less an amount described in paragraph 3(c) below.
   (c) **Reductions to Client's weekly production check:** FPC will decrease the amount paid to the Client for the following:
      (i) The weekly service fee or other fees as described in paragraph 4 below.
      (ii) Deferred funding of a part or all of the Client's weekly production check in order to maintain the contingency receivable at its required minimum percentage (see paragraph 5 below) and/or the amount owed to FPC by Client does not exceed $8,000.
      (iii) Any account receivable purchased that week which FPC deems unacceptable or any purchased account receivable that FPC deems uncollectible (see paragraph 7 below).

4. **FEES:**
   (a) **Conversion fee: :** FPC will waive the standard conversion fee in exchange for Client's commitment to remain with FPC for at least 18 months from the date of conversion. FPC will assess a fee of 10% of all converted accounts receivable, excluding any credit balances (minimum $2,500), if either FPC or Client receives notice of termination prior to fulfillment of Client's commitment to remain with FPC for at least 18 months from the date of conversion.
   (b) **Setup fee:** $3000 setup fee (all software licensing and HIPAA transaction compliancy).
   (c) **Weekly service fees:** FPC will assess a weekly service fee on all purchased accounts receivable, in accordance with the fee schedule established below:

Accounts Receivable	Weekly Fee Factor
$0 - $49,999	.01063
$50,000 - $99,999	.00915
$100,000 - $249,999	.00772
$250,000 – above	.00592

Minimum monthly service fee of $825

FPC will waive the Minimum Service Fee and Contingency Receivable Deficiency Fee for 10 months, as long as the Client continues with our service for at least 18 months from the date of conversion. If the Client leaves the system in less than 18 months the client will then be responsible to pay the previously waived amount of Minimum Service and Deficiency Fees.

   (d) Other fees:
      (i) Client authorizes FPC to assess late payment charges monthly on Patient accounts when payments are not received at FPC by the due dates published in the Patients' billing statement. FPC retains all late payment charges. The Client is responsible for uncollected late payment charges.
      (ii) FPC may charge Client an additional fee (.0125 monthly) based on contingency receivable deficiency (see paragraph 5) on the first production check each month.

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7. **REASSIGNMENT:** In the event FPC, in its sole discretion, considers an account to be uncollectible under FPC's normal collection procedure, or if the account fails to meet the Client's warranties (see paragraph 2), then the Client agrees to repurchase the uncollected balance on that account. When accounts are to be repurchased, FPC may, in lieu of requiring direct repayment, charge the uncollected account against the contingency receivable or deduct the amount from FPC's weekly production check to the Client.

8. **MAINTENANCE AGREEMENT AND LIMITATIONS OF LIABILITY:** FPC maintains the computer in good working order during Client's tenure with FPC, provided Client is not in default of this agreement. FPC's maintenance agreement does not include:
   (a) Service required due to improper use of the system.
   (b) Service required due to use of non-FPC provided hardware and software.
   (c) Service performed by personnel not hired or otherwise authorized by FPC.

   EXCEPT FOR THE MAINTENANCE AGREEMENT DESCRIBED ABOVE, THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. The Client's sole and exclusive remedy for repair or replacement is the maintenance agreement described above. FPC shall not, under any circumstance, be liable for any special or consequential damage or lost revenues.

9. **NON-FPC SOFTWARE PACKAGES/REMOTE NETWORK SYSTEMS:** The Client may operate non-FPC software packages/Remote Network systems purchased elsewhere under the following conditions:
   (a) The software package/Remote Network system must be compatible and function properly with the FPC hardware configuration and FPC must be notified before such software/Remote Network system is used.
   (b) The Client or it's representative(s) will not make modifications to FPC hardware and/or software.
   (c) FPC will not provide program support or be responsible for issues arising from the use of the non-FPC software packages/Remote Network systems. Client agrees to hold FPC harmless from any such claim.

10. **ELECTRONIC SABOTAGE AND VANDALISM:** Due to security risks associated with internet activity and personal use of computers, Client is responsible for all damage to FPC-supplied hardware, software, databases, etc. caused by any virus, worm, or other form of electronic sabotage or vandalism, whether introduced, knowingly or accidentally, via internet, e-mail, CD, floppy disk, tape, or other means. Client agrees to reimburse FPC immediately for expenses incurred to remedy such damage. FPC recommends that all Clients purchase and install comprehensive, recent-release virus protection software, regularly update that software, and take other reasonable precautions to reduce the possibility of electronic sabotage or vandalism. FPC warrants all software and databases supplied by FPC are virus-free.

11. **DEFAULT:** Default shall occur if Client or guarantor:
   (a) Breaches any of the terms or warranties of this agreement.
   (b) Fails to notify FPC immediately in writing of any actions and/or events that would jeopardize FPC's clear title to the accounts receivable purchased from Client (e.g. tax lien, bankruptcy, etc.)
   (c) Becomes insolvent.
   (d) Becomes subject to or commences any proceeding under Federal Bankruptcy Act or any insolvency or debtor's relief law.
   (d) Dies.
   (e) If any property in the possession of FPC or obligation of FPC is attempted to be levied upon by any writ or any other such levy or notice of sale is given, or any sale is made of any property except in ordinary course of business or default is made in the payment of any other indebtedness of any item to FPC.

12. **REMEDIES:** FPC may implement corrective action to eliminate the breach(s) and/or default(s) of this agreement, without waiving any of its rights and/or remedies. FPC shall have the following rights and remedies and they shall be cumulative:
   (a) To accelerate FPC's collection efforts on accounts receivable sold to FPC.
   (b) To declare the Net Amount Owed to FPC due and payable at once.
   (c) To foreclose on any security provided to FPC. Client agrees to cooperate in connection with FPC's foreclosure on its security, including, but not limited to, permitting FPC to review the Client's Patient records and notifying insurance companies and Patients to make payments on accounts receivable directly to FPC.
   (d) To exercise any and all remedies available under law to FPC, including the rights and remedies of a secured party under the Uniform Commercial Code (UCC) as enacted in the state where the Client's office is located.

13. **TERMINATION:** Client, or FPC, may terminate this agreement for any reason by providing 30 days written notice to the other party. In the event of such notice, the Client shall reduce the net amount owed to FPC to zero on the following basis:
   (a) By electing to continue under all terms of this agreement and modifying the weekly funding provided in order to recover the amount owed to FPC by a target date established by Client.
   (b) By paying FPC the Net Amount Owed.
   (c) By discontinuing the sale of new accounts receivable to FPC. FPC will continue to collect the accounts receivable for a period not to exceed three months. Any remaining net amount owed is immediately due and payable.

   Initial Regardless of any notice of termination of this agreement, until the Net Amount Owed to FPC is reduced to zero, and any other obligation to FPC under this agreement is fulfilled, the provisions of this agreement shall remain in full force and effect, with fees continuing as described in paragraph 4. When the Net Amount Owed to FPC is reduced to zero, Client may elect to have FPC continue collecting the accounts under the current terms and conditions of this agreement.

14. **SECURITY INTEREST:** To secure all of Client's obligations hereunder, Client grants to FPC a security interest in all inventory, existing and future accounts, accounts receivable, contract rights, chattel paper, intangibles, all of debtor's rights as a seller of goods under Article 2 of the UCC, all goods returned to or repossessed in connection therewith, all equipment, together with all accessories substitutions, additions, replacements, parts, accessions affixed or used in connection therewith, whether now owned or hereafter acquired or arising, and the proceeds and products thereof, and wherever located.

15. **POWER OF ATTORNEY:** Client grants to FPC Client's power of attorney for the purpose of endorsing Client's name to any remittance received by FPC as payment for services provided by Client. Client shall execute assignments with respect to all purchased accounts receivable so as to vest in FPC full title to all purchased accounts receivable. FPC shall have the right to collect from the Patient all amounts due or to become due on said accounts receivable unless and until the accounts receivable are repurchased by Client in the manner provided in paragraph 13 above.

(f) Notwithstanding the above, the Client shall not assign any of his or her rights or obligations under this Agreement without the prior written consent of FPC.
(g) Client is responsible for all collection agency fees incurred by FPC in attempting to collect damages or amounts due from Patient
(h) In the event of any dispute arising out of this Agreement between FPC and Client, including arbitration or bankruptcy proceeding, prevailing party shall be entitled to recover reasonable attorney's fees and costs, including any costs and fees incurred in any appeal.

19. DEFINITIONS: Whenever used in FPC's Sales and Service Agreement, the following terms shall have the following meanings:
(a) "Patient" refers to a person(s) who has elected to purchase services of Client regardless of who shall be the actual recipient of such services.
(b) "Accounts Receivable" shall refer to the total of all purchased accounts receivable with an unpaid patient balance owing, which excludes accounts with credit balances.
(c) "In-office accounts" refer to only those accounts receivable not purchased, or those accounts reassigned, by FPC. FPC will not provide certain services to in-office accounts, including but not limited to funding, billing and collection services.
(d) "Net Amount Owed" refers to the amount owed to FPC or Client, and shall be computed as the total of payment received by FPC, less all fees assessed by FPC, less all funding provided by FPC, over the tenure of the Client's business relationship with FPC.
(e) "Net Purchased by FPC" refers to the net increase/decrease of Accounts Receivable due to Accounts Receivable purchased by FPC, and shall be computed as Gross Production and In-Office Accounts transferred to FPC, less Adjustments, less Payments Retained by Client

IN WITNESS WHEREOF, the parties have signed this Agreement the day and year above written.

FIRST PACIFIC CORPORATION

By: _____

Title: Executive Vice President of Sales & Service

CLIENT: Mary A. Tujetsch, D.D.S.

By: _____
Mary A. Tujetsch, D.D.S.

EXHIBIT 4

CERTIFIED MAIL

October 6, 2005

First Dental
Mary Tujetsch, D.D.S.
7714 W 159th St.
Orland Park, IL 60462-5036

Dear Dr. Tujetsch:

I have discussed your account several times with Katie Lucitt and our home office; however, after a careful review of our business relationship over the past year, we have determined that it would be in our mutual interest to close out your account at this time. I am writing to provide you with 30 days notice of termination.

FPC currently owes you $3,451.90. Please let us know the most convenient point in the next 30 days that we can return the existing accounts along with any amount that we owe to you. At that point, we will stop all FPC processing of any transactions on your accounts, and all fees will cease. If FPC receives any payments after that point, we will forward those to your office for posting and deposit.

As stated in my earlier correspondence, FPC agrees to waive all previously suppressed fees. To assist in your transition to your new computer system, FPC is prepared to leave our hardware and software in your office for up to two weeks after the point when we cease all processing and fees. We will arrange to recover our equipment at the end of that period or sooner if that suits your needs.

We appreciate the opportunity to be of service in meeting your practice goals, and want to wish you ongoing success in your practice. If you have any questions, please give me a call at 503-551-1230.

Best regards,

Kevin Brady
Vice President, FPC

cc: Katie Lucitt, Account Executive
David Wenger, Marketing Executive

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EXHIBIT 5

FPC
FIRST PACIFIC
CORPORATION
Together we do more

July 6, 2006

RE: Dr. Mary Tujetsch 110140, Dr. Todd Pusateri 111089

To Whom It May Concern:

On or about July 1, 2004, Dr. Mary Tujetsch purchased the dental practice of Dr. Todd Pusateri, located at 7714 W 159th St, Orland Park, IL 60462-5036. Dr. Pusateri was already a client of First Pacific Corporation (FPC) at the time of the sale, and Dr. Tujetsch became an FPC client at the time of the sale.

As part of that sale, FPC generated a copy of the database created during Dr. Pusateri's tenure with FPC, and set it up for Dr. Tujetsch's use. This database included account information (names, addresses, phone numbers, etc...), but did not include any financial data or account history for the patient accounts. Lacking financial data, Dr. Tujetsch's database also lacked the ability to report Active Patients prior to her posting of new financial transactions.

In the fall of 2005, at Dr. Tujetsch's request, FPC generated a report of Active Patients from Dr. Tujetsch's database. However, the report parameters requested by Dr. Tujetsch pre-dated her tenure as an FPC client. Upon presenting the report to her and learning of her intended use, our Account Executive cautioned her that the report would be inaccurate for her stated purpose of comparing the number of Active Patients on the report to the number of Active Patients stated in her sales agreement with Dr. Pusateri.

As part of the sale, Dr. Pusateri agreed to allow Dr. Tujetsch access to his database, which encompassed financial transactions on patient accounts, for 90 days after the sale of the practice. Although she had access to Dr. Pusateri's database for three months following her purchase of the practice, we have no records that indicate she requested or generated a report of Active Patients from Dr. Pusateri's database. Once we deleted Dr. Pusateri's database from the computer in the office, Dr. Tujetsch had no access to Active Patient information prior to July 1, 2004.

At this time, FPC has deleted both Dr. Pusateri's database and Dr. Tujetsch's database from our system, and we have no record of Active Patients for either database.

If you have any questions, please call me at 503-588-1411, extension 2208.

Best regards,

Bret Ketsdever
Client Accounts Manager

P.O. BOX 3000 • SALEM, OREGON 97302-8001 • 503.588.1411 • 800.544.2345

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EXHIBIT 6

*608 Active Patients From 7/02-7/04 Per FPC Report

Date: 10/24/2005 | Active Patients From 07/02 - 07/04 | Page: 1

Account number	Full name	Street	City, State, Zip	Last visit date	Active
16	STEVE ANDERSON	14011 S JAMES DR	MIDLOTHIAN, IL 60	12/12/2002	Yes
24	BARBARA AXELL	14969 WILLOWCRE	MIDLOTHIAN, IL 60	5/18/2004	Yes
32	EUGENE BANAS	4 OAKMINT CT	LEMONT, IL 60439	7/29/2003	Yes
33	DOMENIC BANDER	8303 LINCOLN HW	FRANKFORT, IL 60	9/30/2003	Yes
33	LUKA BANDERA	8303 LINCOLN HWY	FRANKFORT, IL 60	6/10/2004	Yes
33	EDI BANDERA	8303 LINCOLN HWY	FRANKFORT, IL 60	3/8/2003	Yes
40	PETER BECK	17101 GREENWOO	SOUTH HOLLAND,	12/3/2002	Yes
41	KARRIE LANZ	9201 W 142ND ST	ORLAND PARK, IL	3/13/2003	Yes
51	KELLY LAUGHRAN	15701 SUNSET RID	ORLAND PARK, IL	5/27/2004	Yes
58	TONI LEE	20359 COBBLESTO	FRANKFORT, IL 60	5/20/2004	Yes
59	GRAHAM BERRY	5161 CAMINO PLA	SAN DIEGO, CA	92	8/15/2002 Yes
62	ERICA BETTENHAU	19541 PHEASANT L	MOKENA, IL 60448	5/18/2004	Yes
94	SAL LONGO	13856 CHELSEA	LOCKPORT, IL 604	4/24/2003	Yes
98	DELETE DELETE	1006 BUTTERNUT C	FRANKFORT, IL 60	2/3/2004	Yes
104	JOSEPH BUHINSKI	14613 KEYSTONE	MIDLOTHIAN, IL 60	4/17/2003	Yes
105	JOHN LYNCH	14950 S 80TH AVE	ORLAND PARK, IL	3/18/2003	Yes
105	VIRGINIA LYNCH	14950 S 80TH AVE	ORLAND PARK, IL	8/20/2002	Yes
109	RANDY MACA	147 MAPLE	BRAIDWOOD, IL 6(	2/10/2004	Yes
109	CHERYL MACA	147 MAPLE	BRAIDWOOD, IL 60	3/2/2004	Yes
116	PATRICK BURKE JI	5008 W 147TH CT	MIDLOTHIAN, IL 60	12/17/2002	Yes
116	PATRICK BURKE	5008 W 147TH CT	MIDLOTHIAN, IL 60	6/12/2003	Yes
119	MOLLY BURKE	6132 FORESTVIEW	OAK FOREST, IL 6(	9/13/2003	Yes
119	ABIGAIL BURKE	6132 FORESTVIEW	OAK FOREST, IL 6(	3/13/2004	Yes
119	LARRY BURKE	6132 FORESTVIEW	OAK FOREST, IL 6(	6/8/2004	Yes
126	JIM BURLISON	23934 S HIGHLAND	MANHATTAN, IL 60	6/15/2004	Yes
126	ANGELIQUE BURLI	23934 S HIGHLAND	MANHATTAN, IL 60	5/20/2004	Yes
126	JAMES BURLISON	23934 S HIGHLAND	MANHATTAN, IL 60	5/25/2004	Yes
126	RYAN BURLISON	23934 S HIGHLAND	MANHATTAN, IL 60	5/25/2004	Yes
126	TREVOR BURLISOI	23934 S HIGHLAND	MANHATTAN, IL 60	5/25/2004	Yes
126	TYLER BURLISON	23934 S HIGHLAND	MANHATTAN, IL 60	5/20/2004	Yes
130	TYLER BURNHAM	5919 EL MORRO CT	OAK FOREST, IL 6(	3/11/2003	Yes
130	ANDREA BURNHAM	5919 EL MORRO CT	OAK FOREST, IL 6(	3/11/2003	Yes
133	MELISSA MARTIN	224 SURREY DR	GLEN ELLYN, IL 60	1/18/2003	Yes
133	NICK MARTIN	224 SURREY DR	GLEN ELLYN, IL 60	1/18/2003	Yes
134	SUSAN BURROWS	3906 TOWER DR #	RICHTON PARK, IL	10/12/2002	Yes
136	ELIZABETH BURRC	2101 GRAYSTONE	JOLIET, IL 60431	9/24/2002	Yes
140	MICHAEL CACCIAT	14440 IRVING AVE	ORLAND PARK, IL	9/9/2003	Yes
140	EUGENIA CACCIAT	14440 IRVING AVE	ORLAND PARK, IL	9/9/2003	Yes
140	ANTHONY CACCIA	14440 IRVING AVE	ORLAND PARK, IL	6/8/2004	Yes
140	MIA CACCIATO	14440 IRVING AVE	ORLAND PARK, IL	2/19/2004	Yes
140	TRESSA CACCIATO	14440 IRVING AVE	ORLAND PARK, IL	6/8/2004	Yes
164	CAREN CHIUCCARI	10116 S MAPLE AVI	OAK LAWN, IL 604	6/12/2003	Yes
164	BROOKE CZERWIN	10116 S MAPLE AVI	OAK LAWN, IL 604	3/9/2004	Yes
165	ED MCKEEVER	4948 CIRCLE CT	MIDLOTHIAN, IL 60	9/25/2003	Yes

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Account number	Full name	Street	City, State, Zip	Last visit date	Active
165	DELETE DELETE	4948 CIRCLE CT	MIDLOTHIAN, IL 603	3/20/2003	Yes
166	THOMAS MCNELLI	16939 S 84TH AVE	TINLEY PARK, IL 6	12/21/2002	Yes
166	ALEA MCNELLIS	16939 S 84TH AVE	TINLEY PARK, IL 6	12/9/2003	Yes
169	JEAN MENTE	15255 COVENTRY	ORLAND PARK, IL	1/14/2003	Yes
175	DORIS MILES	9231 WILLOW ST	ORLAND PARK, IL	5/20/2004	Yes
175	CHRISTINA MILES	9231 WILLOW ST	ORLAND PARK, IL	11/5/2002	Yes
179	BRIAN CLIFFORD	12542 PATWOE DR	SAINT JOHN, IN 46	11/5/2002	Yes
179	JILL CLIFFORD	12542 PATWOE DR	SAINT JOHN, IN 463	11/2004	Yes
189	CATHERINE MOESI	13321 OAK VIEW C	PALOS HEIGHTS, IL	5/2/2003	Yes
196	DARLENE CONLEY	19942 S ROSEWOO	FRANKFORT, IL 603	9/18/2003	Yes
201	JOHN CONROY	25828 COTTAGEGR	CRETE, IL 60417	5/20/2004	Yes
201	DELETE DELETE	25828 COTTAGEGR	CRETE, IL 60417	3/11/2004	Yes
201	CAITLIN CONROY	25828 COTTAGEGR	CRETE, IL 60417	3/25/2004	Yes
201	JOHN CONROY JR	25828 COTTAGEGR	CRETE, IL 60417	11/25/2003	Yes
201	KELLY CONROY	25828 COTTAGEGR	CRETE, IL 60417	3/11/2004	Yes
201	DANIEL CONROY	25828 COTTAGEGR	CRETE, IL 60417	12/18/2003	Yes
203	DOROTHY MORISE	8138 WHEELER DR	ORLAND PARK, IL	6/3/2004	Yes
213	JOSEPHINE CREN	11018 W 168TH ST	ORLAND PARK, IL	5/27/2004	Yes
215	CLARE CROTTY	8511 HOLLYWOOD	ORLAND PARK, IL	10/30/2003	Yes
215	KERRIGAN CROTT	8511 HOLLYWOOD	ORLAND PARK, IL	4/6/2004	Yes
215	SHANNON CROTTY	8511 HOLLYWOOD	ORLAND PARK, IL	4/15/2004	Yes
217	FRANCIS MURPHY	14126 CHRISTINA	ORLAND PARK, IL	3/25/2004	Yes
227	DAVID NEILL JR	5647 W 171ST PL	TINLEY PARK, IL 6	2/17/2004	Yes
238	KATIE NIELSEN	14528 LONG AVE	MIDLOTHIAN, IL 60	4/15/2003	Yes
240	GAIL DANAHER	17326 CARLYLE CT	TINLEY PARK, IL 6	4/22/2004	Yes
242	EDWARD NOVAK	15724 OLD ORCHA	ORLAND PARK, IL	12/17/2002	Yes
248	RAYMOND NUDI	17159 PARKSIDE	SOUTH HOLLAND,	3/25/2004	Yes
248	MARYELLEN NUDI	17159 PARKSIDE	SOUTH HOLLAND,	2/12/2004	Yes
250	HAMAND DAYAL	16725 W SADLEWO	LOCKPORT, IL 604	3/13/2003	Yes
250	SMITI DAYAL	16725 W SADLEWO	LOCKPORT, IL 604	2/14/2004	Yes
262	JOHN DERAIMO SR	741 WEST NORTH	HINSDALE, IL 6052	6/22/2004	Yes
262	JEANNE DERAIMO	741 WEST NORTH	HINSDALE, IL 6052	4/13/2004	Yes
262	JOHN DERAIMO	741 WEST NORTH	HINSDALE, IL 6052	6/22/2004	Yes
265	BRAD ESPOSITO	15611 NARCISSUS	ORLAND PARK, IL	6/29/2004	Yes
270	RUTH PANICO	419 HILLVIEW CT	LEMONT, IL 60439	6/10/2004	Yes
271	LISA DIVENCENZO	1904 HAVEN HILL D	PLAINFIELD, IL 60	12/11/2003	Yes
281	ROBERT DONAHUE	16136 ALEXANDRIA	TINLEY PARK, IL 6	3/15/2003	Yes
291	JASON DRAISMA	9435 W PLEACOCK	TINLEY PARK, IL 6	1/15/2004	Yes
295	PAULA DUDA	1300 BLUE JAY LA	PLAINFIELD, IL 60	11/18/2003	Yes
295	SELINA DUDA	1300 BLUE JAY LA	PLAINFIELD, IL 60	11/8/2003	Yes
296	TIMOTHY PEDIGO	8137 WEST BRUNS	MONEE, IL 60449	1/20/2004	Yes
305	VETA PETERSON	7758 BRIAR CT	FRANKFORT, IL 60	7/29/2003	Yes
313	JAMES PICHMAN	19709 S 114TH AVE	MOKENA, IL 60448	8/6/2002	Yes
313	ERIC PICHMAN	19709 S 114TH AVE	MOKENA, IL 60448	3/4/2004	Yes

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314	WILLIAM EGLAR	8621 W 170TH ST	ORLAND PARK, IL	11/14/2002	Yes
314	LISA EGLAR	8621 W 170TH ST	ORLAND PARK, IL	4/17/2003	Yes
328	EMIL ERNEST	18015 IDAHO CT	ORLAND PARK, IL	6/22/2004	Yes
336	NORMA POETZ	15715 DEERFIELD	ORLAND PARK, IL	2/5/2004	Yes
346	CARL PREISSLER	PO BOX 163	BLUE ISLAND, IL	6/5/20/2004	Yes
350	JOSHUA PRUSKI	2936 CARRIE CT	FRANKFORT, IL	6/1/18/2003	Yes
352	NICOLE PUKALA	7502 W 160TH PL	TINLEY PARK, IL	6/4/10/2004	Yes
354	ELAINE PUSATERI	3203 S UNION AVE	CHICAGO, IL 6061	6/19/2003	Yes
357	RICHARD PUSATE	10806 MAUE DR	ORLAND PARK, IL	3/11/2004	Yes
357	NANCY PUSATERI	10805 MAUE DR	ORLAND PARK, IL	3/11/2004	Yes
373	JOEL GABBY	P.O. BOX 351	WORTH, IL 60482	5/19/2003	Yes
374	LOUIS REIHER	8242 W 160TH PL	TINLEY PARK, IL	6/12/23/2003	Yes
379	MARTA GAGNE	10838 HALLOW TRI	ORLAND PARK, IL	3/16/2004	Yes
379	JENNIFER GAGNE	10838 HALLOW TRI	ORLAND PARK, IL	4/1/2004	Yes
384	JOLENE GALVAN	9341 S 76TH CT	HICKORY HILLS, IL	4/24/2004	Yes
391	SANDY RITTER	14568 CREEKVIEW	ORLAND PARK, IL	9/12/2002	Yes
393	ERIC ROBERTS	17300 RIDGELAND	TINLEY PARK, IL	6/7/9/2002	Yes
402	KRISTINE ROHLICE	4432 W 143RD ST	CRESTWOOD, IL	6/10/2/2003	Yes
404	DAN ROOS	14119 TIMOTHY DR	ORLAND PARK, IL	7/1/2004	Yes
404	MELISSA ROOS	14119 TIMOTHY DR	ORLAND PARK, IL	5/18/2004	Yes
413	VINCE ROSSI	8637 TULLAMORE	TINLEY PARK, IL	6/4/17/2003	Yes
413	EILEEN ROSSI	8637 TULLAMORE	TINLEY PARK, IL	6/6/17/2004	Yes
418	SUSAN RUETHER	2903 LEVEN AVE	NEW LENOX, IL 60	8/12/2003	Yes
425	ROBERT SADOWSI	7431 W 160TH ST	TINLEY PARK, IL	6/5/8/2004	Yes
425	RYAN SADOWSKI	7431 W 160TH ST	TINLEY PARK, IL	6/2/14/2004	Yes
429	TOM GIROUARD	8 NORTH TRAIL	LEMONT, IL 60439	9/25/2003	Yes
429	ALLISON GIROUAR	8 NORTH TRAIL	LEMONT, IL 60439	12/16/2003	Yes
429	BRENDAN GIROUA	8 NORTH TRAIL	LEMONT, IL 60439	5/6/2004	Yes
429	SEAN GIROUARD	8 NORTH TRAIL	LEMONT, IL 60439	4/29/2004	Yes
434	GILARDO SANDOV	13222 BAYWOOD L	LOCKPORT, IL 604	6/29/2004	Yes
437	JOHN GOODWIN III	14633 SHERMAN A	POSEN, IL 60469	3/30/2004	Yes
451	DEBORAH DEHART	16221 SHERWOOD	ORLAND PARK, IL	12/16/2003	Yes
451	MARK SCHOIBER	16221 SHERWOOD	ORLAND PARK, IL	3/13/2003	Yes
460	ELVIRA SERNA	10936 COLORADO	ORLAND PARK, IL	3/25/2004	Yes
466	DAVID SHEPARD S	19617 S SYCAMORI	MOKENA, IL 60448	2/1/2003	Yes
466	BERNICE SHEPARI	19617 S SYCAMORI	MOKENA, IL 60448	1/14/2003	Yes
466	SAMANTHA SHEPA	19617 S SYCAMORI	MOKENA, IL 60448	3/18/2003	Yes
469	TOM SHESTOKAS	16819 SPICE BUSH	ORLAND PARK, IL	7/8/2003	Yes
472	JOANNE HAASE	4950 W 134TH CT #	MIDLOTHIAN, IL 608	13/2002	Yes
479	KENNETH HAINES	15537 TWIN LAKES	LOCKPORT, IL 604	9/28/2002	Yes
483	MARGARET HALL	308 E 18TH ST	LOCKPORT, IL 604	1/31/2004	Yes
487	DESEREE SMODA	7555 LAKESIDE DR	FRANKFORT, IL 606	8/2004	Yes
487	RAY SMODA	7555 LAKESIDE DR	FRANKFORT, IL 603	23/2004	Yes
488	MICHAEL HAMILL	15607 S BRASSIE L	ORLAND PARK, IL	3/30/2004	Yes

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488	MEGHAN HAMILL	15607 S BRASSIE D	ORLAND PARK, IL	1/20/2004	Yes
488	MATTHEW HAMILL	15607 S BRASSIE D	ORLAND PARK, IL	4/1/2004	Yes
491	ZUHAR HAMMAD	15329 BRASSIE	ORLAND PARK, IL	12/12/2002	Yes
491	NEZEEHA HAMMAD	15329 BRASSIE	ORLAND PARK, IL	3/15/2003	Yes
499	WALTER SPREADB	5243 TEMPLE AVE	OAK FOREST, IL	6/4/26/2003	Yes
499	JENNIFER SPREAD	5243 TEMPLE AVE	OAK FOREST, IL	6/4/15/2003	Yes
499	JACQUELINE SPRE	5243 TEMPLE AVE	OAK FOREST, IL	6/4/26/2003	Yes
499	PETER SPREADBU	5243 TEMPLE AVE	OAK FOREST, IL	6/5/29/2003	Yes
499	PATRICK SPREADE	5243 TEMPLE AVE	OAK FOREST, IL	6/2/6/2003	Yes
499	JESSICA SPREADB	5243 TEMPLE AVE	OAK FOREST, IL	6/4/15/2003	Yes
499	PATRICIA SPREADI	5243 TEMPLE AVE	OAK FOREST, IL	6/5/11/2004	Yes
499	MICHELLE SPREAD	5243 TEMPLE AVE	OAK FOREST, IL	6/5/29/2003	Yes
501	DANIEL HARRINGT	13738 COGHILL	ORLAND PARK, IL	12/4/2003	Yes
501	MARY HARRINGTO	13738 COGHILL	ORLAND PARK, IL	6/15/2004	Yes
501	MEGAN HARRINGT	13738 COGHILL	ORLAND PARK, IL	6/21/2003	Yes
501	COLLEN HARRINGT	13738 COGHILL	ORLAND PARK, IL	6/19/2003	Yes
513	LISA STILP	22152 CLOVE DR	FRANKFORT, IL 60	8/6/2002	Yes
513	RACHEL STILP	22152 CLOVE DR	FRANKFORT, IL 60	8/6/2002	Yes
515	JOHN HARZICH	15712 SUNSET RID	ORLAND PARK, IL	5/13/2003	Yes
515	DOLORES HARZICI	15712 SUNSET RID	ORLAND PARK, IL	11/14/2002	Yes
520	ROBERT HASENKA	17233 OKETO	TINLEY PARK, IL	6/9/23/2003	Yes
520	JOANNE HASENKA	17233 OKETO	TINLEY PARK, IL	6/3/9/2004	Yes
523	SUSAN STRAUSER	1009 SOUTHGATE I	NEW LENOX, IL 60	8/13/2002	Yes
524	TIM HASTINGS	13017 W RTE 6	MOKENA, IL 60448	5/1/2003	Yes
531	LYNN HAWKS	16507 W TETON DF	LOCKPORT, IL 604	7/15/2003	Yes
531	TOMMY HAWKS	16507 W TETON DF	LOCKPORT, IL 604	10/1/2002	Yes
534	DANIELLE SULLIVA	6728 PARK LN	PALOS HEIGHTS, IL	2/12/2004	Yes
542	MARK HESTER	3161 BENDING CRE	CRETE, IL 60417	3/18/2004	Yes
542	DEBBIE HESTER	3161 BENDING CRE	CRETE, IL 60417	6/24/2004	Yes
547	JAMES HICKS	18436 LAKEVIEW C	TINLEY PARK, IL	6/6/22/2004	Yes
553	DOUGLAS SZYMAN	10800 S SAWYER	CHICAGO, IL 60655	8/15/2004	Yes
566	DICK HOOVER	6860 W 101 AVE	CROWN POINT, IN	1/15/2004	Yes
566	ZACH HOOVER	6860 W 101 AVE	CROWN POINT, IN	1/15/2004	Yes
570	ELEANOR HOU	7813 SEAPINES	ORLAND PARK, IL	6/1/2004	Yes
574	MICHAEL TERMUNI	15142 AVERS	MIDLOTHIAN, IL 60	11/5/2002	Yes
576	SEAN HUGHES	9411 QUAIL CROSS	TINLEY PARK, IL	6/7/24/2003	Yes
576	BEVERLY HUGHES	9411 QUAIL CROSS	TINLEY PARK, IL	6/6/26/2003	Yes
576	ARIELLE HUGHES	9411 QUAIL CROSS	TINLEY PARK, IL	6/6/24/2003	Yes
576	MARK HUGHES	9411 QUAIL CROSS	TINLEY PARK, IL	6/7/24/2003	Yes
581	LINDA THOMPSON	14528 LONG AVE	MIDLOTHIAN, IL 60	11/18/2003	Yes
584	CARLA HUNTER	15938 S LONG AVE	OAK FOREST, IL	6/3/16/2004	Yes
584	RYAN HUNTER	15938 S LONG AVE	OAK FOREST, IL	6/11/6/2003	Yes
585	JOANNE HUNTER	1104 DONALD CT	NEW LENOX, IL 60	6/17/2004	Yes
589	KRIS HUTTER	12176 HENIECKE D	MOKENA, IL 60448	11/13/2003	Yes

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589	BRITTANY HUTTER	12176 HENIECKE D	MOKENA, IL 60448	6/12/2003	Yes
589	KYLE HUTTER	12176 HENIECKE D	MOKENA, IL 60448	6/5/2003	Yes
592	SHARON TOBIN	15508 LECLAIRE	OAK FOREST, IL 6	11/26/2002	Yes
595	STEVE IGNOWSKI	2617 BLUESTONE I	LENOX, IL 60451	10/21/2003	Yes
610	RYANE KATS	1606 SCHALLER LN	DYER, IN 46311	1/9/2003	Yes
610	AMY JAABAY	1606 SCHALLER LN	DYER, IN 46311	1/31/2004	Yes
613	ALEX TYMINSKI	6865 W 177TH ST	TINLEY PARK, IL 6	3/2/2004	Yes
614	STEPHEN URBAN	4920 ELIZABETH C	OAK FOREST, IL 6	9/24/2002	Yes
614	KATHLEEN URBAN	4920 ELIZABETH C	OAK FOREST, IL 6	9/24/2002	Yes
614	DELANEY URBAN	4920 ELIZABETH C	OAK FOREST, IL 6	9/24/2002	Yes
614	KALEIGH URBAN	4920 ELIZABETH C	OAK FOREST, IL 6	9/24/2002	Yes
614	LUKE URBAN	4920 ELIZABETH C	OAK FOREST, IL 6	9/24/2002	Yes
620	LISA VALLEY	8437 CHERRY HILL	TINLEY PARK, IL 6	10/8/2002	Yes
622	ERIK VALLOW	17000 WARBLER LN	ORLAND PARK, IL	12/20/2003	Yes
622	SAGA VALLOW	17000 WARBLER LN	ORLAND PARK, IL	12/20/2003	Yes
624	BRIAN JEMILO	4515 143RD ST	MIDLOTHIAN, IL 60	11/20/2003	Yes
624	JANICE JEMILO	4515 143RD ST	MIDLOTHIAN, IL 60	3/30/2004	Yes
624	BRIAN JEMILO JR	4515 143RD ST	MIDLOTHIAN, IL 60	6/8/2004	Yes
624	MATTHEW JEMILO	4515 143RD ST	MIDLOTHIAN, IL 60	6/8/2004	Yes
624	VICTORIA JEMILO	4515 143RD ST	MIDLOTHIAN, IL 60	6/8/2004	Yes
624	NATASHA WILLIAM	4515 143RD ST	MIDLOTHIAN, IL 60	10/29/2002	Yes
625	EDWARD VANDERI	7302 W EVERGREE	ORLAND PARK, IL	12/5/2002	Yes
636	NORMAN JOHNSO	14050 LEMONT RD	LOCKPORT, IL 604	7/16/2002	Yes
644	ALAN JUSTICE	11915 S. AVERS	ALSIP, IL 60803	2/18/2003	Yes
645	CANDICE VIRGILIO	1340 S MAPLE AVE	BERWYN, IL 60402	1/3/2004	Yes
646	ANA JUSTICE	11915 S. AVERS	ALSIP, IL 60803	8/17/2002	Yes
651	DONNA VOIGHT	631 BURNS	FLOSSMOOR, IL 6	8/27/2002	Yes
651	KENNY VOIGHT SR	631 BURNS	FLOSSMOOR, IL 6	9/19/2002	Yes
662	REBECCA DUDA	8801 WEST 170TH	TINLEY PARK, IL 6	12/4/2003	Yes
663	MIKE WARDSIANI	156 CYPRESS DR	BOLINGBROOK, IL	11/12/2002	Yes
670	FRANK WAWRYTKI	15537 TWIN LAKES	LOCKPORT, IL 604	2/4/2003	Yes
670	JANET WAWRYTKO	15537 TWIN LAKES	LOCKPORT, IL 604	8/26/2003	Yes
703	WANDA WILLINGH	26051 S RUBY ST	MONEE, IL 60449	7/31/2003	Yes
717	WILLIAM KORN	16150 S LAUREL	ORLAND PARK, IL	5/11/2004	Yes
719	PEGGY KOZEL	9941 TREE TOP DR	ORLAND PARK, IL	4/22/2003	Yes
721	PETER KRASON	9812 W CIRCLE PK	PALOS PARK, IL 6	3/25/2004	Yes
725	GARY KRIEGER	17957 DAVIDS LN	ORLAND PARK, IL	9/30/2003	Yes
728	ROBERT WOODFO	2901 S MICHIGAN A	CHICAGO, IL 6061	2/28/2004	Yes
742	STEVE ZAESKE	19346 TRAMORE LN	MOKENA, IL 60448	4/10/2003	Yes
742	CINDY ZAESKE	19346 TRAMORE LN	MOKENA, IL 60448	2/26/2004	Yes
768	MICHELLE HOBBS	1013 SCOTTSDALE	JOLIET, IL 60432	7/1/2003	Yes
772	BOB LEEP	14316 KNOX AVE	MIDLOTHIAN, IL 60	12/12/2002	Yes
773	AMANDA YELNICK	810 SOMERSET AC	NEW LENOX, IL 60	1/20/2004	Yes
773	RICHARD M YELNI	810 SOMERSET AC	NEW LENOX, IL 60	1/20/2004	Yes

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773	ALYSSA YELNICK	810 SOMERSET AC	NEW LENOX, IL 60	5/4/2004	Yes
777	RAYFORD PEACOC	7758 W BRIAR CT	FRANKFORT, IL 60	9/16/2003	Yes
785	ALISON JACKSON	8052 OLD MILL RO	FRANKFORT, IL 60	12/17/2002	Yes
788	LILLIANA PADILLA	16024 ALEXANDRIA	TINLEY PARK, IL 6	3/18/2004	Yes
788	RAMON PADILLA S	16024 ALEXANDRIA	TINLEY PARK, IL 6	3/18/2004	Yes
789	STEVE CAMPIONE	7925 GLENFIELD DI	TINLEY PARK, IL 6	6/24/2004	Yes
789	ANNETTE CAMPIO	7925 GLENFIELD DI	TINLEY PARK, IL 6	6/24/2004	Yes
789	JESSICA CAMPION	7925 GLENFIELD DI	TINLEY PARK, IL 6	6/24/2004	Yes
792	RAYMOND GIERUT	10644 LYNN DR	ORLAND PARK, IL	3/25/2004	Yes
792	EMILY GIERUT	10644 LYNN DR	ORLAND PARK, IL	3/18/2004	Yes
795	STACI LORZ	14439 S KARLOV	MIDLOTHIAN IL 60	8/14/2003	Yes
796	BARBRA LAZZARA	18809 MEADOW CR	MOKENA, IL 60448	7/1/2003	Yes
796	GUY LAZZARA	18809 MEADOW CR	MOKENA, IL 60448	5/18/2004	Yes
802	GREG KRAYNAK	14416 S GLEN DR	LOCKPORT, IL 604	9/13/2003	Yes
802	GINA KRAYNAK	14416 S GLEN DR	LOCKPORT, IL 604	7/31/2003	Yes
802	DANIEL KRAYNAK	14416 S GLEN DR	LOCKPORT, IL 604	8/21/2003	Yes
802	JACLYN KRAYNAK	14416 S GLEN DR	LOCKPORT, IL 604	7/31/2003	Yes
809	NIKOLE WILLS	14559 S KEDVALE	MIDLOTHIAN, IL 60	8/15/2002	Yes
821	LAURA NELIN	8001 KILLARNEY C	TINLEY PARK, IL 6	3/27/2003	Yes
822	WALTER WOJTOW	16746 S 88TH CT	TINLEY PARK, IL 6	7/8/2003	Yes
822	DANIEL WOJTOWI	16746 S. 88TH CT	TINLEY PARK, IL 6	8/8/2002	Yes
822	CAROLINE WOJTO	16746 S 88TH CT	TINLEY PARK, IL 6	6/3/2004	Yes
823	ISTVAN PETHES	2104 CULVER CT	PLAINFIELD, IL 60	7/24/2003	Yes
824	MEGHAN CRAIG	15642 SHIRE DR	ORLAND PARK, IL	11/20/2003	Yes
824	AUSTIN CRAIG	15642 SHIRE DR	ORLAND PARK, IL	10/16/2003	Yes
824	BRYAN CRAIG	15642 SHIRE DR	ORLAND PARK, IL	11/25/2003	Yes
825	ROSE CASTANEDA	4360 W. 150TH ST.	MIDLOTHIAN, IL 60	11/7/2002	Yes
837	KEVIN JOHNSON	5805 ORANGE LAN	OAK FOREST, IL 6	12/21/2002	Yes
837	MEAGAN JOHNSON	5805 ORANGE LAN	OAK FOREST, IL 6	12/3/2002	Yes
843	STAN ADDIS	4403 COOPER RID	CHAMPAIGN, IL 61	8/15/2002	Yes
849	MICHAEL COSTELL	16416 84TH AVE	TINLEY PARK, IL 6	9/27/2003	Yes
850	FAVIAN MARTINEZ	9233 QUAIL CT	TINLEY PARK, IL 6	3/11/2003	Yes
852	ADELE DARRAGH	16428 CRAIG DR	OAK FOREST, IL 6	1/28/2003	Yes
854	PHILIP LOUTTIT	14801 S 88TH AVE	ORLAND PARK, IL	9/5/2002	Yes
855	DEBBIE PAPPAS	1861 HAWTHORNE	WESTCHESTER, IL	1/29/2004	Yes
858	STEPHEN MCCLIN	14150 POLK	MATTESON, IL 604	7/8/2003	Yes
859	DOROTHY NICHOL	9827 TREETOP	ORLAND PARK, IL	1/14/2003	Yes
864	REBECA TERMUNE	13453 S LOOMIS C	MIDLOTHIAN, IL 60	2/26/2004	Yes
864	GENEVIEVE TERMI	13453 S LOOMIS C	MIDLOTHIAN IL 60	2/19/2004	Yes
866	GENE SZCZESNIEV	7825 BRISTOL PAR	TINLEY PARK, IL 6	3/4/2004	Yes
869	DANIEL BUSCH	19701 SCARTH LAN	MOKENA, IL 60448	10/1/2002	Yes
876	KIMBERLY JAMES	16812 OLCOTT	TINLEY PARK, IL 6	6/17/2004	Yes
883	DEMETRI MARKOU	6 SURRY LN	LEMONT, IL 60439	5/27/2004	Yes
886	ERIC BREI	765 BLUESTONE B	NEW LENOX, IL 60	2/26/2004	Yes

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888	RYAN BREI	765 BLUESTONE B	NEW LENOX, IL 60	7/2/2002	Yes
892	CHRISTINE GIALAN	14534 LINDER AV	MIDLOTHIAN, IL 60	7/9/2002	Yes
899	ANDREA PANOZZC	8125 BASSWOOD	ORLAND PARK, IL	11/20/2003	Yes
903	ALICE SULZER	15701 ORLAN BRO	ORLAND PARK, IL	10/3/2002	Yes
907	FRANK KRUPA	15591 SUNRISE	ORLAND PARK, IL	6/8/2004	Yes
912	MARY JO MAKARO	16121 HAVEN	TINLEY PARK, IL	6/2/25/2003	Yes
917	MICHELLE KILPATF	2809 GIFFORD PLA	NEW LENOX, IL 60	7/8/2003	Yes
917	KAITLYN KILPATRI	2809 GIFFORD PLA	NEW LENOX, IL 60	7/8/2003	Yes
921	PATTY AYRES	16806 82ND AVE	TINLEY PARK, IL 6	9/2/2003	Yes
923	DANI ROBERTS	7711 JAMISON DR	FRANKFORT, IL 60	5/4/2004	Yes
926	SURAPHON HOMPI	9507 N SHERMER	MORTON GROVE, I	10/10/2002	Yes
927	EMILY GRIGGS	17443 SAUK DR.	LOCKPORT, IL 604	4/15/2003	Yes
928	SCOTT ROSENLUN	8840 CEDARWOOD	TINLEY PARK, IL 6	10/3/2002	Yes
929	JON E GIBSON	15 CARRIAGE PAR	OXFORD, GA 3005	8/7/2003	Yes
930	JOHN HOULIHAN	8201 WEST 159TH	TINLEY PARK, IL 6	9/25/2004	Yes
930	LINDA HOULIHAN	8201 WEST 159TH	TINLEY PARK, IL 6	11/18/2003	Yes
942	PAUL BALLOU	50 LINCOLN OAKS	WILLOWBROOK, IL 6	5/5/2003	Yes
949	STEVEN CAMARILL	881 BRIGANTINE D	NEW LENOX, IL 60	6/19/2004	Yes
955	TAMMY EDMONSO	9302 HUNTER 104	TINLEY PARK, IL 6	11/21/2002	Yes
960	PATRICIA PACOUR	11423 W 171ST	ORLAND PARK, IL	7/31/2003	Yes
968	ANDREA LAMONIC	15718 ORLANBRO	ORLAND PARK, IL	7/29/2003	Yes
972	PAT DONOHUE	6601 WEST 180TH	TINLEY PARK, IL 6	4/27/2004	Yes
976	KATHLEEN ANHAL	5115 WOLFE DR	OAK LAWN, IL 604	4/29/2004	Yes
979	IRMA BOBROFF	14326 CREME RD	LOCKPORT, IL 604	6/3/2004	Yes
982	COLLEEN GIBSON	15 CARRIAGE PAR	OXFORD, GA 3005	7/24/2003	Yes
985	ROSA ARENAS	15434 CHERRYWO	ORLAND PARK, IL	12/19/2002	Yes
985	JACQUELINE AREN	15434 CHERRYWO	ORLAND PARK, IL	12/19/2002	Yes
985	JOSEPH ARENAS	15434 CHERRYWO	ORLAND PARK, IL	7/23/2002	Yes
985	ANDRES ARENAS	15434 CHERRYWO	ORLAND PARK, IL	2/6/2003	Yes
991	AL KRAVITZ	17221 DOONEEN A	TINLEY PARK, IL 6	9/30/2003	Yes
991	STEPHANIE KRAVI	17221 DOONEEN A	TINLEY PARK, IL 6	4/22/2004	Yes
992	ANTOINETTE DEFE	9330 SUTTON PL	TINLEY PARK, IL 6	5/6/2004	Yes
996	ALEXANDER BOBR	14326 CREME RD	LOCKPORT, IL 604	7/25/2002	Yes
1000	ANGELA TOTOS	342 N LAGRANGE R	FRANKFORT, IL 60	2/11/2003	Yes
1002	KELLIE FINLON	8607 BELL STREET	CROWN POINT, IN	5/20/2004	Yes
1002	NICOLE TEETER	8607 BELL STREET	CROWN POINT, IN	8/21/2003	Yes
1004	IVY EAMES	15701 LAMON AVE	OAK FOREST, IL 6	7/29/2003	Yes
1005	VERNA PYTLIK	6200 EL MOORE LA	OAK FOREST, IL 6	5/13/2003	Yes
1007	MARY DONOVAN	7414 W 11TH ST	WORTH, IL 60482	10/10/2002	Yes
1008	TOM MARASOVICH	16121 HAVEN	TINLEY PARK, IL 6	7/29/2003	Yes
1009	MELANIE GLAZA	14614 WEST AVE	ORLAND PARK, IL	9/27/2003	Yes
1011	JEAN SOLTIS	320 E NEBRASKA	FRANKFORT, IL 60	1/30/2003	Yes
1011	ANDREW SOLTIS	320 E NEBRASKA	FRANKFORT, IL 60	7/1/2003	Yes
1011	MICHAEL SOLTIS	320 E NEBRASKA	FRANKFORT, IL 60	7/15/2003	Yes

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1011	JOE SOLTIS	320 E NEBRASKA	FRANKFORT, IL 60	7/15/2003	Yes
1011	ZAC SOLTIS	320 E NEBRASKA	FRANKFORT, IL 60	7/1/2003	Yes
1015	GEORGE LEMPERS	6400 PINE CONE DI	TINLEY PARK, IL 6	7/3/2003	Yes
1016	GWEN FARROW	PO BOX 1132	JOLIET, IL 60434	4/10/2004	Yes
1019	ALEX NAVARRO	1365 GORDON LAN	LEMONT, IL 60439	4/24/2004	Yes
1021	JOHN LAUGHRAN	7648 NORTHFIELD	TINLEY PARK, IL 6	5/20/2004	Yes
1028	TIM WALSH	16701 PAUL CT	ORLAND PARK, IL	2/17/2004	Yes
1029	DEVIN PROKOPIAK	15918 CENTERWAY	TINLEY PARK, IL 6	5/6/2004	Yes
1033	FRANCISCA ALEJO	7150 WEST 173RD	TINLEY PARK, IL 6	9/5/2002	Yes
1035	ELIO GORGIEVSKI	16639 JEAN LANE	TINLEY PARK, IL 6	8/6/2002	Yes
1035	BONNIE GORGIEVS	16639 JEAN LANE	TINLEY PARK, IL 6	12/30/2003	Yes
1038	NOREEN BRADY	11850 WINDEMERE	ORLAND PARK, IL	6/24/2004	Yes
1040	RAYMOND NYKAZA	499 TALL SHIP DR	SALEM, SC 29676	7/24/2003	Yes
1040	BARBRA NYKAZA	499 TALL SHIP DR	SALEM, SC 29676	7/10/2003	Yes
1042	DOROTHY RICKER	4912 WEST 156TH	OAK FOREST, IL 6	7/1/2004	Yes
1048	FLORENCE HAMER	5265 DIAMOND DR	OAK FOREST, IL 6	2/25/2003	Yes
1051	ALEXANDRIA KIRC	22077 THYME LANE	FRANKFORT, IL 60	6/15/2004	Yes
1058	BRADLEY NEWBY	7512 W 163RD PL	TINLEY PARK, IL 6	6/6/2004	Yes
1061	DELETE DELETE	DELETE	UNKNOWN, ZZ	9/25/2003	Yes
1067	ELSIE KRAHULIK	3842 WV 107TH ST	CHICAGO, IL 6065	8/7/2003	Yes
1072	WILLIAM J ANDERS	10711 CANTERBUR	MOKENA, IL 60448	12/4/2003	Yes
1075	BRENT KIVI	8918 PATTIE LANE	ORLAND PARK, IL	11/9/2002	Yes
1078	BASSIOIOS KRIARI	1000 THORTEN	LOCKPORT, IL 604	7/25/2002	Yes
1079	JOHN THEODORE	7630 W 157TH PL	ORLAND PARK, IL	1/8/2004	Yes
1080	KATHLEEN HAMER	4431 W 123RD STR	ALSIP, IL 60803	5/20/2003	Yes
1082	JOSEPHINE JACKO	15413 BEGONIA CT	ORLAND PARK, IL	7/2/2002	Yes
1085	MARY BRADLEY	16056 CRYSTAL CR	ORLAND PARK, IL	1/14/2003	Yes
1092	ANTHONY ZURLIS	16210 SHERWOOD	ORLAND PARK, IL	9/12/2002	Yes
1093	DEMETRIOS POLIM	17720 IROQUOIS TI	TINLEY PARK, IL 6	8/12/2003	Yes
1093	DEBBIE POLIMENA	17720 IROQUOIS TI	TINLEY PARK, IL 6	9/2/2003	Yes
1099	GENE OCONNOR	14521 LAMON 2S	MIDLOTHIAN, IL 60	7/25/2002	Yes
1103	VICTOR TORRES	9231 PEPPERWOO	TINLEY PARK, IL 6	7/2/2002	Yes
1103	MARIA TORRES	9231 PEPPERWOO	TINLEY PARK, IL 6	7/11/2002	Yes
1105	JENNY OSYPKA	8730 W 162ND ST	ORLAND PARK, IL	5/1/2003	Yes
1106	ALEX SOJKOWSKI	8612 W 143RD PL	ORLAND PARK, IL	8/6/2002	Yes
1107	GEORGE PRZYBYL	5121 S PAULINA AV	CHICAGO, IL 6060	7/2/2002	Yes
1110	DYLAN LEWIS	12955 W PLAYFIELI	MIDLOTHIAN, IL 60	9/3/2002	Yes
1113	KYLE FARR	16532 CRESCENT	TINLEY PARK, IL 6	1/9/2003	Yes
1114	AURELIANO SAND	16200 APPLE LN UI	TINLEY PARK, IL 6	1/31/2004	Yes
1115	JOSHUA BATTERM	1842 VOLMER RD	FLOSSMOOR, IL 6	2/14/2004	Yes
1116	NICK RUNIONS	16121 HAVEN	ORLAND HILLS, IL	7/9/2002	Yes
1117	RACHEL WASILKU	15808 ORLANBRO	ORLAND PARK, IL	7/16/2002	Yes
1118	MICHAEL WISNIEW	14917 TERRACE LA	MIDLOTHIAN, IL 60	1/28/2003	Yes
1120	LAURA FELTZ	5700 VICTORIA DR	OAK FOREST, IL 6	7/20/2002	Yes

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1122	FRANK SPIEGL	16733 FOREST AVE	OAK FOREST, IL	6/7/25/2002	Yes
1124	COLLEEN NICELY	14557 TRUMBULL	MIDLOTHIAN, IL	606/8/2004	Yes
1124	JONATHON NICELY	14557 TRUMBULL	MIDLOTHIAN, IL	608/13/2002	Yes
1125	FRANK BEDNAR	335 NEVADA ST	FRANKFORT, IL	607/18/2002	Yes
1126	MICHAEL MARKOU	6 SUREY LANE	LEMONT, IL	60439 7/18/2002	Yes
1127	GAIL DALLA COSTA	17088 BONNIE TRA	OAK FOREST, IL	6/6/24/2003	Yes
1130	JASON LEWIS	13625 S. ROYAL CT	MIDLOTHIAN, IL	606/3/2002	Yes
1131	VIOLA METER	7333 PARADISE LN	ORLAND PARK, IL	9/11/2004	Yes
1133	LINDA OYLER	18574 WESTPOINT	TINLEY PARK, IL	6/9/30/2003	Yes
1134	JOSHUA RUNIONS	16121 HAVEN	ORLAND HILLS, IL	10/12/2002	Yes
1135	ANDREA PLUTZ	5 NELSON RD	NEW LENOX, IL	60 3/1/2003	Yes
1136	DEBRA FERNANDE	16536 S CRANBERI	TINLEY PARK, IL	6/8/15/2002	Yes
1136	ADRIENNE FERNAN	16536 S CRANBERI	TINLEY PARK, IL	6/8/15/2002	Yes
1137	ZACH MILANOVICH	14044 CHESWICK D	ORLAND PARK, IL	8/1/2002	Yes
1139	JESSICA SZELIGA	13252 W PIN OAK C	HOMER GLENN, IL	8/28/2003	Yes
1139	DEREK SZELIGA	13252 W PIN OAK C	HOMER GLENN, IL	4/24/2003	Yes
1140	DEAN PANOS	348 S DEARBORN A	BOURBONNAIS, IL	8/6/2002	Yes
1141	ANGIE PALERMO	600 NORTHGATE	NEW LENOX, IL	60 12/30/2003	Yes
1141	JOHN PALERMO	600 NORTHGATE	NEW LENOX, IL	60 12/30/2003	Yes
1144	JAMES GRACA	5130 ELMWOOD RI	OAK FOREST, IL	6/10/12/2002	Yes
1145	CAROL SCHWENNI	125 TWIN OAKS #3	JOLIET, IL	60431 8/15/2002	Yes
1146	JEANINE WENTZLA	19561 PHEASANT C	MOKENA, IL	60448 1/7/2003	Yes
1146	TIM WENTZLAFF	19561 PHEASANT C	MOKENA, IL	60448 1/7/2003	Yes
1148	MICHAEL RAMIREZ	6300 WEST 167TH :	TINLEY PARK, IL	6/8/13/2002	Yes
1149	ANGIE GIACONE	895 SHAGBARK	NEW LENOX, IL	60 8/27/2002	Yes
1150	MICHAEL LEACH	504 CREEKWOOD I	LOCKPORT, IL	604 8/22/2002	Yes
1151	GOLDIE GEORGAC	17351 ELK DR	ORLAND PARK, IL	8/22/2002	Yes
1152	MARY ROZAK	7337 WEST 153RD	ORLAND PARK, IL	8/29/2002	Yes
1153	DAN VIDUGIRIS	14611 APPALOOSA	LOCKPORT, IL	604 9/14/2002	Yes
1154	WALTER LIPTAK	9231 W 142ND ST	ORLAND PARK, IL	8/29/2002	Yes
1155	JOANNE T HUNTEI	10529 WILLIAMS W	MOKENA, IL	60448 9/12/2002	Yes
1156	PHYLISS MERISKO	124 COUNTRY CLU	CHICAGO HEIGHTS	9/26/2002	Yes
1157	LANETTA MILLS	14501 VAN BUREN	DOLTON, IL	60419 4/22/2003	Yes
1158	TINA TEWS	22912 SUN RIVER I	FRANKFORT, IL	609/10/2002	Yes
1158	ALEXIS TEWS	22912 SUN RIVER I	FRANKFORT, IL	609/10/2002	Yes
1159	MARVA SAUNDERS	365 NEVADA	FRANKFORT, IL	60 10/24/2002	Yes
1160	KELLY PEDRAZA	7500 WISHING WEI	FRANKFORT, IL	60 10/21/2003	Yes
1161	DAVID GILL	120 WINDCREST	NEW LENOX, IL	60 12/16/2003	Yes
1164	PAT SWANSON	5270-A DIAMOND D	OAK FOREST, IL	6/10/10/2002	Yes
1164	BRIAN NOELL	5270-A DIAMOND D	OAK FOREST, IL	6/10/10/2002	Yes
1164	JEFF NOELL	5270-A DIAMOND D	OAK FOREST, IL	6/10/10/2002	Yes
1165	SANDRA BRDAR	8231 RED OAK DR	ORLAND PARK, IL	5/27/2003	Yes
1165	HOLLY BRDAR	8231 RED OAK DR	ORLAND PARK, IL	10/22/2002	Yes
1165	DAVID BRDAR	8231 RED OAK DR	ORLAND PARK, IL	5/6/2003	Yes

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1165	ROBERT BRDAR	8231 RED OAK DR	ORLAND PARK, IL	5/13/2003	Yes
1165	SARAH BRDAR	8231 RED OAK DR	ORLAND PARK, IL	8/5/2003	Yes
1167	DOROTHY CHANO/	14501 RIDGE	ORLAND PARK, IL	10/8/2002	Yes
1168	ROBERT NEISIS	15714 BRASSIE CT	ORLAND PARK, IL	6/10/2003	Yes
1168	JEAN NEISIS	15714 BRASSIE CT	ORLAND PARK, IL	10/1/2002	Yes
1169	DIANA PODLASEK	16325 BOARDWALI	ORLAND HILLS, IL	9/26/2002	Yes
1170	EGIDIO DIFILIPPO	16313 S WILSHIRE	ORLAND PARK, IL	9/28/2002	Yes
1171	ANNA POSPISIL	17433 QUEEN ELIZ	TINLEY PARK, IL	6/7/1/2004	Yes
1171	NATHAN POSPISIL	17433 QUEEN ELIZ	TINLEY PARK, IL	6/7/1/2004	Yes
1171	LAUREN POSPISIL	17433 QUEEN ELIZ	TINLEY PARK, IL	6/10/24/2002	Yes
1172	SAM MAURDIN	15714 FOXBEND	ORLAND PARK, IL	10/1/2002	Yes
1172	INGRID MAURDIN	15714 FOXBEND	ORLAND PARK, IL	10/1/2002	Yes
1173	JOSEPH KOKOLUS	13819 ELM	ORLAND PARK, IL	10/29/2003	Yes
1175	JULIE KOKOLUS	10520 O'CONNELL	MOKENA, IL 60448	10/3/2002	Yes
1177	KAYLA TAYLOR	9333 HUNTER	ORLAND HILLS, IL	10/10/2002	Yes
1182	MARIANNE FARREI	16133 S 84TH PI	TINLEY PARK, IL	6/10/26/2002	Yes
1183	NATHAN CAMPBEL	14421 DIXON LN	LOCKPORT, IL 604	10/24/2002	Yes
1184	TOM WALSH	11540 KILEY LANE	ORLAND PARK, IL	5/6/2003	Yes
1186	SHENEE SEPT	13406 KILDARE	ROBBINS, IL 6047	2/5/20/2003	Yes
1187	YANCY PRESTON	7401 175TH STREE	TINLEY PARK, IL	6/1/7/2003	Yes
1191	ZAHID KHAN	18102 LAKE SHORE	ORLAND PARK, IL	11/19/2002	Yes
1193	WENDY BOCKSTAI	15100 S RIDGELAN	OAK FOREST, IL	6/11/23/2002	Yes
1194	JEFF BROWLEY	17219 COVENTRY	COUNTRY CLUB HI	5/1/2003	Yes
1195	ALBERT TREIBER	13911 JAMES DR	MIDLOTHIAN, IL 60	11/26/2002	Yes
1197	WESLEY PETTIFER	815 GREENFIELD A	JOLIET, IL 60433	6/26/2003	Yes
1197	JACQUELINE PETT	815 GREENFIELD A	JOLIET, IL 60433	10/16/2003	Yes
1200	RICHARD ROBERT	7831 WEST 157TH	ORLAND PARK, IL	12/3/2002	Yes
1201	INEVA BROWN	7323 HERITAGE	FRANKFORT, IL 60	2/4/2003	Yes
1203	LISA BANDA	14831 CLIFTON PAI	MIDLOTHIAN, IL 60	1/7/2003	Yes
1204	JESSE GALBAN	2745 178TH STREE	LANSING, IL 60438	4/10/2004	Yes
1204	DAKOTA GALBAN	2745 178TH STREE	LANSING, IL 60438	5/6/2004	Yes
1204	TYLER GALBAN	2745 178TH STREE	LANSING, IL 60438	5/6/2004	Yes
1205	LEONARD WOODF	2701 S INDIANA AV	CHICAGO, IL 6061	12/5/2002	Yes
1206	SHARON SULLIVAN	4820 W 157TH ST #	OAK FOREST, IL 60	5/13/2004	Yes
1208	LISA KRASON	9812 CIRCLE PARK	PALOS PARK, IL 60	6/29/2004	Yes
1210	FLORIA KELDERHC	3419 NORWOOD LA	NEW LENOX, IL 60	1/21/2003	Yes
1212	MARCELLUS CLAY	14817 MAPLEWOO	HARVEY, IL 60426	2/20/2003	Yes
1213	ED INSAKCO	15201 KENTON AVE	OAK FOREST, IL 60	1/7/2003	Yes
1216	JOSEPH MIGLIORE	9510 STONBROOK	TINLEY PARK, IL	6/2/12/2004	Yes
1217	BETTINA WASHING	7986 W. 163RD	TINLEY PARK, IL 60	1/18/2003	Yes
1220	JOSE LUCIANO	5155 WEST 167TH	OAK FOREST, IL 60	7/29/2003	Yes
1220	AFRICA CERVANTE	5155 WEST 167TH	OAK FOREST, IL 60	3/30/2004	Yes
1220	MONICA LUCIANO	5155 WEST 167TH	OAK FOREST, IL 60	4/13/2004	Yes
1221	KRISTIE KOZIANA	8249 WOODLAND D	TINLEY PARK, IL 60	1/21/2003	Yes

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1222	CECILIA SALAMAT	6815 FORESTVIEW	OAK FOREST, IL	6/1/28/2003	Yes
1223	JAMIE FOSTER	1800 BELLECHASE	NEW LENOX, IL	60 1/21/2003	Yes
1225	CLAIR BECHAN	14023 GAIL LANE #	MIDLOTHIAN, IL	60 1/23/2003	Yes
1226	TIMOTHY ECHOLS	3714 S BLACKSTO	HARVEY, IL	60426 2/13/2003	Yes
1227	JAMES PALUMBO	15612 SAYRE	OAK FOREST, IL	6/4/29/2004	Yes
1227	MARIA PALUMBO	15612 SAYRE	OAK FOREST, IL	6/4/29/2004	Yes
1228	SYLVESTER SMITH	7966 W 163RD ST	TINLEY PARK, IL	6/2/15/2003	Yes
1229	VICTORIA VARGAS	1891 REGENT ST	NEW LENOX, IL	60 6/29/2004	Yes
1229	JOSEPH VARGAS	1891 REGENT ST	NEW LENOX, IL	60 6/29/2004	Yes
1232	MARY LOU DUDA	9164 BROOKSIDE C	ORLAND PARK, IL	3/23/2004	Yes
1233	ANGELO ROMANO	15700 LAPAZ CT	OAK FOREST, IL	6/8/26/2003	Yes
1233	ALEXANDRA IACSII	15700 LAPAZ CT	OAK FOREST, IL	6/2/11/2003	Yes
1237	GERALDINE MESSI	14545 MORNINGSII	ORLAND PARK, IL	1/28/2003	Yes
1238	KARA CACCAVALL	17772 RIDGELAND	TINLEY PARK, IL	6/2/27/2003	Yes
1240	ROSEMARY MISZK	15704 SUNSET RID	ORLAND PARK, IL	2/27/2003	Yes
1242	JOEL FARR	16532 CRESCENT /	TINLEY PARK, IL	6/2/11/2003	Yes
1243	MILO MILOVAHOVI	11251 S ARCHER	LEMONT, IL	60439 2/11/2003	Yes
1246	ROBERT MCNAMAI	7300 WEST 153RD	ORLAND PARK, IL	2/25/2003	Yes
1247	KURT BUDIMIER	20545 GRAND PRA	FRANKFORT, IL	605/25/2004	Yes
1247	MARIA BUDIMIER	20545 GRAND PRA	FRANKFORT, IL	605/25/2004	Yes
1248	LUBNA SOUS	7719 S NEENAH	BURBANK, IL	6045/3/1/2003	Yes
1249	MELANIE CARTER	18810 RUTH DR	MOKENA, IL	60448 5/29/2003	Yes
1250	MINDY DEMICHELE	422 CLAIRE AVE	ROMEOVILLE, IL	6/2/27/2003	Yes
1252	CLARA VARCO	7512 W 163RD PL	TINLEY PARK, IL	6/4/13/2004	Yes
1254	STEVEN KOGUT	22728 RAVISLOE LI	FRANKFORT, IL	604/22/2003	Yes
1257	MARIO PIAZZOLLA	9836 WEST 151ST S	ORLAND PARK, IL	3/18/2003	Yes
1258	LONNA BARCELON	17019 CONNOR CT	TINLEY PARK, IL	6/3/16/2004	Yes
1258	LIAM BARCELONA	17019 CONNOR CT	TINLEY PARK, IL	6/3/16/2004	Yes
1259	JOSHUA EHRHART	575 HUNTSBRIDGE	MATTESON, IL	6045/25/2004	Yes
1260	CHARLIE GREER	5300 STANDFORD I	MATTESON, IL	6043/29/2003	Yes
1262	DAN DIDO	13608 IDLE ELD DI	ORLAND PARK, IL	3/20/2003	Yes
1263	JOANN EDWARDS	5225 WEST JAMES	MIDLOTHIAN, IL	603/4/2004	Yes
1264	KAREN CUBR	17625 WOBURN RE	TINLEY PARK, IL	6/4/15/2003	Yes
1264	ALLYSON CUBR	17625 WOBURN RE	TINLEY PARK, IL	6/4/29/2003	Yes
1265	JOHN OBRIEN	INCORRECT ADDRI	PLAINFIELD, IL	603/29/2004	Yes
1266	LISA SABIA	1712 DIXIE HWY	CRETE, IL 60417	3/29/2003	Yes
1267	THOMAS HAZARD	8665 W LESLIE DR	ORLAND HILLS, IL	3/27/2003	Yes
1268	ANDRINA HUGHES	8624 KATHLEEN LA	TINLEY PARK, IL	6/8/26/2003	Yes
1270	EMILY LLOYD	9001 LORI LANE	ORLAND PARK, IL	6/3/2004	Yes
1271	ALICE PETERSON	8342 WEST 160TH I	TINLEY PARK, IL	6/4/20/2004	Yes
1273	THERESA ANZALO	7807 BELLE RIVE C	TINLEY PARK, IL	6/2/10/2003	Yes
1274	MICHELLE CRAVEN	19333 WATERFORI	MOKENA, IL	60448 4/20/2004	Yes
1274	MACAYLA CRAVEN	19333 WATERFORI	MOKENA, IL	60448 4/20/2004	Yes
1274	BRANDON CRAVEN	19333 WATERFORI	MOKENA, IL	60448 10/23/2003	Yes

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1274	ALEXIS CRAVEN	19333 WATERFORI	MOKENA, IL 60448	10/23/2003	Yes
1276	ADAN CELIS	6825 WEST 179TH	TINLEY PARK, IL 6	6/24/2003	Yes
1276	MARIA CELIS	6825 WEST 179TH	TINLEY PARK, IL 6	6/24/2003	Yes
1277	DAVID FARIAS	7838 EVAN TERRA	FRANKFORT, IL 60	10/14/2003	Yes
1278	MARIANNE NOTARI	7838 EVAN TERRA	FRANKFORT, IL 60	4/8/2003	Yes
1279	FRANK OLEKSY	16500 LESLIE ANN	TINLEY PARK, IL 6	4/29/2004	Yes
1279	DOLORES OLEKSY	16500 LESLIE ANN	TINLEY PARK, IL 6	4/15/2003	Yes
1280	MARANDA COUCH	736 WISCONSIN	NEW LENOX, IL 60	4/15/2003	Yes
1281	CARMELLA MIGLIO	9510 STONEBROO	TINLEY PARK, IL 6	1/29/2004	Yes
1282	JOHN PAWLOWSKI	8653 BALLY CASTL	TINLEY PARK, IL 6	4/15/2003	Yes
1283	JOHN WISS	8446 CHERRY HILL	TINLEY PARK, IL 6	4/8/2003	Yes
1284	CONNIE SEREDA	5295 DIAMOND	OAK FOREST, IL 6	4/17/2003	Yes
1285	NICHOLAS JOHNS	7951 WEST 159TH	TINLEY PARK, IL 6	2/10/2004	Yes
1286	SHERYL CESARIO	16160 PRISTINE PL	ORLAND HILLS, IL	4/15/2003	Yes
1287	RICHARD MILLER	20901 S WOLF RD	MOKENA, IL 60448	3/9/2004	Yes
1288	ANA KENDALL	15514 ORLAN BRO	ORLAND PARK, IL	5/15/2004	Yes
1291	KAM GOYAL	7514 TIFFANY DR	ORLAND PARK, IL	4/29/2003	Yes
1291	KARMISH GOYAL	7514 TIFFANY DR	ORLAND PARK, IL	7/1/2003	Yes
1292	THOMAS WILSON	7240 SOUTHWICK	FRANKFORT, IL 60	5/1/2003	Yes
1292	PAUL WEST	7240 SOUTHWICK	FRANKFORT, IL 60	5/6/2003	Yes
1292	STEVE WEST	7240 SOUTHWICK	FRANKFORT, IL 60	6/21/2003	Yes
1293	JOHN REIDY	7749 PALM DR	ORLAND PARK, IL	5/1/2003	Yes
1294	PAULINA GETCHES	605 REEF RD	LOCKPORT, IL 604	3/13/2004	Yes
1295	PAM SOTTOSANTO	240 LINDEN DR	FRANKFORT, IL 60	7/1/2003	Yes
1296	MARY BELCHER	17023 JUDY CT	OAK FOREST, IL 6	2/19/2004	Yes
1298	KAREN HEGEDIUS	16718 S HILLTOP	ORLAND HILLS, IL	5/13/2003	Yes
1299	JOESPH MACKUS	15330 REGENT DR	ORLAND PARK, IL	4/29/2004	Yes
1300	AUTUM BROMFIELI	12333 ROGER CT	MOKENA, IL 60448	6/12/2003	Yes
1305	MARIA GUTIERREZ	7819 KEYSTONE	ORLAND PARK, IL	5/20/2003	Yes
1307	MARTHA PRUNSKY	23735 S 104TH AVE	FRANKFORT, IL 60	5/22/2003	Yes
1309	QINGHUI HU	17560 NAVAJO TR	TINLEY PARK, IL 6	6/3/2003	Yes
1310	JENNIFER JONES	16755 S HARLEM	TINLEY PARK, IL 6	6/10/2003	Yes
1312	GUY DEKERF	8750 WEST ROBIN	ORLAND PARK, IL	9/16/2003	Yes
1313	CHRISTOPHER SK	1304 OAKMONT DR	LEMONT, IL 60439	6/26/2003	Yes
1313	RENET SKORUSA	1304 OAKMONT DR	LEMONT, IL 60439	7/10/2003	Yes
1313	DAVID SKORUSA	1304 OAKMONT DR	LEMONT, IL 60439	8/18/2003	Yes
1314	STEVE MOORE	736 MCCARTHY ST	LEMONT, IL 60439	6/5/2003	Yes
1315	LORI TUNNO	16550 76TH AVE	TINLEY PARK, IL 6	2/12/2004	Yes
1315	MATTHEW TUNNO	16550 76TH AVE	TINLEY PARK, IL 6	2/12/2004	Yes
1317	MARK LEJA	19123 WEBBER RD	MOKENA, IL 60448	6/10/2003	Yes
1318	BETH MALLOY	10908 FRONT STRE	MOKENA, IL 60448	4/24/2004	Yes
1321	JOSEPH EBELING	15945 S LOCKWO	OAK FOREST, IL 6	9/9/2003	Yes
1323	STEVE DUFOUR	550 WEST ARLING	CHICAGO, IL 606	8/7/2003	Yes
1324	JASON COWGER	4740 ELLSWORTH	GARY, IN 46408	6/26/2003	Yes

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1325	MADELYN HAYES	16410 FRANCIS CT	ORLAND PARK, IL	7/3/2003	Yes
1325	CHRISTINA HAYES	16410 FRANCIS CT	ORLAND PARK, IL	5/27/2004	Yes
1327	JIM JOHNSON	14225 KILBOURN	MIDLOTHIAN, IL 60	6/29/2004	Yes
1328	AGAPHTA OLANO	9053 147TH ST	ORLAND PARK IL	7/31/2003	Yes
1329	ELIZABETH DOEDE	15034 SPRINGFIEL	MIDLOTHIAN, IL 60	7/3/2003	Yes
1330	BETTY FROST	17624 WOBURN RE	TINLEY PARK, IL 6	7/8/2003	Yes
1331	SHERRY TABLERIC	14345 RIDGE AVE	ORLAND PARK, IL	7/10/2003	Yes
1333	KATHRYN MCGARF	15432 TEE BROOK	ORLAND PARK, IL	6/24/2004	Yes
1335	PATRICK PEMBER	16798 D 91ST AVE	ORLAND HILLS, IL	2/5/2004	Yes
1335	MICHELLE PEMBEF	16798 D 91ST AVE	ORLAND HILLS, IL	2/3/2004	Yes
1335	LAUREN PEMBERT	16798 D 91ST AVE	ORLAND HILLS, IL	2/3/2004	Yes
1335	KRYSTIN PEMBER	16798 D 91ST AVE	ORLAND HILLS, IL	1/29/2004	Yes
1336	JENNIFER SAMOS	16561 LESLIE DR	ORLAND HILLS, IL	7/31/2003	Yes
1338	KAREN VINCI	16839 91ST AVE	ORLAND HILLS, IL	7/17/2003	Yes
1340	ROBERT FELLER	7942 JOLIET DR N	TINLEY PARK, IL 6	2/17/2004	Yes
1343	OSCAR GRANDE	108 NASHUA ST	PARK FOREST, IL	6/5/2003	Yes
1343	VIVIEN BOYD	108 NASHUA ST	PARK FOREST, IL	8/14/2003	Yes
1346	BEN HORENZIAK	23345 S 104TH AVE	FRANKFORT, IL 60	7/29/2003	Yes
1348	RANDY DEVAUL	411 W MONTROSE	ELMHURST, IL 601	7/29/2003	Yes
1349	KELLY MURNANE	8106 MALLOW DR	TINLEY PARK, IL 6	8/14/2003	Yes
1350	EUGENE HUDZIAK	1430 ILLINOIS ST	SCHAUMBURG, IL	7/31/2003	Yes
1352	CHARLES ZAMBUT	9300 LOCHWOOD C	TINLEY PARK, IL 6	8/5/2003	Yes
1353	DONALD NELSON	8014 BOB O LINK	ORLAND PARK, IL	8/7/2003	Yes
1354	MILDRED STEYSK	7962 163RD PL	ORLAND HILLS, IL	9/16/2003	Yes
1356	ERIC KALNS	7917 W 164TH PL	TINLEY PARK, IL 6	9/11/2003	Yes
1357	STEPHAN VILLMAN	17964 EDWARDS	COUNTRY CLUB HI	2/10/2004	Yes
1358	HUMBERTO CHAVE	1036 E 7TH ST	LOCKPORT, IL 604	9/2/2003	Yes
1359	LINDA BUTTE	17510 CEDAR LANE	TINLEY PARK, IL 6	8/28/2003	Yes
1361	KRISTINA DANGLE	16827 HIGHVIEW	ORLAND HILLS, IL	9/27/2003	Yes
1362	CLAIRE CONWAY	11209 WEST 191ST	MOKENA, IL 60448	10/11/2003	Yes
1362	JOHN CONWAY	11209 WEST 191ST	MOKENA IL 60448	10/11/2003	Yes
1364	LINDA SMILEY	9225 WILLOW LANE	BRIDGEVIEW, IL 6	8/21/2003	Yes
1365	KATHY MCKEON	INCORRECT ADDR	FRANKFORT, IL 60	9/16/2003	Yes
1366	SOPHIE TRACZYK	7631 WEST SYCAM	ORLAND PARK, IL	6/17/2004	Yes
1369	SCOTT CLELAND	7970 BURR RIDGE	WOODRIDGE, IL 6	8/28/2003	Yes
1375	BARRY WEINSTEIN	18435 LAKEVIEW C	TINLEY PARK, IL 6	5/27/2004	Yes
1377	FERROKH SHIRAZI	8930 W CEDARWO	ORLAND HILLS, IL	9/23/2003	Yes
1379	MAYSOON TARAWI	8751 W 166TH ST	ORLAND PARK IL	2/24/2004	Yes
1379	MOHAMMED TARAI	8751 W 166TH ST	ORLAND PARK, IL	3/2/2004	Yes
1379	RAIED TARAWNEH	8751 W 166TH ST	ORLAND PARK IL	3/2/2004	Yes
1380	COLLIN KEANE	15721 CHESTERFIE	ORLAND PARK, IL	10/2/2003	Yes
1381	KATHY YEATES	11115 ELMWOOD C	MOKENA, IL 60448	9/27/2003	Yes
1382	TOM WALL	7501 WEST 174TH	TINLEY PARK, IL 6	9/30/2003	Yes
1383	VALERIE JAGER	14500 SAN FRASCI	POSEN, IL 60469	6/3/2004	Yes

Account number	Full name	Street	City, State, Zip	Last visit date	Active
1383	LUCUS JAGER	14500 SAN FRASCI	POSEN, IL 60469	6/3/2004	Yes
1384	BENIGNO SOLIS	15825 S BRAMBLEW	OAK FOREST, IL	6/10/2003	Yes
1385	JILL GOBBY	20447 COBBLESTO	FRANKFORT, IL 604	6/8/2004	Yes
1386	CHRIS WETHERSP	17059 S LOCKWOO	OAK FOREST, IL	6/1/3/2004	Yes
1388	TAMYAH WETHERS	17059 S LOCKWOO	OAK FOREST, IL	6/1/3/2004	Yes
1388	TIFFANY WETHERS	17059 S LOCKWOO	OAK FOREST, IL	6/2/28/2004	Yes
1387	JOSEPHINE SMITH	13130 E PLAYFIELI	MIDLOTHIAN, IL 60	10/9/2003	Yes
1388	CHRIS WURINARIS	17137 SHETLAND C	TINLEY PARK, IL	6/10/16/2003	Yes
1390	NIKA KAISER	17233 ORIOLE AVE	TINLEY PARK, IL	6/10/14/2003	Yes
1393	LAWRENCE SANDO	16422 NEW CASTLI	LOCKPORT, IL 604	5/22/2004	Yes
1394	KHALAF ELZAYYA	9816 TREETOP	ORLAND PARK, IL	10/21/2003	Yes
1394	SARAH ELZAYYAT	9816 TREETOP	ORLAND PARK, IL	10/21/2003	Yes
1396	JIM REIHER	8242 WEST 160TH	TINLEY PARK, IL	6/5/20/2004	Yes
1398	TOM FLANNERY	14418 CRYSTAL TR	ORLAND PARK, IL	10/28/2003	Yes
1399	MARY FRITSCH	14528 CREEKVIEW	ORLAND PARK, IL	10/30/2003	Yes
1400	PATROCINIO PASC	13050 THISTLE CT	HOMER GLENN, IL	11/6/2003	Yes
1401	EDWARD MAREVK	16660 S PATRICIA	TINLEY PARK, IL	6/1/20/2004	Yes
1403	LISA DAPKUS	7110 COACHWOOI	TINLEY PARK, IL	6/5/20/2004	Yes
1406	HENRY MULLENIX	16101 ALEXANDRI	TINLEY PARK, IL	6/12/9/2003	Yes
1407	TIMOTHY RYAN	16415 TERRY LANE	OAK FOREST, IL	6/5/18/2004	Yes
1408	ALFREDO YANEZ	14950 TERRACE LA	MIDLOTHIAN, IL 60	12/6/2003	Yes
1408	MELISSA YANEZ	14950 TERRACE LA	MIDLOTHIAN, IL 60	2/26/2004	Yes
1411	LEAH PODLASEK	9324 SUTTON PL	TINLEY PARK, IL 6	11/22/2003	Yes
1411	ELLESE PODLASEI	9324 SUTTON PL	TINLEY PARK, IL 6	11/22/2003	Yes
1412	HARVEY SHIMKO	15955 ASHFORD C	TINLEY PARK, IL 6	1/17/2004	Yes
1413	LISA CHAVEZ	14024 GREENBAY	CHICAGO, IL 6063	11/25/2003	Yes
1415	JEFF ALBRIGHT	7512 WEST 161ST	TINLEY PARK, IL 6	6/17/2004	Yes
1415	BLAKE ALBRIGHT	7512 WEST 161ST	TINLEY PARK, IL 6	6/19/2004	Yes
1416	JUSTIN PANAGAKI	10525 GREAT EGR	ORLAND PARK, IL	11/25/2003	Yes
1418	NAYFEH JABER	14490 STREAMWO	ORLAND PARK, IL	12/2/2003	Yes
1420	TODD SALDANA	16749 S 93RD AVE	ORLAND HILLS, IL	12/6/2003	Yes
1422	ROBERTA KLINE	15314 S HARDING	MIDLOTHIAN, IL 60	2/10/2004	Yes
1422	NIKO TELLIOS	15314 S HARDING	MIDLOTHIAN, IL 60	12/23/2003	Yes
1423	MARILEE ALBERT	1264 BROOKLINE	NAPERVILLE, IL 60	1/6/2004	Yes
1424	GIOVANNI ABATE	16621 S 84TH AVE	TINLEY PARK, IL 6	1/27/2004	Yes
1425	JESSE GUARDADO	7524 W 160TH STR	TINLEY PARK, IL 6	3/9/2004	Yes
1430	DAVID SHILHARVE	9001 LORI LN	ORLAND PARK, IL	6/29/2004	Yes
1434	HENRY KONSTANT	18201 MURPHY CIR	TINLEY PARK, IL 6	1/3/2004	Yes
1434	DOROTHY KONST/	18201 MURPHY CIR	TINLEY PARK, IL 6	1/3/2004	Yes
1436	TOMASO EBARRA	14410 PALMER	POSEN, IL 60469	1/8/2004	Yes
1437	LORRAINE HILGEN	15031 LAPALM	OAK FOREST, IL 6	3/23/2004	Yes
1443	MELISSA MYERS	7628 ROYCE CT	FRANKFORT, IL 60	2/17/2004	Yes
1444	BRIAN EGAN	205 MORGAN APT	MANHATTAN, IL 60	3/13/2004	Yes
1447	JOHN CATTERSON	13057 THISTLE CT	HOMER GLENN, IL	1/29/2004	Yes

Account number	Full name	Street	City, State, Zip	Last visit date	Active
1452	JIM DOBROVICH	21402 BURGUNDY	FRANKFORT, IL 60	3/23/2004	Yes
1453	WAYNE MILLER	816 TIMBER PL	NEW LENOX, IL 60	2/24/2004	Yes
1455	JEROME ODROBIN	30 CORINTH CT	TINLEY PARK, IL 6	4/15/2004	Yes
1456	CHERYL WESNER	5908 EDGEWOOD	LA GRANGE, IL 60	3/13/2004	Yes
1457	ROXANNE MINZENI	218 PIONEER PL	NEW LENOX, IL 60	3/2/2004	Yes
1458	DARLENE EVERSO	6307 HONEY LANE	TINLEY PARK, IL 6	4/1/2004	Yes
1459	DALE WISE	6307 HONEY LANE	TINLEY PARK, IL 6	3/4/2004	Yes
1460	TOM KOS	14014 TERRY DR	ORLAND PARK, IL	4/15/2004	Yes
1461	LOIS FLANAGAN	119 S COOPER RD	NEW LENOX, IL 60	3/25/2004	Yes
1464	ERIK STEELE	6623 WEST 167TH	TINLEY PARK, IL 6	3/25/2004	Yes
1465	NICK BANDERA	15704 ORLAND BR	ORLAND PARK, IL	3/11/2004	Yes
1465	ANNA BANDERA	15704 ORLAND BR	ORLAND PARK, IL	3/11/2004	Yes
1466	ANN REDA	8426 WESTBURRY	TINLEY PARK, IL 6	3/23/2004	Yes
1466	ERIN REDA	8426 WESTBURRY	TINLEY PARK, IL 6	5/6/2004	Yes
1466	MICHAEL REDA	8426 WESTBURRY	TINLEY PARK, IL 6	4/8/2004	Yes
1466	KEVIN REDA	8426 WESTBURRY	TINLEY PARK, IL 6	5/6/2004	Yes
1467	CASIMIR PAUL	15512 LOURDES	HOMER GLENN, IL	3/13/2004	Yes
1467	LORRAINE PAUL	15512 LOURDES	HOMER GLENN, IL	3/13/2004	Yes
1469	ANTONIJA DEFELI	3321 BLANDFORD	NEW LENOX, IL 60	4/1/2004	Yes
1470	TOM THORNOCK	16130 OAK PARK A	TINLEY PARK, IL 6	4/20/2004	Yes
1471	LORRAINE BADER	16054 84TH AVE	TINLEY PARK, IL 6	3/23/2004	Yes
1472	ELLEN HALLAHAN	7855 BRISTOL PAR	TINLEY PARK, IL 6	3/18/2004	Yes
1472	TARA HALLAHAN	7855 BRISTOL PAR	TINLEY PARK, IL 6	3/18/2004	Yes
1475	JIM THEODORE	7630 WEST 157TH	ORLAND PARK, IL	6/22/2004	Yes
1478	DAVE JOHNSON SI	9701 RAVINIA LN #	ORLAND PARK, IL	5/13/2004	Yes
1478	DAVID JOHNSON JI	9701 RAVINIA LN #	ORLAND PARK, IL	4/27/2004	Yes
1479	CELESTE SALERN	17502 CAPISSTRA	ORLAND PARK, IL	4/6/2004	Yes
1482	DARLENE SOBCZA	13739 IRONWOOD	HOMER GLENN, IL	4/6/2004	Yes
1484	JAN SHEEHAN	711 LISDOWNEY	LOCKPORT, IL 604	4/22/2004	Yes
1486	OTTIS NICHOLS	16745 S 89TH AVE	ORLAND HILLS, IL	4/20/2004	Yes
1489	RONALD BAILEY	1792 NORMANDY	HAZEL CREST, IL	4/27/2004	Yes
1492	GARY DAVIS	16745 S 89TH AVE	ORLAND HILLS, IL	4/20/2004	Yes
1493	HENRY PAYNE	10545 GOLF RD	ORLAND PARK, IL	4/22/2004	Yes
1494	RON POEHOCKI	1800 FOXWOOD DR	NEW LENOX, IL 60	4/24/2004	Yes
1497	MILAN VALUCH	18334 PINE LAKE D	TINLEY PARK, IL 6	5/4/2004	Yes
1498	CHARLES BAOUAB	7450 CASHEW DR	ORLAND PARK, IL 6	10/2004	Yes
1499	HELEN DELLAMAN	16717 WEST ADOB	LOCKPORT, IL 604	5/6/2004	Yes
1499	DANIEL DELLAMAN	16717 WEST ADOB	LOCKPORT, IL 604	5/13/2004	Yes
1503	ABIGAIL ROMERO	8023 S KEDZIE	CHICAGO, IL 6065	5/20/2004	Yes
1504	ANDREW LIPPNER	7547 161ST STREE	TINLEY PARK, IL 6	6/19/2004	Yes
1504	DERRICK LIPPNER	7547 161ST STREE	TINLEY PARK, IL 6	6/24/2004	Yes
1505	STEPHANIE FEIN	11901 S WILL COO	PALOS PARK, IL 6	6/3/2004	Yes
1506	AMANDA GERACI	14461 MALLARD LA	HOMER GLENN, IL	5/27/2004	Yes
1510	DANIEL SERRITELL	16742 S PAXTON A	TINLEY PARK, IL 6	5/27/2004	Yes

Account number	Full name	Street	City, State, Zip	Last visit date	Active
1511	JOSE BELLO	8323 S KEDZIE AVE	CHICAGO, IL 6065	5/20/2004	Yes
1517	RICHARD MILLET	10324 CANTERBUR	WESTCHESTER, IL	5/27/2004	Yes
1518	MARIE CRONIN	21817 CAPPEL LN	FRANKFORT, IL 60	6/22/2004	Yes
1520	WILLIAM MURPHY	3906 W 102 ND ST	CHICAGO, IL 6065	6/10/2004	Yes
1521	LISA NEWCUM	13130 BLUE HERO	ORLAND PARK, IL	6/10/2004	Yes
1524	MICHAEL SCHOLTE	246 CHARLESTON	ROMEOVILLE IL	6/22/2004	Yes
1527	JAMES SPILLER	16132 GEORGETO	ORLAND PARK, IL	6/29/2004	Yes
1528	ANDREA JENSEN	21551 S 108TH AVE	FRANKFORT, IL 60	6/29/2004	Yes

SA283

EXHIBIT 7

Date: 12/30/2003
Time: 10:20 PM

PRACTICE OVERVIEW

O.P.

111089 - FIRST DENTAL

Production		
AA - PUSATERI DDS, TODD C.	$ 6,269.00	$ 26,589.82
CC - COLLECTIONS	$ 0.00	$ 419.12
D2 - BABBITT, MONICA S.	$ 0.00	$ 38.00
D3 - PURDUE, RICHARD D.	$ 12,715.00	$ 142,547.10
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 70.00
H2 - GALBAN, JACKIE	$ 8,513.00	$ 78,848.28
PR - PRODUCTS	$ 70.00	$ 1,112.00
XX - X, X	$ 0.00	$ 1,453.28
ZZ - DOUBLE BOOK	$ 0.00	$ 2,835.00
Total Production	$ 25,567.00	$ 254,022.58

Days Worked		
AA - PUSATERI DDS, TODD C.	2	38
CC - COLLECTIONS	0	0
D2 - BABBITT, MONICA S.	0	26
D3 - PURDUE, RICHARD D.	10	142
D4 - BRITESMILE, BRITESMILE	0	0
H2 - GALBAN, JACKIE	10	121
PR - PRODUCTS	0	0
XX - X, X	0	0
ZZ - DOUBLE BOOK	0	87

Production Per Hour		
AA - PUSATERI DDS, TODD C.	$ 447.79	$ 127.88
CC - COLLECTIONS	$ 0.00	$ 0.00
D2 - BABBITT, MONICA S.	$ 0.00	$ 0.21
D3 - PURDUE, RICHARD D.	$ 192.65	$ 161.64
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 0.00
H2 - GALBAN, JACKIE	$ 98.69	$ 101.97
PR - PRODUCTS	$ 0.00	$ 0.00
XX - X, X	$ 0.00	$ 0.00
ZZ - DOUBLE BOOK	$ 0.00	$ 0.26
Total Production Per Hour	$ 739.13	$ 396.95

A/R Collection		
Patient Payments FPC	$ 447.20	$ 5,738.33
Insurance Payments FPC	$ 7,090.47	$ 83,789.85
Office Payments	$ 14,908.10	$ 135,380.86

Reassignment	$ 0.00	$ 1,840.39
Number of New Patients	40	335

Number of Patients Referred by Referral Sources		
Patients	0	0
Doctors	0	0
Other	0	0
Number of Active Patients	1,223	

PRACTICE OVERVIEW

111089 - FIRST DENTAL

Recall Status of All Patients	
Number with Current Recall	353
Number with Overdue Recall	749
Number Without Recall	945

Number of Patients with Diagnosed Treatment (other than Prophy Codes)	
Scheduled	364
Unscheduled	427
Total	791

Date: 4/29/2004
Time: 10:17 PM

PRACTICE OVERVIEW

111080 - FIRST DENTAL

O.P.

	Month-to-Date	Year-to-Date
Production		
AA - PUSATERI DDS, TODD C.	$ 278.00	$ 13,278.04
CC - COLLECTIONS	$ 40.00	$ 179.65
D2 - BABBITT, MONICA S.	$ 0.00	$ 0.00
D3 - PURDUE, RICHARD D.	$ 11,052.20	$ 43,021.30
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 35.00
H2 - GALBAN, JACKIE	$ 6,476.60	$ 25,869.60
PR - PRODUCTS	$ 0.00	$ 94.00
XX - X, X	$ 161.60	$ 784.60
ZZ - DOUBLE BOOK	$ 870.00	$ 1,810.00
Total Production	$ 18,877.60	$ 86,006.39
Days Worked		
AA - PUSATERI DDS, TODD C.	5	17
CC - COLLECTIONS	0	0
D2 - BABBITT, MONICA S.	0	0
D3 - PURDUE, RICHARD D.	11	43
D4 - BRITESMILE, BRITESMILE	0	0
H2 - GALBAN, JACKIE	11	43
PR - PRODUCTS	0	0
XX - X, X	0	0
ZZ - DOUBLE BOOK	0	0
Production Per Hour		
AA - PUSATERI DDS, TODD C.	$ 7.89	$ 114.47
CC - COLLECTIONS	$ 0.00	$ 0.00
D2 - BABBITT, MONICA S.	$ 0.00	$ 0.00
D3 - PURDUE, RICHARD D.	$ 151.40	$ 152.02
D4 - BRITESMILE, BRITESMILE	$ 0.00	$ 0.00
H2 - GALBAN, JACKIE	$ 88.74	$ 94.93
PR - PRODUCTS	$ 0.00	$ 0.00
XX - X, X	$ 0.00	$ 0.00
ZZ - DOUBLE BOOK	$ 0.00	$ 0.00
Total Production Per Hour	$ 248.03	$ 361.42
A/R Collection		
Patient Payments FPC	$ 657.60	$ 3,039.41
Insurance Payments FPC	$ 8,791.00	$ 37,889.43
Office Payments	$ 11,185.36	$ 44,844.33
Reassignment	$ 85.00	$ 85.00
Number of New Patients	23	89
Number of Patients Referred by Referral Sources		
Patients	0	0
Doctors	0	0
Other	0	0
Number of Active Patients	1,227	

PRACTICE OVERVIEW

111059 - FIRST DENTAL

Recall Status of All Patients		
Number with Current Recall	392	
Number with Overdue Recall	798	
Number Without Recall	872	

Number of Patients with Diagnosed Treatment (other than Prophy Codes)		
Scheduled	397	
Unscheduled	194	
Total	591	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE MEANING OF "ACTIVE PATIENT"

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants	)	06 CH 11607 (Transferred to Law Division)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE MEANING OF "ACTIVE PATIENT"

Pursuant to 735 ILCS 5/2-1005, Defendants move this Court for entry of summary judgment as to the meaning of "active patient," as that term of art is used in the parties' Agreement and in the dental profession. In support of their motion, Defendants state as follows:

INTRODUCTION AND STATEMENT OF FACTS[1]

First Dental, P.C. is the seller ("Seller") of a dental practice in Orland Park, Illinois ("Dental Practice"). Plaintiff ("Tujetsch"), a licensed dentist, is the buyer. Tujetsch bought the Dental Practice pursuant to an asset sale agreement executed June 27, 2004 ("Agreement"). Based on a concern first raised over 16 months after the sale, Tujetsch contends that the following Recital concerning "active patients" in the Agreement is false and fraudulent:

> Seller has represented that the Dental Practice has approximately 1,200 active patients, who have been treated within the previous twenty-four months according to First Pacific Corporation.[2]

As defined above and demonstrated hereinbelow, an "active patient" of a dental practice is a patient treated in the dental practice in the previous 24 months. As demonstrated in the January

[1] Defendants filed a motion for summary judgment on January 10, 2011 as to all counts of the complaint (the "January Motion"). The January Motion remains pending. Defendants incorporate by reference the Statement of Undisputed Facts set forth in the January Motion.

[2] First Pacific Corporation provided computerized third-party billing and information technology services to the Dental Practice. *See* January Motion at pp. 3, 4, 6, 8, 9, 11, 13, 14 and its Exh. I, *passim*.

Motion, there is no evidence that fewer than 1,200 patients were treated in the Dental Practice in the 24 months before its sale to Tujetsch. However, Tujetsch contends that the Recital is nonetheless false and fraudulent because even if 1,200 patients were treated in the Dental Practice in the 24 months prior to the sale, it was predictable -- based on a review of patient charts first undertaken years later -- that some of those 1,200 patients might not return to the Dental Practice for treatment after the sale.[3] Tujetsch's recently-formed opinions about whether a patient treated in the Dental Practice before the sale was likely to return thereafter cannot be the basis for a claim based on "active patients," because that term, properly understood, is exclusively historical and backward-looking.

"Active patient" is a term of art commonly used by persons skilled in the dental arts to provide a rough indication of one measure of the size of a dental practice based on past experience, *i.e.*, the number of patients treated in a specified number of previous months, usually 24. As such, "active patient" is based on historical fact, not speculation. The only variation in the generally accepted definition of "active patient" is the number of months in the lookback period. For example, some experts utilize a longer lookback for rural practices or practices that engage in cosmetic dentistry and a shorter lookback for practices that are located in urban settings or engaged in general dentistry. However, while the length of the lookback period may vary, there is no generally accepted definition of "active patient" that requires or includes any prediction as to future patient behavior.

Tujetsch construes the term "active patient" in the Recital as a subjective prediction of future patient conduct instead of an objective tally of past patient treatments. Tujetsch attempts

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[3] In fact, if this case goes to trial unrebutted evidence will show that patients of the Dental Practice returned in sufficient numbers to generate monthly income roughly equal to pre-sale levels for about six months after the sale, but stopped coming back thereafter, after they met Dr. Tujetsch and experienced price increases and late-fee policies implemented by her.

thereby to convert the Recital into a guarantee that 1,200 patients will present themselves for treatment after the sale, and will continue to return for treatment thereafter. By utilizing this idiosyncratic (and fundamentally unworkable) definition of "active patient," Tujetsch attempts to convert a backward-looking statement -- that approximately 1,200 patients had been treated in the 24 months before the sale -- into a forward-looking prediction that 1,200 patients will be treated, in some unspecified number of months, after the sale. Tujetsch's attempt to re-write the parties' 2004 Agreement by promoting a self-serving definition of "active patient" is meritless, as a matter of law.

STANDARD OF REVIEW

Summary judgment under 735 ILCS 5/2-1005 is a means of resolving litigation where no material fact is at issue. *See* Chubb Ins. Co. v. DeChambre, 349 Ill. App. 3d 56, 59 (1st Dist. 2004). In ruling on a motion to dismiss the Court considers the pleadings and proffered evidence to determine if any material factual dispute exists. If there is no dispute of material fact, the Court considers the facts and the law and determines whether, on the undisputed facts, the moving party is entitled to judgment. *See* Id., 349 Ill. App. 3d at 59.

ARGUMENT

There is no dispute of material fact regarding a prediction, in the Recital, as to the number of patients returning to the Dental Practice after the sale. That is because the Recital contains no such prediction. As demonstrated below, "active patient" has a well-established meaning among dental professionals, and has attained the status of a term of art in that profession. As such, Tujetsch, a dentist, is bound by that meaning and may not now substitute another meaning that is more to her liking.

A. A "Term Of Art" Is A "Word Or Phrase Having A Specific, Precise Meaning In A Given Specialty, Apart From Its General Meaning In Ordinary Contexts."

A "term of art" is a "word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." Black's Law Dictionary 1511 (8th ed. 2004). Authorities on the construction of contract language have uniformly stated that when words in a contract have attained, through wide usage in a particular profession or trade, the status of a term of art, the technical meaning of that term of art is preferred over the common or ordinary meaning. *See* Calamari and Perillo, Contracts § 3.13, at 155 [4th ed.] ("While words [in a contract] are generally assigned their ordinary meaning, where a word has attained the status of a term of art and is used in a technical context, the technical meaning is preferred over the common or ordinary meaning") (this principle is hereinafter referred to as the "Term of Art Rule"). Another authority, Corbin on Contracts, has expressed the Term of Art Rule as follows:

> In numberless well-considered cases, proof of local or trade usage, custom, and other circumstances has been allowed to establish a meaning that the written words of the contract would never have been given in the absence of such proof. It is not necessary that words should be unusual words or words that are "ambiguous on their face" in order to admit evidence of special usage. Such evidence often establishes a special and unusual meaning definitely in conflict with the more common and ordinary usages. . . . The final interpretation of a word or phrase should not be adjudged without giving consideration to all relevant word usages, to the entire context and the whole contract, and to all relevant surrounding circumstances. . . . Seldom should the court hold that written words exclude evidence of the custom, since even what are often called "plain" meanings are shown to be incorrect when all the circumstances of the transaction are known; and usages and customs are a part of those circumstances by which the meaning of words is to be judged.

3 Arthur L. Corbin, Corbin on Contracts § 555 at 232-39 (1960).

The Restatement (Second) of Contracts provides that "[a]n agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage" (Restatement (Second) of Contracts

§ 220 Comment d (1981)), and that "[u]nless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement") *See also* Id. at § 202(3)(b); § 221; at § 222 Comment b, § 223 Comment b (1981) ("there is no requirement that an agreement be ambiguous before evidence of a usage of trade [or course of dealing] can be shown, **nor is it required that the usage of trade [or course of dealing] be consistent with the meaning the agreement would have apart from the usage [or course of dealing]**"); Id., § 246 and comment on clause (a); 5 W. Jaeger, Williston on Contracts § 648, at 6-7 (3d ed. 1961); 12 R. Lord, Williston on Contracts §34:1, at 3-4 (4th ed. 1999) (contract language need not be ambiguous in order for usage to aid in interpretation); 17A Am. Jur. 2d Effect Of Usage, Custom, Or Course Of Dealing § 364 (1991) ("According to the prevailing view, where trade custom or usage attaches a special meaning to certain words or terms used in any particular trade or business, it is competent for the parties . . . to show the peculiar meaning of them in the business or trade to which the contract relates, not for the purpose of altering, adding to, or contradicting the contract, but for the purpose of elucidating the language used as a means of enabling the court to interpret the contract language according to the intentions of the parties.")

See also 5 Samuel Williston, Williston on Contracts § 648 at 6-7 (3d ed. 1961) ("It may be said broadly that any usage with knowledge of which both parties are chargeable is always admissible to show the meaning of the language employed. Usage is an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense."); Id. § 650 at 21 ("The correct rule with reference to the admissibility of evidence as to trade usage . . . is that while words in a contract are ordinarily

to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet **if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage**. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense.")

See also Grover C. Grismore, Law of Contracts § 106 at 165-66 (1947) ("Certain presumptions are habitually indulged in regard to the standards to be applied in the interpretation of language. They are as follows: (1) The ordinary or popular sense of words as used throughout the country is preferred, in the absence of circumstances indicating a contrary understanding. (2) Technical terms and words of art are to be given their technical meaning, unless the circumstances indicate a contrary understanding. . . . (4) The **usages of** a trade, or a locality, or **a profession**, etc., **will always supersede the ordinary or popular sense of words where the situation is such as to justify the assumption that these special usages would more nearly approximate the understanding of the parties. If the special usage relied upon is in fact the settled habit of expression of the group in question and not merely the expression of a few persons, and if the parties to the contract are members of the group, then the special usage will always prevail in the absence of competent affirmative evidence that the parties understood that some other meaning was to be attributed to the language in question**. But if one of the parties is not a member of the trade or other group, then the special usage of that group will not be adopted unless he had actual knowledge of it, or unless it

is so well known that it is fair to assume he must have had knowledge of it.").

See also II E. Allan Farnsworth, Farnsworth on Contracts § 7.13 at 283 ("Under the [Uniform Commercial] Code "any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware" is said just like a course of dealing, to "give particular meaning to and supplement or qualify terms of an agreement."); 1 Greenleaf on Evidence, § 278 ("The terms of every written instrument are to be understood in their plain, ordinary and popular sense, **unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words**; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense.").

See also Williston on Contracts (3d ed.) §§ 648, 650; Wigmore on Evidence (3d ed.) § 2463, pp. 203-4; McBain, *The Rule Against Disturbing Plain Meaning of Writings*, 31 Cal. L. Rev. 145 (1943); Patterson, *The Interpretation and Construction of Contracts*, 64 Col. L. Rev. 833, 839-44 (1964); 11 R. Lord, Williston on Contracts §31:9, at 340-41, §32:7 (4th ed. 1999); 12 R. Lord, Williston on Contracts §34:1 (4th ed. 1999); 5 W. Jaeger, Williston on Contracts § 648, at 6-7 (3d ed. 1961) ("Usage is an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense.")

B. Illinois Follows the Term Of Art Rule In Construing Contracts.

The Term of Art Rule has long been established in Illinois. *See, e.g.*, Reed v. Hobbs, 3 Ill. 297, 300-01 (1840); Cigler v. Keinath, 185 Ill. App. 353, 357 (1st Dist. 1914), *reversed on other grounds*, Cigler v. Keinath, 265 Ill. 144 (1914) ("[t]he rule of construction is to

collect the real intention of the parties from the terms used in the contract, taking them in their plain, ordinary and popular sense, **unless by the known usage of the trade they have acquired a peculiar sense** . . . .") (emphasis supplied) *See also* Steinke v. Novak, 109 Ill App 3d 1034, 1038 (3d Dist 1982) ("Words used in a will are to be given their ordinary and natural meaning, but where technical terms are used, they are presumed to be used in their technical meaning.").

In Intersport, Inc. v. NCAA, 381 Ill App 3d 312 (1st Dist 2008), Intersport was licensed to use a trademark to promote the sale of "media broadcasts." When Intersport announced that it intended to use the trademark to distribute content through cell phones, licensor argued that "media broadcasts" did not include distribution through cell phones, because the parties were bound by "media broadcast" as construed in accordance with the technical definition of "broadcast" in the Federal Communications Act; and that Act defined "broadcasting" only as distribution through television or radio -- not cell phones. The First District recited the controlling legal principles as follows:

> First, the court will examine the language of the contract alone, as the plain and ordinary meaning of the terms are the best indication of the parties' intent. . . . Contract terms should also be interpreted in accordance with the custom and usage of those particular terms in the trade or industry of the parties. Quoting Judge Learned Hand, the Illinois Supreme Court has explained that "'[f]linch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words . . . .'" The court must also place itself in the position of the parties at the time they entered into the agreement. To that end, the language in the contract may be enlarged or limited by the attendant circumstances of the contract and its purpose. . . . . contract terms need not be found to be ambiguous before evidence of the custom and usage of the terms in the parties' trade or practice can be considered.

Id at 319-20. Based on the foregoing, the court found that custom and usage in the parties' trade required the court to construe "broadcast" in conformity with the Federal Communications Act (and not according to its generic meaning), such that "media broadcast" did not include distribution of media content through cell phones.

Other Illinois cases uniformly uphold the Term of Art Rule *See, e.g.*, Chicago Bridge & Iron Co. v. Reliance Insurance Co., 46 Ill. 2d 522, 531-32 (1970) ("If a usage exists in a particular trade of which both parties either had notice or should have had notice, it is only just and proper that their contract should be interpreted in view of the trade practice") (*citing* Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 299 F. 991 (S.D.N.Y. 1924) (Learned Hand, J.)) (attached hereto as Exhibit 1); *see also* United States Trust Co. v. Jones, 414 Ill. 265, 271 (1953). The presumption in interpreting a contract is that the meaning of a technical term is its technical meaning. Bandak v. Eli Lilly & Co. Ret. Plan, 587 F.3d 798, 800 (7th Cir. 2009) (citing Reed v. Hobbs, 3 Ill. 297 (1840); Minges Creek, LLC v. Royal Ins. Co., 442 F.3d 953, 956 (6th Cir. 2006); Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1013 (3d Cir. 1980); Superior Business Assistance Corp. v. United States, 461 F.2d 1036, 1039 (10th Cir. 1972)). (The foregoing cases are attached hereto as Group Exhibit 2.)

As the forgoing authorities indicate, if an Illinois contract utilizes a term of art, there is a presumption that that term of art is construed according to its accepted meaning, not a layperson's subjective interpretation of that term based on general principles. This especially true where, as here, the party to be charged with the technical meaning of a widely accepted term of art is a member of the profession that has adopted the term of art, claimed expertise in valuing and purchasing dental practices, and had, as of June 2004, previously purchased four dental practices. *See* January Motion, at pp. 1, 7, and at its Exh. E, ¶¶56-58.

C. **"Active Patient Is A Term Of Art in Dentistry.**

In 1991 the American Dental Association ("ADA") House of Delegates passed its Resolution 30H (Trans. 1991:621) in which it defined the term "active patient" as follows:

Active and Inactive Dental Patients of Record (1991:621)

Resolved, that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms "active" and "inactive" dental patients of record apply:

Active Dental Patient of Record: An active dental patient of record is any individual in either of the following two categories: Category I—patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II—patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.

Inactive Dental Patient of Record: An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

Since the ADA's passage of Resolution 30H, the foregoing definition of "active patient" has been repeatedly utilized *verbatim* in ADA publications. *See, e.g.*, *Valuing a Practice: A Guide for Dentist*, attached hereto as Exhibit 3, at p. 22; "*Dental Records,*" attached hereto as Exhibit 4, at p. 9; "*Guide to Closing a Dental Practice*" attached hereto as Exhibit 5, at p. 47; "*Current Policies, Adopted 1954-2009,*" attached hereto as Exhibit 6, at p. 91.

The ADA's definition of "active patient" has been all but universally accepted among persons skilled in the dental arts. In its "*2008 Survey of Dental Practice: Characteristics of Dentist in Private Practice and Their Patients,*" attached hereto as Exhibit 7, the ADA presents a statistical analysis of the dental profession in the United States. The ADA mailed a written questionnaire to a national, random sample of approximately 6,800 dentists in private practice

The sample included general practitioners and specialists, as well as members and nonmembers of the ADA. Id at p 1 The ADA received responses from 2,416 dentists, representing an overall response rate of 35 5%. Among other things, respondents were asked how they defined "active patient." According to the *Survey*, 96.3% of independent dentists, 95 9% of solo dentists, and 97.2% of independent non solo dentists defined an active patient as a patient treated within the last 12 to 24 months. *See* Id. at pp. 52, 61, and 70, respectively

The importance of the ADA as the authoritative source of terms of art for the dental profession has been recognized by the courts. In Wenzell v. Ingrim, 228 P 3d 103 (Alaska 2010) (attached hereto as Exhibit 8), Wenzell purchased a dental clinic from Ingrim. The purchase agreement included a covenant not to compete that prohibited Ingrim from the "practice of dentistry" within fifteen miles of his old clinic for two years. Id at p 106 One year after the sale, Ingrim was employed as a dentist at a not-for-profit clinic of the Alaska Native Medical Center ("ANMC") two miles away from his old clinic When Wenzell sued Ingrim for breaching the covenant not to compete, the issue at bar was whether Ingrim's employment by a not-for-profit clinic constituted "practice of dentistry" for purposes of the covenant not to compete. Id

Ingrim argued that "practice of dentistry" should be construed as practicing dentistry in a "private, competitive, fee-for-service practice," a construction that would exclude Ingrim's employment at the ANMC. Id at p. 108 The Alaska Supreme Court rejected this argument because "practice of dentistry," as used in the purchase agreement, had to be construed according to the definition ascribed to that term in the dental industry In order to determine the meaning of "practice of dentistry" in the dental industry, the court turned to the ADA, and found that "[t]he [ADA] defines 'dentistry' as 'the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral

cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body '" Significantly, the court then "conclude[d] that this is the proper definition of 'practice of dentistry' as used in [the purchase agreement]," and applied that definition to resolve the parties' dispute Id at p 108

The same reasoning -- and result -- applies with equal force in this case Here, as in Wenzell, the proper definition of a term of art in a contract between two dentists for the sale of a dental practice is the definition of that term promulgated by the ADA, the preeminent and authoritative voice of the dental profession That definition binds the parties, to the exclusion of another definition that one of the parties might prefer *See* Figueroa v. Pac. Dental Assocs., 2009 Cal App Unpub LEXIS 5057 *4 (Cal App 1st Dist June 23, 2009) (utilizing ADA definition of teeth cleaning ("prophylaxis")) (attached hereto as Exhibit 9); Kilgore v. Ohio State Dental Bd., 1995 Ohio App LEXIS 2508 (Ohio Ct App., Columbiana County June 14, 1995) (chiding parties for failing to introduce evidence of ADA definition of "oral maxillofacial practice" where meaning of that term was in dispute) (attached hereto as Exhibit 10)

D. "Active Patient" Has a Widely Accepted Meaning in The Dental Profession.

The widespread use and acceptance of "active patient" among dental professionals, as defined by the ADA, is apparent when that term is "Googled" *See, e g*, Henry Schein, "*The Most Important Number--The Active Patient Count*" ("The active patient count is defined as the number of different individuals seen in the practice during a prior specified time period The ideal specified time period being the prior eighteen months; however, there is variation between different consultants as to what this period should be -- twelve, eighteen, or twenty-four months ")[4]; Mark Dilatush, "*What is an Active Patient Anyway?*" ("Over the history of dentistry,

[4] See http://www henryschein com/us-en/images/dental/ActivePatientCount pdf

you were taught to measure active patients as those patients that have visited the office over the PAST 18 months ") (emphasis in original)[5]; Rick Willeford, MBA, CPA, CFP, "*The Buck Starts Here!*" ("You can roughly gauge your practice potential based on the number of active patients you have. The definition of an "active" patient ranges from one who has been in for treatment at least once in the last 18 months in an urban setting to one who has been seen within three years in a rural setting.")[6]; Dr. Gene Heller, "*Defining Successful Relationships*" ("The Active Patient Count is the number of different individuals seen in the office during the past eighteen months ")[7]

Dental regulations promulgated in various states -- including Indiana, where Tujetsch was licensed to practice dentistry in 2009 -- have utilized "active patient" in a manner consistent with the definition promulgated by the ADA. *See, e.g.*, Section 828 IAC 4-3-10(e) of the Indiana Administrative Code concerning "Mobile Dental Facilities And Portable Dental Operations," (providing that "[a]s used in this section, 'active patient' applies and refers to a person whom the mobile dental facility or portable dental operation has examined, treated, cared for, or otherwise consulted with during the two (2) year period prior to discontinuation of practice, or moving from or leaving the community").[8]

Finally, experts engaged in appraising and brokering dental practices are aware of the accepted technical meaning of "active patient." *See, e.g.*, Affidavit of Bruce Lowy attached hereto as Exhibit 11.

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[5] *See* at http://www.newpatientsinc.com/newsletters/092007.htm#LETTER.BLOCK7

[6] *See* http://www.dentistryiq.com/index/display/article-display/151317/articles/dental-economics/volume-92/issue-8/features/the-buck-starts-here.html

[7] *See* http://dentalentrepreneur.com/archives/fall08/practice_builders/index.html

[8] *See* www.in.gov/legislative/iac/T08280/A00040.PDF

E. A Party Is Presumed To Know A Trade Usage Embodied in a Term of Art And Is Therefore Bound By That Usage When (As Here) The Usage Is Well-Defined And Well-Recognized.

A member of a trade or profession is presumed to know a trade usage and hence be bound by it when (as here) the usage is established, well-defined, and well-recognized within the profession Gholson, Byars & Holmes Constr Co v. United States, 173 Ct Cl 374, 395 (Ct Cl 1965) (*citing* Buffalo Merchandise Warehouses v United States, 115 Ct Cl 568, 572, 88 F Supp 276, 277 (1950); United States v Stanolind Crude Oil Purshasing Co , 113 F 2d 194, 200 (10th Cir 1940); Gelb v. Automobile Ins Co of Hartford, 168 F 2d 774, 775 (2d Cir 1948)) (The foregoing cases are attached hereto as Group Exhibit 12.) As a dentist licensed since 1989 and the buyer of four dental practices before 2004, Tujetsch is presumed to know the correct definition of "active patient."

F. "Active Patient" Is A Tally Of Past Events, Not A Prediction Of Future Events.

According to its widely accepted definition as a term of art, an "active patient" is "active" because he (she) has been treated in the past 24 months, not because he (she) is predicted to return for treatment in the future A count of "active patients" is backward-looking and objective, a report of facts (patient treatments) that actually occurred, not a subjective prediction of future events based on unspecified considerations A count of "active patients" is useful as a rough indicator of one measure of the size of a dental practice precisely because it has an accepted, objective definition that dental professionals agree on, and that is based on historical fact, not an amorphous, subjective, and potentially self-serving attempt to foretell the future *See* Id at ¶¶45-46 This makes intuitive sense Patients are human beings, not chattels that can be bought and sold as assets owned by a dental practice, and the behavior of patients is subject to myriad factors -- too many factors to be readily predictable

Defendants represented that practice management software of the Dental Practice reported that the Dental Practice had approximately 1,200 "active patients" around June 2004 -- meaning that the Dental Practice had treated approximately 1,200 patients in the previous 24 months. There is no evidence that that did not occur. The statement that a patient was treated in the Dental Practice in the 24 months before June 2004 is not a prediction that such patient will be treated in the future, nor is it a representation that after being treated the patient has not died, moved to a new home; declined to schedule further treatment; or suggested that he or she might see a different dentist.

G. Tujetsch' Definition Of "Active Patient" As A Prediction Of The Future Is Fundamentally Unworkable.

Tujetsch' claim premised on "active patients" cannot stand because it is based on an idiosyncratic, self-serving, and incorrect definition of a precisely defined term of art. Tujetsch suggests, *sub silentio*, that an "active" patient is "active" because he or she is predicted to return for treatment at some unspecified time. That is not true. Where a term has acquired a technical meaning as a term of art, the technical construction of the term is preferred over the common meaning. Courts will not substitute an ill-defined, self-serving, and ambiguous general meaning for a clear term of art. "Active patient" cannot be construed as a prediction of future events because the term-of-art definition of "active patient" is set forth in the Recital, the only sentence that mentions "active patients" in the Agreement, because there is no established non-technical meaning of "active patient," and because both parties to the Agreement are dentists.

CONCLUSION

For the foregoing reasons, Defendants move this Court to enter summary judgment that the term "active patient," as used in the Agreement, connotes a patient treated in the Dental Practice during the previous 24 months, and is not a prediction as to the number of patients who

will return to the Dental Practice to seek treatment in the future; and providing for such other and further relief as the Court deems just and appropriate.

Dated: February 14, 2010

Respectful submitted,
TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.,

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EXHIBIT 1

LEXSEE 299 F 991

KUNGLIG JARNVAGSSTYRELSEN v DEXTER & CARPENTER, Inc., et al

District Court, S.D. New York

299 F. 991; 1924 U.S. Dist. LEXIS 1599

May 21, 1924

OPINION BY: [**1] HAND

OPINION

[*991] LEARNED HAND District Judge The declaration is for breach of a contract for the sale of coal It alleges, stripped of irrelevant matter, that the defendant sold and the plaintiff bought a cargo of coal at $31 90 per ton, "said price including cost, insurance and freight upon said coal prepaid to the port of Malmo," the price "to be paid against delivery in the city of New York of shipping documents, including insurance policies, bills of lading, and invoice"; that the plaintiff established a letter of credit with a New York bank, which it instructed to pay the price on receipt of the invoice, shipping documents, and "policy or policies of insurance"; that the bank, contrary to instructions, paid the purchase price without demanding policies of insurance, and received in lieu thereof only a "certificate of insurance," declaring under the hand of the defendant's insurance broker that insurance had been underwritten in London for account of the defendant; that under the law of England such a certificate was not a policy of insurance within the meaning of such a contract of sale; that the coal was lost at sea and that the plaintiff has paid the bank; that the [**2] insurance broker had not taken out any insurance when the certificate of insurance was delivered to the bank

The plea makes profert of the contract, which was parol, and which provided for the sale of 150,000 tons of coal at various prices for various points of delivery, in all cases "c i f" (the letters being so written), of which 30,000 were to be delivered at Malmo It alleged that the cargo in question was shipped under the contract; that it was a universal custom in the United States, in cases of "c i f" sales, for the seller to have the option of New York or London insurance; that in case of London insurance the seller might procure it through an American broker, who would in turn through a London broker secure the actual policy, who cabled back when he had fixed it; that on receipt [*992] of such a cable the New York broker would issue such a certificate of insurance as the plea made profert of; that this custom was followed in the case at bar, the defendant paid the New York broker, indorsed the certificate, and the bank accepted the papers on tender The certificate of insurance in question recited that insurance of necessary amount had been issued by "London underwriters" [**3] for the account of the defendant on the shipment in question; that policies of London underwriters would be exchanged on demand for the certificate as soon as practicable; that the insurance was placed subject in all respects to English laws and customs governing marine and war risk insurance Various conditions applicable specifically to coal cargoes were contained in an annexed rider

The purpose of the demurrer is to secure a ruling consonant with those recent English cases under which such a certificate would not be a valid tender of insurance, and under which apparently, even after acceptance, substantial damages may be recovered Under the declaration at bar it may well be argued that only nominal damages can in any aspect be recovered, without some allegation that the plaintiff has been unable to collect from the London underwriters under the certificate of insurance That is quite another question from whether the tender could have been refused and damages recovered for the breach However, since the tender, if bad, was a breach, I suppose that nominal damages, at least, were recoverable, and, if so, the declaration is not demurrable Hence the demurrer raises the validity [**4] of the plea

Before reaching this question, there is one preliminary matter, to wit, whether the acceptance by the bank of the certificate without reservation still left it within the

power of the plaintiff to treat it as an insufficient tender The bank was the plaintiff's agent for that purpose and it is a matter of no moment to the defendant if it disobeyed its instructions That question I mention only to pass, assuming merely for argument that, though acceptance would bar the right to reject, it did not prevent an action for damages on breach of the promise to deliver insurance

Thus I am brought squarely to the question whether if there be a uniform usage in this country to treat such certificates as performance of a contract "c i.f.' the tender was good I must start by observing that the plea varies from the declaration, the latter alleging that the contract stipulated for "policies of insurance," while the contract contained only the words:

"We offer * * * the quantity indicated herein at the following prices: * * * $31 50 per gross ton c i f Malmo "

On demurrer the plea controls, and the case is at once distinguished from the only case in the English Court [**5] of Appeal, and that last decided in order of time, Donald H Scott & Co v Barclay's Bank, [1923] 2 K B 1 There action was brought on by the seller on a letter of credit, upon the bank's refusal to accept the tender of a certificate of insurance completer in detail than that at bar, but still referring to the policy for part of the contract The letter of credit had prescribed among the necessary documents an "approved insurance policy' Bankes, Scrutton, and Atkin L JJ, held that, as the buyer must look [*993] to another policy to ascertain all the terms of insurance, the tender was bad There was no proof of usage, and the certificate did not declare that a specific policy had been taken out on the cargo in suit, but it was merely a coverage slip on a floating policy However it specifically provided against any broker's lien for premiums paid

In Diamond, etc, Co v Fl Bourgeois, [1921] 3 K B 443 the next most recent case, McCardie, J had before him an action on the refusal by the buyer to accept under a contract of sale "c i f ' A certificate of insurance was tendered similar to that in Scott v Barclay's Bank, supra, which the learned judge held insufficient [**6] His reasons were three First, the same as that later adopted by the Court of Appeal; second, that the certificate was not a classifiable legal document at all: and, third, that it was very doubtful whether such a certificate would support an action under the British statute McCardie, J, expressed a faint doubt whether a uniform usage might not have made good such a tender

In Wilson etc Co. v Belgian, etc, Co, [1920] 2 K B 1 Bailhache, J, also had a case of suit upon the buyer's refusal under a usual "c i f " contract There the tender had been of a broker's coverage note This was not identical in form with the certificate of insurance in the two later cases, but so far as I can see was the same in substance, except for the absence of a provision relating to the broker's lien for premiums, a circumstance on which Bailhache, J, in part relied in his judgment There was some proof of custom, but the witnesses could recall no instance where such a note had been forced upon an unwilling buyer, a defect that, with deference, it seems to me was scarcely or moment, if none had never been refused Bailhache, J, in declaring that the certificate was not a good tender [**7] of insurance, said that he did not mean to include in his decision American certificates of insurance, a reservation which, however, the two cases already cited declined to accept The custom he thought insufficiently proved for the reason given How far a custom might have controlled does not definitely appear

The first case was also a judgment of McCardie, J in Manbre Sacharine Co v Corn Prod Co Ld, [1919] 1 K B 188 The suit was by the buyer, who had accepted the documents under a "c i f ' contract, one of which was a letter of the seller stating that the goods were insured by it under a general policy covering these and more, and in substance that the policy was pro tanto for the benefit of the buyer Having paid, the buyer sued for breach of contract as in the case at bar McCardie, J, thought that custom might have made such a tender good, but found none such It did not appear whether the buyer's efforts, if any, to collect on the insurance, had proved vain, but damages in full were allowed on the theory that only a separate policy of insurance, uncomplicated by sharing with other goods, was a proper tender

Such is the law at present in England, so far [**8] as I have found, and it is clear that no case is like that at bar The contract did not here prescribe a policy of insurance, but left the obligations to be determined from the letters "c i f ' There was a specific London policy underwritten on this cargo alone; the usage in New York was universal to [*994] accept such certificates as performance; the policy as underwritten is valid under the laws of England, where it was made Candidly, it seems to me probable that a tender even under all these circumstances would at present be held bad in England but any conclusion is as yet doubtful, and the results so far has been reluctantly reached However that may be and much as I should hesitate to diverge from the settled law of so great a commercial country, it seems to me, in the language of a great English judge:

"It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind " Humfrey v Dale, 7 E & B 266, 278

When a usage of this kind has become uniform in an actively commercial community, that should be warrant

enough for supposing that it answers the needs of those who are dealing upon the faith of it. [**9] I cannot see why judges should not hold men to understanding which are the tacit presupposition on which they deal. From Lord Holt's time on they have generally in one way or the other been forced in the end to yield to the more flexible practices of commercial usage. So far as I know, the results have been generally acceptable to every one once they were settled.

The objections to this specific usage are that it is unreasonable, and that it contradicts the contract. The first objection may be divided into two parts: First, that it compels the buyer to take insurace the full terms of which he has no opportunity to see; and, second, that it exposes him to a broker's lien. As to the first, it would be formidable if the contract prescribed the terms of the policy to be delivered, but it does not. Any policy would do which was adequate marine protection within tolerable limits. The certificate at bar contains some of the terms of the policy actually underwritten, and for the balance refers to "English law and customs." Now it is quite true that such a reference leaves much uncertain, but can any one say that it is less certain than the permissible latitude in the provisions of [**10] a policy which the seller might tender and the buyer must accept? That law is a standard of reference as definite as the contract prescribed, and I can see no ground for declaring a usage unreasonable which substituted one for the other. Certainly the situation is toto coelo different from such a tender under a contract which stipulated for the delivery of an approved policy of insurance.

The other supposed unreasonable feature of the usage is that there might be a broker's lien upon the policy for premiums. The New York broker could have none, because the lien is possessory (*Spring v. So. Car. Ins. Co., 8 Wheat. 268, 285, 5 L. Ed. 614*; *Rose v. Shimasi, 168 App. Div. 93, 153 N.Y. Supp. 734*), and he has given up the certificate. The London broker might indeed have a lien for the premium paid by him, even though the seller paid the New York broker (Fisher v. Smith, L.R. 4 App. Cas. 1), but he would have no general lien (Manss v. Henderson, 1 East, 335), because he knew that the policy was for a third person. Therefore the objection comes to this: Though the seller pays the premium to the New York broker, a usage is unreasonable which exposes the buyer to the possibility of a lien [**11] for that premium in [*995] favor of the London broker, whom the New York broker does not pay. In the first place, is it altogether clear that the London broker could hold his lien, if he knew that the certificate was to pass to a third person and would represent the policy which he retained? Assuming that he could, and that the usage leaves the buyer exposed to such a risk, it does not on that account appear to me to be beyond reasonable limits because of that possible injustice. Usages are never of importance unless they modify rights which would otherwise result. The fact that the usage imposes a risk upon the buyer, which he would not incur if a policy were delivered, is not, I think, so vital to the substance of the contract that it may not be interpolated into the contract by implication.

This raises the general question of how far the usage contradicts the language of the contract. "Insurance" certainly does not literally mean a "policy of insurance." When the buyer has a policy of insurance awaiting his demand and covering the loss, and that alone, why should the situation be thought to contradict a contract giving him only "insurance"? Is it less insurance because, [**12] though he has received symbolic delivery of the policy and actual delivery of the document whih controls its production, he has not the policy itself? I must own that I cannot see why.

But the conventional statement of the rule is really not susceptible of consistent application anyway, and has been recognized not to be by the best writers. Words mean what the parties who use them want them to mean, and it makes no difference how widely their meaning in a special case varies from their common meaning. It is true that, in deciding how far any specific usage can be supposed to vary that normal meaning, the extent to which that meaning is set awry ought to be an important consideration, but that is all. At least that, I am glad to say, is the authoritative rule in this court. *Eames v. Claflin (C.C.A. 2) 239 Fed. 631*, 152 C.C.A. 465; *Nicoll v. Pittsvein Coal Co. (C.C.A. 2) 269 Fed. 968*.

There appear to be no American cases on the point here at bar, but *Vietor v. National City Bank, 200 App. Div. 557, 193 N.Y. Supp. 868*; *206 App. Div. 664, 199 N.Y.S. 955*, and *237 N.Y. 538, 143 N.E. 733*, is not far away. There the New York courts went much further in allowing a usage to wrest common [**13] terms from their common meaning. The issue was whether a receipt for water carriage, signed by a transportation company, could by usage fulfill the definition of a bill of lading. The seller, presenting such a document, was held to make a good tender.

The demurrer is overruled.

EXHIBIT 2

LEXSEE 587 F 3D 798

STEPHEN I BANDAK, Plaintiff-Appellee, v. ELI LILLY AND COMPANY RETIREMENT PLAN, et al , Defendants-Appellants

Nos 09-1620, 09-2271

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

587 F.3d 798; 2009 U.S. App LEXIS 25369; 48 Employee Benefits Cas. (BNA) 1001

October 9, 2009, Argued
November 18, 2009, Decided

PRIOR HISTORY: [**1]
Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division No 1:06-CV-01622-LJM-JMS--Larry J. McKinney, Judge
Bandak v. Eli Lilly & Co. Ret. Plan, 2009 U.S. Dist. LEXIS 10885 (S.D. Ind. Feb. 10, 2009)

DISPOSITION: AFFIRMED

COUNSEL: For STEPHEN I BANDAK, Plaintiff - Appellee: Andrew W Hull, Attorney, HOOVER HULL LLP, Indianapolis, IN

For ELI LILLY PHARMACEUTICAL COMPANY, EMPLOYEE BENEFITS COMMITTEE OF THE ELI LILLY AND COMPANY RETIREMENT PLAN, Defendants - Appellants: Jon B. Laramore, Attorney, BAKER & DANIELS, Indianapolis, IN

JUDGES: Before POSNER, ROVNER, and WILLIAMS, Circuit Judges

OPINION BY: POSNER

OPINION

[*799] POSNER, *Circuit Judge*. Bandak, a retired employee of Eli Lilly, sued the company's retirement plan under ERISA and received a judgment for $ 100,222.86 in damages and an injunction against the plan's offsetting any of his future benefits by amounts paid to him under a plan in which he was enrolled when he worked in the United Kingdom. The district court also awarded him attorneys' fees and costs, amounting to $ 89,612, on the ground that Lilly's position in the litigation had not been substantially justified.

Bandak, who is English, began work for the Lilly group of companies in 1978 in England, and was enrolled in the pension plan of the English member of the group. [**2] In 1995, he was shifted to the United States. Lilly informed him in writing that he was now enrolled in the U.S. affiliate's retirement plan and that his benefits under the plan would be based on his years of service retroactive to his initial employment by the Lilly group, which is to say back to 1978. Thus he would be treated as if he had worked for U.S. Lilly from 1978 to 1995 rather than for the English affiliate. He retired in 2004.

[*800] The plan in effect in 1995 said that an employee's retirement benefits "shall be reduced by the Actuarial Equivalent of any benefit payable to such a person under a *qualified defined benefit plan* maintained by" a Lilly employer (emphasis added). On the basis of this provision, the plan administrator decided that Bandak was not entitled to benefits under the English affiliate's retirement plan because it was a "qualified defined benefit plan" and thus within the exclusion. If this is correct, Bandak's pension entitlement would fall from $ 18,000 a month to $ 14,000.

The term "qualified defined benefit plan" is an American legal term that means a plan approved by the Internal Revenue Service for favorable federal tax treatment. See, e.g., *26 U.S.C. §§ 401(a)(5)(D)(i)*, [**3] *1060(e)(2)(A)(ii)* ("a defined benefit plan . . . which qualifies"); *26 C.F.R. § 1.401-4(c)(7)(ii)*; *Powell v. Commissioner, 129 F.3d 321, 323 (4th Cir. 1997)*; *Arnold v. Arrow Transportation Co., 926 F.2d 782, 783 (9th Cir. 1991)*; *Wilson v. Bluefield Supply Co., 819 F.2d*

457, 464 (4th Cir. 1987); Jesse D Taran & Pamela C. Scott, "Qualified Defined Benefit Plans: The Essentials," 875 *PLI/Tax* 149, 155 (2009) It has no reference to foreign taxation The presumption in interpreting a contract is that the meaning of a technical term is its technical meaning *Reed v Hobbs, 3 Ill 297 (1840)*; *Minges Creek, LLC v Royal Ins. Co., 442 F.3d 953, 956 (6th Cir. 2006)*; *Mellon Bank, N.A. v Aetna Business Credit, Inc., 619 F.2d 1001, 1013 (3d Cir. 1980)*; *Superior Business Assistance Corp. v. United States, 461 F.2d 1036, 1039 (10th Cir. 1972)*; *Restatement (Second) of Contracts § 202(3)(b)* (1981), and thus, if it is a technical legal term, its technical legal meaning *Sunstar, Inc. v. Alberto-Culver Co., No. 07-3288, 586 F.3d 487, 2009 U.S. App. LEXIS 23759, 2009 WL 3447450, at *3 (7th Cir. Oct. 28, 2009)*; *Mellon Bank, N.A. v. Aetna Business Credit, Inc., supra*; *Superior Business Assistance Corp. v. United States, supra*. Elsewhere in the [**4] plan document, moreover, "qualified" plan unmistakably means a U.S. plan because it makes specific references to the Internal Revenue Code

Lilly argues that it would be "unfair" for Bandak to get greater benefits than if he had begun work for Lilly's U.S. affiliate rather than its English affiliate in 1978. Whether and in what sense it is "unfair" would require a deeper investigation than attempted by the plan administrator -- would require for example investigating whether it really is "unfair" to give an employee relocated to a foreign country (remember that Bandak is English, not American) a 30 percent increase in retirement benefits ($ 4,000/$ 14,000). Lilly is a sophisticated enterprise, the plan document was undoubtedly drafted by lawyers specializing in ERISA, and those lawyers would, unless it were otherwise stated in the document, use technical legal terms in their technical legal senses

While conceding that "qualified defined benefit plan" is not an English legal term, Lilly says that the plan in which Bandak was enrolled when he worked in England was a "broad-based retirement plan" entitled to favorable tax treatment under English law. The district judge rejected the argument [**5] on the grounds that the administrative record contains no English plan document and that Lilly cites no English law. Lilly thus laid no foundation for comparing the English plan to a U.S. "qualified defined benefit plan."

The U.S. plan does state that "in no event shall an Employee receive credit more than once for the same period of Service." But the plan restricts "Employees" to citizens or residents of the U.S., and Bandak was neither when he was working for the English affiliate

[*801] Two years after he was relocated to the United States the retirement plan of the U.S. affiliate was amended to provide that the plan benefits "of an individual who becomes an Employee on or after April 1, 1997" would be reduced by the amount of benefits to which he was entitled "by a plan or program maintained by a non-United States [Lilly company] that provides retirement-type benefits," or by the retirement plan of a foreign government. The amendment did not apply to Bandak, whose employment by the domestic affiliate had begun before 1997; its only significance in the litigation is in undermining Lilly's position.

Rather than trying to define a "qualified" retirement plan, the amendment eliminated [**6] double counting for anyone who had received "retirement-type benefits" under a plan maintained by a foreign Lilly affiliate for whom the employee had worked. Lilly argues that the amendment does not apply to foreign retirement plans that are "like" a U.S. qualified defined benefit plan; those plans, it argues, had always been usable to reduce benefits. On this interpretation the plan administrator when dealing with a benefits claim by someone like Bandak who is not subject to the amendment has to decide how much "like" a "qualified defined benefit plan" in its U.S. sense the foreign affiliate's plan had been. The administrator would have to familiarize himself with the retirement laws of the 52 other countries in which one or more of Lilly's 142 affiliates operate. He would have to decide whether the Chinese affiliate, for example, has a retirement plan that is sufficiently "like" a qualified defined benefit plan under U.S. law to satisfy the plan administrator's understanding of "qualified defined benefit plan."

Notice the strangeness of an interpretation that allows an employee to get double service credit (as Lilly's lawyer acknowledged at argument) if the foreign affiliate's retirement [**7] plan is not given favorable tax treatment by the foreign government

It seems the amendment was intended to close what Lilly belatedly had decided was a loophole through which Bandak has sailed. This interpretation is supported by the minutes of the Lilly board meeting at which the amendment was adopted. The chairman of the board explained that the "amendment is necessary to prevent the Company from paying benefits for years of service that are already being paid or credited by another affiliate or foreign country." That describes Bandak's case to a T

The contention in Lilly's brief that the reference in the minutes to years of service "credited by another affiliate" is a reference to defined contribution plans, not defined benefit plans, makes no sense. Though Lilly does offer a defined contribution plan, benefits generated by such plans are based on the contributions to the employee's retirement account rather than on his years of service. E.g., *Evans v. Akers, 534 F.3d 65, 71 n. 5 (1st Cir. 2008)*; *Hawkeye National Life Ins. Co. v. AITS Industrial Corp., 122 F.3d 490, 500 n. 6 (8th Cir. 1997)*;

Andrew L. Gaines & Steven M. Margolis, "An Introduction to Defined Contribution Plans," [**8] 875 *PLI/Tax* 183, 189 (2009) Nor were defined contribution plans common prior to 1997 See Gregory N Filosa, "International Pension Reform: Lessons for the United States," *19 Temp Int'l & Comp L.J. 133, 137 (2005)*; Marti Dinerstein, "Social Security 'Totalization': Examining a Lopsided Agreement with Mexico," Center for Immigration Studies (Sept 2004), available at www cis org/articles/2004/back904 pdf (visited Oct 11, 2009); Noriyuki Takayama, "Pension Reform in Japan at the Turn of the Century," 26 *Geneva Papers on Risk and Insurance* 565 [*802] (2001); Lothar Schruff, "Pensions and Post-Retirement Benefits by Employers in Germany," 64 *Brooklyn L. Rev* 795, 800 (1998)

The implication that the 1997 amendment was based on a belief that without it persons in Bandak's situation would have a double dip is further strengthened by Lilly's inability to name even one person whose benefits under a foreign retirement plan had been reduced *before* the amendment (which remember is not applicable to Bandak) went into effect even though Lilly is a global enterprise and many of its high-level scientific employees, like Bandak, must at times during their career with Lilly reside in different countries, [**9] working for different affiliates each with its own defined benefit plan

A document in Bandak's employee file states that "until 1997 [the reference is to the 1997 amendment], the offset [for foreign plans] was not specifically written into the plan, but was followed as a common practice " Provisions of an ERISA plan must be in writing *29 U.S.C. § 1102(a)(1)*; *Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83-84, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995)* They cannot be modified by "common practice " E g , *Orth v. Wisconsin State Employees Union Council 24, 546 F.3d 868, 872 (7th Cir. 2008)*; *In re Unisys Corp Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 905-06 (3d Cir. 1995)*

Lilly reminds us that a plan administrator's judgment is entitled to deference when as in this case (as in almost every case) the plan document vests the administrator with discretion in interpreting and applying the plan But the entitlement is diminished by indications that the conflict of interest inherent when benefits determinations are made by a plan funded by the employer has infected the administrator's consideration of the application for benefits As we explained in *Mars v. Motorola, Inc., 577 F.3d 783, 789 (7th Cir. 2009)*, [**10] elaborating on the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008)*, "If the circumstances indicate that probably the decision denying benefits was decisively influenced by the plan administrator's conflict of interest, it must be set aside The *likelihood* that the conflict of interest influenced the decision is therefore the decisive consideration, as seems implicit in the majority opinion's [in *Glenn*] reference to indications of 'procedural unreasonableness' in the plan administrator's handling of the claim in issue *Id. at 2352* (emphasis in original), and its suggestion that efforts by the plan administrator to minimize a conflict of interest would weigh in favor of upholding his decision *Id. at 2351*"

We know that the chairman of Lilly's board of directors was concerned about the cost of its retirement plan And the disingenuousness of Lilly's arguments suggests that the conflict of interest was indeed gnawing at the administrator Consider the administrator's failure to identify *anyone* in Bandak's position hired before the 1997 amendment who had been denied service credit for his time with a foreign affiliate, and consider the implausible [**11] suggestion that the reference to private plans in the 1997 amendment is just to defined contribution plans Consider also the barrenness of the record concerning the English plan and English tax law, which makes one wonder how the plan administrator even knew that the English plan was a "qualified defined benefit plan," and which suggests the administrator was covertly applying the 1997 amendment, while conceding its inapplicability to Bandak

So not only was the district court's decision correct; Lilly's rejection of [*803] Bandak's claim was not substantially justified, and therefore the district judge committed no error in awarding Bandak his reasonable attorneys' fees and costs *Sullivan v. William A. Randolph Inc., 504 F.3d 665, 670-72 (7th Cir. 2007)*; see *29 U.S.C. § 1132(g)* Bandak has asked for fees for defending the appeal, and he is entitled to them too As we explained in *Sullivan*, "affirmance entitles an appellee who has properly been awarded an attorney's fee in the district court to an attorney's fee for successfully defending the district court's judgment in the court of appeals Otherwise the purpose of the initial award--to shift the cost of litigation to the losing party--would [**12] be imperfectly achieved." *Sullivan v. William A. Randolph Inc., supra, 504 F.3d at 672* (citations omitted) Bandak is directed to submit within 10 days an itemized statement of the attorneys' fees that he incurred in defending the appeal and Lilly will have 10 days to respond

AFFIRMED

SA314

LEXSEE 442 F 3D 953

MINGES CREEK, L L.C., Plaintiff-Appellee, v. ROYAL INSURANCE COMPANY OF AMERICA, Defendant-Appellant.

No 05-1313

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0126p 06; *442 F.3d 953*; *2006 U.S. App. LEXIS 8302*; *2006 FED App. 0126P (6th Cir.)*

March 16, 2006, Argued
April 6, 2006, Decided
April 6, 2006, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 03-72763-Julian A. Cook, Jr., District Judge.

COUNSEL: ARGUED: James N. McNally, SOMMERS, SCHWARTZ, Southfield, Michigan, for Appellant. Rick J. Patterson, POTTER, DeAGOSTINO, O'DEA & PATTERSON, Auburn Hills, Michigan, for Appellee.

ON BRIEF: James N. McNally, Leonard B. Schwartz, SOMMERS, SCHWARTZ, Southfield, Michigan, for Appellant. Rick J. Patterson, Steven M. Potter, POTTER, DeAGOSTINO, O'DEA & PATTERSON, Auburn Hills, Michigan, for Appellee.

JUDGES: Before: DAUGHTREY and GILMAN, Circuit Judges; RUSSELL, District Judge.*

* The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION BY: RONALD LEE GILMAN

OPINION

[***1] [*954] RONALD LEE GILMAN, Circuit Judge. A customer slipped and fell on an icy sidewalk upon exiting a card store in the Minges Brook Mall, a shopping center owned by Minges Creek, L.L.C. Chubb Insurance Company, the insurer of the mall's common areas, paid the settlement cost and the associated litigation expenses resulting from the customer's lawsuit. Minges Creek then sued Royal Insurance Company of America, [**2] the insurer of the card store, for indemnification on the basis that Minges Creek was named as an additional insured under the card store's liability policy with Royal. Summary judgment was granted in favor of Minges Creek. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions for the district court to dismiss the complaint with prejudice.

[***2] I. BACKGROUND

Minges Creek is the owner of the Minges Brook Mall located in Battle Creek, Michigan. In December of 1989, Minges Creek leased a portion of its property to the "1/2 Off Card Shop" (Card Shop). The "leased premises" were defined in the lease as the 6,796 square feet shown on the site plan, which clearly indicated that the leased premises were limited to the interior of the store and did not include the exterior walls, the roof, or the surrounding land. (Lease § 1.01) Common areas, including the parking lots, roadways, and pedestrian sidewalks, were provided by Minges Creek "for the convenience and use of the tenants of the Shopping Center, and their respective subtenants, agents, employees, customers, invitees, and any other licensees of Landlord [**3] ." (Lease § 7.03)

The lease also set forth the Card Shop's insurance obligations as a tenant:

> Tenant shall, during the entire term hereof, keep in full force and effect a policy of public liability and property damage insurance *with respect to the leased premises and the business operated by Tenant* and any subtenants of Tenant in the leased premises The policy shall name Landlord, any other parties in interest designated by Landlord, and Tenant as insured

(Lease § 10 01) (Emphasis added)

Pursuant to the Card Shop's lease obligation, Royal issued a general liability policy to the Card Shop to cover its Minges Brook Mall store and several other Card Shop locations. An addendum to Royal s policy with the Card Shop defined additional insureds as follows:

> The following is added to **SECTION II- WHO IS AN INSURED**:
>
> 5 a. Any person or organization you are required by a written contract, agreement or permit to name as an insured is an insured but only with respect to liability arising out of:
>
> 2 Premises owned or used by you

[*955] (Royal Ins Policy 'Enhancement Endorsement" § 12)

The Card Shop, along with all of the other [**4] tenants of the Minges Brook Mall, was also required by the lease to pay a proportionate share of Minges Creek's cost of maintaining and insuring the common areas of the mall Minges Creek's insurance policy covering the common areas was issued by Chubb

The underlying accident that gave rise to the insurance dispute in this case occurred in March of 1999 when Peggy Lampert a customer of the Card Shop, slipped and fell on ice while walking to her car from the store Lampert sued Minges Creek, the Card Shop, and a snow removal contractor in Michigan state court Her complaint alleged as follows:

> The accident occurred when Plaintiff Peggy Lampert, as a customer of the 1/2 Off Card Shop, Inc began walking toward her car which was located in Defendant Minges Creek LLC's parking lot, and while in the process of leaving the store, slipped and fell on ice, causing her to sustain very serious personal injuries and damages

[***3] The state trial court dismissed the Card Shop from Lampert's suit because the Card Shop did not "legally possess[] the sidewalk area where the fall occurred." Minges Creek was found to have "exclusive dominion and control over maintaining the [**5] entire parking area including the sidewalks in front of the 1/2 Off Card Shop " Following the Card Shop's dismissal, Minges Creek settled the lawsuit with Lampert for $ 210,000 Chubb, as Minges Creek's insurer, covered this cost as well as the expense of defending against Lampert's claim

Minges Creek then filed suit against Royal, the Card Shop's insurer The suit was removed to federal court based on diversity of citizenship Alleging that it was an additional insured under the Card Shop's policy, Minges Creek sought reimbursement for the $ 210,000 settlement cost and approximately $ 26,700 in expenses that were incurred in defending against Lampert's claims Royal's insurance contract promised to pay all insureds "those sums that the insured becomes legally obligated to pay [and] defend the insured against any 'suit' seeking [bodily injury or property] damages "

After both parties moved for summary judgment, the district court granted judgment in favor of Minges Creek It held that Minges Creek was an additional insured under the Card Shop's insurance policy issued by Royal and that the accident occurred on premises used by the Card Shop Thus, even though the Card [**6] Shop did not control the common area where the accident occurred, and even though it was dismissed from Lampert's lawsuit, the Card Shop's insurance policy was deemed to cover the claim According to the district court, this obligated Royal to defend and indemnify Minges Creek The district court therefore ordered Royal to reimburse Minges Creek for the settlement cost and the litigation expenses for the underlying litigation with Lampert Royal now appeals

A. Standard of review

II. ANALYSIS

The district court's grant of summary judgment is reviewed de novo *Int'l Union v. Cummins Inc., 434 F.3d 478, 483 (6th Cir. 2006)* Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law *Fed. R. Civ. P. 56(c)* In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences

in favor of the nonmoving party *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. [*956] 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The central issue is "whether the evidence presents a [**7] sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

B. Applicable law

Both parties agree that because Michigan is the forum state and the place where Royal's insurance policy was written, Michigan law governs the interpretation of the insurance policy. *See Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir. 2003) (applying the law of the forum state in diversity cases). The interpretation of an insurance policy is a question of law that is reviewed de novo. *Schmalfeldt v. N. Pointe Ins. Co.*, 469 Mich. 422, 670 N.W.2d 651, 653 (Mich. 2003).

An insurance policy is interpreted in accordance with its terms. *Twichel v. MIC Gen. Ins. Corp.*, 469 Mich. 524, 676 N.W.2d 616, 622 (Mich. 2004) (holding that, based on the clear language of the policy at issue, a driver was not covered by his grandfather's insurance). Moreover, a party's "reasonable expectations cannot supercede the clear language of a contract." *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 664 N.W.2d 776, 786 (Mich. 2003) [**8] (quotation marks omitted).

[***4] Insurance policies must be read as a whole, giving meaning to all of their terms. *Auto-Owners Ins. Co. v. Harrington*, 455 Mich. 377, 565 N.W.2d 839, 841 (Mich. 1997). If a term is not defined in an insurance policy, the term is "accorded its commonly understood meaning." *Twichel*, 676 N.W.2d at 622. The Michigan Supreme Court employs dictionary definitions to interpret nontechnical terms, but uses specialized dictionaries and caselaw to interpret legal terms of art. *See id.* (referencing dictionary definitions to interpret the term "owner"); *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 596 N.W.2d 190, 194 (Mich. 1999) (distinguishing between legal terms of art, like "equitable remedy," which should be interpreted in accordance with their common law understandings, and colloquialisms, which should be given their ordinary meaning). If language in an insurance policy can reasonably be interpreted in more than one way, the policy will be interpreted against the insurer. *Wilkie*, 664 N.W.2d at 786-87. Courts, however, should not "create ambiguity in an insurance policy [**9] where the terms of the contract are clear and precise." *Henderson*, 596 N.W.2d at 193. Unambiguous terms "must be enforced as written," and insurers are not liable for risks that they do not assume. *Id.*

In the present case, the district court held Royal liable for both the expense of litigating Lampert's suit and the ultimate settlement cost. It thus held that Royal had both a duty to defend and a duty to indemnify Minges Creek, a named insured under Royal's policy with the Card Shop. According to the Michigan Supreme Court, "the duty to defend is broader than the duty to indemnify and is properly invoked when claims are even arguably within coverage." *Polkow v. Citizens Ins. Co.*, 438 Mich. 174, 476 N.W.2d 382, 384 (Mich. 1991) (quotation marks omitted). Although all doubts regarding whether the duty to defend applies are resolved in favor of the insured, *id.*, "if coverage is not possible, then the insurer is not obliged to provide a defense." *Marlo Beauty Supply, Inc. v. Farmers Ins. Group of Cos.*, 227 Mich. App. 309, 575 N.W.2d 324, 327 (Mich. 1998) (construing an ambiguous policy against the insurer). We must therefore first determine [**10] whether Lampert's suit against Minges Creek was covered by Royal's insurance policy.

[*957] **C. The insurance contract**

1. Was Minges Creek a named insured?

Because the lease agreement between Minges Creek and the Card Shop required the Card Shop to name Minges Creek as an additional insured, the district court held that Royal was obligated to defend and indemnify Minges Creek. Royal contends, however, that Minges Creek was an additional insured under the Card Shop's policy only with respect to incidents occurring inside of the Card Shop. This is because the "written contract, agreement or permit" requiring the Card Shop to name Minges Creek as an additional insured, as stated in Royal's Insurance Policy "Enhancement Endorsement" § 12, obligated the Card Shop to insure only the "leased premises." (Lease § 10.01).

Royal issued a certificate of liability insurance to Minges Creek, stating that "the certificate holder is listed as an additional insured-Landlord with respect to the property located at [Minges Brook Mall]." Minges Creek therefore qualified as an additional insured under Royal's policy. The scope of Royal's liability to Minges Creek as a named insured [**11], however, must be determined by the "premises owned or used" language in Royal's policy.

2. Did the accident occur on premises "owned or used by" the Card Shop?

In order for Royal to be obligated to defend and indemnify Minges Creek, Lampert's accident had to have occurred on "premises owned or used by" the Card Shop. The parties dispute the proper definitions of both the term "premises" and the term "used." Royal first argues that the term premises refers only to the inside of the

Card Shop, whereas Minges Creek asserts that the term premises means the Card Shop plus the common areas surrounding the store

[***5] The district court in following Michigan precedent that instructs courts to generally apply the commonly understood meaning of terms *see Twichel, 676 N W 2d at 622*, referenced the dictionary definition of the term premises Premises is defined by *Merriam Webster's Collegiate Dictionary* 920 (10th ed 1997) as "a tract of land with the buildings thereon " If the term premises is more appropriately classified as a "term of art " however, reference to a specialized dictionary is appropriate *Black's Law Dictionary* 1180-81 (6th ed 1997), [**12] is such a specialized dictionary, and it defines premises as follows:

> Land with its appurtenances and structures thereon Premises is an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent upon circumstances in which used, and may mean a room, shop, building, or any definite area

Black's Law Dictionary thus recognizes that the term premises has an elastic and context-specific definition The district court focused on the first sentence of the definition and concluded that *Black's* supports Minges Creek's claim that the accident is covered by Royal's policy But the court failed to consider the definition beyond the first sentence specifically the part stating that the meaning of the term premises "is to be determined by its context and is dependent upon circumstances in which used " *Id.*

Royal persuasively argues that throughout the insurance policy, "an intent is clearly shown to rely on the written contract [i e the lease] to define the obligation to add the landlord as a named insured, and to define the scope of the obligation owed to that party " [**13] It contends that the term premises in the insurance policy is *un*ambiguous because the lease's definition [*958] of the term "leased premises" should be deemed to control the meaning of the term premises as used in the policy A term in a contract is unambiguous if there is only one way to reasonably interpret the term *See Wilkie, 664 N W 2d at 786-87* (defining an ambiguous term in a contract as one where there is more than one reasonable interpretation) Royal argues that because its policy specifically refers to the 'written contract agreement or permit' in its "additional insured" section, the only reasonable interpretation of the term premises is one based on the lease

We agree that the lease and Royal's policy are inextricably intertwined and should be interpreted in context with each other Although Minges Creek argues against referring to the lease in order to define the term premises in the policy, Minges Creek's conclusion that the Card Shop *used* the area where Lampert fell is based on the provision of the lease (Lease § 7 03) designating the common areas for use by all of the tenants of the shopping center Minges Creek cannot have it both ways The [**14] plain language of Royal's policy links it to the lease, and therefore the only reasonable interpretation of "premises owned or used by' the Card Shop is one that is informed by the lease

Given the lease's provision obligating the Card Shop to insure only the inside of its store, we conclude that the only reasonable interpretation of the term premises comports with the lease's definition of the term "leased premises ' The lease defines the leased premises as the 6,796 square feet inside the Card Shop, and does not include the sidewalk where Lampert fell And the lease obligated the Card Shop to name Minges Creek as an insured only with respect to the "leased premises " Defining the term premises in the insurance policy to include the common areas that the Card Shop was not required to insure strikes us as unreasonable

The case of *Zurich Insurance Co. v CCR & Co., 226 Mich App 599, 576 N W 2d 392 (Mich 1997)*, supports the proposition that terms that might be ambiguous in some contexts can have highly specific and unambiguous meanings in others *Zurich* posits an example where A contracts with B to pay for eagles *Id at 397 n 4* Depending on the context, [**15] eagles can unambiguously mean coins if the parties are numismatists, birds if the parties are animal dealers, or scores in an athletic competition [***6] if the parties are golfers *Id* In the present case, the context that defines the otherwise ambiguous term premises is not extrinsic evidence but the plain language of the lease, which is specifically referenced in Royal's insurance policy This context requires that the definition of premises in the policy be coextensive with the Card Shop's obligation to name Minges Creek as an additional insured

Because we conclude that the term premises is restricted to the inside of the Card Shop Lampert's accident outside of the Card Shop is not covered by Royal's policy We therefore do not have to analyze the definition of the term "used,' but wish to reiterate that even Minges Creek looked to the lease to define that term Moreover we note that an absurd result would occur if the terms 'premises" and "used" were both interpreted according to Minges Creek's definition of premises (the Card Shop and the sidewalk around it) and its expansive definition of used (in which all tenants use the common areas) Under its interpretation, [**16] Minges Creek

could seek indemnity under Royal's policy even if a patron of another store fell on the common sidewalk In fact, it could presumably seek coverage as the named insured from every tenant in the shopping center whose policy contained language similar to Royal's This interpretation is all the more unreasonable in light of Minges Creek having procured a separate insurance [*959] policy through Chubb that explicitly covered the common areas Minges Creek has clearly not advanced a reasonable interpretation of "premises owned or used" by the Card Shop

For the reasons stated above, we also hold that Royal had no duty to defend against Lampert's claims Even accepting all of Lampert's allegations as true, Royal's policy does not cover her accident Royal therefore was not required to defend Minges Creek against the lawsuit by Lampert *See Marlo Beauty Supply, 575 N.W.2d 324 at 327* (holding that "if coverage is not possible, then the insurer is not obliged to provide a defense")

At bottom, this case appears to involve an effort by one insurance company (Chubb, the insurer of the common areas) to obtain reimbursement from another insurance company (Royal, the insurer [**17] of the Card Shop's leased premises) The only reasonable reading of the documents controlling the relationship between the parties, however, convinces us that Chubb was the proper insurance company to defend and indemnify Minges Creek for Lampert's accident that occurred in the common areas

III CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to dismiss the complaint with prejudice

SA3D

LEXSEE 619 F 2D 1001

MELLON BANK, N A , v AETNA BUSINESS CREDIT, INC , Appellant

No 79-1092

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

619 F.2d 1001; 1980 U S App LEXIS 19061

October 9, 1979, Argued
March 31, 1980, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (D C Civil No 75-1156)

COUNSEL: Thomas McGanney (argued), White & Case, New York City, William C O'Neil, David G Ries, Thorp, Reed & Armstrong, Pittsburgh, Pa , for appellant

Thomas R. Johnson (argued), Kirkpatrick, Lockhart, Johnson & Hutchison, Pittsburgh, Pa , for appellee

JUDGES: Before ALDISERT and HUNTER, Circuit Judges and CAHN *, District Judge

* Edward N Cahn of the United States District Court for the Eastern District of Pennsylvania, sitting by designation

OPINION BY: CAHN

OPINION

[*1005] OPINION OF THE COURT

This diversity case, tried under Pennsylvania law, [1] involves a contractual dispute between Mellon Bank, N A , of Pittsburgh, Pennsylvania (Mellon) and Aetna Business Credit, Inc , of East Hartford, Connecticut (Aetna) Both parties are commercial lending institutions In the context of this case, Mellon is the construction lender and Aetna is the permanent or "take out" lender [2] Mellon sued Aetna averring that Aetna breached a written contract by refusing to purchase the [**2] construction loan held by Mellon In a nonjury proceeding the district court found Aetna in breach and awarded Mellon damages in the amount of $ 1,165,731, representing Mellon's loss following foreclosure on the construction loan Aetna has appealed to this court from the final judgment entered below The facts, in greater detail, are as follows

1 In this diversity action we are bound by the law of Pennsylvania, including its conflict of law rules *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc. 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* The district court made no specific finding in regard to choice of law However, the district court applied Pennsylvania law

All parties have proceeded at the trial and appellate level as if Pennsylvania law applied to the interpretation of this contract No objection was raised below or on appeal At this time we will consider the parties to have waived any objection to the application of Pennsylvania law See *Bilancia v GMC 538 F.2d 621 (4th Cir 1976)*

2 In *First National State Bank of New Jersey v Commonwealth Federal Savings and Loan Association of Norristown, 610 F.2d 164 (3d Cir. 1979)*, Judge Adams outlined the usual method of financing a real estate development as follows:

As with most real estate developments, the financing here was to take place in two stages: a short-term construction loan and a long-term permanent loan The construction loan was to finance the actual construction of the project and the permanent loan, or mortgage loan, was designed to replace or 'take out' any short-term borrowings A permanent loan is generally obtained from a savings institution or insurance company.

> while a construction lender usually is a commercial bank A standby commitment obligates the permanent lender to refinance the construction loan if called upon to do so by the developer, but in addition generally provides the borrower with the option to search for an alternative lender with more advantageous terms. The premium paid for this option is a nonrefundable fee, and the commitment enables a developer to seek short term construction financing
>
> *610 F.2d at 167* (footnote omitted)

[**3] I FACTS

Messrs. Opp, Elgin and Wise (the borrowers) were joint venturers in the development and construction of an office complex in the suburbs of Atlanta, Georgia The project, known as Kensington Square, was to consist of six two-story office buildings The estimated total cost of the project was $ 2,500,000

In May of 1974 Aetna extended to the borrowers a permanent loan commitment in the amount of $ 2,500,000 The borrowers paid a $ 50,000 fee to Aetna to bind the commitment which was to remain in force until August 1, 1975. Under the terms of the commitment the borrowers could obtain a six month extension for an additional fee of $ 25,000

In June of 1974 Mellon issued a construction loan commitment to the borrowers. In July of 1974 the borrowers, Mellon, and Aetna executed a tripartite Buy-Sell Agreement and related instruments Upon completion of the project, the Buy-Sell Agreement obligated Aetna, subject to certain conditions, to purchase the construction loan from Mellon By August 1, 1975, the borrowers' contractor had substantially completed the project and Mellon had advanced $ 2,241,489 under the construction loan The work which remained unfinished involved the [**4] completion of individual suites to the specifications of prospective tenants However, earlier in 1975 there had been a precipitous decline in the Atlanta real estate market and the project was only seven percent leased, which placed its economic feasibility in jeopardy.

On August 1, 1975, a Mellon representative met with Aetna's special counsel in Atlanta and delivered closing documents to him. In a letter to Mellon dated August 15, [*1006] 1975, Aetna stated that upon Aetna's receipt of sworn statements from the borrowers, representing that they are solvent, "we (Aetna) shall be in a position to fund this loan." On August 27, 1975 Aetna received the executed affidavits of solvency Two days later Aetna gave notice to Mellon that it would not purchase the construction loan

The borrowers defaulted on their obligation on September 1, 1975 On October 3, 1975, Mellon declared the construction loan in default. On November 3, 1975, Kensington Square was sold at a foreclosure sale for $ 1,150,000 Thereafter, Mellon obtained an order from the Superior Court, DeKalb County, Georgia, confirming that the property was sold for its true market value

Mellon brought suit against Aetna [**5] on November 12, 1975, in the United States District Court for the Western District of Pennsylvania In its complaint Mellon alleged that Aetna had breached the Buy-Sell Agreement by refusing to purchase the construction loan Mellon claimed damages measured by the difference between the $ 2,241,489 advanced to the borrowers under the construction loan and the confirmed foreclosure sale price of $ 1,150,000 plus prejudgment interest and costs

Aetna's answer denied that all conditions precedent to its take-out commitment had occurred or been performed. Aetna alleged that as a condition precedent to its obligation to purchase the construction loan it was required that the borrowers be solvent The Buy-Sell Agreement in Section 4 provided that:

> (In) the event of bankruptcy or insolvency of Borrower the provisions of paragraph 3 of the Permanent Commitment relating thereto shall be applicable

Aetna drafted paragraph 3 of the Permanent Commitment, insisted that it be incorporated by reference in the Buy-Sell Agreement, and rejected Mellon's attempt to negotiate its deletion Paragraph 3 stated:

> We (Aetna) shall have no obligation to acquire the construction loan from the [**6] construction lender in the event of bankruptcy or insolvency of the Borrower

Aetna contended that the borrowers were not solvent at the time it was to purchase the construction loan from Mellon Also Aetna alleged that there had been material adverse change in the borrowers' condition which negated Aetna's duty to fund the loan The Permanent Commitment stated:

> (The borrowers) will furnish evidence satisfactory to you (Aetna) at the date of funding that there has been no material adverse change in our financial or other condition from that presented to you (Aetna) for the purpose of considering the loan [3]

3 Section 8 of the Buy-Sell Agreement provided that "the Permanent Commitment shall remain in full force and effect "

Mellon maintained that the borrowers were not insolvent and that there was no material adverse change in the borrowers' financial condition Further, Mellon urged that Aetna was not only in breach of the Buy-Sell Agreement, but in breach of a promise contained in the letter of August 15, 1975 That letter stated:

> (W)e agreed to purchase the captioned loan from you upon compliance with all terms and conditions of our commitment One such [**7] condition states that we shall have no obligation to purchase in the event of bankruptcy or insolvency of the borrower Our funding is, therefore, conditioned upon your submission of sworn statements (in form attached hereto) of each borrower, that each is presently in a solvent condition Upon receipt of these statements, we shall be in a position to fund this loan

Record at 336a The letter was signed by John J Gillies, an attorney for Aetna The executed affidavits represented that the borrowers were "presently in a solvent financial condition My liabilities do not exceed the fair market value of my assets and I am able to pay my debts as they mature " Record at 341a-344a However, a cover letter from the borrowers' attorneys returned with the affidavits stated:

> [*1007] This will further confirm conversation held in your office on August 8, 1975, wherein Mr Opp advised members of your organization that the current cash flow from his other endeavors would not carry the payments on the Kensington operation until the same is leased He further advised that the other individuals in the joint venture do not have sufficient cash flow to carry the amount of the loan [**8] payments until tenants are acquired

Record at 339a The letter also noted that Mr Opp faced certain contingent liabilities from litigation then pending against him

The district court, after a bench trial, first found that:

> Aetna's defense in reality boils down to a very thin thread, that is, the issue of whether on August 1, 1975, the borrowers were insolvent That was an affirmative defense, which Aetna was required to prove by a fair preponderance and has failed to do so

Record at 75a Second, the district court concluded that in determining whether or not the borrowers were insolvent the assets and liabilities of the Kensington Square project should be disregarded Record at 78a Third, the district court decided that Aetna's failure to purchase the construction loan was in breach of a promise set forth in its letter of August 15, 1975 Finally, the district court held that the act of the borrowers' furnishing evidence to Aetna of no material adverse financial change on their part was not a condition precedent to Aetna's obligation to purchase the construction loan, but merely a promise of the borrower, and that in any event the promise or condition had [**9] been fulfilled. The district court entered judgment for Mellon against Aetna in the sum of $ 1,165,731, which included prejudgment interest

We determine that the district court incorrectly placed the burden of proof on Aetna to establish the insolvency of the borrowers Also, the district court should have considered the assets and liabilities of the Kensington Square project in calculating whether or not the borrowers were insolvent The district court erred in interpreting Aetna's August 15 letter and the return of the borrowers' affidavits either as a separate contractual obligation to purchase the construction loan or as a waiver of the condition that the borrowers not be insolvent The district court correctly construed the clause in the Permanent Commitment requiring the borrowers to furnish evidence of "no material adverse change in our financial or other condition" to be a promise of the borrowers and not a condition precedent to Aetna's obligation The case will be remanded for further proceedings in accordance with this opinion

II BURDEN OF PROOF

The generally accepted rule is that the burden of proof in regard to a condition precedent is on the party alleging the breach [**10] of the conditional promise. [4] *Standard Alliance Industries v Black Clawson Co., 587 F.2d 813, 823 (6th Cir 1978)*, cert denied, *441 U S 923, 99 S Ct 2032, 60 L Ed 2d 396 (1979)*; *Ziman v Employers Fire Insurance Co., 493 F.2d 196, 199 (2d Cir 1974)*; *Aetna Casualty and Surety Co. v Harris, 218 Va 571, 239 S E 2d 84, 88 (1977)*; *Allis Chalmers Manufac-*

turing Co. v. Malan Construction Corp., 30 N.Y.2d 225, [*1008] *331 N.Y.S.2d 636, 282 N.E.2d 600, 602 n.5 (1972); Israel W. Berthiaume's Case, 328 Mass. 186, 102 N.E.2d 412, 414 (1951);* 3A Corbin, Contracts §§ 749-751; 5 Williston, Contracts § 674. The few Pennsylvania cases dealing with the burden of proving a condition precedent also suggest that the burden of proof to establish the condition is on the party alleging the breach *Dauphin Deposit Trust Co. v. World Mutual Health and Accident Insurance Co., 206 Pa.Super. 406, 213 A.2d 116 (1965),* [5] *Jennison v. Aacher, 201 Pa Super. 583, 193 A.2d 769, 772 (1963);* Bossler v Poroner, 29 Pa Dist 421, 12 Berks 39 (C P Berks County 1919)

4 The only general exception to this rule is reflected by the strained reasoning courts utilize to place the burden on an insurance company where the company raises a "condition" in a policy as a defense See e g., *Fortress Re Inc. v. Jefferson Insurance Co., 465 F. Supp. 335 (E D N.C 1978); Stortenbecker v. Pottawattamie Mutual Insurance Association, 191 N.W.2d 709 (S. Ct.Iowa 1971); Allen v. Ross, 38 Wis 2d 209, 156 N.W.2d 434 (1968)*

All parties and the district court have characterized the insolvency condition as a condition precedent. See Mellon Bank v. Aetna, No 75-1156 at 7 (W.D Pa 1978); Brief of Appellee at 21; Brief for Appellant at 6 This is clearly a correct characterization solvency was a condition which had to exist or occur before a duty of immediate performance of Aetna's promise would arise See Restatement of Contracts § 250, 3A Corbin, Contracts §§ 739-747; 5 Williston, Contracts §§ 666-668 We need not delve into the elusive distinctions between conditions precedent and subsequent. There has been no contention presented that the insolvency clause was or became a condition subsequent.

[**11]

5 This opinion is reported in Atlantic Second under the name of Peters v. World Mutual Health and Accident Insurance Co The difference in names between the official and the Wests reporter is unexplained

Therefore, the district court was in error when it placed on Aetna the burden of proving the insolvency of the borrowers as a defense to the action [6] Mellon had the burden of showing that the borrowers were solvent as a condition precedent to recovery for breach of Aetna's promise [7]

6 It should be noted that the appellant Aetna was partly responsible for this misapplication of the burden Mellon correctly pleaded the occurrence of all conditions precedent in its complaint Record at 5a; see *Fed.R.Civ.P. 9(c).* Aetna properly made a specific denial of the solvency condition Record at 63a; see *Fed.R.Civ.P. 9(c)* However, Aetna misled the court by incorrectly pleading the nonoccurrence of the condition precedent as an "Affirmative Defense " Record at 64a

7 We do not accept Mellon's argument, made in a supplementary letter brief, that the condition precedent is really a proviso subject to proof by Aetna See 5 Williston, Contracts § 667, pp 182-183 (1961) Mellon cites no authority for this proposition other than Williston, whose own analysis would probably preclude the application of the proviso doctrine to this situation See 5 Williston, Contracts § 667 There is no Pennsylvania case law in support of Mellon's analysis and all other case law which has been brought to our attention is contrary thereto. See *Kadner v. Shields, 20 Cal.App.3d 251, 97 Cal.Rptr. 742 (1971)*

[**12]

III INTERPRETATION OF "INSOLVENCY"

Aetna took the position in their briefs and at oral argument that they are entitled to judgment on the record as a matter of law The basis for Aetna's position is the wording of the insolvency clause which states that Aetna "shall have no obligation to acquire the construction loan in the event of insolvency of the Borrower " Aetna contends that the test of insolvency is well established in law and as a commercial standard a party is insolvent when their liabilities exceed their assets or they are unable to pay their debts as they come due. See e g *Larrimer v. Feeney, 411 Pa 604, 192 A.2d 351 (1963); 11 U.S.C. § 101(26) (1978);* Uniform Commercial Code, 12A Pa Con Stat Ann § 1-201(23) (Purdons) Aetna contends that documentary evidence establishes the borrowers were insolvent under either of these tests, and therefore, Aetna had no obligation to purchase the construction loan

Mellon takes the position that the insolvency test must be applied without reference to the liabilities or assets of the borrowers which accrue from the Kensington Square project Mellon alleges that only this construction of the insolvency clause properly [**13] reflects the intent of the parties and is required for a rational interpretation of the Buy-Sell Agreement Aetna responds to Mellon's position by contending that Mellon's interpretation of the insolvency clause is an impermissible rewriting of the words of the contract

The district court heard oral testimony, received documentary evidence and concluded that the term in-

solvency in the context of the Buy-Sell Agreement should be interpreted to exclude reference to assets or liabilities related to the Kensington Square project. The district court held this interpretation was "required by the clear allocation of lending risks between Mellon Bank and Aetna." No. 75-1156, slip. op. at 8. The basis for this holding was not the words of the contract, but evidence extrinsic to it. The district court found that Aetna's loan officer recognized Aetna's principal risk to [*1009] be whether the office park could reach and maintain a ninety percent occupancy level. The district court found that Aetna in analyzing the security for its permanent loan did not consider the borrowers' cash flow, did not condition its obligation upon any occupancy level, and therefore concluded "Aetna recognized [**14] that the financial transaction in question was not a basis for finding insolvency." The district court cited no basis in the contract document or wording of the insolvency clause for its conclusion. Our task is to decide if the district court permissibly used extrinsic evidence to interpret the contract and, if so, whether it drew the proper legal conclusions therefrom.

In this case we confront several familiar, but not necessarily consistent, precepts of contract interpretation. We start from the premise that commercial parties are free to contract as they desire. *Brokers Title Co., Inc. v. St. Paul Fire and Marine Insurance Co., 610 F.2d 1174 (3d Cir. 1979).* Absent illegality, unconscionableness, fraud, duress, or mistake the parties are bound by the terms of their contract. [8] *Peter J. Mascaro Co. v. Milonas, 401 Pa. 632, 166 A.2d 15 (1960); National Cash Register Co. v. Modern Transfer Co., 224 Pa.Super. 138, 302 A.2d 486 (1973).*

> 8 Illegality, unconscionableness, fraud, duress or mistake are not alleged here. It should be noted that both parties to the Buy-Sell Agreement are commercial entities of great experience and expertise and were represented by counsel in negotiations. Therefore, what we rule in this case is not based on overriding policy concerns that courts sometimes apply to restrict freedom of contract. In the future commercial parties creating loan commitments and buy-sell agreements will negotiate with knowledge of this opinion and will take greater care in expressing their intent. If in the instant case the parties had, with greater clarity, excluded or included the liabilities associated with the Kensington Square project, that would not present public policy difficulties. In this case the court sits with one purpose to interpret through the use of objective indicia the intent of the contracting parties.

Additionally, it should be noted that we are not dealing with a proceeding in equity. For example, in *First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Association of Norristown, 610 F.2d 164 (3d Cir. 1979)*, we considered a situation where a breach of a take out loan commitment had occurred, and the construction lender sought specific performance of the take-out commitment. The consideration of factors such as the allocation of risk between the parties was important in deciding if the court should exercise its discretion to grant equitable remedies.

[**15]

"In construing a contract, a court's paramount consideration is the intent of the parties." *O'Farrell v. Steel City Piping Co., 266 Pa.Super. 219, 403 A.2d 1319, 1324 (1979).* It would be helpful if judges were psychics who could delve into the parties' minds to ascertain their original intent. However, courts neither claim nor possess psychic power. Therefore, in order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent. As Justice Holmes observed:

> (T)he making of a contract depends not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs not on the parties' having meant the same thing but on their having said the same thing.

Holmes, The Path of the Law, in Collected Legal Papers 178, as quoted by *Judge Friendly in Frigaliment Importing Co. v. B. N. S. International Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y.1960)* (emphasis in original). See also Gilmore, The Death of [**16] Contract (1974).

The strongest external sign of agreement between contracting parties is the words they use in their written contract. Thus, the sanctity of the written words of the contract is embedded in the law of contract interpretation. As it has been variously put:

> (A) court will make no inference or give any construction to the terms of a written contract that may be in conflict with the clearly expressed language of the written agreement.

National Cash Register Co. v. Modern Transfer Co., Inc., 224 Pa.Super. 138, 142, 302 A.2d 486, 488 (1973).

> [*1010] A court is not authorized to construe a contract in such a way as to modify the plain meaning of its words, under the guise of interpretation.

Best v. Realty Management Corp., 174 Pa.Super. 326, 329-330, 101 A.2d 438, 440 (1953).

> When a written contract is clear and unequivocal, its meaning must be determined by its contents alone.

East Crossroads Center, Inc. v. Mellon-Stuart Co., 416 Pa. 229, 230, 205 A.2d 865, 866 (1965).

> The rule enunciated in *Gianni v. Russell & Co., Inc., (281 Pa. 320, 126 A. 791)* supra, is firmly embedded in the law of Pennsylvania and from that rule we will [**17] not permit a deviation for it is essential that the integrity of written contracts be maintained. . . . "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement: (citing cases). All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract * * * and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence: (citing cases).'

United Refining Co. v. Jenkins, 410 Pa. 126, 134, 189 A.2d 574, 578 (1963) (emphasis and citations omitted). [9]

> 9 Though the concept of the Parole Evidence Rule is relevant here, the issue in this case really concerns an exception to that rule. In the instant case one party introduced extrinsic evidence to "interpret" the contract. The other party argues that this extrinsic evidence seeks to vary or add to the contract and is therefore not admissible. If the written contract is unambiguous, the Parol Evidence Rule and the doctrines cited above bar the use of extrinsic evidence for interpretation. If the written contract is ambiguous the Parole Evidence Rule does not prevent the use of extrinsic evidence to interpret the writing.
>
> This issue of ambiguity must be carefully distinguished from the issue of "integration" which arises when evidence is introduced to vary or add to the unambiguous written terms of a contract on the ground that the evidence is admissible because the written contract is not fully integrated. The issue becomes whether the proffered evidence is extrinsic to the integrated written contract, and thus inadmissible, or whether the proffered evidence is part and parcel of the entire contract of which the written document is only a part.
>
> Though it may be asserted that Pennsylvania courts employ a strict "four corners" approach to issues of integration, we do not believe this approach is required by Pennsylvania decisions in regard to the issue of ambiguity. See *Universal Film Exchanges, Inc. v. Viking Theatre Corp., 400 Pa. 27, 161 A.2d 610 (1960)*; cf. In *Re Estate of Breyer, 475 Pa. 108, 379 A.2d 1305 (1977)*; *United Refining Co. v Jenkins, 410 Pa. 126, 138, 189 A.2d 574 (1963)*. In the case at bar there is no contention that the contract is not fully integrated.

[**18]

In a world where semantics is a science instead of an art we might be able to read a contract and understand it without question. However, English is often a difficult and elusive language, and certainly not uniform among all who use it. External indicia of the parties' intent other than written words are useful, and probably indispensable, in interpreting contract terms. If each judge simply applied his own linguistic background and experience to the words of a contract, contracting parties would live in a most uncertain environment. Therefore, under Pennsylvania law we are instructed that:

> A court must be careful not to "retire into that lawyers Paradise where all words have a fixed, precisely ascertained meaning, where men may express their purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair inspect the text, and answer all questions without raising his eyes.

In *Re Estate of Breyer, 475 Pa. 108, 379 A.2d 1305, 1309 n.5 (1977)* (citations omitted), quoting Thayer, Pre-

liminary Treatise on Evidence 428, as quoted in 3 Corbin, Contracts § 535 n.16 (1960):

> In [**19] the construction of any contract, certain principles must guide us: (a) if there is any doubt as to the meaning of a [*1011] term of a contract, such term should "receive a reasonable construction and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the (contract) was made'; (b) in construing a contract we seek to ascertain what the parties intended and, in so doing, we consider the circumstances, the situation of the parties, the objects they have in mind and the nature of the subject matter of the contract; (c) "However broad may be the apparent terms of the agreement, it extends only to those things concerning which the parties intended to contract, and the subject-matter of their negotiations may affect the meaning of the words they employ, especially if, in connection with that subject-matter, the conventional interpretation would give an unreasonable or absurd result.'

United Refining Co. v. Jenkins, 410 Pa. 126, 137-38, 189 A.2d 574, 580 (1963) (citations omitted) (emphasis deleted).

Courts are left with the difficult issue of determining as a matter of law which [**20] category written contract terms fall into clear or ambiguous. *United Refining Co. v. Jenkins, supra; O'Farrell v. Steel City Piping Co., 266 Pa.Super. 219, 403 A.2d 1319 (1979).* [10] There is a point at which interpretation becomes alteration of the written contract. We must determine if the trial judge went beyond that point. [11]

> 10 Under Pennsylvania law, ambiguous writings are interpreted by the fact finder and unambiguous writings are interpreted by the court as a question of law. *Brokers Title Insurance Co., Inc., v. St. Paul Fire and Marine Insurance Co., 610 F.2d 1174 (1979).* In the instant case the judge sitting without a jury made findings of fact and reached conclusions of law.
>
> 11 We could declare our holding in this case, quote the appropriate doctrine, and not explain the approach we feel a court should take on the issue of ambiguity. However, we believe that guidance and standards are necessary in this most difficult area.

A.

Ambiguity is defined as:

> intellectual uncertainty; . . [**21] , the condition of admitting of two or more meanings, of being understood in more than one way, or referring to two or more things at the same time . . .

Webster's Third New International Dictionary (unabr. 1971).

A court must have a reference point to determine if words may reasonably admit of different meanings. Under a "four corners" approach a judge sits in chambers and determines from his point of view whether the written words before him are ambiguous. An alternative approach is for the judge to hear the proffer of the parties and determine if there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of differing meanings. We believe the latter to be the correct approach.

It is the role of the judge to consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning. The trial judge must then determine if a full evidentiary hearing is warranted. If a reasonable alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that [**22] interpretation should be considered by the fact finder. [12] See Corbin, Contracts § 542.

> 12 It is only by this approach that courts can achieve consistency in contract interpretation.
>
> The strict "four-corners" doctrine allows a court to sit in an isolated position and decide if words are "clear" or "ambiguous." Judges today come from a variety of backgrounds private law practice, government service, business, academia and their fields of experience represent an even wider variance. The parties who appear before the court in these times of complex commercial transactions come from a variety of specialized worlds of trade. It is the parties' linguistic reference that is relevant, not the judges'. The judge is in his or her linguistic field of expertise only when viewing words which lawyers have developed as terms of legal art. Even when the judge faces the need to interpret legal terms of art, extrinsic evidence and legal briefing are useful.

For example, a contract might provide for a party to pay "$ 10,000 for 100 ounces of platinum." A judge might state that the quoted words are so clear and unambiguous that parol evidence is not admissible to vary their meaning. That judge might never learn that the parties have a consistent past practice of dealing only in Canadian dollars and follow a standard trade practice of measuring platinum in troy ounces (12 to the pound instead of 16). This is because that judge's linguistic frame of reference includes the dollars and the ounces he or she encounters in daily life. That is not the linguistic frame of reference of the commercial parties.

There are many other examples which demonstrate the necessity of the approach we outline. A "pound" of caviar is always 14 ounces. One can readily see the difficulty counsel might have convincing a judge who never has eaten caviar that a "pound" can be 14 ounces. The case could also come before a judge who was a lifelong gourmet and consumer of caviar. To the gourmet judge it might be "clear and unambiguous" that a pound of caviar is 14 ounces. Similarly, in the lumber business a "two by four" is never really two inches by four inches, but somewhat smaller. The background of some judges might make them aware of this, the background of others might not. Following the approach we outline in this opinion a consistent result could be reached in each case the parties would be bound to the same meaning of the external signs of their intent. When the judge who knows only common usage is told that a specialized usage can be shown which is common to both parties, he will realize an ambiguity can exist and will admit evidence to determine the meaning by which the parties should be bound. Under a "four-corners" approach to the question of ambiguity, the result would depend on which judge heard the case.

[**23]

[*1012] An analysis of Pennsylvania cases demonstrates that this approach is in accord with practice in the Pennsylvania courts. [13] Accordingly we conclude that it [*1013] was proper for the court here to consider extrinsic evidence.

13 Confusion is often caused by the use of the term "ambiguous on its face." See *Merriam v. Cedarbrook Realty, Inc., 266 Pa.Super. 252, 404 A.2d 398, 401 (1978)*. A requirement of "facial ambiguity" might mean that a court should look exclusively at the "face" of a contract to determine if words are ambiguous. However, we are not aware of any cases where Pennsylvania courts have construed a writing, declared it unambiguous, and ruled that any consideration of an argument for ambiguity must be disregarded. Much to the contrary, many cases which hold words unambiguous do so only after an examination of circumstances and facts demonstrate that any variation of the words would be an impermissible rewriting of the contract. See e. g. *United Refining Co. v. Jenkins, supra; Merriam v. Cedarbrook Realty, Inc., 266 Pa.Super. 252, 404 A.2d 398, 401-402 (1978); Best v. Realty Management Corp., 174 Pa.Super. 326, 101 A.2d 438 (1955)*. Even given this approach, there will be cases where a claim of ambiguity is virtually impossible, and a failure to proffer an argument for ambiguity in the answer to pleadings or motions might be sufficient to allow a judge to declare terms unambiguous. There is no reason for a court to consider seriously a complaint or argument which seeks to mischaracterize an agreement. See e. g. *East Crossroads Center, Inc. v. Mellon-Stuart Company, 416 Pa. 229, 205 A.2d 865 (1965)*. However, the court must entertain the argument before it can be rejected. The judge should not abandon his legal expertise or knowledge of the English language. We only assert that the judge's own semantic expertise does not stand sacrosanct against a reasonable alternative semantic reference presented by the parties. If no "reasonable" alternative meanings are put forth, then the writing will be enforced as the judge reads it on its "face." See International Systems, Inc. v. Personnel Data Systems, slip. op. (Pa.Supreme Ct. Jan. 18, 1980).

An illuminating example of the approach of the Pennsylvania courts is the case of *United Refining Co. v. Jenkins, 410 Pa. 126, 189 A.2d 574 (1963)*. This case was divided into two parts, a suit on a note (United v. Jenkins) and a counterclaim on an oil sale contract (Jenkins v. United). The basis of the claim in United v. Jenkins was a note which provided:

December 31, 1957 after date I promise to pay the order of United Refining Company Ten Thousand Dollars . . with interest at 5 per cent per annum

The trial court had admitted extrinsic evidence on behalf of Jenkins to show that the sole source of payment of the note was to be proceeds from property involved in another agreement between United and Jenkins. Jenkins contended that the note was part and parcel of the oil sale agreement between United and Jenkins and that

therefore the proffered interpretation was a permissible interpretation of the note. The Pennsylvania Supreme Court ruled that this note was clear and unequivocal and could not be varied by parol evidence. "The contract is absolute and complete on its face and sufficiently comprehensive to embody the aim and object of the parties." *410 Pa. at 134, 189 A.2d at 578*, quoting *Speter v. Michelson, 303 Pa. 66, 70-71, 154 A. 127 (1931)*. Judgment was entered for United.

The basis of the counterclaim was the same oil purchase agreement which Jenkins had claimed was integrated with the note in United v. Jenkins; under this purchase agreement United agreed to purchase and Jenkins agreed to sell all the crude oil produced by Jenkins. The agreement provided that it was to continue in force "so long as there remains unpaid any indebtedness and interest thereon of (Jenkins) to (United)." Jenkins argued that the clause meant what it said that as long as a debt was outstanding, the agreement was in force. United argued that it would be irrational to construe the words in such a way that the obligation remained in effect even if the debts Jenkins owed United were in default. The Pennsylvania Supreme Court agreed with United and the counterclaim was dismissed. This cause was held to be ambiguous and was interpreted rationally in accord with all the circumstances and negotiations of the parties.

It is beyond argument that the clause in issue in the counterclaim by Jenkins was not ambiguous on its face. The words "so long as" have a clear meaning. The words "there remains unpaid" have no facial ambiguity. The meaning of the words "any indebtedness and interest thereon" were not in dispute. They referred to the note Jenkins owed United. It was this very note which the court ruled in United v. Jenkins was not "part and parcel" of the oil purchase plan, but a separate integrated contract. There were no facially inconsistent words in the contract. Why then did the court allow United to add the condition that made the clause which was written "so long as there remains unpaid any indebtedness and interest thereon of (Jenkins) to (United)" read "so long as there remains unpaid any indebtedness and interest thereon of (Jenkins) to (United) which is not in default"? The reasons are clear from an examination of external signs and objective indicia this was the only rational interpretation of the parties intent. The court had made detailed examination of the evidence offered on the claim and the counterclaim. The evidence on the counterclaim was so compelling that the inference was permissible. However, there was no similar evidence of a compelling nature presented by Jenkins in the action on the note. Interpretation of the note as written was not irrational.

[**24]

B.

But our approach does not authorize a trial judge to demote the written word to a reduced status in contract interpretation. Although extrinsic evidence may be considered under proper circumstances, the parties remain bound by the appropriate objective definition of the words they use to express their intent. Generally parties will be held to definitions given to words in specialized commercial and trade areas in which they deal. Similarly, certain words attain binding definition as legal terms of art. See e. g. Brockett v. Carnes, slip. op. (Pa.Super.Ct.Dec. 19, 1979). Dates, numbers and the like generally cannot be varied. See e. g. *O'Farrell v. Steel Piping Co., supra.* [14] For example, extrinsic evidence may be used to show that "Ten Dollars paid on January 5, 1980," meant ten Canadian dollars, but it would not be allowed to show the parties meant twenty dollars. Trade terms, legal terms of art, numbers, common words of accepted usage and terms of a similar nature should be interpreted in accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent. [15]

14 But see the "two by four" example given at note 12, supra.

[**25]

15 There could still be proof of fraud, duress, mistake or subsequent oral modification to vary the term used. See F. D. I. C. v. Barness, No. 78-100, slip op. at 20-21 (Pa.Super.Ct.Jan. 31, 1980). See note 9, supra.

We have concluded that the district court here exceeded the permissible boundary of interpretation. We believe its interpretation of insolvency was improperly restrictive. Commercial parties entered a Buy-Sell Agreement using a well defined commercial term and legal term of art "insolvent." The court rejected the test which we believe an attorney or commercial creditor would use to determine if the borrowers were insolvent in any other context, and instead substituted a test for insolvency which excluded certain liabilities of the borrowers. This variation of the written words used in the contract was not justified by the evidence received. When the district judge received Mellon's evidence it should have rejected it as insufficient to vary the meaning of a commercial term as well established as "insolvent." In this case the district court added a term which

made the condition [**26] a nullity. It ruled that, although the solvency of the borrowers was a condition [*1014] in the written contract, the fact that the borrowers' solvency was not significantly considered by Aetna in evaluating the take-out loan minimized or nullified this clause of the contract.

The condition that the borrowers not be insolvent was added by Aetna and retained in the contract over Mellon's protests. The fact that the insolvency of the borrowers was not significantly considered by Aetna in evaluating the take-out loan is immaterial given the expression of that concern in the written words of the contract. The fact that Aetna thought it bore some risk of default if the occupancy rate of the project fell too low was not sufficient to vary the normal commercial meaning of the word "insolvent." Of course Aetna bore some risk of default Aetna's funding obligation extended over a ten year period. There was no substantial evidence for Mellon's interpretation of the contract other than evidence tending to show that Aetna was not significantly concerned with the borrowers' solvency until they desired an "out" to excuse their obligation to purchase a loan which had become unsound. Fortunately [**27] for Aetna it retained that "out" in the Buy-Sell Agreement despite specific objections from Mellon. See Testimony of DeLuca, Record at 515a-518a. At best, Mellon's officers admitted that they knew the insolvency clause was adverse to Mellon's interests, but they didn't "really" know what it meant. Testimony of DeLuca, Record at 518a. Mellon's evidence was simply insufficient to vary the clear meaning of the commercial term "insolvent."

C.

Our holding the parties to a generally accepted commercial interpretation of the word "insolvency" in no way produces an irrational result. Aetna was to undertake the risk of a decline in the real estate market for ten years after it purchased the construction loan. Mellon was at risk of construction not being completed on time and within cost. The issue is who bore the risk that the borrowers' financial reserves could not carry the project from the date of the Buy-Sell Agreement to the closing on the permanent financing i. e. who bore the risk of a decline in the Atlanta real estate market from July of 1974 to August of 1975. It is not irrational to place that risk on Mellon, nor is it irrational to place it on Aetna. [16] Aetna inserted the insolvency [**28] clause in the commitment. Mellon demanded that the clause be excluded from the Buy-Sell Agreement. Aetna refused. When Mellon signed the agreement notwithstanding the inclusion of the clause, it became bound by the usual meaning of insolvency. This result is not irrational and therefore does not compel the alternative meaning of insolvency suggested by Mellon. Mellon cannot now insert an exception to the solvency condition. "Where one of two innocent persons must sustain a loss, the law will place that burden on the party that has agreed to sustain it." *F. J. Busse, Inc. v. Department of General Services, 47 Pa.Cmwlth. 539, 408 A.2d 578, 580 (1979).* See International Systems, Inc. v. Personnel Data Systems, slip. op. (Pa. Superior Ct., Jan. 18, 1980)

> 16 Mellon cannot deny that such a decline in real estate value was a risk it at least partially bore Mellon took a mortgage on the Kensington property as security for its construction loan.

Accordingly, we conclude that in determining the insolvency of the [**29] borrowers the district court must include all the assets and liabilities of the borrowers in applying both generally accepted commercial tests for insolvency. The notion of insolvency is measured both by a balance sheet showing all assets and liabilities and the test of whether one can meet current debts as persons engaged in a trade normally do. [17]

> 17 The issue is if the borrowers were solvent on the day the duty to fund would otherwise arise August 1, 1975. A determination of solvency requires a factual review of the borrowers' financial condition and the application of complex and sometimes conflicting accounting practices and valuation theories. Although the definition of solvency on the surface appears simple, the factual finding of its existence may present difficulties which should be resolved by the trial court.

[*1015] IV. THE LETTER OF AUGUST 15, 1975

We find it necessary to respond to Mellon's alternative argument that notwithstanding the presence of the insolvency clause in the contract, [**30] Aetna waived any defense based on this clause by its letter of August 15, 1975. We believe that the letter of August 15, 1975, and the borrowers' affidavits of solvency submitted in response to that letter do not establish a separate contract obligating Aetna to purchase the construction loan nor do they constitute a waiver of the condition that the borrowers not be insolvent at the time Aetna would otherwise become obligated to purchase the loan. We are unable to perceive how this letter could be construed as an offer by Aetna to waive any of Aetna's contractual rights under the insolvency clause. This very letter reasserted Aetna's rights under that clause, reminded the borrowers that their solvency was a required condition precedent to funding the permanent loan, and asked for "sworn statements" to assure Aetna that the condition was fulfilled. The letter never unequivocally stated that Aetna would fund the loan upon submission of the statements, but only that Aetna would "be in a position" to fund the loan. In the context of complex commercial dealings courts must be careful not to take single acts or isolated corre-

spondence out of the context of the entire situation and construe [**31] them as separate contracts or waivers of important contract rights unless such an intent is explicitly and clearly expressed.

When Aetna requested affidavits they were asking for sworn truthful statements of the borrowers' solvency [18] If the borrowers were insolvent when they signed affidavits swearing that they were solvent, then the return of those affidavits did not consummate a contract since the act of acceptance was not in conformity with the offer. If the affidavits were signed truthfully, then the letter and affidavits merely evidence that the condition of solvency was satisfied. [19] In reality, the letter of August 15 was an attempt by Aetna to determine if the insolvency condition was fulfilled.

> 18 As a matter of judicial integrity and public policy the court would not enforce a contract requiring submission of perjured affidavits. In any event, it could not be argued here that Aetna, when requesting "sworn" affidavits, wanted anything less than truthful statements.
>
> 19 We need not determine what the effect might be if the borrowers signed the affidavits truthfully but were unaware of their own insolvency. The cover letter returned with the letters makes clear that all parties were aware that the major borrower, Mr. Opp, could not meet his obligations in connection with the Kensington Square project.

[**32]

In addition, the cover letter which was returned with the affidavits and signed by the borrowers' attorney can be said to have derogated the contents of the affidavits. An acceptance must be unequivocal to be valid. In *Re ABC-Federal Oil and Burner Co., 182 F. Supp. 928 (E.D.Pa.1960)*, aff'd *290 F.2d 886 (3d Cir. 1961)*; *Hedden v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962)*.

V. MATERIAL ADVERSE CHANGE

The district court determined that the material adverse change clause was not a condition precedent to Aetna's obligation to buy the construction loan. First, the district court noted that paragraph four of the Buy-Sell Agreement contained an extensive list of conditions precedent to Aetna's obligations. The material adverse change clause was not in that paragraph. Normally this might be probative evidence that the material adverse change clause was not a condition precedent. However, the material adverse change clause was in a totally different document, which preceded the Buy-Sell Agreement. The material adverse change clause was contained in the Loan Application, which in turn became part of the Permanent Commitment, which as previously noted, became part of the Buy-Sell Agreement [**33] by incorporation. Therefore, the fact that such a clause was not in paragraph four of the Buy-Sell Agreement does not by itself support the district court's conclusion that the material adverse change clause was not a condition precedent to Aetna's obligation. The insolvency [*1016] condition also was not in paragraph four, but in the Permanent Loan Commitment.

The district court also held that the insolvency clause was not a condition precedent to Aetna's obligation based on the language of the clause. The clause stated:

> If the application is approved, we (the borrowers) agree to the following: . . . we (the borrowers) will furnish evidence satisfactory to you (Aetna) at the date of funding that there has been no material adverse change in our financial or other condition. . .

Record at 29a.

The rule in Pennsylvania is that a condition precedent to an obligation must be expressed by clear language or it will be construed as a promise or covenant. Language not clearly written as a condition precedent is presumed not to be, unless the contrary clearly appears to be the intention of the parties. *Britex Waste Co. v. Nathan Schwab and Sons, 139 Pa.Super. 474, 12 A.2d* [**34] *473 (1940)*; Potts Mfg. Co. v. Loffredo, 96 Dauph. 413 (Ct. of Common Pleas), aff'd, *235 Pa.Super. 294, 340 A.2d 468 (1974)*; Sharp v. McKelvey, 57 Lanc.Rev. 377, exceptions dismissed, 57 Lanc.Rev. 391, aff'd *196 Pa.Super. 138, 172 A.2d 580 (1961)*. We hold that it was not error for the district court to construe the material adverse change clause as a promise of the borrowers, and as consideration for Aetna's promise and not a condition precedent to Aetna's obligation. It was also not error for the district judge to hold that this clause was fulfilled. Aetna required no more information than they received, and expressed no dissatisfaction with this information. Aetna added the insolvency/bankruptcy condition in the acceptance of the application which already contained the material adverse change clause. It is a rational interpretation to view the insolvency clause as addressing Aetna's concerns about the borrowers' financial condition because it viewed the material adverse change clause as insufficient to cover the same potential problems. The material adverse change clause was the procedural way Aetna was to receive information about the financial status of the borrowers. Unless the [**35] borrowers and Mellon were in substantial noncompliance with their obligations under the Buy-Sell Agreement/Permanent Loan Commitment, Aetna was limited

to the insolvency condition as a ground for refusing to purchase the construction loan.

VI. CONCLUSION

On remand the district court should place the burden of proof on Mellon to establish the condition precedent that the borrowers were not insolvent as of August 1, 1975. The district court should include the liabilities of the Kensington Square project in deciding whether or not the borrowers were then insolvent. Aetna's letter of August 15, 1975, and the response thereto do not constitute a valid waiver of the condition precedent nor do they create a separate contract obliging Aetna to purchase the construction loan. [20]

20 We need not reach the issue of Mellon's entitlement to prejudgment interest.

The judgment of the district court will be vacated and the cause remanded for proceedings consistent with the foregoing.

SA333

LEXSEE 461 F.2D 1036

SUPERIOR BUSINESS ASSISTANCE CORPORATION, Defendant-Appellant, v. UNITED STATES of America, Defendant-Appellee

No. 71-1671

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

461 F.2d 1036; 1972 U.S. App. LEXIS 8922; 72-2 U.S. Tax Cas. (CCH) P9617; 29 A.F.T.R.2d (RIA) 1428

June 19, 1972

DISPOSITION: [**1] Reversed.

JUDGES: Lewis, Chief Judge, and Kilkenny * and Doyle, Circuit Judges.

* Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION BY: KILKENNY

OPINION

[*1037] KILKENNY, Circuit Judge:

This is an appeal from a summary judgment granted in a suit to quiet title to certain real property and in an ancillary proceeding to determine whether the United States or appellant, Superior Business Assistance Corporation, has the first right to the sum of $3,000.13, now being held by the plaintiff [1] in the suit to quiet title. The proceeding originated [**2] in the Oklahoma state court and was removed to the district [*1038] court for the Western District of Oklahoma, pursuant to *28 U.S.C. § 1444*. The district court held that the United States was entitled to the fund. We reverse.

[1] Central Management, Inc.

FACTS

Appellant obtained a judgment against Victor Wickersham in the district court of Oklahoma County, Oklahoma on July 26, 1967. The judgment was properly filed and docketed in the district court of Cleveland County, Oklahoma, on October 4, 1967. The United States filed its notice of tax lien with the County Clerk of Cleveland County on March 28, 1968.

Previously, on February 24, 1966, Wickersham and others entered into what was designated a "Joint Venture Agreement" with reference to the purchase and sale of a parcel of real property in Cleveland County. Under the terms of this agreement, Wickersham was to receive 10% of the profit upon the sale of the land. Plaintiff acquired title to the real property owned by the [**3] joint venture on February 2, 1970, and commenced this suit to resolve the dispute between appellant and appellee. The total net profit of the venture was $30,001.34. Consequently, Wickersham's share would be $3,000.13.

ISSUE

Although a place was provided on the last page of the Joint Venture Agreement for Wickersham's signature, the copy of the instrument before us was not signed by him. However, it is clear from the terms of the agreement and the parties agree, that he had some type of an interest, the issue being whether the interest was in the real property or a mere chose in action to collect his percentage of the fund. The appellant contends that the interest was in real property and subject to its judgment lien, while the United States argues that appellant's interest was nothing more than a chose in action.

CONCLUSIONS

While federal law determines the priority of competing liens on property to which a tax lien has attached, state law determines the extent of the taxpayer's property rights to which the lien can attach. *Aquilino v. United*

States, 363 U.S. 509, 80 S. Ct. 1277, 4 L. Ed. 2d 1365 (1960). [**4]

2 *26 U.S.C. § 6321, 26 U.S.C. § 6323(a), (f).*

Under Title *12. Oklahoma Statutes Annotated, § 706*, a judgment becomes a lien upon real property of the judgment debtor in the county where the judgment was rendered and in any other county where the judgment was filed and docketed of record. There is no judgment lien on personal property, such as a chose in action, until such time as the judgment creditor succeeds in levying execution upon specific property. See *Burchfield v. Bevans, 242 F.2d 239 (10th Cir. 1957).*

The Wickersham interest, here under scrutiny, is clearly outlined in Paragraph VII of the Joint Venture Agreement.

3 * * *

"VII

It is further agreed by and between the joint venturers that for and in consideration of services previously rendered and other good and valuable consideration received, *Victor Wickersham shall be entitled to and receive a percentage of the net profits of this joint venture operation so that therefore the joint venturers shall share in the net profits of the joint venture in accordance with the following 'percentage of net profits participation schedule':*

Victor Wickersham	10%
W. F. Parrish, Jr.	15%
James F. Freeman	22 1/2%
Floyd J. Freeman	30%
Freeman Enterprises, Inc.	22 1/2%"

* * *

"That all gains, profits and increases from or by reason of the said joint venture shall be divided in accordance with the 'percentage of net profits participation schedule' set forth hereinabove. . . ."

* * *

"This agreement shall be construed with the laws of the State of Oklahoma and Uniform Partnership Act contained in the laws of the State of Oklahoma." (Emphasis supplied.)

* * *

[**5] [*1039] That the parties intended to give Wickersham an equitable interest in the real property is demonstrated beyond question by Paragraph II of the agreement.

4 * * *

"II

That for the convenience and expendiency of the business of this joint venture, Floyd J. Freeman holds title to the property owned by this joint venture in his name solely, but that *each joint venturer hereto does have an equitable interest in said property in accordance with the 'percentage of net profits participation schedule' hereinafter set forth*, and that Floyd J. Freeman holds title to the subject property as trustee and for the benefit of the joint venturers hereto in accordance with said 'percentage of net profits participation schedule' . . ." (Emphasis supplied.)

* * *

Of particular significance is the fact that the agreement in defining Wickersham's interest used the technical words "equitable interest". In the [**6] absence of explicit language showing a contrary intent, technical words must be given their usual technical meaning. *Barber v. Gonzales, 347 U.S. 637, 74 S. Ct. 822, 98 L. Ed. 1009 (1954).* The laws of Oklahoma subsisting at the time and place of making of the agreement, entered into and formed a part of it as if they were expressly referred to or incorporated in its terms. *Wood v. Lovett, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404 (1941); Meyer v. City of Eufaula, 154 F.2d 943 (10th Cir. 1946).* Words used in a writing, which had at the time a well known meaning in the law, are to be employed in that sense unless the context clearly requires a contrary result. *Keck v. United States, 172 U.S. 434, 19 S. Ct. 254, 43 L. Ed. 505 (1899).* In other words, it is our duty to construe the contract so as to effectuate the manifest intention of the parties and to give life and vitality to the language the parties have

used to express their agreement. [**7] *Tenneco Oil Co. v. Gaffney, 369 F.2d 306 (10th Cir. 1966)*; *United States v. Continental Oil Co., 237 F. Supp. 294 (W.D.Okla.1964)*, aff'd. *364 F.2d 516 (10th Cir. 1966)*.

An equitable interest in real property has long been recognized by the Oklahoma courts. *Guaranty State Bank v. Pratt, 72 Okl. 244, 180 P. 376 (1919)*; *Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947)*, and *Youngs v. Case, 341 P.2d 572 (Okl.1959)*.

Youngs v. Case, supra, is of particular significance. The case was decided many years prior to the execution of the joint venture contract now before us. There, an attorney rendered legal services to another in connection with the purchase of eighty acres of land located in the state of Oklahoma. The attorney agreed to render his client additional legal services as might be required until the land was disposed of by the seller and, as compensation for his services rendered and to be rendered, the parties agreed that the attorney should receive one-half of the net income from the [**8] land until disposed of and one-half of the profit made thereon when sold. The court held that this transaction constituted a joint venture and that an equitable interest was created in the attorney, permitting him to prosecute an action to quiet title under Title *12, Oklahoma Statutes Annotated, § 131*. Additionally, the court there held that an agreement, express or implied, to share losses is not essential to the validity of a joint venture in cases where one party furnishes the money and the other party service. *341 P.2d at 576*.

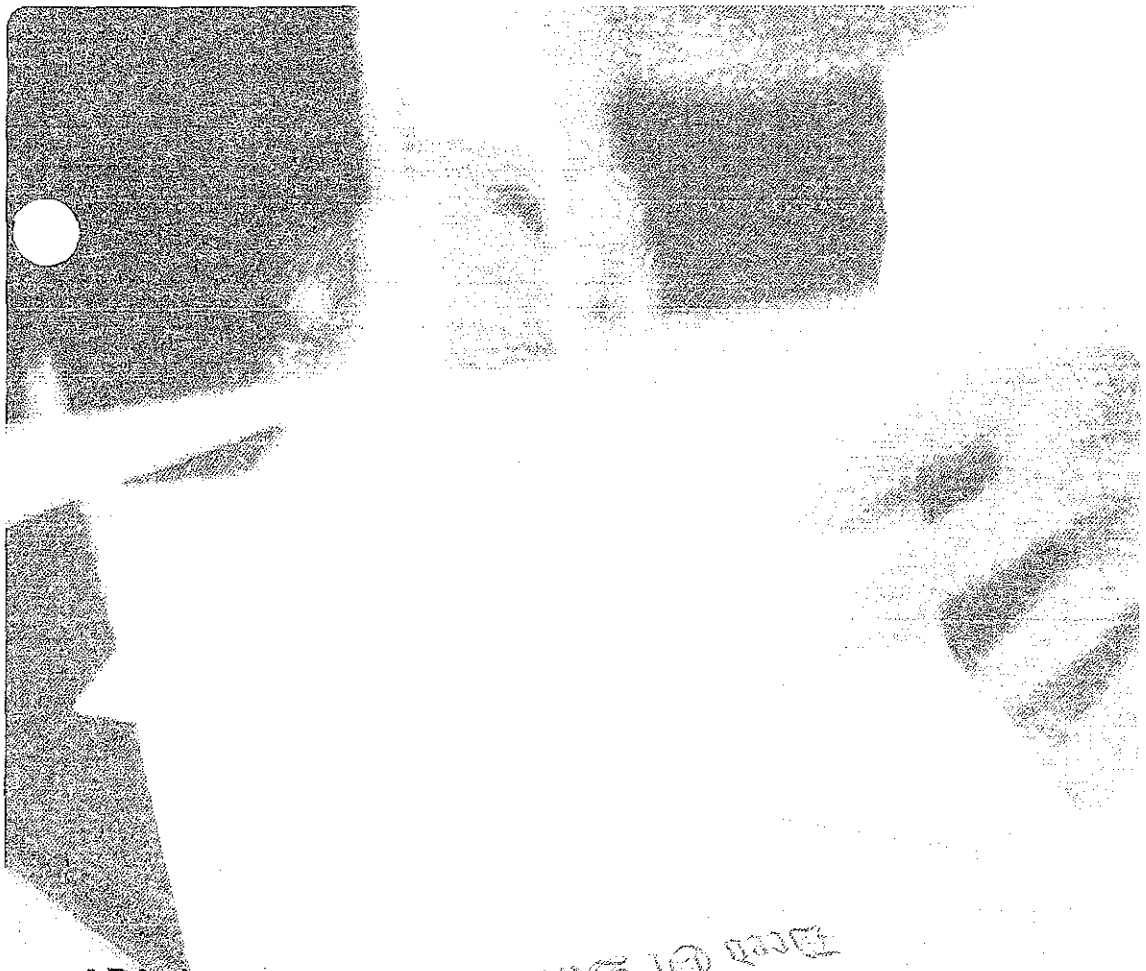
In the light of the language of the agreement and of the law of the state of Oklahoma as expressed in the foregoing cases, we have no alternative but to hold that Wickersham had an equitable interest in the real property of the joint venture at the time of the filing and docketing of the judgment in Cleveland County and that appellant had [*1040] a valid judgment lien against such interest long prior to the filing of the appellee's tax lien on March 28, 1968. Accordingly, we reverse the judgment of the lower court and direct that the fund [**9] here in dispute be paid to the appellant, rather than to the appellee.

Reversed.

EXHIBIT 3

VALUING A PRACTICE:

A GUIDE FOR DENTISTS



- Critical Valuation Issues
- Buying a Practice vs. Starting a Practice
- Legal and Tax Issues

ADA American Dental Association®

SA338

Be sure the valuator can differentiate between practice or personal-related items. For example, insurance expense may have included premiums for health insurance covering the dentist and his or her family as well as premiums that cover the staff

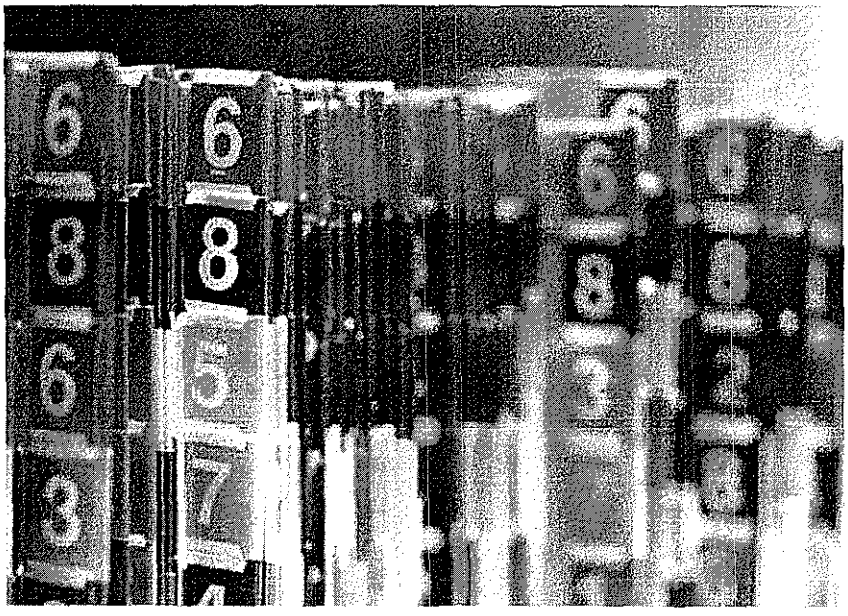
11 If the valuation relates to only a portion of a practice and the buyer is to enter a partnership or expense-sharing arrangement with the seller, a copy of this arrangement or a description of the specific details of this arrangement should be provided. It is extremely difficult, if not impossible, to determine the fair market value for a portion of a practice unless the post buy-in structure and financial arrangements are known

PATIENT AND SERVICE INFORMATION

1. Total number of active patients and a breakdown as to whether these patients are assigned to specific dentists who will remain after the sale. As defined by the 1991 House of Delegates in Resolution 30H (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II - patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty-four (24) months. It should be noted, however, that many dental practice appraisers consider an active patient as someone who has been seen in the past 12-18 months and, to the dentist's knowledge, is still living in the area. They do not consider individuals who were seen for one-time emergency treatment as active patients. Typically, practice appraisers concentrate on this definition of an active patient in their valuation.
2. Number of new patients per month in each of the past three years and year-to-date for present year. A new patient is one who has become a patient of record. A patient of record is someone who has been examined by a dentist, has had a medical and dental history completed and evaluated by a dentist and has had his or her oral condition diagnosed and a treatment plan developed by a dentist
3. Number of monthly patient visits for the practice and for each dentist and hygienist for the past three years and year-to-date for the present year.
4. A demographic profile of active patients (i.e., age, percentage with dental insurance)
5. A description of any special contractual relationships with patient groups, employers or insurance companies, including PPOs, IPAs or capitation programs and dates when these contracts expire.
6. Percentage distribution of the types of services or procedures that have been provided in the practice for the past three years.

EXHIBIT 4

Dental Records



American Dental Association
www.ada.org

Council on Dental Practice
Division of Legal Affairs

Seven out of ten dentists are members of the ADA.

2007

Color Coding
Many dental offices use a color-coded filing system for patient record files. Color-coded labels—usually the first two letters of the patient's last name and active date of treatment—are placed on the patient's file. This can help make record retrieval fast and easy.

Active and Inactive
Most offices have two categories of patient records files: 1) Active and 2) Inactive.

Active files hold the records of patients currently having their dental care provided by the practice. Inactive patients are considered to be those who have not returned for 24 months. Keep files of active patients on-site. These records should be conveniently located in the office.

Inactive files hold the records of patients who have been treated in the office in the past but are not currently under care in the office. These files are generally located in the office, but in a remote area.

As defined by policy of the American Dental Association, (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months.

The above definition is typically used in practice appraisals and may not be the same definition of an active patient used in a dental office in records maintenance.

A system should be established in your office to identify a change from active to inactive status on a timely basis. All records, active and inactive, should be maintained carefully to be certain that they are not destroyed or lost.

Content of the Dental Record

The information in the dental record should primarily be clinical in nature. The record includes a patient's registration form with all the basic personal information.

The dental team should be very meticulous and thorough in the dental office recordkeeping tasks. All information in the dental record should be clearly written, and the person responsible for entering new information should sign and date the entry. The information should not be ambiguous or contain many abbreviations. In practices with more than one dental practitioner, the identity of the practitioner rendering the treatment should be clearly noted in the record.

All entries in the patient record should be dated, initialed and handwritten in ink and/or computer printed. While no specific color of ink is required, any copy of the record should be easy to read. Handwritten entries should be legible. If a mistake is made, do not correct it with "white-out." A single line should be drawn through the incorrect info, the new corrected info added, and again, the entry should be signed and dated.

The following are examples of what is typically included in the dental record:

- database information, such as name, birth date, address, and contact information
- place of employment and telephone numbers (home, work, mobile)
- medical and dental histories, notes and updates
- progress and treatment notes
- conversations about the nature of any proposed treatment, the potential benefits and risks associated with that treatment, any alternatives to the treatment proposed, and the potential risks and benefits of alternative treatment, including no treatment,
- diagnostic records, including charts and study models
- medication prescriptions, including types, dose, amount, directions for use and number of refills
- radiographs
- treatment plan notes
- patient complaints and resolutions

EXHIBIT 5

Guide to Closing a Dental Practice

Contains sample letters and tips to close a dental practice at retirement or in the event of a dentist's long-term illness or death

ADA American Dental Association®
America's leading advocate for oral health

SA344

Endnotes

[i] Publication 538 "Starting a business and keeping records," Internal Revenue Service, Jan 2007.
[ii] McGill, John, MBA, JD, CPA, How long should you keep your business records, Journal of Clinical Orthodontics, May 2003.
[iii] Paoloski, Susana, DDS, "When is it safe to pitch office papers," Journal of the Greater Houston Dental Society, Sept 2002.
[iv] Presavento & Pesavento, LTD, CPAs, "Records retention schedule," Collier, Sarner and Assoc Newsletter, Berwyn, IL, May 15, 2005.
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[vii] Proper Disposal of Prescription Drugs, www.whitehousedrugpolicy.gov, accessed Sept. 10, 2008.
[viii] Practitioner's Manual, An Informational Outline of the Controlled Substance Act, United States Department of Justice, Drug Enforcement Administration, Office of Diversion Control, 2006 Edition.
[ix] Wikipedia, http://en.wikipedia.org/wiki/Hospice#Concept, accessed August 26, 2008.
[x] Wikipedia, http://en.wikipedia.org/wiki/Durable_power_of_attorney, accessed August 26, 2008.
[xi] ADA Policy, (Trans. 1991:621),; As defined by policy of the American Dental Association, (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months.

The above definition is typically used in practice appraisals and may not be the same definition of an active patient used in a dental office in records maintenance.

[xii] American Dental Association, "Tips For Evaluating Information On The Internet," http://www.ada.org/sections/newsAndEvents/pdfs/tips.pdf, accessed August 29, 2008.

EXHIBIT 6

ADA American Dental Association®

America's leading advocate for oral health

Current Policies

Adopted
1954-2009

side, and following that arch to the terminus of the lower jaw, the lower right third molar (32).

Supernumerary teeth are identified by the numbers 51 through 82, beginning with the area of the upper right third molar, following around the upper arch and continuing on the lower arch to the area of the lower right third molar (e.g., supernumerary #51 is adjacent to the upper right molar #1; supernumerary #82 is adjacent to the lower right third molar #32).

Primary Dentition

Consecutive upper case letters (A-T), in the same order as described for permanent dentition should be used to identify the primary dentition.

Supernumerary teeth are identified by the placement of the letter "S" following the letter identifying the adjacent primary tooth (e.g., supernumerary "AS" is adjacent to "A"; supernumerary "TS" is adjacent to "T").

International Standards Organization (ISO) TC 106 Designation System for Teeth and Areas of the Oral Cavity

Designation of Areas of the Oral Cavity

The oral cavity is designated by a two-digit number where at least one of the two digits is zero, as follows:

00 designates the whole of the oral cavity
01 designates the maxillary area
02 designates the mandibular area
10 designates the upper right quadrant
20 designates the upper left quadrant
30 designates the lower left quadrant
40 designates the lower right quadrant
03 designates the upper right sextant
04 designates the upper anterior sextant
05 designates the upper left sextant
06 designates the lower left sextant
07 designates the lower anterior sextant
08 designates the lower right sextant

Designation of Teeth

Teeth are designated by using a two-digit code. The first digit of the code indicates the quadrant and the second indicates the tooth in this quadrant:

a. First digit (quadrant)

Digits 1-4 are used for quadrants in the permanent dentition and digits 5-8 for those in the deciduous dentition, clockwise from the upper right quadrant.

b. Second digit (tooth)

Teeth in the same quadrant are designated by the second digit 1-8 (1-5 in the deciduous dentition); this designation is from the median line in a distal direction.

Active and Inactive Dental Patients of Record (1991:621)

Resolved, that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms "active" and "inactive" dental patients of record apply:

Active Dental Patient of Record: An active dental patient of record is any individual in either of the following two categories: Category I—patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II—patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.

Inactive Dental Patient of Record: An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

Individual Practice Association (1990:540)

Resolved, that the following definition of Individual Practice Association be adopted:

A legal entity organized and governed by individual participating dentists for the primary purpose of collectively entering into contracts to provide dental services to enrolled populations.

Medically Necessary Care (1990:537)

Resolved, that the following definition of "medically necessary care" be adopted:

Medically necessary care means the reasonable and appropriate diagnosis, treatment, and follow-up care (including supplies, appliances and devices) as determined and prescribed by qualified, appropriate health care providers in treating any condition, illness, disease, injury or birth developmental malformations. Care is medically necessary for the purpose of: controlling or eliminating infection, pain and disease;

EXHIBIT 7

ADA American Dental Association®

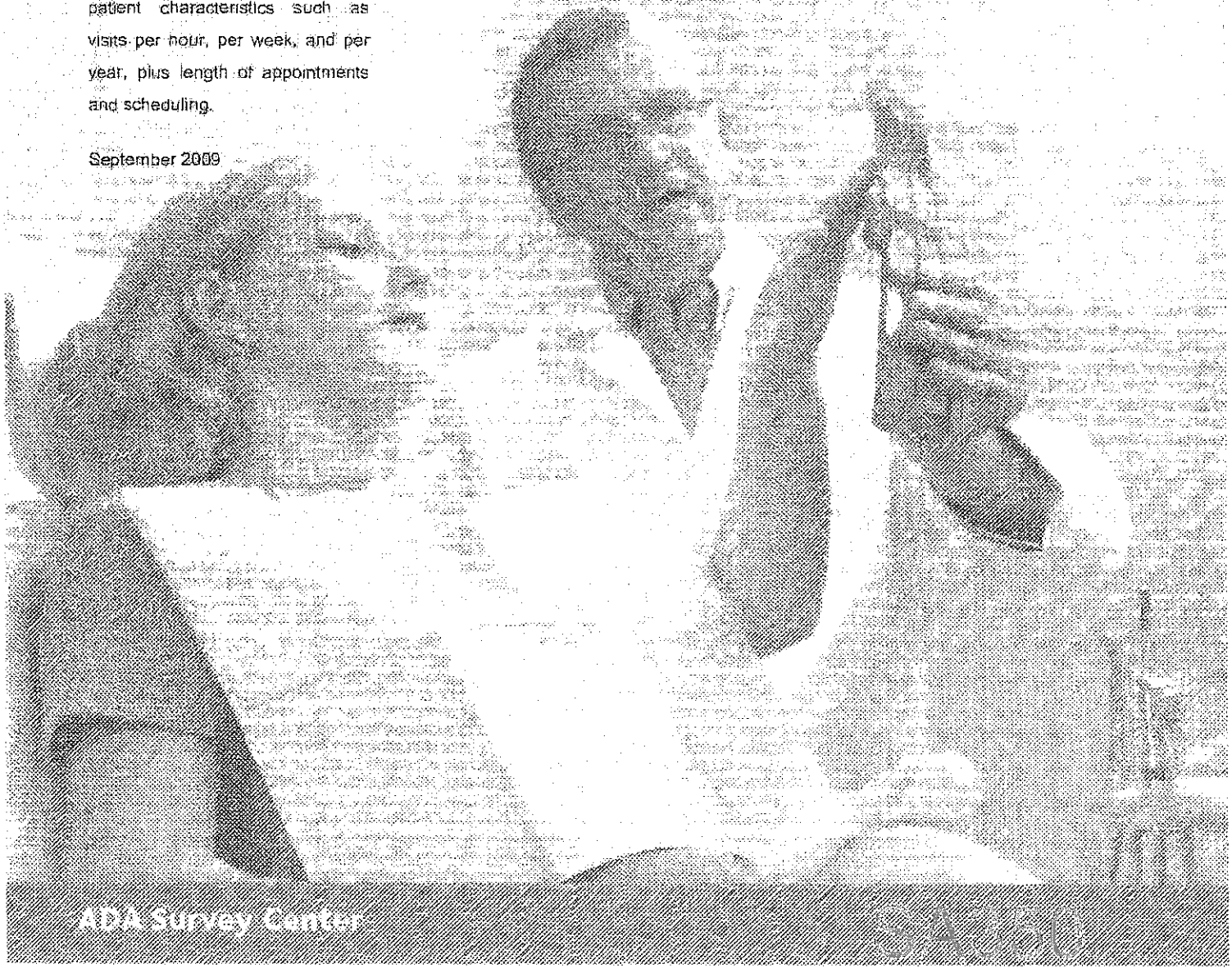
2008 Survey of Dental Practice

Characteristics of Dentists in Private Practice and Their Patients

Dental Practice

Personal and professional characteristics of dentists in private practice, including employment status, practice hours and size, and number of operatories, along with patient characteristics such as visits per hour, per week, and per year, plus length of appointments and scheduling.

September 2009



ADA Survey Center

Dentists were asked for the number of active patients currently on record in their primary practice. (Most independent dentists, 96.3%, defined active patients as those treated within the last 12 to 24 months.) General practitioners' practices had an average of 2,354.5 patients while specialists' practices had an average of 2,090.5. (See Table 56 and Figure 35.)

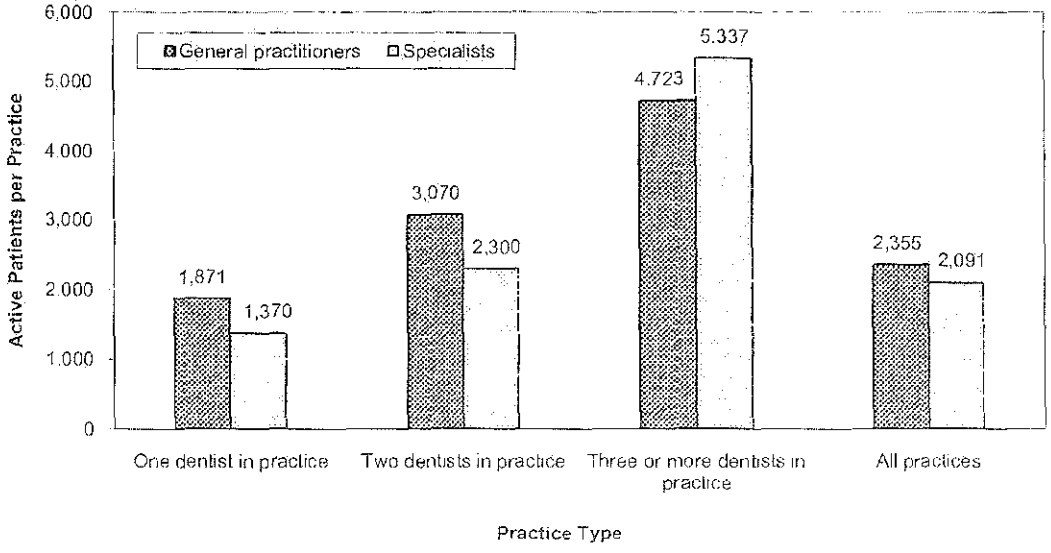
Among all independent dentists' primary practices, the average number of patients varied with the number of dentists in the practice. Practices with one dentist averaged 1,798.3 active patients on record, practices with two dentists averaged 2,951.6 patients, and practices with three or more dentists averaged 4,861.9 patients.

Table 56: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Dentists, 2007

Type of Practice	*Mean*	*1st Q*	*Median*	*3rd Q*	*S.D.*	*N*
General Practitioners						
One dentist in practice	1,871	1,100	1,700	2,500	1,030	587
Two dentists in practice	3,070	1,800	2,500	4,000	2,028	168
Three or more dentists in practice	4,723	2,550	4,000	5,300	3,686	69
All Independent	2,355	1,200	2,000	3,000	1,858	824
Specialists						
One dentist in practice	1,370	400	900	2,000	1,338	262
Two dentists in practice	2,300	748	1,500	3,226	1,958	80
Three or more dentists in practice	5,337	2,000	4,500	7,000	4,909	53
All Independent	2,091	500	1,200	2,900	2,628	395
All Independent (Weighted)						
One dentist in practice	1,798	1,000	1,500	2,400	1,123	849
Two dentists in practice	2,952	1,500	2,500	4,000	2,077	248
Three or more dentists in practice	4,862	2,460	4,000	5,637	3,893	122
All Independent	2,314	1,140	2,000	3,000	2,039	1,219

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice.*

Figure 35: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Dentists, 2007



Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice.*

Dentists were asked for the number of active patients currently on record in their primary practice. (Most solo dentists, 95.9%, defined active patients as those treated within the last 12 to 24 months.) Solo general practitioners' practices had an average of 1,871.4 patients while solo specialists' practices had an average of 1,369.8. (See Table 65.)

Table 65: Number of Active Patients per Practice, Solo Dentists, 2007

Type of Practice	*Mean*	*1st Q*	*Median*	*3rd Q*	*S.D.*	*N*
General Practitioners	1,871	1,100	1,700	2,500	1,030	587
Specialists	1,370	400	900	2,000	1,338	262
All Solo (Weighted)	1,798	1,000	1,500	2,400	1,123	849

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice.*

In 2007, the average length of a patient's appointment with a solo dentist was 49.0 minutes. The average length of an appointment was longer among solo general practitioners than solo specialists, 50.6 minutes compared to 41.8 minutes. A typical patient visited a solo dentist, on average, 3.7 times per year. Patients of solo specialists averaged 5.4 visits annually, while solo general practitioners' patients averaged 3.3 visits per year. (See Table 66.)

Table 66: Appointment Length and Annual Number of Visits among Solo Dentists, 2007

	General Practitioners			*Specialists*			*All Solo (Weighted)*		
	Mean	*S.D.*	*N*	*Mean*	*S.D.*	*N*	*Mean*	*S.D.*	*N*
Appointment length in minutes	50.6	14.8	719	41.8	22.6	418	49.0	16.8	1,137
Annual number of visits	3.3	1.2	689	5.4	4.0	403	3.7	2.2	1,092

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice.*

Dentists were asked for the number of active patients currently on record in their primary practice. (Most independent nonsolo dentists, 97.2%, defined active patients as those treated within the last 12 to 24 months.) General practitioners' practices had an average of 3,551.1 patients while specialists' practices had an average of 3,510.2. (See Table 74 and Figure 48.)

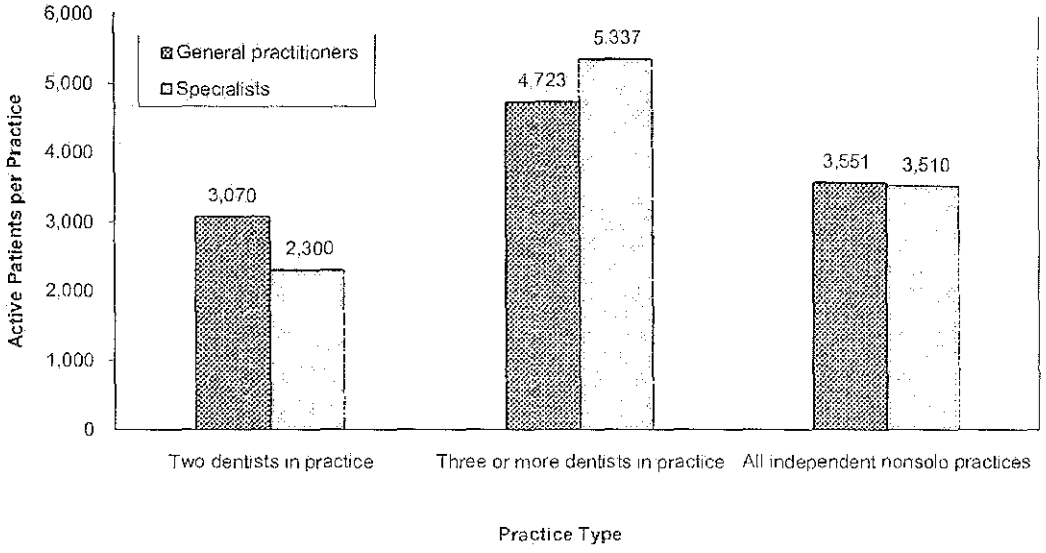
Among all independent nonsolo dentists' primary practices, the average number of patients varied with the number of dentists in the practice. Practices with two dentists averaged 2,951.6 patients, and practices with three or more dentists averaged 4,861.9 patients.

Table 74: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Nonsolo Dentists, 2007

Type of Practice	*Mean*	*1st Q*	*Median*	*3rd Q*	*S.D.*	*N*
General Practitioners						
Two dentists in practice	3,070	1,800	2,500	4,000	2,028	168
Three or more dentists in practice	4,723	2,550	4,000	5,300	3,686	69
All independent nonsolo	3,551	2,000	3,000	4,500	2,719	237
Specialists						
Two dentists in practice	2,300	748	1,500	3,226	1,958	80
Three or more dentists in practice	5,337	2,000	4,500	7,000	4,909	53
All independent nonsolo	3,510	1,000	2,800	4,600	3,744	133
All Independent Nonsolo (Weighted)						
Two dentists in practice	2,952	1,500	2,500	4,000	2,077	248
Three or more dentists in practice	4,862	2,460	4,000	5,637	3,893	122
All independent nonsolo	3,544	1,800	2,900	4,500	2,941	370

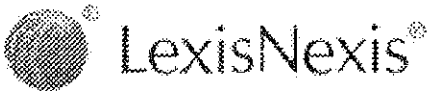
Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

Figure 48: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Nonsolo Dentists, 2007



Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

EXHIBIT 8



Cited
As of: Feb 01, 2011

DOMINIC WENZELL, D.M.D. P.C., Appellant, v. GUY INGRIM, D.M.D., Appellee.

Supreme Court No. S-13347, No. 6469

SUPREME COURT OF ALASKA

228 P.3d 103; 2010 Alas. LEXIS 39

April 9, 2010, Decided

PRIOR HISTORY: [**1]
Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sharon Gleason, Judge. Superior Court No. 3AN-07-9282 CI.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A grant of summary judgment based upon contract interpretation is subject to de novo review. Drawing all reasonable inferences in favor of the nonmoving party, the Alaska Supreme Court will uphold summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Summary judgment is improper when the evidence before the superior court establishes a factual dispute as to the intent of the contracting parties.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN2] Covenants are construed to effectuate the parties' intent. Clear and unambiguous language should be accorded its plain meaning. Where language is ambiguous, extrinsic evidence of surrounding circumstances and usage may be admitted to aid in determining the intent of the parties and resolve the ambiguity. A restrictive covenant ancillary to the sale of a business is construed liberally not to favor either party.

Contracts Law > Contract Interpretation > General Overview
Healthcare Law > Business Administration & Organization > Licenses > General Overview
[HN3] The general rule of law is that a contract may be interpreted by the general and accepted usage of the trade or business involved. Thus, the term "practice of dentistry" should be given its common industry definition. The American Dental Association defines "dentistry" as the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body.

Healthcare Law > Business Administration & Organization > Licenses > General Overview
[HN4] Alaska law provides that one engages in the "practice of dentistry" who evaluates, diagnoses, treats,

or performs preventative procedures related to diseases, disorders, or conditions of the oral cavity, maxillofacial area, or adjacent and associated structures, *Alaska Stat. § 08.36.360.*

Healthcare Law > Business Administration & Organization > Licenses > General Overview

[HN5] *Alaska Stat. § 08.36.350(a)* provides that the statutory chapter on dentistry applies to a person who practices dentistry in the state except a dentist in the employ of the Alaska Native Service.

Healthcare Law > Business Administration & Organization > Licenses > General Overview

[HN6] The statutory provision of *Alaska Stat. § 08.36.350(a)* does not suggest that a dentist at the Alaska Native Medical Center is not engaging in the "practice of dentistry"; instead, it exempts an Alaska Native Service dentist from all provisions of the chapter on dentistry, including licensing requirements, disciplinary actions, and statutory definitions. It is precisely because a dentist in the employ of the Alaska Native Service is practicing dentistry that it is necessary to exempt him or her from the otherwise applicable statutory provisions.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN7] In the typical case, where a party seeks to enforce a covenant not to compete against a person who opens a for-profit practice or accepts private employment, a court need not inquire into the presence of competition; it can be presumed. A plaintiff can prove a breach of the covenant by showing that the challenged conduct falls within the category of prohibited activity and occurred within the geographic scope and duration of the covenant. In the rare instance where a party is attempting to enforce a covenant not to compete against a person employed by a federally-funded non-profit organization that provides free or low-cost health care services, competition will not be presumed and must be proven.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN8] The enforceability of a covenant not to compete is a question of law to be decided by the court after a factual inquiry into the relevant factors.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN9] Non-competition agreements are disfavored in the law as restraints upon trade and because they impose hardships upon individuals seeking to earn a livelihood. Such agreements may be ancillary to an employer-employee agreement or, as in this case, to the sale of a business. The enforceability of a non-competition agreement ancillary to the sale of a business is an issue of first impression in Alaska. Unlike covenants not to compete ancillary to employment contracts, which are scrutinized with particular care because they are often the product of unequal bargaining power, this level of scrutiny is not applied to covenants ancillary to the sale of a business because the contracting parties are more likely to be of equal bargaining power.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN10] According to the *Restatement (Second) of Contracts §§ 186, 188,* a covenant not to compete is unenforceable on grounds of public policy if it unreasonably restrains trade, either because: (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. In the context of covenants not to compete ancillary to the sale of a business, the Restatement describes the "promisee's legitimate interest" as the "value of the good will that he has acquired" in the purchase of the business. When determining the enforceability of a covenant not to compete ancillary to the sale of a business, a court must therefore consider whether the restriction bargained for is no greater than is needed to protect the goodwill the purchaser has acquired in the business and, if so, whether the purchaser's need to protect that goodwill outweighs the hardship to the seller and likely injury to the public. A similar test has been adopted in numerous jurisdictions, and the Alaska Supreme Court adopts it in Alaska.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

[HN11] Although a court should generally examine whether a covenant not to compete is enforceable only after determining that it was breached, it is within the

superior court's discretion on remand to assume a breach and address the enforceability of the covenant first.

Contracts Law > Remedies > Liquidated Damages

[HN12] The validity of a liquidated damages clause is to be decided by the court, which will consider whether the facts of the case satisfy the liquidated damages test.

COUNSEL: David A. Devine and Sarah A. Badten, Groh Eggers, LLC, Anchorage, for Appellant.

Susan D. Mack and Blake H. Call, Call, Hanson & Kell, P.C., Anchorage, for Appellee.

JUDGES: Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Eastaugh, Justice, not participating.].

OPINION BY: FABE

OPINION

[*104] FABE, Justice.

I. INTRODUCTION

Dominic Wenzell purchased a private dental clinic in Anchorage from Guy Ingrim. [*105] The purchase agreement included a "Covenant Not to Compete" prohibiting Ingrim from the "practice of dentistry" within fifteen miles of his old clinic for two years and within ten miles for an additional three years. One year after the sale, Ingrim began employment as a dentist at the Alaska Native Medical Center (ANMC), two miles away from the clinic. Wenzell sued in superior court for breach of the covenant not to compete. The superior court found as a matter of law that Ingrim's employment at ANMC did not constitute the "practice of dentistry" and granted summary judgment in Ingrim's favor, dismissing the lawsuit. Although we conclude that Ingrim's employment [**2] at ANMC does constitute the "practice of dentistry" and vacate the superior court's grant of summary judgment, we remand the case to the superior court to determine whether Ingrim's employment at ANMC violates the covenant not to compete.

II. FACTS AND PROCEEDINGS

A. Facts

Wenzell and Ingrim are both professional dentists licensed to practice dentistry in Alaska. In 2005 Ingrim retained a broker to assist him in the sale of his Anchorage dental practice, Turnagain Dental Clinic. He began negotiations with Wenzell, who signed a Letter of Intent/Pre-Agreement in February 2006 to purchase Ingrim's practice. Wenzell offered $ 500,000 and proposed a "Restrictive Covenant" that would "restrict Dr. Guy Ingrim from practicing dentistry within a 30 mile radius [from Turnagain Dental Clinic] for a period of five years." After further negotiations, this restriction was reduced to fifteen miles for the first two years and ten miles for the next three years. The sale was consummated in May 2006. The $ 500,000 purchase price was broken down as follows: $ 400,000 for "Patient Charts & Goodwill," $ 10,000 for the "Restrictive Covenant Not to Compete," and the remaining $ 90,000 for dental equipment and [**3] supplies.

Section 13(a) of the Purchase and Sale Agreement, entitled "Seller's Covenant Not to Compete and/or Solicit," provides:

> In connection with the sale to Buyer of the goodwill of the practice . . . , Seller[] shall not carry on or engage in the practice of dentistry, either directly or indirectly, as an owner, operator, or employee, within a fifteen (15) air mile radius of the Buyer's practice . . . for a period of two (2) years from the closing date and then for the ensuing three (3) years for a radius of ten (10) air miles, without the prior written permission of the Buyer.

Section 13 also includes the following liquidated damages provision:

> The covenant not to compete and/or solicit is of material significance to Buyer. Because the damage Buyer will sustain will be difficult if not impossible to ascertain, if the covenant not to compete and/or solicit is breached for whatever reason, Seller shall pay Buyer Two Hundred Fifty Thousand Dollars ($ 250,000) as liquidated damages. Furthermore, Seller agrees that should he choose to treat any former patients of the practice other than his family members and first tier relations, that in addition to the liquidated damages set forth herein, [**4] he will pay the Buyer the sum of Three Hundred Dollars ($ 300) per patient.

According to Wenzell, this provision was of critical importance to him and he would not have purchased Ingrim's dental practice without it. Wenzell claims that prior to the signing of the agreement, he reminded Ingrim of his obligations under Section 13.

Following the sale, Ingrim moved with his family to Mexico, where he intended to stay for the duration of the restrictive covenant. Due to marital difficulties, however, he returned to Anchorage roughly a year later.

Upon his return, Ingrim began employment at the Alaska Native Medical Center (ANMC), in his own words "practicing dentistry." ANMC is located within fifteen miles of Turnagain Dental Clinic and provides free dental services to Alaska Natives, other Native Americans, and their children. At ANMC, Ingrim performs dental examinations, reviews x-rays, drills and fills cavities, and occasionally pulls teeth.

Upon learning that Ingrim was working at ANMC, Wenzell, through his attorney, sent a letter demanding that Ingrim cease practicing [*106] dentistry within fifteen miles of Turnagain Dental Clinic and pay Wenzell $ 250,000 within nine days or face litigation. [**5] Ingrim came to Wenzell's office the next day, requesting that Wenzell not bring a lawsuit. According to Ingrim, his employment at ANMC does not violate Section 13(a) because he does not compete with Turnagain Dental Clinic. Wenzell suggested that Ingrim take a position outside of the geographic scope of Section 13(a), but Ingrim refused. Wenzell filed suit on August 16, 2007.

The parties dispute whether Ingrim's employment at ANMC competes with Wenzell's business. Wenzell testified that his current and potential Alaska Native patients might instead seek treatment with Ingrim at ANMC, and then would not refer additional patients to his practice. Ingrim presented expert testimony that his employment at ANMC "is in no way unfair or actually competitive [with Turnagain Dental Clinic]. He's not in private practice, he doesn't have an office, he doesn't see private patients. He doesn't market his practice. He doesn't have a private phone number. There's no way that he's in competition with any dentist in the community." Ingrim's broker also suggested that employment at ANMC does not pose a competitive threat to Turnagain Dental Clinic and that the impact on the business is likely to be minimal. [**6] Ingrim testified that he has not solicited any former patients and in fact would be unable to solicit patients because ANMC patients do not select their dentist.

B. Proceedings

The parties filed cross-motions for summary judgment. Ingrim sought a judgment that there was no breach of Section 13(a), while Wenzell sought $ 250,000 in damages for the breach of Section 13(a). After oral argument on February 26, 2008, the superior court ruled on the record that Ingrim had breached Section 13(a) as a matter of law and directed the parties to file supplemental briefing related to the validity of the liquidated damages provision and alternative remedies.

After reviewing the supplemental briefing, the superior court vacated its prior judgment on April 21, 2008, and instead determined that a jury should decide whether Ingrim breached Section 13(a). Relying on *Aviation Associates v. Temsco Helicopters, Inc.* ("*Temsco*"), [1] the superior court concluded that there should be an evidentiary hearing to determine the proper interpretation of Section 13(a) and to formulate an appropriate jury instruction concerning the covenant.

1 *881 P.2d 1127 (Alaska 1994).*

The superior court held an evidentiary hearing on [**7] August 15 and August 25, 2008 in an attempt to frame an appropriate jury instruction. The court heard testimony by Wenzell; Ingrim; Joseph Consani, Ingrim's broker for the sale of his dental practice and now Wenzell's witness; and Stanley Pollock, Ingrim's expert witness on the sale of dental practices and what constitutes the practice of dentistry. At the end of the hearing, the court held as a matter of law that the "practice of dentistry" as used in Section 13(a) does not include employment at ANMC, and therefore granted Ingrim's motion for summary judgment that he did not breach Section 13(a). The court then held that there was a question of fact as to whether Ingrim solicited dental patients of Turnagain Dental Clinic. Wenzell informed the court that he was not pursuing a claim that Ingrim solicited patients and requested that it enter final judgment so that he could appeal the ruling. The court entered final judgment in favor of Ingrim on October 24, 2008, and Wenzell now appeals.

III. STANDARD OF REVIEW

[HN1] A grant of summary judgment based upon contract interpretation is subject to de novo review. [2] "Drawing all reasonable inferences in favor of the nonmoving party, we will uphold [**8] summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a [*107] matter of law." [3] "[S]ummary judgment is improper when the evidence before the superior court establishes a factual dispute as to the intent of the contracting parties." [4]

2 *K & K Recycling, Inc. v. Alaska Gold Co., 80 P.3d 702, 711-12 (Alaska 2003)* (citing *Am. Computer Inst. v. State, 995 P.2d 647, 651 (Alaska 2000)).*

3 *Nichols v. State Farm Fire & Cas. Co., 6 P.3d 300, 303 (Alaska 2000).*

4 *K & K Recycling, Inc., 80 P.3d at 712* (citing *Sykes v. Melba Creek Mining, Inc., 952 P.2d 1164, 1167 (Alaska 1998)).*

IV. DISCUSSION

A. The Proper Interpretation of Section 13(a)

1. Section 13(a) prohibits the practice of dentistry in competition with Turnagain Dental Clinic.

We must first interpret Section 13(a) before examining whether it was breached by Ingrim's employment at ANMC. As we have previously held, [HN2] "[c]ovenants are construed to effectuate the parties' intent. Clear and unambiguous language should be accorded its plain meaning." [5] Where language is ambiguous, "extrinsic evidence of surrounding circumstances and usage may be admitted to aid in determining the intent of the parties and [**9] resolve the ambiguity." [6] A restrictive covenant ancillary to the sale of a business, like the one in this case, is construed liberally not to favor either party. [7]

> 5 *Gordon v. Brown, 836 P.2d 354, 357 (Alaska 1992)* (quoting *Lamoreux v. Langlotz, 757 P.2d 584, 587 (Alaska 1988)).*
>
> 6 *Nat'l Bank of Alaska v. J. B. L. & K. of Alaska, Inc., 546 P.2d 579, 582 (Alaska 1976); see also Neal & Co., Inc. v. Ass'n of Vill. Council Presidents Reg'l Hous. Auth., 895 P.2d 497, 502 (Alaska 1995)* ("extrinsic evidence [] includ[es] the parties' conduct, goals sought to be accomplished, and surrounding circumstances at the time the contract was negotiated" (citing *Peterson v. Wirum, 625 P.2d 866, 870 & n.7 (Alaska 1981))).*
>
> 7 *See Aviation Assocs., Ltd. v. Temsco Helicopters, Inc., 881 P.2d 1127, 1130 n.5 (Alaska 1994)* ("Under such circumstances, the parties presumably bargain from positions of equal bargaining power." (quoting *Centorr-Vacuum Indus., Inc. v. Lavoie, 135 N.H. 651, 609 A.2d 1213, 1215 (N.H. 1992))).* In contrast, restrictive covenants ancillary to employment agreements are strictly construed against the employer. *Id.*

Section 13(a) of the Purchase and Sale Agreement provides that Ingrim "shall not carry on or [**10] engage in the practice of dentistry, either directly or indirectly, as an owner, operator, or employee" for five years within certain geographic boundaries. Wenzell argues that the words of Section 13(a) are "simple, straightforward, and mean what they say" -- they prohibit "any practice of dentistry" regardless of whether the practice is in competition with Turnagain Dental Clinic.

Ingrim argues that the parties instead intended Section 13(a) to be a "restriction against competition -- not a restriction against all dentistry." In support of this interpretation, Ingrim notes the various references to Section 13(a) in the Purchase and Sale Agreement as a "Covenant Not to Compete." For example, the heading of Section 13(a) is "Seller's Covenant Not to Compete and/or Solicit"; the liquidated damages provision states that "[t]he covenant not to compete and/or solicit is of material significance to Buyer"; the "Restrictive Covenant Not to Compete" is listed as an asset being sold, with a value of $ 10,000, and Exhibit F lists "a covenant not to compete" as among the assets being sold.

The superior court found that "the primary intent of the parties was to address Dr. Wenzell's stated concern [**11] of not wanting to have another dental practice in competition with him down the street or within the mileage that was specified in the agreement." In addition to the references to Section 13(a) as a covenant not to compete, the superior court believed the $ 250,000 liquidated damages provision to be "indicative of a intent for there to be compensation in the event of actual competition between the buyer and the seller . . . as opposed to dentistry that would not be in direct competition with Dr. Wenzell's practice."

We agree, and conclude as a matter of law that the parties intended to prohibit Ingrim from practicing dentistry in competition with Turnagain Dental Clinic. As made clear by the numerous references in the agreement, [*108] Section 13(a) is a covenant not to compete. [8] The purpose of a covenant not to compete, as suggested by its name, is to prevent the covenantor from competing with the covenantee and, in the case of the sale of a business, to protect the goodwill associated with the purchased company. [9] Wenzell himself describes the purpose of Section 13(a) as protecting the "continued success of his dental practice," not barring Ingrim from practicing his trade in any capacity. [**12] Moreover, the magnitude of the liquidated damages provision, almost half of the total cost of the business, suggests an intent that the restrictive covenant only prevent the practice of dentistry that competes with Turnagain Dental Clinic. Therefore, Section 13(a) is properly interpreted as prohibiting only the practice of dentistry in competition with Turnagain Dental Clinic.

> 8 The Purchase and Sale Agreement states that "descriptive headings . . . are for convenience only and shall not be deemed to affect the meaning or construction of any provisions herein." Even ignoring the heading of Section 13(a), there are three other references to the provision as a covenant not to compete.
>
> 9 *See RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. f* (explaining that covenants not to compete ancillary to the sale of a business protect the covenantee's "legitimate interest" in

the "value of the good will that he has acquired"); BLACK'S LAW DICTIONARY 392 (8th ed. 2004) ("Noncompetition covenants are valid to protect business goodwill in the sale of a company."). "Goodwill" is defined as a "business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. [**13] for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets." BLACK'S LAW DICTIONARY 715 (8th ed. 2004).

2. The term "practice of dentistry" should be given its common industry definition.

Ingrim argues that the "practice of dentistry" should be interpreted as "private, competitive, fee-for-service practice," which would exclude his employment at ANMC. The superior court agreed, holding as a matter of law that "practice of dentistry," as used in Section 13(a), does not include employment at ANMC and thus Ingrim's employment at ANMC does not violate Section 13(a). This holding was in error.

We have stated[HN3] "the general rule of law" that "a contract may be interpreted by the general and accepted usage of the trade or business involved." [10] Thus, the term "practice of dentistry" should be given its common industry definition. The American Dental Association defines "dentistry" as "the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and [**14] their impact on the human body." We conclude that this is the proper definition of "practice of dentistry" as used in Section 13(a). [11]

10 *Stock & Grove, Inc. v. City of Juneau, 403 P.2d 171, 176 (Alaska 1965)*; *see also AS 45.01.303(d)* ("usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement [and] may give particular meaning to specific terms of the agreement").

11 Similarly, [HN4] Alaska law provides that one engages in the "practice of dentistry" who "evaluates, diagnoses, treats, or performs preventative procedures related to diseases, disorders, or conditions of the oral cavity, maxillofacial area, or adjacent and associated structures." *AS 08.36.360*

The superior court relied on *AS 08.36.350* in finding, as does Ingrim in arguing, that the "practice of dentistry" excludes employment at ANMC. [HN5] *Alaska Statute 08.36.350(a)* provides that the statutory chapter on dentistry "applies to a person who practices . . . dentistry in the state except . . . a dentist in the employ . . . of the Alaska Native Service." As an initial matter, this statutory provision was not explicitly [**15] or implicitly incorporated into the parties' Purchase and Sale Agreement. There is no evidence in the record that Ingrim and Wenzell's understanding of the meaning of "practice of dentistry" was influenced by this statute, or even that they were familiar with the statute at the time of contracting.

In any event, we interpret *AS 08.36.350(a)* differently than Ingrim and the superior court.[HN6] The statutory provision does not suggest that a dentist at ANMC is not engaging in the "practice of dentistry"; instead, it [*109] exempts an Alaska Native Service dentist from all provisions of the chapter on dentistry, including licensing requirements, disciplinary actions, and statutory definitions. It is precisely because "a dentist in the employ of the . . . Alaska Native Service" is practicing dentistry that it is necessary to exempt him or her from the otherwise applicable statutory provisions. [12]

12 Although exempt from the dentistry chapter, such a dentist is still "held to the same standard of care" as one to whom the dentistry chapter is applicable. *AS 08.36.350(b)*.

Relying on the expert testimony of Dr. Pollock, Ingrim also argues that the "private practice of dentistry" excludes employment at ANMC [**16] because such employment instead constitutes "'community' dental services." Even assuming this to be true, it is not relevant here -- Section 13(a) prohibits the "practice of dentistry," not the "private practice of dentistry." Dr. Pollock did not clearly testify that the "practice of dentistry" excludes community dentistry. [13]

13 Dr. Pollock did provide testimony that "a community dentist is not really practicing dentistry . . . ." The American Dental Association, in contrast, refers to "public health" dentistry (used interchangeably with "community" dentistry by Dr. Pollock) as "that form of *dental practice* which serves the community as a patient rather than the individual." (Emphasis added.) But even crediting Dr. Pollock's testimony, Ingrim sees *individual* patients at ANMC and does not serve communities by, for example, helping organize the fluoridation of village water treatment plants, attending village dental health fairs, or lecturing Alaska Native communities about the importance of dental health. Thus, he is not exclusively a community dentist.

B. Whether Ingrim Breached Section 13(a) Is a Question of Fact.

Ingrim's employment at ANMC clearly constitutes the "practice of dentistry" [**17] as that term is defined above. Ingrim sees numerous individual patients, performing their dental examinations, reviewing their x-rays, drilling and filling their cavities, and pulling teeth "on occasion." Moreover, Ingrim has admitted during this litigation that he is practicing dentistry at ANMC. In his affidavit submitted in support of his motion for summary judgment, Ingrim stated: "I admit that I am practicing dentistry and I admit the Alaska Native Medical Center is located within a fifteen air mile radius of the Turnagain Dental Office." Similarly, in his answer, Ingrim admitted that he "began working at the Alaska Native Medical Center engaging in the practice of dentistry." [14] Thus, Ingrim's employment falls within the category of activity prohibited by the covenant not to compete.

> 14 *See Darnall Kenna & Co., Inc. v. Heppinstall, 851 P.2d 73, 76 (Alaska 1993)* ("The general rule provides that admissions made in the pleadings are conclusively established.").

But this does not resolve the question before us: whether Ingrim's employment violates Section 13(a). As we discussed earlier, Section 13(a) is properly interpreted as prohibiting the practice of dentistry in competition with [**18] Turnagain Dental Clinic, thereby protecting Wenzell's legitimate interest in the goodwill he acquired. [HN7] In the typical case, where a party seeks to enforce a covenant not to compete against a person who opens a for-profit practice or accepts private employment, a court need not inquire into the presence of competition; it can be presumed. A plaintiff can prove a breach of the covenant by showing that the challenged conduct falls within the category of prohibited activity and occurred within the geographic scope and duration of the covenant. This case, however, presents a rare instance where a party is attempting to enforce a covenant not to compete against a person employed by a federally-funded non-profit organization that provides free or low-cost health care services. In such a case, competition will not be presumed and must be proven.

We therefore remand this case to the superior court to consider whether Ingrim's practice of dentistry at ANMC is in competition with Turnagain Dental Clinic and thus violates Section 13(a). This question cannot be answered based on the record before us, and may need to be presented to a jury to resolve factual disputes. [15] In considering whether [*110] there [**19] is competition, the superior court should examine whether Ingrim's employment at ANMC has the realistic potential to draw business away from Turnagain Dental Clinic, reduce the number of referrals it receives, or otherwise harm Turnagain Dental Clinic and the goodwill Wenzell purchased.

> 15 The superior court suggested that there was a disputed factual issue concerning competition when it ruled that the parties would go to trial on the claim that Ingrim solicited patients in violation of the Purchase and Sale Agreement, although Wenzell chose not to proceed to trial on that claim.

C. The Superior Court Must Consider Whether Section 13(a) Is Enforceable as Applied to Ingrim's Employment at ANMC.

Ingrim argues that, to the extent his employment at ANMC is found to violate Section 13(a), that provision is overbroad and unenforceable. Although raised below, the superior court did not reach this issue because it found that Ingrim's employment at ANMC did not constitute the practice of dentistry and therefore did not violate Section 13(a). If on remand the superior court or a jury determines that Section 13(a) was breached, the superior court must consider its enforceability. [16]

> 16 [HN8] The enforceability [**20] of a covenant not to compete is a question of law to be decided by the court after a factual inquiry into the relevant factors. *See* Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner To Practice, Incident to Sale of Practice,* 62 A.L.R.3d 918 (1975) ("[W]hat is a reasonable restraint on competition is a question of law for the determination of the court, and not one of fact for the jury."); 6 RICHARD A. LORD, WILLISTON ON CONTRACTS § 13:4 (4th ed. 2009) ("The question of reasonableness is ordinarily for the court, not the jury.").

[HN9] "[N]on-competition agreements are disfavored in the law as restraints upon trade and because they impose hardships upon individuals seeking to earn a livelihood." [17] Such agreements may be ancillary to an employer-employee agreement or, as in this case, to the sale of a business. [18] The enforceability of a non-competition agreement ancillary to the sale of a business is an issue of first impression in Alaska. [19] Unlike covenants not to compete ancillary to employment contracts, which "are scrutinized with particular care because they are often the product of unequal bargaining power," [20] this [**21] level of scrutiny is not applied to covenants ancillary to the sale of a business because the contracting parties are more likely to be of equal bargaining power. [21]

17 *DeCristofaro v. Sec. Nat'l Bank, 664 P.2d 167, 168-69 (Alaska 1983).*

18 *See RESTATEMENT (SECOND) OF CONTRACTS § 188(2)* (1981).

19 We have, however, discussed the enforceability of a covenant not to compete ancillary to an employment contract. In *Data Management, Inc. v. Greene*, this court held that if an overbroad covenant not to compete ancillary to an employment contract can be reasonably altered to render it enforceable, a court shall do so unless it finds that the covenant was not drafted in good faith. *757 P.2d 62, 64 (Alaska 1988).*

20 *RESTATEMENT (SECOND) OF CONTRACTS § 188.*

21 *Aviation Assocs., Ltd. v. Temsco Helicopters, Inc., 881 P.2d 1127, 1130 n.5 (Alaska 1994); see also Dalrymple v. Hagood, 246 Ga. 235, 271 S.E.2d 149, 150 (Ga. 1980)* ("In determining the reasonableness of a covenant not to compete greater latitude is allowed in those covenants relating to the sale of a business than in those covenants ancillary to an employment contract."); *Century Bus. Servs., Inc. v. Urban, 179 Ohio App. 3d 111, 2008 Ohio 5744, 900 N.E.2d 1048, 1054 (Ohio App. 2008)* ("restrictive [**22] covenants entered into ancillary to the sale of a business should be afforded less scrutiny than ones entered into by employees as consideration for employment").

[HN10] According to the Restatement (Second) of Contracts, a covenant not to compete is unenforceable on grounds of public policy if it unreasonably restrains trade, either because:

> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
>
> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. [22]

In the context of covenants not to compete ancillary to the sale of a business, the Restatement describes the "promisee's legitimate interest" as the "value of the good will that he has acquired" in the purchase of the business. [23] When determining the enforceability [*111] of a covenant not to compete ancillary to the sale of a business, a court must therefore consider whether the restriction bargained for is no greater than is needed to protect the goodwill the purchaser has acquired in the business and, if so, whether the purchaser's need to protect that goodwill outweighs the hardship to the seller and likely injury to the public. A similar test has been adopted [**23] in numerous jurisdictions, [24] and we adopt it in Alaska.

22 *RESTATEMENT (SECOND) OF CONTRACTS §§ 186, 188.*

23 *Id. § 188 cmt. f; see also* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 80.8 (Rev. Ed. 2003) ("[C]ourts readily recognize the interest of buyers in protecting the good will purchased and frequently enforce covenants not to compete accompanying the sale of a business.").

24 *See* Tinio, *supra* note 16 (listing jurisdictions in which, to be enforceable, "contractual restrictions on the right of medical practitioners to practice, made as an incident to the sale of a medical practice . . . must not extend beyond what is necessary to protect the interests of the buyer, must not be unnecessarily injurious to the seller, and must not unduly interfere with the public interest."); *see also* 6 WILLISTON ON CONTRACTS, *supra* note 16, § 13:4 ("In considering what is reasonable, courts pay regard to: (1) the question of whether the promise is broader than is necessary for the protection of some legitimate interest of the covenantee; (2) the effect of the promise or agreement on the covenantor, and (3) the effect of the promise or agreement upon the public welfare or common good." (internal citations [**24] omitted)).

Under the first prong of the analysis, the superior court must decide whether Section 13(a), as applied to Ingrim's employment at ANMC, is more restrictive than necessary to protect Wenzell's legitimate interest in the goodwill he acquired in purchasing Turnagain Dental Clinic. If the superior court or a jury determines that Ingrim's employment at ANMC is in competition with Turnagain Dental Clinic and thus violates Section 13(a), it will have already resolved the first prong -- the covenant is no broader than is necessary to protect the goodwill Wenzell purchased. Under the second prong, the superior court must balance Wenzell's need to protect the goodwill he purchased with the hardship to Ingrim from enforcing the covenant and the likely injury to the public. It appears from the record that Ingrim is employed by an organization providing an important, low-cost service to a population in need of such care. In a case that implicates such considerations, it is appropriate for a court to closely scrutinize the covenant not to compete to determine whether it is void for public policy reasons. [25]

25 *See* 6 WILLISTON ON CONTRACTS, *supra* note 16, § 13:6 ("[T]he concern of the courts [**25] for the public welfare typically results in

> closer judicial scrutiny of restraints on . . . dentists . . . because of the . . . value of their services to the community.").

[HN11] Although a court should generally examine whether a covenant not to compete is enforceable only after determining that it was breached, it is within the superior court's discretion on remand to assume a breach and address the enforceability of the covenant first. If the superior court can decide the enforceability of the covenant as applied to Ingrim's employment at ANMC on the current record or with an additional evidentiary hearing, but prior to a full trial, it may do so in the interest of judicial economy. [26]

> 26 If the superior court rules that Section 13(a) is unenforceable, either before or after trial, it should modify the provision to make it enforceable if it can reasonably do so provided that the agreement was drafted in good faith, which Ingrim has conceded. *See Data Mgmt., Inc. v. Greene, 757 P.2d 62, 64 (Alaska 1988).*

D. The Validity of the Liquidated Damages Provision

If Ingrim is found to have breached Section 13(a) and the superior court holds that this provision is enforceable, the superior court must [**26] evaluate the validity of the liquidated damages provision under *Carr-Gottstein Properties, Ltd. Partnership v. Benedict.* [27] Although we do not decide this issue today, we note our concern that the amount of stipulated damages is the same regardless of the nature of the breach of Section 13(a), which suggests that the parties made no [*112] attempt to forecast actual damages. [28] Indeed, Wenzell stated that the $ 250,000 figure was selected because it represents half of the purchase price, essentially conceding that it was not a forecast of actual damages.

> 27 *72 P.3d 308, 311 (Alaska 2003)* ("Liquidated damages clauses are proper . . . where it would be difficult to ascertain actual damages, and where the liquidated amount [is] a reasonable forecast of the damages likely to occur in the event of breach." (internal quotation marks omitted)). We thus agree with the superior court that [HN12] the validity of a liquidated damages clause is to be decided by the court, which will consider whether the facts of the case satisfy the liquidated damages test. *Id. at 310-11.*
>
> 28 *See Katenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995)* (finding a liquidated damages provision to be flawed because it assigned the same high [**27] penalty "for a total or partial breach, or for breach of minor or major contract provisions" (internal quotation marks omitted)).

V. CONCLUSION

For the foregoing reasons, we VACATE the superior court's grant of Ingrim's motion for summary judgment dismissing the lawsuit and REMAND the case to the superior court to conduct proceedings consistent with this opinion.

EXHIBIT 9

LEXSEE 2009 CAL. APP. UNPUB. LEXIS 5057

LORETTA FIGUEROA, Plaintiff and Appellant, v. PACIFIC DENTAL ASSOCIATES, Defendant and Respondent.

A121610

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

2009 Cal. App. Unpub. LEXIS 5057

June 23, 2009, Filed

PRIOR HISTORY: [*1]
San Francisco City & County Super. Ct. No. CGC-07-459319.

JUDGES: Margulies, J.; Marchiano, P.J., Graham, J. concurred.

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: Margulies

OPINION

Plaintiff Loretta Figueroa was employed as a dental hygienist by defendant Pacific Dental Associates (Pacific Dental). In 2004, Pacific Dental decided to reduce the time allotted to hygienists' routine teeth-cleaning sessions from 60 minutes to 50 minutes to enhance profitability. Believing that the reduction would reduce the quality of patient care, Figueroa resisted the change and was eventually fired. She filed an action against Pacific Dental, alleging that she was terminated because of her opposition to the change and that such a termination violated public policy. The trial court granted summary judgment against her claims, reasoning that the Business and Professions Code provisions relied on by Figueroa did not protect her conduct. We affirm.

I. BACKGROUND

Figueroa filed a complaint in June 2007, alleging a single cause of action for termination from employment in violation of public policy. The complaint alleged [*2] that Figueroa had worked for Pacific Dental, a San Francisco dental office, as a registered dental hygienist, beginning in 1991. In March 2004, Pacific Dental decided to increase the number of patients seen by its hygienists each day by reducing the time spent with patients from an hour to 50 minutes. Figueroa "pointed out that this would not be enough time for some patients, but her concerns were ignored." There followed a debate about the new level of treatment and its disclosure to patients. As a result of her reluctance to go along with the policy, and her conduct in expressing that reluctance, Figueroa was fired. Figueroa alleged that Pacific Dental's conduct violated, "among other statutes, *Business and Professions Code § 1680(q)*, which specifically forbids the discharge of an employee primarily based on the employee's attempt to comply or to aid in compliance with sound dental practices."

Pacific Dental moved for summary judgment in August 2007, arguing that the record demonstrated that Figueroa had not attempted to enforce compliance with dental disciplinary rules, as required by the *Business and Professions Code* section 1680, subdivision (q), and that she was terminated for [*3] business reasons. In a decla-

ration submitted in support of the motion, Pacific Dental's periodontist, Garry Rayant, stated that there had never been a professional disciplinary complaint or claim of malpractice against Pacific Dental during his tenure, which began in 1989. [2] Rayant said he had always found Figueroa's "attitude difficult and at times unacceptable." She questioned his diagnoses and treatments in a manner he believed to be inappropriate and made " 'editorial' " comments in patient charts. He complained about her conduct in writing in 1999. When no action was taken, he continued to work with her for several years without further formal complaint, although he saw little improvement in her deficiencies.

1 All statutory references are to the Business and Professions Code.

2 This claim was not entirely true. One of the practice's dentists admitted in deposition that he had settled a malpractice claim approximately five years earlier.

Rayant explained that by 2004, Pacific Dental's practice was booming, with a three-month waiting list, but unprofitable. The practice hired a consultant who proposed, in March 2004, "a restructured program [that would] run more efficiently which would [*4] reduce waiting times for patients, yet leave ample time for excellent patient care. One of the most critical changes required to increase efficiency was the shortening of routine cleaning appointments from 60 minutes to 50 minutes. Patients' *[sic]* whose conditions required more than 50 minutes were either scheduled for 60 minute appointments or two 50 minute appointments (based on the best judgment of the dentist)." According to the consultant, "most dental offices in San Francisco had already switched to 50 minute appointments for most cleanings and had little trouble completing cleanings (called 'prophylaxis') according to the definition provided by the American Dental Association ('ADA')."

Rayant stated that Figueroa made clear she would not cooperate in the implementation of the program, in part because she believed routine prophylaxis should include an additional procedure, cleaning below the gum line, that was not included in the ADA definition. It was, however, included as an element of "prophylaxis" as defined by the insurer Delta Dental. Thereafter, Figueroa made notations in patient charts reflecting her dissent, but she never contended that the change was illegal or grounds [*5] for a disciplinary proceeding against Pacific Dental. By the time the change to 50-minute cleanings was implemented in November 2004, Figueroa had been given oral and written warnings about her conduct. The decision to terminate her was made in December 2004.

A declaration submitted by Pacific Dental's consultant confirmed his retention and the content of his recommendations, adding that "my understanding is that 50 minute appointments for regular cleanings are permitted by law when deemed appropriate by the treating dentist. If I believed there was even a remote possibility that 50 minute appointments were inconsistent with law, neither myself nor my firm would have suggested that any dental office have 50 minute appointments for regular cleanings." Declarations by other dentists in the Pacific Dental practice supported Rayant's contentions, declaring that Figueroa was fired because of her difficult attitude rather than her advocacy of better patient care.

In a declaration submitted in opposition, Figueroa stated that while she was criticized for her attitude early in her career with Pacific Dental, she had taken the comments to heart and changed her behavior. She had worked closely [*6] with several Pacific Dental dentists "without serious complaints" for the four years between 1999 and 2003. She confirmed the difference between the ADA and Delta Dental definitions of "prophylaxis." In deposition excerpts, Figueroa testified that in November 2004, she began to write "ADA prophylaxis" in patient charts to distinguish the treatment she was providing in a 50-minute appointment, which did not include cleaning below the gum line, from the Delta Dental definition. Figueroa stated that in her view it was not the change, per se, that was improper but the failure expressly to inform patients, who would continue to assume they were getting a 60-minute cleaning. She had been forbidden by the Pacific Dental dentists from informing patients of the change. Figueroa believed the "sole reason" she was terminated was that she "advocated for better dental care for patients."

Figueroa also submitted the declaration of an expert in dental practice with experience in reviewing the treatment records of California dentists, Dr. Kevin Sheets. Sheets contended that the examples of allegedly improper patient file notations by Figueroa cited by Pacific Dental were not, in fact, improper. He [*7] did not address the controversy regarding the length of cleaning appointments or otherwise opine on the quality of the dentistry practiced at Pacific Dental.

The trial court granted Pacific Dental's motion for summary judgment. In its order, the trial court held that Figueroa "has not, and it appears to this Court that Plaintiff cannot, produce any admissible evidence that establishes that she ever engaged in any 'protected activity' that would trigger the duty not to retaliate contained in Business & Professions code *section 1680(q)*. While plaintiff produced evidence that she expressed objections to the switch to 50 minute appointments for ordinary cleanings . . . she produced no evidence that she ever told [Pacific Dental] that she believed the change was

illegal . . . . Further the undisputed facts . . . show that she never told [Pacific Dental] she contended that the new policy would result in 'negligent or incompetent treatment' nor that it would 'discourage necessary treatment'."

II. DISCUSSION

Figueroa contends that the trial court erred in granting summary judgment because her disagreement with Pacific Dental with respect to the regular prophylaxis treatments was " 'protected [*8] activity' " under the Business and Professions Code.

"Because plaintiff appealed from the trial court's order granting defendant summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action. [Citation.] In this action, therefore, we must determine whether defendant has shown that plaintiff has not established a prima facie case . . . 'a showing that would forecast the inevitability of a nonsuit' in defendant's favor. [Citation.] 'If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.' [Citation.] In performing our de novo review, we view the evidence in the light most favorable to plaintiff as the losing party. [Citation.] In this case, we liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." *(Johnson v. American Standard, Inc. (2008) 43 Cal.4th 56, 64.)*

The cause of action for termination of employment in violation of public policy originated with *Tameny v. Atlantic Richfield Co.* (1980) *27 Cal.3d 167 (Tameny).* [*9] The claim recognizes that "while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." *(Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1094,* overruled on other grounds in *Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 80, fn. 6.)* "[D]espite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee." *(Id. at p. 1090.)* In drawing this line, the Supreme Court has held that the public policy "must be based on policies 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . ' " *(Silo v. CHW Medical Foundation (2002) 27 Cal.4th 1097, 1104.)*

"To support such a *[Tameny]* cause of action, the [public] policy in question must satisfy four requirements: 'First, the policy must be supported by either constitutional [*10] or statutory provisions. Second, the policy must be "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial." ' " *(Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920, 932.)* "Th[ese] limitation[s] recognize[] an employer's general discretion to discharge an at-will employee without cause under *[Labor Code] section 2922,* and best serve[] the Legislature's goal to give law-abiding employers broad discretion in making managerial decisions." *(Green v. Ralee Engineering Co., supra, 19 Cal.4th at pp. 79-80.)*

Figueroa contends, and Pacific Dental does not dispute, that a fundamental public policy enforceable through a *Tameny* claim is contained in the Business and Profession Code sections defining "unprofessional conduct" by a dentist. [3] Under section 1670, a dentist who engages in "unprofessional conduct" is subject to disciplinary measures, including license revocation, reprimand, and probation. *Section 1680* lists a wide variety of conduct that constitutes unprofessional dentistry, [*11] including "[t]he aiding or abetting of a licensed dentist, . . . or registered dental hygienist . . . to practice dentistry in a negligent or incompetent manner" *(id.,* subd. (y)) and "the discharge of an employee primarily based on the employee's attempt to comply with the provisions of this chapter or to aid in the compliance" *(id.,* subd. (q)). Section 1685 states, "In addition to other acts constituting unprofessional conduct under this chapter, it is unprofessional conduct for a person licensed under this chapter to require, either directly or through an office policy, or knowingly permit the delivery of dental care that discourages necessary treatment or permits clearly excessive treatment, incompetent treatment, grossly negligent treatment, repeated negligent acts, or unnecessary treatment, as determined by the standard of practice in the community."

> 3 Because Pacific Dental does not dispute Figueroa's reliance on these statutes, we assume without deciding that they express the type of fundamental public policy adequate to support a *Tameny* claim under the standards set out in *Ross v. Raging Wire Telecommunications, Inc., supra, 42 Cal.4th at p. 932.*

In order to claim the protection [*12] of *section 1680, subdivision (q),* which precludes the discipline of an employee as a result of his or her attempt to comply with the statutes governing dental practice, Figueroa

must locate a provision of the Business and Professions Code whose violation was threatened by the change to 50-minute cleaning appointments. Figueroa has not pointed us to any state statutes or regulations specifically governing the timing or components of dental prophylaxis. Rather, the only provisions she has called to our attention are those quoted above, which preclude generally the "practice [of] dentistry in a negligent or incompetent manner" (*§ 1680, subd. (y)*) and "the delivery of dental care that discourages necessary treatment or permits clearly excessive treatment, incompetent treatment, grossly negligent treatment, repeated negligent acts, or unnecessary treatment, as determined by the standard of practice in the community." (§ 1685.) It is these statutes we will use to measure the public policy at issue in this action.

We agree with the trial court's conclusion that Pacific Dental successfully demonstrated Figueroa could not make a prima facie case that the controversy regarding cleaning time concerned [*13] negligent or incompetent treatment, as required to violate these statutory provisions. The testimony of Pacific Dental's witnesses established that an adequate cleaning for most patients could be performed in 50 minutes and that a 50-minute cleaning was the norm in the majority of dental offices in San Francisco. The fact that the ADA does not require cleaning below the gum line as a regular feature of prophylaxis provides fairly conclusive evidence that Pacific Dental's new practice, whatever its merits, did not constitute negligent or incompetent treatment. Further, Figueroa implicitly acknowledged that prophylaxis as defined by the ADA could be performed in 50 minutes, since she labeled her 50-minute appointments an "ADA prophylaxis." For patients requiring more extensive cleaning, Pacific Dental dentists reserved the option of scheduling a 60-minute treatment or a second 50-minute treatment.

Figueroa believed either that patients routinely should be given the Delta Dental version of prophylaxis, including cleaning below the gum line, or that, at a minimum, they should be informed that their treatment did not include this cleaning. [4] While this difference of opinion between Figueroa [*14] and the dentists clearly concerned the nature of dental care provided at Pacific Dental, Figueroa provided no evidence suggesting it was a dispute over the provision of reasonable versus "negligent or incompetent" care. Rather, it was a good faith dispute about the appropriate components of routine preventative care and patient communication, with both sides inside the bounds of reasonable care. [5]

> 4 Although there were references in Figueroa's deposition to impropriety in billing Delta Dental for prophylaxis when only an ADA cleaning was performed, we find insufficient evidence on this issue to create a triable issue that Pacific Dental was engaged in any type of improper billing practice. In any event, Figueroa denied that she believed Pacific Dental was "defrauding" Delta Dental by following the ADA definition.
>
> 5 Figueroa contends a claim of malpractice is supported by her written employment warning, in which one of the office's dentists characterized her conduct as writing "incriminating" notes in the patient files. In his declaration, the dentist called that a poor choice of words. Regardless, it is clear from the record that Figueroa never contended or believed the office was committing [*15] malpractice. The mere use of the word "incriminating" to refer to her notations does not constitute substantial evidence to the contrary.

Figueroa acknowledges she must "prove that she attempted to comply or aid in the compliance with the provisions of [the Business and Professions Code] and that she was discharged because of that." In making her arguments, however, she ignores the specific language of the Code, contending that "by statute, California specifically protects its [dental hygienists] who support better patient treatment." Such a broad construction of the *Tameny* cause of action in these circumstances is unwarranted, either by the language of the Business and Professions Code or the policies underlying a *Tameny* claim. The Business and Professions Code does not require dentists to provide a particular level or type of care, other than to avoid negligent and incompetent care. It leaves to the discretion of individual dental health professionals to select among the range of reasonable treatment options. As this case illustrates, for example, the ADA believes cleaning below the gum line is not a necessary component of routine cleaning, while Delta Dental takes, or at least took, [*16] a different position. [6] Because the statutes refer only to conduct falling below the level of competent, there is no basis in the Business and Professions Code for protecting employee advocacy of "better patient treatment" that is not concerned with avoiding malpractice.

> 6 In deposition, Pacific Dental's counsel suggested that Delta Dental has revised its view and adopted the position of the ADA. While Delta Dental's current position is immaterial to resolution of this appeal, its past position clearly illustrates the range of professional opinion.

Nor would it serve the purposes of *Tameny* to create such a right. A *Tameny* claim is not intended to restrict employers' "broad discretion in making managerial decisions" *(Green v. Ralee Engineering Co., supra, 19 Cal.4th at pp. 79-80)* or to turn "ordinary disputes between employer and employee" into lawsuits *(Gantt v.*

Sentry Insurance, supra, 1 Cal.4th at p. 1090). For that reason, we are required to confine the cause of action to the public policy concern actually articulated by the Legislature: the avoidance of dental malpractice. So long as it is within the range of the standard of practice in the community, the precise level of care provided [*17] by a particular dental office is of no statutory concern. As a result, disputes between the proprietors of the office and their staff concerning this topic do not constitute protected activity, and the proprietors may lawfully terminate at-will employees on the basis of their resistance to an office's chosen standard of practice. As this case illustrates, any other rule would undermine dentists' control over their practices by permitting their employees to select their own methods and level of treatment.

Figueroa also argues that her "good faith belief in her actions qualifies her for protection." (See, e.g., *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1043* [employee is protected when refusing to engage in conduct reasonably believed to violate Fair Employment and Housing Act, even if the conduct is ultimately found lawful].) There is no dispute Figueroa sincerely believed that Pacific Dental should have continued to provide 60-minute prophylaxis treatments and/or informed its patients of the change. Under *Yanowitz*, however, what was required was not merely a good faith belief in her position, but a good faith belief that the conduct she resisted violated public policy. As [*18] discussed above, there is no evidence Figueroa believed Pacific Dental would be providing care that violated the Business and Professions Code--that is, negligent or incompetent care--if it did not adopt her position. Accordingly, her good faith advocacy of a higher standard did not constitute protected activity.

Finally, Figueroa argues that her conduct was protected because she believed she would not be able to complete the prescribed procedures in 50 minutes. Pacific Dental, however, provided uncontradicted evidence that other dental offices in San Francisco regularly provided 50-minute prophylaxis. In light of this standard of practice in the community, Figueroa was not entitled to protection under *Tameny* merely because she was unable or unwilling to comply with standard procedures.

Because we conclude that Figueroa failed to create a triable issue of fact regarding the protected nature of her conduct, we do not consider the other issues raised by the parties.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Graham, J.

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

EXHIBIT 10

LEXSEE 1995 OHIO APP. LEXIS 2508

DAVID S. KILGORE, DDS, APPELLANT, - VS - OHIO STATE DENTAL BOARD, APPELLEE.

CASE NO. 94-C-63

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, COLUMBIANA COUNTY

1995 Ohio App. LEXIS 2508

June 14, 1995, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil Appeal from Columbiana County Common Pleas Court. Case No. 94 CIV 274.

DISPOSITION: JUDGMENT: Affirmed.

COUNSEL: For Appellant: Stuart A. Strasfeld, Youngstown, Ohio.

For Appellee: Betty Montgomery, Attorney General, Julia M. Graver, Asst. Attorney General, Health & Human Services Section, Columbus, Ohio.

JUDGES: Hon. Joseph E. O'Neill, Hon. Gene Donofrio, Hon. Edward A. Cox. Donofrio, J., concurs. Cox, J., concurs.

OPINION BY: Joseph E. O'Neill

OPINION

OPINION

O'NEILL, P.J.

This appeal arises out of the trial court's judgment entry, dated September 7, 1994, affirming the decision of the Ohio State Dental Board which issued an adjudication order, on May 3, 1994, finding that the appellant had violated *R.C. 4715.30(A)(9)* and Sec. 4715-5-04(B)(2) of the Ohio Administrative Code by practicing outside of his specialty field.

The appellant is a licensed dentist who limits his practice to oral and maxillofacial surgery (Tr. 27). A friend of appellant's, Mr. Coffee, approached him in September 1991 telling him that his wife was experiencing acute pain in [*2] the lower left side of her jaw. Upon examination, Dr. Kilgore determined that Mrs. Coffee was suffering from an abscessed tooth which he alleviated by doing an extirpation and doing a root canal. Dr. Kilgore also extracted two teeth, performed routine diagnostic procedures, placed a gold on-lay on a tooth, and followed up with endodontic treatment and bridge work (Tr. 12).

Originally the agreement had been that, in return for Dr. Kilgore performing these services, Mr. Coffee would install air conditioning in a home being constructed by Dr. Kilgore. Subsequently, a dispute arose between the parties relative to Dr. Kilgore's billing. A complaint was filed by the Coffees to the State Dental Board. The billing dispute was settled and withdrawn but the board, upon reviewing the billing complaint, noticed that Dr. Kilgore was not limiting his practice to oral and maxillofacial surgery. Dr. Kilgore was notified that the board intended to proceed on a charge that he had practiced outside of his specialty and, upon his request, an administrative hearing was scheduled and conducted.

Dr. Robert L. Schroeder, a licensed dentist, investigated the complaint and testified at the administrative [*3] hearing. Dr. Kilgore also testified at the administrative hearing. Following the hearing, the board issued an adjudication order finding that the appellant had violated *R.C. 4715.30(A)(9)* and *Ohio Administrative Code Sec. 4715-5-04(B)(2)*. In this order, the dental board suspended the appellant's license for ninety (90) days and he was placed on probation for five (5) years. The appellant

appealed this order to the Court of Common Pleas which affirmed the decision of the board.

Section 4715-5-04 of the Administrative Code read, in pertinent part, as follows:

> "(A) A licensed dentist who limits his practice to a specialty(s) recognized by the 'American Dental Association' for limited practice may use the designation 'Practice limited to', or 'Specialist in' in announcements, cards, letterheads, office signs, referral slips, directory listings or otherwise, provided the requirements of this rule are met.
>
> "(B) The licensed dentist must comply with the following standards before announcing or otherwise designating himself to be in a limited specialty practice:
>
> "(1) The indicated specialty(s) of dentistry must be those for which there are certifying boards recognized by [*4] the 'American Dental Association'; and
>
> "(2) The practice of the licensed dentist seeking specialty designation must be limited exclusively to the indicated specialty area(s). * * *"

R.C. 4715.30(A)(9) provides, in pertinent part, as follows:

> "(A) The holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for any of the following reasons:
>
> "* * *
>
> "(9) Violation of any provision of this chapter or any rule adopted thereunder;"

Very specifically, following the hearing, the board concluded and ruled that Dr. Kilgore, as the result of his services rendered to Mrs. Coffee, had not limited his practice exclusively to his indicated specialty area of oral and maxillofacial surgery.

The first assignment of error complains that the decision of the dental board is not supported by reliable, probative and substantial evidence.

Appellant takes issue with the fact that Dr. Schroeder, who was the investigator, was not qualified as an expert in the field of oral and maxillofacial surgery. In this contention, the appellant is correct. Dr. Schroeder rendered an opinion that:

> "An oral maxillofacial [*5] surgeon deals with the diagnosis and treatment of all problems in and around the head and the neck region of a person encompassing everything with the exception of what we consider routine restorative treatment that does not require the expertise of an oral maxillofacial surgeon."

At best, this can only be classed as a general description of the specialty of an oral maxillofacial surgeon, but certainly not a definition of that specialty. Most certainly, somewhere within the American Dental Association or the Ohio State Dental Board, there should be a very specific description and definition of an oral maxillofacial practice. If we could stop at this point, it would be our conclusion that there was a complete failure of evidence on the part of the Ohio State Dental Board. However, Dr. Kilgore, during direct examination, admitted that some of the services that he had performed for Mrs. Coffee was beyond his specialty. "I told him at the time I was an oral maxillofacial surgeon and I cannot do it but I would do it as a favor. But it's not what I normally do." This testimony was sufficient evidence to support a conclusion that Dr. Kilgore had not limited his practice exclusively to [*6] his indicated specialty area.

Under this assignment of error, the appellant also argues the absence of Mrs. Coffee during the administrative hearing. Appellant contends it was plain error for the dental board to proceed when there was no longer a complaint before it. There is a requirement that there be a complainant before the board. *R.C. 4715.03*, which provides for the organization, the adoption of rules, the conduct of investigation and the classification of qualified personnel, the state dental board, paragraph (D) provides, in pertinent part:

> "The board shall administer and enforce the provisions of this chapter. The board shall investigate evidence which appears to show that any person has violated any provision of this chapter. * * * "

It is correct that the complaint against Dr. Kilgore originated as a fee dispute. However, upon initial investigation of that fee dispute, the board became aware that there was evidence which appeared to show that Dr. Kilgore had violated a provision of Chapter 4715.

This first assignment of error is found to be without merit.

The second assignment of error contends that the trial court abused its discretion in upholding the order [*7] of the Ohio State Dental Board suspending the appellant's dental license for a period of ninety (90) days.

Basically, the appellant argues that there was nothing in the record to reflect that the Ohio State Dental Board exercised discretion in suspending the dental license of the appellant for a period of ninety (90) days and placing him on probation for a period of five (5) years. Sanctions for a violation of any provision of *Chapter 4715. of the Revised Code* or of any administrative rule adopted by the dental board are set forth in paragraph (C) of *R.C. 4715.30*, which reads as follows:

> "Subject to *Chapter 119 of the Revised Code*, the board may take one or more of the following disciplinary actions if one or more of the grounds for discipline listed in divisions (A) and (B) of this section exist:
>
> "(1) Censure the license or certificate holder;
>
> "(2) Place the license or certificate on probationary status for such period of time the board determines necessary and require the holder to:
>
> > "(a) Report regularly to the board upon the matters which are the basis of probation;
> >
> > "(b) Limit practice to those areas specified by the board;
> >
> > "(c) Continue or renew [*8] professional education until a satisfactory degree of knowledge or clinical competency has been attained in specified areas.
>
> "(3) Suspend the certificate or license;
>
> "(4) Revoke the certificate or license."

It is insisted by the appellant that, in its adjudicatory order, the board must demonstrate that it considered all of the various statutory sanctions hereinbefore set forth and that its findings are consistent with the evidence presented to it. Appellant insists that this demonstration of a consideration of the various statutory sanctions is set forth in *Brost v. Ohio State Medical Board (1991), 62 Ohio St.3d 218, 581 N.E.2d 515*, and, in fact, sets forth an alleged quotation from that case. We have reviewed the *Brost, supra*, case completely and cannot find that the Supreme Court has set forth a requirement that the board must demonstrate that it considered all of the various statutory sanctions. Rather, we find the Supreme Court in *Brost, supra*, stating at page 221:

> "As noted, the General Assembly has granted the board a broad spectrum of sanctions from which to choose. Naturally, the General Assembly intended that the sanction selected by the [*9] board be proportionate to the prohibited act or acts committed by the doctor. * * *".

This was not the first time that Dr. Kilgore had been before the board on a disciplinary matter. On October 31, 1989, Dr. Kilgore was sent an order by the Ohio State Dental Board finding that he had been practicing outside the scope of his specialty. His license was suspended for a period of thirty (30) days, he was placed on probation and ordered to take continuing education. That order also required that he notify the board whether he was limiting his practice to oral and maxillofacial surgery or practicing general dentistry. On November 28, 1989, he notified the board that he would limit his practice to oral and maxillofacial surgery.

Based upon this previous adjudication and based upon the evidence which was placed before the board, most certainly the sanctions selected by the board was proportionate to the prohibited act or acts committed by Dr. Kilgore.

This second assignment of error is found to be without merit.

The third assignment of error complains that the Court of Common Pleas confined its review of the case to the transcript as filed by the Ohio State Dental Board and did not set [*10] the matter for hearing as requested by the appellant.

On August 30, 1994, counsel for the appellant, by way of a letter, requested that the trial judge set the appeal pending before him for a hearing. This request was obviously denied. In support of this contention, the appellant refers us to a portion of *R.C. 119.12* which sets

forth various provisions controlling appeals from administrative bodies. Very specifically, one paragraph of that code section reads as follows:

> "'The court shall conduct a hearing on such appeal and shall give preference to all proceedings under *sections 119.01 to 119.13 of the Revised Code*, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (D) of *section 4731.22 of the Revised Code* or the chiropractic examining board issued pursuant to *section 4734.101 of the Revised Code* shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action; and the court shall determine the rights of the parties [*11] in accordance with the laws applicable to such action. At such hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence."

Relative to a "hearing", the Ohio Supreme Court has had the following to say:

> " *R.C. 119.12* requires only a hearing. The hearing may be limited to a review of the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs, oral argument/or newly discovered evidence." *Ohio Motor Vehicle Dealers Board v. Central Cadillac Co. (1984), 14 Ohio St.3d 64, 471 N.E.2d 488.*

In the instant case, the trial judge allowed the filing of briefs and determined the case based upon the briefs and a review of the record. There is no indication that this action, by the judge, was an abuse of discretion. Relative to the presentation of addition evidence, the trial judge, in his final judgment, had the following to say:

> "The Court also notes that the Notice of Hearing issued by The Ohio State Dental Board clearly contained what the investigation and violations were. The appellant had opportunity to be present, testify, [*12] be represented by counsel, and present evidence as he so chose at the adjudicatory hearing.
>
> "None of the evidence offered in the affidavit is evidence that could not have been presented before the adjudicatory board, nor has the request to take additional evidence indicated that new evidence has arisen since the time of the hearing, or that he was denied an opportunity by any means to present evidence at the adjudicatory hearing.
>
> "For these reasons the affidavit, and any additional evidence are not warranted, and the Court confines its review of this matter to the Transcript as filed by The Ohio State Dental Board."

We affirm the judgment of the trial court.

Donofrio, J., concurs.

Cox, J., concurs.

APPROVED:

Joseph E. O'Neill

PRESIDING JUDGE

EXHIBIT 11

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division)

AFFIDAVIT OF BRUCE J. LOWY

I, Bruce J. Lowy, being of the age of majority, and first being placed under oath, depose and state as follows:

1. I am authorized to furnish this Affidavit and competent to testify to the matters set forth in this Affidavit.

2. The facts set forth in this affidavit are within my personal knowledge.

3. If called upon as a witness, I would and could competently testify to all of the facts stated in this Affidavit.

4. I received an undergraduate degree in Industrial Psychology from Kent State University.

5. Thereafter, I attended John Carroll University's graduate program in Educational Psychology and studied Business Administration at Keller Graduate School of Management.

6. I am a nationally recognized expert in the fields of Dental Practice Management and Dental Practice Valuation.

7. I have been a management consultant and valuation specialist to the Dental Profession Since 1976.

8. In 1976, I was a National Consultant for Sycom, a leading dental practice

management consulting firm.

9. As such, I traveled throughout the United States and Canada providing analysis, training, and system design for dental practices.

10. In 1977, I established my own consulting firm, Progressive Management & Associates (hereinafter "PM&A").

11. PM&A has a website with URL http://www.brucelowy.com.

12. PM&A provides comprehensive consulting, marketing, valuation, and brokerage services to the dental industry.

13. PM&A has two offices, one located at 8840 Karlov Avenue, in Skokie, Illinois, and another at 2256 West End Court, Lehigh Acres, Florida.

14. For over twenty-five years, PM&A has been engaged in providing various specialized practice-management valuation services to dentists and dental practices throughout the United States.

15. I am certified with the Secretary of State of the State of Illinois as a Certified Business Broker and an active member of the Practice Valuation Study Group, a national organization of business valuation experts.

16. Clients generally call upon my valuation expertise when there is a need to value a health care practice incident to a purchase, sale, legal dispute, or because of estate and financial planning.

17. I am also the cofounder of Dental Staff Placement, Inc., a Chicago-based employment agency specializing in permanent and temporary placement of dental personnel.

18. I have been a guest lecturer on dental practice administration and principles of dental practice valuation at the School of Dentistry of the University of Illinois.

19. I lecture regularly at the Chicago Dental Society's Mid-Winter Meeting, and have conducted numerous leadership conferences for the Academy Of General Dentistry and the Illinois State Dental Society.

20. I regularly speak and lecture dentists and dental professionals on a comprehensive list of dental practice and business management topics including: practice valuations; practice sales/acquisitions; associate and partnership planning; partnership formation and planning; practice analysis and strategy; planning marketing professional services; personnel management; financial controls (financial arrangements, collections and insurance); new patient examination and case presentation procedures; trends in the economics of dentistry and the basics of the "Business of Dentistry."

21. Since I began to offer professional practice valuation services, I have personally participated in the valuation of over 350 dental practices.

22. In order to meet the standard of care applicable to professional valuation and consulting services in respect of dental practices, I stay abreast of developments in the field of dentistry, including the meaning of terms of art that are utilized and accepted in that profession.

23. One widely accepted term of art in the dental profession is "active patient."

24. The preeminent, authoritative voice of the dental profession in the United States on matters of professional standards and accepted usages and terminology is the American Dental Association.

25. In 1991, the House of Delegates of the American Dental Association adopted its Resolution 30H (Trans. 1991:621).

26. Resolution 30H defines an active dental patient as follows:

Active and Inactive Dental Patients of Record (1991:621)

> Resolved, that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms "active" and "inactive" dental patients of record apply:
>
> **Active Dental Patient of Record:** An active dental patient of record is any individual in either of the following two categories: Category I -- patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.
>
> **Inactive Dental Patient of Record**: An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

27. The ADA recently performed a statistical analysis of the dental profession in the United States and issued a monograph entitled "*2008 Survey of Dental Practice: Characteristics of Dentists in Private Practice and Their Patients*." *See* Exhibit A.

28. According to that study, over 95% of dentists who responded to the survey indicated that they defined an "active patient" as a patient treated within the last 12 to 24 months. *See* Id. at pp. 52, 61, and 70, respectively.

29. The definition of active patient is important to persons buying or selling dental practices because a count of "active patients" can be used to provide a rough indication of one measure of the size of a dental practice, based on past experience.

30. However, care must be taken correctly to interpret the limited meaning of "active patient" as it has been defined as a term of art in dentistry, for at least two reasons.

31. First, the number of patients treated in the past says nothing about the amount of net cash flow generated by the dental practice in respect of those treatments.

32. Most appraisers of dental practices appraise the value of a dental practice as a function of the net cash flow that the practice generates, not the number of patients that it has treated in the past -- or is expected to treat in the future.

33. That is because the historical number of patients that a dental practice has treated in a given historical timeframe does not indicate that the practice generated net cash flow when it treated those patients, nor does it provide a reliable prediction that a dental practice will generate net cash flow in the future.

34. Indeed, two dental practices with the same historic number of "active patients" can have substantially different net cash flow -- and appraised values -- for many reasons, such as where one practice is expected to perform more specialized (and expensive) dental procedures than another.

35. Because of the centrality of net cash flow to the appraisal of dental practices, some buyers and seller of dental practices use gross revenues as a proxy for net cash flow and negotiate the sale price of a dental practice as a percentage of gross revenues in a previous period.

36. For example, one popular "rule of thumb" in the dental industry is that dental practices should sell for approximately 50% to 67% of their revenue in the previous year.

37. Second, the term "active patient" cannot be construed as a prediction that any patient will be "active" in the future.

38. While a layperson might naively interpret the term "active patient" as a statement that a patient is "active" because he or she is predicted to return for treatment in the future, that is not the case.

39. The generally accepted definition of "active patient" as a term of art in dentistry is based on objective, historical fact, not an expectation of future events.

40. The number of "active patients" includes only those patients who have actually been treated in a dental practice during some defined period of time, usually 24 months.

41. As such, a count of "active patients" is not a subjective prediction that a specified number of patients will return and request treatment in the future.

42. The only inquiry that is required to generate a count of active patients is a count of the number of unique patients who have been treated in a given dental practice during a specified lookback period -- usually 12 or 24 months.

43. Properly understood, a count of active patients does not require or imply that a manual review of patient charts has been conducted to predict how many of the patients actually treated during the specified lookback period will return.

44. Because it is a limited and exclusively backward-looking measure, an active patient count does not require that a dentist attempt to predict how many of the patients treated during the lookback period will return based on their present state of health, or indications that they might have moved to a new home, or expressed an intention to change dentists.

45. The utility of the term "active patient" is derived largely from the fact that it is, as defined, objective and based on empirically verifiable facts (discrete treatment events) that are generally not subject to conjecture, manipulation, subjectivity, or speculation.

46. In my expert opinion, the term "active patient" would have little if any utility if it were based on unspecified factors used to generate a subjective prediction about the number of patients who might return to a practice for treatment, because there are a potentially infinite number of factors that determine whether a patient returns.

47. For example, if a count of active patients were influenced by a patient moving his or her residence, this would require a consideration of how far the new home might be from the dental practice in question as a function of distance, and perhaps also actual commuting times.

48. A patient moving across the street might generate a different count of active patients than one moving across the county.

49. The potentially limitless number of considerations that could be said to bear upon "active patient" -- if it were a prediction, as distinct from a historical measure -- coupled with the subjective and complex nature of attempting to predict human behavior generally explain, in my view, why that "active patient" is universally understood not to include any predictive content.

50. With or without a count of active patients, patient abandonment after the sale of a dental practice is an unavoidable risk.

51. The practice of dentistry is highly competitive, and there is no shortage of dentists to choose from.

52. Patients cannot be compelled to the return to a dental practice after it is sold, and may choose not to return based on purely subjective, personal preferences.

53. If the existing patients of a dental practice do not feel a personal affinity with a new owner, or dislike changes in office procedures and costs, they cannot be compelled to return.

54. I counsel my clients who are buying dental practices to view an active patient count as merely the starting point for an analysis of potential future patient traffic, because the fact that a patient has been treated in the past does not perforce imply that such patient will be treated in the future.

55. Rather than value a dental practice by attempting to predict how individual patients may behave in the future, I counsel my clients to focus on the cash flow generated by a

practice, and assume that no dental practice can remain viable without being sensitive to issues that may affect the ability to retain existing patients and attract new ones.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.

Bruce J. Lowy

Bruce J. Lowy

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

FILED
2011 MAR 15 PM 1:06

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	06 CH 11607 (Trans. to Law Division, Commercial Calendar S) Hon. Lee Preston Room 2004

NOTICE OF MOTION

To: Williams Montgomery & John Ltd
David E. Stevenson & Paul J. Ripp
Chicago, Illinois 60606
312.443.3200

PLEASE TAKE NOTICE that on *March 17, 2011, at 9.30 a.m.* or as soon thereafter as counsel may be heard, we shall appear before the *Honorable Lee Preston*, or any judge sitting in his stead, in *Court Room 2004*, of the Richard J. Daley Center, Chicago; Illinois, and then and there present *Defendants' Motion to Strike Affidavit of Mary Tujetsch*

KENT MAYNARD & ASSOCIATES LLC

By: _____
One Of Defendants' Attorneys

Kent Maynard Jr
Eleazar E. Calero
KENT MAYNARD & ASSOCIATES LLC
17 North State Street, Suite 1700
Chicago, IL 60602
312.265.6935 - (T)
312.264.4568 - (F)
Firm ID No : 41822

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned, an attorney, certifies that a copy of the *Motion* was served on the above listed, by:

___ Hand delivering same;

___ Depositing same in the U.S. Mail Depository, on *January 11, 2011*;

___ Transmitting via facsimile;

X Forwarding same via electronic mail (DES@willmont.com, and PJR@willmont.com) on *March 15, 2011*.

By: _____
Eleazar E. Calero

Kent Maynard Jr.
Eleazar E. Calero
KENT MAYNARD & ASSOCIATES LLC
17 North State Street, Suite 1700
Chicago, IL 60602
312.265.6935 - (T)
312.264.4568 - (F)
Firm ID No.. 41822

No. 11-1965

IN THE

Appellate Court of Illinois

FIRST JUDICIAL DISTRICT

MARY A. TUJETSCH,
Plaintiff-Appellant,

v.

TODD C. PUSATERI, FIRST DENTAL, P.C., and FIRST DENTAL OF ORLAND PARK, P.C.
Defendants-Appellees

Circuit Court No.: 2006-CH-11607

(Transferred to Law Division, Commercial Calendar "S")

The Honorable Raymond W. Mitchell, Presiding Judge

APPELLEES'
RULE 342 SUPPLEMENTARY APPENDIX

VOLUME II OF II

Kent Maynard, Jr.
Kent Maynard & Associates LLC
17 N. State Street, Suite 1700
Chicago, Illinois 60602
(312) 423-6586
Firm ID 41822

Attorneys for Plaintiff-Appellant

DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF MARY TUJETSCH

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

2011 MAR 15 PM 1:05

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division)

DEFENDANTS' MOTION TO STRIKE AFFIDAVIT OF MARY TUJETSCH

Defendants, by and through their attorneys, KENT MAYNARD & ASSOCIATES LLC, hereby move this Court for entry of an Order striking the affidavit of Mary Tujetsch (the "Affidavit") that is attached as "Exhibit A" in support of (1) Plaintiff's *Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment* ("Opposition"), filed on or around February 22, 2011; and (2) Plaintiff's *Amended Motion for Summary Judgment* ("Cross Motion"), which appears to have been filed on March 11, 2011. In support thereof, Defendants state as follows:

INTRODUCTION AND FACTUAL BACKGROUND

In this litigation, Plaintiff seeks damages for fraud and breach of contract in connection with her purchase of a dental practice in Orland Park, Illinois ("Dental Practice"). First Dental, P.C. is the seller ("Seller") of the Dental Practice. Plaintiff bought the assets of the Dental Practice pursuant to an asset sale agreement executed June 27, 2004 ("Agreement"). Plaintiff contends that the following recital in the Agreement concerning (hereinafter the "Recital") is actionable as fraud and breach of contract: "Seller has represented that the Dental Practice has approximately 1,200 active patients, who have been treated within the previous twenty-four months according to First Pacific Corporation software." Plaintiff construes the foregoing as a

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division)

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promise by Defendants that they would "provide" or "deliver" to Plaintiff 1,200 patients *after the sale*, because the patients of the Dental Practice had been "sold" to Plaintiff.

Defendants concede that a seller who promises to deliver X widgets in exchange for Y dollars may breach that promise if he delivers fewer than X widgets. However, patients are human beings, not widgets that can be bought and sold, and a seller cannot breach a promise that was not made. Sellers of dental practice sell things as can be sold -- furnishings, equipment, inventories of medicine, patient lists, and, in some cases, accounts receivable. However, they do not, and cannot sell -- or commit to deliver -- human beings. The Recital cannot reasonably be construed as an indication that Plaintiff had "purchased," and that Defendants had promised to "deliver" 1,200 patients to Plaintiff after the sale. The Agreement does not require Defendants to operate a modern-day press gang[1] to compel patients to appear.

In Count I of the Complaint, Tujetsch alleges that Seller "[failed] to provide [her] with a list of Active Patients or any other patient lists," thereby breaching a "[performance] obligation to place Tujetsch in 'possession and operating control of' '[a]ll patient lists . . . relating to the Dental Practice . . . .'" Cmplnt, ¶18. Count II asserts that Defendants breached the Agreement by overstating, in the Recital, the number of "active patients" treated in the Dental Practice in the 24 months prior to its sale (Cmplnt, ¶¶30, 31), and misrepresenting that unspecified "equipment" of the Dental Practice was in working order as of the date of the Agreement (Cmplnt, ¶¶32, 33). Count III alleges "on information and belief" that, in order to induce Tujetsch to enter into the Agreement, Dr. Pusateri, at the time he executed the Agreement on June 27, 2004, knowingly inflated the number of "active patients" of the Dental Practice in the Recital, and knowingly misrepresented that "equipment" of the Dental Practice was then "working and in good order."

[1] "Press gangs" as used herein refers to the bands of men used by the British Royal Navy, beginning in 1664 and during the 18th and early 19th centuries, to compel men into service by abducting them.

On January 10, 2011, Defendants filed the first of Defendants' two pending motions for summary judgment (the "January Motion"). Therein, Defendants assert that there is no evidence that Defendants breached a contractual obligation to deliver patient lists to Plaintiff; no evidence that Defendants overstated "active patients" or breached a promise "to deliver" a specified number of "active patients" after the sale; and no evidence that any equipment of the Dental Practice was out of order at the time the Agreement was executed. Plaintiff did not offer any evidence of a failure to deliver "patient lists" in the Opposition. When facts alleged in an affidavit are not contradicted by a counteraffidavit, those facts are taken as true. Hall v. De Falco, 178 Ill. App. 3d 408, 412 (1st Dist. 1988). A party's failure to challenge affidavits in support of or in opposition to a motion for summary judgment constitutes an admission of those facts. Id. (*citing* Getman v. Indiana Harbor Belt R.R. Co., 172 Ill. App. 3d 297, 300 (1st Dist. 1988)). Because Plaintiff has admitted that there is no evidence that she failed to receive "patient lists," Defendants will seasonably ask this Court to enter summary judgment in favor of Defendants on Count I.

With respect to Counts II and III, Plaintiff disputes the notion that the Recital reports the number of "active patients" as the number of patients treated in the Dental Practice within the previous twenty-four months according to First Pacific Corporation software. Anticipating that Plaintiff would offer a disparate, and idiosyncratic definition of "active patient," Defendants filed on February 14, 2011 a second, narrowly tailored motion for summary judgment as to the established meaning of "active patient" (the "February 14 Motion"). As demonstrated in the February 14 Motion, "active patient" is a term of art used in the dental profession to connote a patient treated during a defined lookback period -- usually 12 or 24 months.

Plaintiff has been a licensed dentist since 1989 and is presumed to be familiar with, and

therefore bound by terms of art used in the dental profession. *See* February 14 Motion at p. 14. In September 2002, less than two years before she signed the Agreement in this case, Plaintiff entered into an agreement to purchase the assets of another dental practice. That agreement, bearing Plaintiff's signature and initials on virtually every page, was produced by Plaintiff in discovery. At the bottom of its first page, the September 2002 agreement states: "Seller has represented that 481 active patients remain in the practice. **Active patients represents the number of individuals treated within the past 12 month period**." At its paragraph 16, the September 2002 agreement states: "Seller will provide a listing of 481 active patient names and addresses. **Active patients is defined as having been treated by Seller within the last 12 month period**." *See* Exhibit A, at Bates T01103, T01106 (emphasis supplied). This definition of "active patient," employed by Plaintiff in the September 2002 agreement, conforms to the definition of "active patient" as a dental term of art (*see* February 14 Motion, *passim*), and demonstrates that Plaintiff knew the accepted meaning of that term.

By contrast, in this case Plaintiff contends that "active patient" does not mean patients treated by Seller within a defined period, even though that is what the Recital says. Rather, Plaintiff claims that she "understood and intended" that "active patient" in the Recital means "a patient who maintains a continual, ongoing relationship where treatment is obtained on a fee basis." Opposition, at p. 3; Cross Motion, at p. 3; Affidavit at ¶7. The Affidavit does not set forth any fact as to how or why Plaintiff formed this "intention," nor does it indicate that she expressed her intention to any Defendant. At bottom, Plaintiff's professed "intention" is an opinion about the proper meaning of a dental term of art. However, the Affidavit fails to set forth any facts to establish that Plaintiff is entitled to express an expert opinion about the meaning of "active patient," and does not point to a single third party document or learned

treatise that defines "active patient" the way she does.

By substituting her own definition of "active patient" for the generally accepted one, Plaintiff contends that the Agreement "promised" that approximately 1,200 patients would be "provided" would after the sale, and that those patients would "maintain a continual, ongoing relationship where treatment [would be] obtained on a fee basis." See Opposition at pp. 1-2, 11. According to Plaintiff, "[t]he issue in this lawsuit is whether the Defendants breached the Agreement by **failing to provide** 'approximately 1,200 active patients' and what damages Plaintiff has suffered as a result of that breach." Id. at p. 11 (emphasis supplied). According to Plaintiff, Defendants' "**failure to deliver** . . . the active patients promised is . . . a material breach." Opposition at p. 12 (emphasis supplied). At paragraph 29(a), the Affidavit states that professionals who worked in the Dental Office before and after the sale -- and provided affidavits in support of Defendants' first motion for summary judgment -- "have no knowledge regarding the number of active patients **sold** by Dr. Pusateri to [Plaintiff] in June 2004" (emphasis supplied).

As noted above, dental patients are human beings, not chattels that can be bought and sold. It is absurd to construe the Recital as a promise by Defendant "to provide" some number of patients after the sale, or as a guarantee that the new owner would "receive" that number of patients during some undefined period. The notion that human beings may be bought and sold was abolished throughout the United States in 1865 with the adoption of the Thirteenth Amendment to the United States Constitution.

In the February 14 Motion, Defendants demonstrated that the term "active patient" is a term of art in the dental profession, and is understood to be a statement of historical fact, not a prediction about the future. If the February 14 Motion is granted, that would necessarily defeat

any claim based on the notion that Defendants promised "to provide" approximately 1,200 patients after the sale. However, regardless of how this Court rules on the February 14 Motion, the affidavit of Mary Tujetsch that is attached to the Opposition and the Cross Motion (and to this motion as Exhibit B) must be stricken, because it fails to comport with Supreme Court Rule 191.

THE AFFIDAVIT DOES NOT COMPORT WITH RULE 191(A)

Affidavits in support of motions under section 2-1005 are controlled by Supreme Court Rule 191 (210 Ill. 2d R. 191). Elliott v. LRSL Enterprises, Inc., 226 Ill. App. 3d 724, 732 (2d Dist. 1992). Rule 191 provides, in pertinent part, that

> Affidavits in support of and in opposition to a motion for summary judgment under section 2–1005 of the Code of Civil Procedure . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

210 Ill. 2d R. 191(a). It is the function of a trial court to determine the admissibility of evidence, and its rulings will not be disturbed absent an abuse of discretion. Independent Trust Corp. v. Hurwick, 351 Ill. App. 3d 941, 952 (1st Dist. 2004).

The Affidavit should be stricken because it: (a) does not set forth with particularity the facts upon which it is based; (b) does not include sworn or certified copies of the papers on which the affiant relies; (c) consists of conclusions of law, instead of facts admissible into evidence; and (d) does not affirmatively show that the affiant, if sworn as a witness, could testify competently thereto.

A. The Affidavit Does Not Set Forth With Particularity The Facts Upon Which It Is Based

The Affidavit is purportedly offered as evidence that Defendants breached a promise "to

produce," after the closing, the 1,200 patients "**sold** by Dr. Pusateri to [Plaintiff] in June 2004." *See* Affidavit at 29(a) (emphasis supplied). How and when Defendants were supposed "to produce" the patients to Plaintiff after the sale is not explained in the Affidavit. The Affidavit goes to great pains to categorize patient files. However, categories and lists prepared by a litigant are not evidence. No patient file is attached to the Affidavit. The Affidavit is offered to prove a negative: That promised patients were not provided by Defendants after the sale. Why, then, are no facts offered as to the number of patients who appeared for treatment after the sale? The answer is simple: Plaintiff's theories of liability make no sense.

Plaintiff asserts that she "understood" that "active patient" in the Recital was predictive in nature, instead of what the Recital says it was -- a count of patients treated in the Dental Practice during the previous 24 months, as reported by First Pacific Corporation software. However, the Affidavit Does not set forth any factual basis for Plaintiff's subjective "understanding." Plaintiff admits that the Agreement does not define "active patient," and does not aver that she told any Defendant that "active patient" was defined in conformity with her undisclosed, subjective belief. The Affidavit therefore consists, at bottom, of an unsubstantiated lay opinion as to the correct meaning of a dental term of art.

Other paragraphs of the Affidavit make factual averments that are based solely on Plaintiff's conclusory interpretation of various documents without disclosing any factual basis for those beliefs. *See, e.g.*, ¶¶11, 12, 17-21. No fact -- other than Plaintiff's own self-serving construction of "active patient" -- is provided to support the conclusion that Defendant promised to "deliver" patients after the closing. No language in the Agreement or evidence is offered as the basis for a post-closing obligation of any Defendant to deliver patients to Plaintiff.

B. The Affidavit Does Not Attach Sworn Or Certified Copies Of The Patient Records Upon Which Affiant Relies

The opinions about "active patients" set forth in the Affidavit appear to be based on Plaintiff's review of "patient files." However, no patient file is attached to the Affidavit. The failure to attach properly sworn or certified documents upon which affiant's opinions are based is fatal to the Affidavit. Robidoux, 201 Ill. 2d at 339-40. *See also* Preze v. Borden Chemical, Inc., 336 Ill. App. 3d 52 (2d Dist. 2002) ("we do not take as true Affidavit or portions thereof that do not meet the requirements of Supreme Court Rule 191(a).").

The Affidavit refers repeatedly to "patient files" (*see* ¶¶ 9, 10, 17, 21, and Exhibit 6). In paragraph 17 she avers, "I have reviewed the patient files. There are three groups of patient files . . ." However, not a single patient file is attached to the Affidavit, let alone a patient file that is sworn or certified. Instead, Plaintiff appends to the Affidavit (as its Exhibits 4, 5, and 6) lists that she apparently compiled during the course of her review of patient files. Lists compiled by a litigant to summarize evidence are not themselves evidence. Exhibits 4, 5, and 6 are inadmissible hearsay. The Affidavit does not attempt to lay a foundation that the Exhibits qualify for admission into evidence under any exception to the hearsay rule, such as the business records exception. The Exhibits are not memoranda made in the regular course of a business. *See* 145 Ill. 2d R. 236(a); Hurwick, 351 Ill. App. 3d at 950. As such, they must be stricken from the Affidavit, and from the record of this case. To the extent that any paragraph of the Affidavit is based on or incorporates Exhibits 4, 5, and 6, that paragraph must also be stricken. At a minimum, that would include the following paragraphs: ¶¶11, 12, 13, 17, 18, 19, 20, 21, and 26. Moreover, because the notion that Defendants underdelivered "active patients" -- as the Recital is construed by Plaintiff -- is dependent on patient files that are not attached, the Affidavit should be stricken in its entirety.

C. **The Affidavit Consists Of Conclusions Instead Of Facts Admissible In Evidence**

The substantive portions of the Affidavit consist entirely of legal conclusions without supporting facts, and purported compilations of evidence that are not themselves evidence. As such, the Affidavit does not affirmatively show that Affiant could testify as to its contents. *See* Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp., 336 Ill. App. 3d 572, 579 (4th Dist. 2002). There is nothing in the Affidavit to suggest that Plaintiff has any expertise in the accepted meaning of "active patient." This Court may not rely on the "expert" opinions of a lay witness as to the construction of contract terms; that is the province of the Court.

D. **The Affidavit Does Not Affirmatively Show That The Affiant, If Sworn As A Witness, Could Testify Competently To The Statements In The Affidavit**

Plaintiff provides no basis for her tacitly-implied expertise as to the correct meaning of "active patient." Plaintiff states only that she subjectively "understood and intended that the term 'active patient' as used in the Agreement to mean a patient who maintains a continual, ongoing relationship where treatment is obtained on a fee basis." Plaintiff may subjectively understand also that "black" means "white" and "up" means "down," but that would not make her an expert in physics -- or lexicography. Nothing in Plaintiff's training, education, and experience (which is not set forth in the Affidavit or a curriculum vitae attached thereto) reflects any study of, or training in the meaning of "active patient." Despite his obvious lack of expertise, Plaintiff expresses an opinion that her subjective interpretation can be used to override the contrary, widely accepted understanding.

While it is certainly possible that in the course of her work as a dentist Plaintiff has formed some anecdotal impressions of the meaning of "active patient," such impressions do not qualify her as an expert competent to advise the Court on this issue. Plaintiff's definition of "active patient" is inconsistent with the definition of "active patient" as a term of art used in the

dental profession (see February 14 Motion), and conflicts with the definition of that term in the asset purchase agreement that Plaintiff signed in September 2002. To the extent that Plaintiff is impliedly tendered as an expert in terms of art commonly used in the dental profession, she must present credentials that qualify her as such.

The Affidavit is inadmissible as a mater of law because it constitutes unsubstantiated opinions of a lay witness and fails to attach the patient files on which Plaintiff claims to have relied in forming her opinions and compiling her lists. Those lists are not evidence, and cannot substitute for evidence.

CONCLUSION

For the foregoing reasons, the Affidavit does not comport with Illinois Supreme Court Rule 191. As such, the Affidavit is incompetent and inadmissible, and must be stricken not only from the Opposition, but also from the record of this case.

Dated: March 15, 2011

Respectful submitted,
TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.,

By: _____
One of Their Attorneys

Kent Maynard, Jr.
Eleazar E. Calero
KENT MAYNARD & ASSOCIATES LLC
17 North State Street, Suite 1700
Chicago, IL 60602
TEL. 312/423-6586
Firm Id. No. 41822

EXHIBIT A

AGREEMENT FOR PURCHASE AND SALE OF
BUSINESS ASSETS OF
DR. ROY V. CARLSON DENTAL PRACTICE
LANSING, ILLINOIS

This Agreement is made and entered into as of the _____ day of September, 2002, by and between DR. ROY V. CARLSON (hereinafter referred to as "Seller"), and DR. MARY A. TUJETSCH, (hereinafter referred to as "Buyer"),

WHEREAS, the Seller is a sole proprietorship, established and doing business under the laws of the State of Illinois; and

WHEREAS, Seller owns, operates and maintains a dental practice located at 18025 Wentworth Avenue, Lansing, Illinois 60438; and Seller's license is in good standing and in compliance with state, county, and local laws.

WHEREAS, Seller desires to sell the practice and certain assets, hereinafter sometimes referred to as the "business assets";

WHEREAS, Buyer desires to purchase and acquire said practice and assets as hereinafter more fully set forth;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained in this Agreement, and in consideration of the payment of the purchase price, and other good and valuable consideration which is hereby receipted, it is hereby agreed as follows:

1. AGREEMENT TO SELL AND TO BUY.

Under the terms hereof, Seller agrees to sell, convey, transfer, assign and deliver to Buyer and Buyer agrees to buy, acquire and accept all of the business assets of Seller.

2. ASSETS INCLUDED.

The business assets included in this purchase and sale are substantially all of Seller's business assets located at Seller's existing dental practice and 18025 Wentworth Avenue, Lansing, Illinois 60438, including all inventory and supplies, dental equipment and tools, all furniture and furnishings, shelving and cabinets, and the goodwill of the business.

Seller has represented that 481 active patients remain in the practice. Active patients represents the number of individuals treated within past 12 month period. Seller will send letter to

481 active patients, at Seller's expense, explaining the sale of the practice and the introduction of Buyer.

3. ASSETS EXCLUDED.

The business assets not included in this purchase and sale are cash, Seller's accounts receivable, ~~copy machine~~, lighting fixtures and other items which are a permanent part of the premises.

4. PURCHASE PRICE.

The purchase price hereof shall be Twenty Thousand Dollars ($20,000.00).

5. EARNEST MONEY.

The Buyer shall pay the Seller earnest money in the amount of One Thousand Dollars ($1,000.00) upon acceptance of this Contract.

6. BALANCE OF PURCHASE PRICE.

The balance of the purchase price in the amount of Nineteen Thousand Dollars ($19,000.00) shall be paid in cash by certified or cashier's check at the time of Closing.

7. CLOSING DATE AND PLACE.

The Closing shall take place at 6:00 p.m. on September 30, 2002 or at such other date and time as the parties agree to (hereinafter referred to as the "Closing Date"), at the office of Seller's attorney, Barry C. Bergstrom, Ltd.

8. LIABILITIES.

Buyer assumes none of the Seller's liabilities except for telephone listing.

9. TELEPHONE NUMBER AND LISTING.

Buyer shall be entitled to Seller's telephone number and listings, if any, and Seller agrees to get consent to and approve such transfer and execute any documents evidencing same as may be required by the telephone company or publisher's of directories.

10. SELLER'S ACCOUNTS RECEIVABLE.

As accounts receivable are not being included in this purchase and sale, Seller shall take full responsibility for collecting Seller's own accounts receivable which are due Seller as of the Closing Date and Buyer shall have no legal responsibility for their collection or bookkeeping and accounting in connection therewith. Buyer does, however, agree that any remittances

received by Buyer which are specifically applicable to Seller's accounts receivables will be forwarded by Buyer to Seller intact within three (3) business days of such receipt.

11. PRORATIONS.

All usual items shall be prorated as of the Closing Date, including utilities and telephone and any other items mutually agreed upon.

12. SALES PRICE ALLOCATION.

The sales price shall be allocated as follows:

Goodwill, telephone number and listing and patient records	~~$17,000.00~~	$1000.00
Inventory and supplies	$ ~~500.00~~	Zero
Equipment, other personalty, furniture and fixtures	~~$ 2,500.00~~	$19,000.00
Total		$20,000.00

13. NON COMPETITION.

Seller agrees not to establish a dental practice or work as a dentist following Closing.

14. LEASE OF PREMISES.

Effective at the time of Closing, Buyer shall be entitled to occupy the premises of the dental practice for the rental amount of One Dollar ($1.00) per month on a month to month basis at the option of the Buyer until March 31, 2003. In addition to the payment of rent, the Buyer shall pay one-half (1/2) of utilities including water, gas and electric for the entire premises at 18025 Wentworth Avenue, Lansing, Illinois 60438, and One Hundred Per Cent (100%) of the telephone bill for the dental practice. Seller agrees to maintain the premises during the term of the lease except for interior cleaning and replacement of lights and light bulbs.

15. EXTENSION OF LEASE.

The parties may agree to enter into a month to month extension of the lease after March 31, 2003 upon terms to be negotiated by the parties. If the Buyer desires to extend the lease after said date, the Buyer shall give the Seller sixty (60) days prior written notice of Buyer's intention and the parties shall enter into an agreement

within thirty (30) days. If an agreement is reached to extend the lease after March 31, 2003, either party may terminate the lease on forty-five (45) days prior written notice.

16. PATIENT RECORDS.

Upon Closing, all patient treatment cards and x-rays shall be transferred by the Seller to the Buyer. All white patient ledger cards shall remain the property of the Seller. The Buyer agrees to maintain all patient records and x-rays for a period of ten (10) years after Closing for the benefit of the Seller and the Buyer. The Buyer agrees to make the patient records available to the Seller at reasonable times during said period for purposes of claims and insurance. Seller will provide a listing of 481 active patient names and addresses. Active patients is defined as having been treated by Seller within the last 12 month period.

17. INSURANCE.

At Closing, Buyer shall present Seller with proof of malpractice insurance coverage. In addition, during the time of occupancy of the premises by the Buyer, the Buyer shall carry liability insurance which shall name the Seller as an additional insured in the amount of $300,000. Buyer will provide Seller with a certificate of insurance for such coverage. Further, Buyer shall be responsible for carrying contents insurance on the assets of the practice and provide Seller with proof thereof. Seller will maintain insurance coverage on physical structure of building as stated in home owner's insurance policy.

18. BIOHAZARDS.

Buyer agrees to be responsible for the pick up and disposal of any biohazards remaining on the premises at the time of closing and at the termination of the lease. The expense for biohazard material disposal shall be borne by the Buyer with no reimbursement from the Seller.

19. REMOVAL OF PROPERTY.

At time of Closing, Seller shall give Buyer a Bill of Sale for all personal property, tools, equipment, furniture and fixtures as provided under this Agreement. However, at the time of termination of the lease and vacation of the premises by the Buyer, if the Buyer does not remove or dispose of any of the items being transferred at the time of Closing, the parties agree that anything remaining on the premises shall become the property of the Seller to be disposed of as he wishes with no further liability or compensation between the parties.

20. BUYER'S AND SELLER'S REPRESENTATIONS AND WARRANTIES.

Buyer and Seller make to each other the representations and warranties set for the in Schedule A and Schedule B which representations and warranties shall survive the Closing for the benefit of each party.

21. NON-ASSIGNMENT.

This Agreement shall be non-assignable by either party without the prior written consent of all parties.

22. AGREEMENT SHALL SURVIVE CLOSING.

The terms and provisions of this Agreement shall survive the Closing.

23. GENERAL CONDITIONS AND PROVISIONS.

The additional general conditions and provisions appearing on Schedule C are incorporated herein by reference and made a part hereof.

24. INCORPORATION OF SCHEDULES BY REFERENCE.

The parties agree that Schedule A through and including Schedule C attached hereby are incorporated herein by reference and made a part hereof for all legal intents and purposes as fully set forth herein.

IN WITNESS WHEREOF, the parties hereby have caused this Agreement to be executed as of the year and date first written above.

BUYER:

By: Mary A. Tujetsch
MARY A. TUJETSCH

SELLER:

By: R V Carlson
ROY V. CARLSON

T 01107

SA403

BUYER'S ADDRESS:

55 E. Washington Street
Suite 2121
Chicago, IL ~~60621~~ 60602

SELLER'S ADDRESS:

18025 Wentworth Avenue
Lansing, IL 60438

BUYER'S REPRESENTATIVE

SELLER'S REPRESENTATIVE:

Barry C. Bergstrom, Ltd.
3330-181st Place
Suite 104
Lansing, IL 60438
(708) 895-7040 - Phone
(708) 895-7045 - Fax

SCHEDULE A

BUYER'S REPRESENTATIONS AND WARRANTIES

Buyer represents and warrants as follows:

1. That Buyer has inspected the Business Assets and financial statements of Seller, including a physical inspection of the business premises.

2. That Buyer accepts the business premises and Business Assets being purchased hereunder in their present condition.

Buyer accepts Seller's assertion that all equipment is working and in good order. Seller asserts that equipment is in compliance with state, local, county laws.

Buyer does not assume nor will be responsible for any known, unknown, or contingent liabilities of Seller incurred by any means including, but not limited to, professional malpractice or personal injury of any nature.

SCHEDULE B

SELLER'S REPRESENTATIONS AND WARRANTIES

Seller represents and warrants as follows:

1. Seller is the owner of the business and Business Assets being sold hereunder.

2. That said Business Assets are or will be free and clear of any and all encumbrances as the date of Closing.

3. That there are no suits or actions pending or threatened against the business or Business Assets as of this date and there will be none as of the date of Closing.

4. That there are no audits or governmental or administrative agency investigations or proceedings pending or threatened against the business or the Business Assets.

5. Seller will be responsible for all payroll tax liability and sales tax liability, if any, prior to October 1, 2002.

Seller will not solicit any of his former patients for any dental practice reasons. Seller has represented that 481 active patients remain in practice at time of closing.

Seller will not engage in patient referrals that would extend beyond the scope of Buyer's practice. All active patients will be transitioned to Buyer and no other dentists will be acquiring patients of Seller's practice via Seller referral or sale.

SCHEDULE C

GENERAL CONDITIONS AND PROVISIONS

1. BOOKS AND RECORDS.

Seller will retain ownership of all books and records with the business except as provided in Paragraph 16 of the Agreement.

2. TRANSFER OF ASSETS.

At Closing, the transfer of assets and other rights of Seller to Buyer hereunder shall be effected by a full covenant and warranty bill of sale and such other endorsements, assignments and other good and sufficient instruments of transfer and conveyance as Buyer shall reasonable request.

3. ACTS AND DOCUMENTS AFTER CLOSING.

The parties agree that they will at any time and from time to time after Closing, upon reasonable request of the other party, do, execute and acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all such other and further acts, documents, assurances and assistances as my be necessary in conformity with this Agreement.

4. INDEMNIFICATION OF BUYER.

Seller covenants and agrees to indemnify Buyer, and save Buyer harmless from and against any and all liabilities, claims, expenses, or other obligations of Seller imposed or sought to be imposed against Buyer and which are arising out of transactions or events prior to the Closing Date unless Buyer has assumed them hereunder.

5. MAINTENANCE OF ASSETS.

Seller shall maintain the Business Assets being sold prior to Closing in their present condition, reasonable wear and tear excepted.

6. RISK OF LOSS.

Seller shall assume risk of loss prior to Closing and Buyer thereafter.

7. NO BROKER.

The parties represent and warrant to each other that there has been no broker or finder in connection with

the Agreement, and that neither knows of any facts that would give rise to any claim for brokers' or finders' fees.

8. CONFIDENTIALITY.

The parties agree that after Closing, neither will disclose any confidential matters relating to the business, its records, patients or relating to the other party, unless otherwise provided herein.

9. INTRODUCTION TO PATIENTS AND SUPPLIERS.

Seller, at his expense, will send a letter to the patients and suppliers announcing the transfer of the practice and introducing Buyer. In addition, the Seller may also advertise in the newspaper his retirement and the transfer of the practice to the Buyer.

10. INJUNCTIVE RELIEF.

This Agreement may be enforced by injunctive relief as well as at law in a suit for damages for the breach hereof.

11. NOTICES.

Any notice, request, instruction or other documents required or desired to be given hereunder by either party shall be in writing and may be delivered to the other party in person, in which case said notice shall be effective as of its date of delivery. Notices may also be given in writing by Certified Mail addressed to the other party at the address shown herein and shall be deemed given as of the date such notice is deposited, with postage prepaid in the United States Mails. In addition, the party shall also mail a notice to the party's attorney, if any, at the address provided below by certified mail with postage prepaid.

12. CONTROLLING LAW.

This Agreement shall be construed and interpreted under the laws of its place of execution and be enforceable in said venue and jurisdiction as well as any other place where jurisdiction of the parties and subject matter can be obtained.

13. BINDING EFFECT.

The provisions of this Agreement shall be binding upon and inure to the benefit of and be enforceable by the heirs, personal representatives, successors and assigns of the parties.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH,	)	
	)	
Plaintiff,	)	06 CH 11607
	)	
v.	)	(Transferred to Law Division,
	)	Commercial Calendar "W")
	)	
TODD C. PUSATERI, FIRST DENTAL, P.C.,	)	
and FIRST DENTAL OF ORLAND PARK, P.C.	)	Hon. Sanjay Tailor
	)	Room 2304
Defendants.	)	

AFFIDAVIT OF MARY A. TUJETSCH, D.D.S.

I, MARY A. TUJETSCH, D.D.S., being of the age of majority, first being placed under oath, depose and state as follows:

1. The facts set forth in this affidavit are within my personal knowledge.

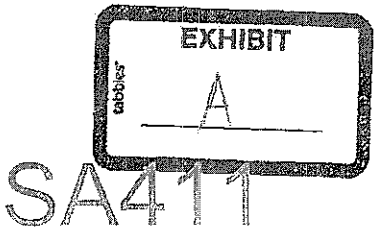
2. If called upon as a witness, I would and could competently testify to all facts stated in this Affidavit.

3. I am a licensed dentist in the states of Illinois, Indiana and Michigan.

4. In June, 2004, I purchased for $165,000 a dental practice at 7714 159th Street, Orland Park, Illinois ("Dental Practice") from First Dental P.C. First Dental P.C. was owned and operated by Dr. Todd Pusateri ("Pusateri"). A true and correct copy of the Asset Purchase Agreement is attached as Exhibit 1.

5. Section 6.03 of the Asset Purchase Agreement required that I enter into a 5-year lease for the office occupied by the Dental Practice. A true and correct copy of the Lease is attached as Exhibit 2. The Lease required payments of $2,400 per month, escalating at 5% per year, plus $375 per month for common area maintenance expenses. (Exhibit 2, p. 3)

6. The Agreement did not define the term "active patient."



7. I understood and intended that the term "active patient" to mean a patient who maintains a continual, ongoing relationship where treatment is obtained on a fee basis. I understood the reference to "First Pacific Corporation software" was simply the database where the identity of the active patients could be found.

8. At no time prior to executing the Asset Purchase Agreement did Dr. Pusateri inform me that First Pacific Corporation ("FPC"), the company that handled the computer-based billing, listed "active patient" in its database to include patients that had been treated within a 24-month period, irrespective of whether they had changed dentists, moved, refused to schedule appointments, had billing disputes or were dead. I understood that the term "active patient" would not include patients who had changed dentists, moved, refused to schedule appointments, had billing disputes, demanded discounts, were referred to collections or were dead.

9. Prior to purchasing the Dental Practice, I visited the Dental Practice in Orland Park on two occasions. During such visits, I was not afforded an opportunity to audit the patient files or inspect the dental equipment in the office to determine if it was working and in good order. During one visit with Dr. Pusateri, Dr. Pusateri showed me the patient files, indicating that the files on two walls were the files of the "active patients." Pusateri randomly pulled two patient files and explained his financial policies, record keeping and medical notations were contained in the patient files. Pusateri never informed me that the patient files had been segregated by his staff into active patient files and inactive patient files. Pusateri showed me the dental equipment. Pusateri represented that the equipment was working and in good order. I relied on Pusateri's representations regarding the equipment because I could not take x-rays or use the equipment without patients.

10. After purchasing the Dental Practice, I discovered that the patient files on one wall were patient files of the co-tenant, Innovative Chiropractic, not the patient files for the Dental Practice

11. Prior to purchasing the Dental Practice, Dr. Pusateri provided a copy of a valuation report, entitled "Opinion of Value", prepared by Practice Transition Partners. A copy of the Opinion of Value regarding the Dental Practice is attached as Exhibit 3. The Opinion of Value prepared by Practice Transition Partners concluded that the Dental Practice had a value of $177,930. (Exhibit 3, p. 6) As a result of discovery in the present lawsuit, I have learned that the valuation report prepared by Practice Transition Partners is flawed because:

(a) The valuation report was based on representations made by Pusateri that the Dental Practice had 1,125 active patients who were seen in the prior 12 months and who had appointments scheduled with 6 month follow up (See Exhibit 4, Question 29); and

(b) The valuation report assumed that the salary paid to the other dentist in the office, Dr. Purdue, was being paid to Dr. Pusateri and as a consequence, the salary of Dr. Purdue was added back into the income to determine the valuation of the Dental Practice (Exhibit 3, p. 5); and

(c) The valuation report was prepared under Pusateri's misleading written directive in the appraisal questionnaire that an assumption should be made that Pusateri had an existing non-compete agreement with the other dentist, Dr. Purdue, which was not true as verified by Pusateri's written answer in the appraisal questionnaire that no such covenant existed at the time of the appraisal.

12. At no time did Dr. Pusateri inform me that the Opinion of Value prepared by Practice Transition Partners (Exhibit 3) was based on a different definition of active patients, a different number of active patients and the false income assumptions. Pusateri never provided to me that questionnaire prepared by him and submitted to Practice Transition Partners to obtain the Opinion of Value for the Dental Practice.

13. Prior to the execution of the Asset Purchase Agreement, Dr. Pusateri represented the following to me:

(a) The Dental Practice charged usual and customary fees to patients;

(b) The Dental Practice had agreements with each patient that permitted him to charge for missed appointments and that he enforced such agreements. (A true and correct copy of the agreements with the patients is attached as Exhibit 5.);

(c) The co-tenants, the chiropractors (Innovative Chiropractic), used the office on alternating days and thus, the chiropractors would not interfere with the operations of the Dental Practice on Tuesdays, Thursday and Saturdays; and

(d) All of the dental equipment and business equipment was working and in good order.

14. After purchasing the Dental Practice, I discovered that the representations set forth in Paragraph 12 above were not true:

(a) The Dental Practice offered discounted services on an ongoing basis by charging only $39 (children) and $49 (adults) for teeth cleaning and a dental exam. This fee is far below the usual and customary rate for cleaning of teeth and an examination by a dentist;

(b) While the Dental Practice did have agreements with patients that permitted the charging a fee for missed appointments, Pusateri never enforced those agreements, causing some patients to be upset when I began to enforce the patient agreements after purchasing the Dental Practice;

(c) The chiropractors worked on the same days that the Dental Practice was open (Tuesdays, Thursdays and Saturdays), resulting in disruptions and conflicts as the Dental Practice and the chiropractors used the same waiting room and reception area; and

(d) The following dental equipment was not working and in good order: dental chair, cuspidor and light, x-ray developer, autoclave, ultasonic cleaner, copier/fax, phone system and stereo system with speakers.

15. Because the equipment was not working and in good order, I had to do the following: (1) replace one of the dental chairs, (2) replace the x-ray developer, (3) replace the autoclave, (4) replace the ultrasonic cleaner, (5) replace the copier/fax, and (6) replace the stereo system.

16. After I purchased the Dental Practice, I requested that Pusateri send a letter to the patients advising that he had sold the Dental Practice to me. Pusateri denied my request, even though it is customary for dentists to send such a letter after selling a dental practice.

17. I have reviewed the patient files. There are three groups of patient files: (1) Group 1 consists of 456 patient files that I returned to Pusateri as required by law as he was the last dentist to treat the patient, Group 2 consist of 177 closed patient files that Pusateri stored in a back room of the dental office, and (3) Group 3 consists of the 523 patient files that I retained.

18. Of the 456 files for patients in Group 1, none qualify as "active patients." The rest of the patients were not active patients for the follow reasons: 175 had changed dentists (of this total 38 of these patients changed due to a geographic move or relocation), 234 had refused x-rays or other dental treatment or the files were marked as "NFA" (no future appointments) by Pusateri staff , 13 were relatives of Pusateri, 12 were either deceasedor were afflicted with a terminal disease. 21 of the files were devoid of any medical records or data and 1 file was duplicated for a patient. The resulting total is 456 files returned to Pusateri (Ex. 4 thereto)

19. Of the 177 patients in Group 2, there were no patients who qualify as active patients. These patients were not active patients because 62 had changed dentists (of this group, 5 had moved or relocated), 97 refused x-ray or dental treatment or had their files marked "NFA" (no future appointments) by Pusateri staff members. In addition, 2 patients were either deceased or suffered from a terminal illness and 6 were friends or family members of Pusateri. 10 of these files contained no medical records pertaining to patients.(Ex. 5 thereto)

20. Of the 523 patient in Group 3, there were only 391 patients who may qualify as active patients. Group 3 includes 138 patients who were first treated after I purchased the Dental Practice and thus do not quality as "active patients" under the Agreement. (Ex. 6 thereto.)

21. In total, the patient files reflect that I only received 391 active patients from Pusateri. That is only 32.6 % of the "active patients" promised under the Agreement.

22. After I purchased the Dental Practice, I retained all of the Pusateri's former employees which included Dr. Richard Purdue (dentist), Jackie Galban (hygienist), Jan Johnson (receptionist), and Tina Dowling (dental assistant).

23. Before I purchased the Dental Practice, Dr. Pusateri represented that the Dental Practice could sustain itself. As a result, I continued my dental practices in Chicago, Illinois and Calumet City, Illinois.

24. In the months following the purchase of the Dental Practice, Dr. Purdue, the contractor dentist, treated the vast majority of the patients of the practice as he had previously done when the practice was owned by Defendant Pusateri. Accordingly, I found the need to treat only a small percentage of the patients at the Orland Park office.

25. While operating the Dental Practice in Orland Park, Dr. Pusateri, interfered with and undermined the operations of the Dental Practice by doing the following:

(a) Dr. Pusateri removed my office sign from the main sign next to the road, precluding the visibility required to attract new patients and making it difficult for patients to locate the office;

(b) Shortly after I purchased the Dental Practice, Dr. Pusateri posted For Sale signs along the road and in the front windows of the office, giving the appearance that the Dental Practice was going to close. Patients repeatedly asked me if we were still in business or if we were going out of business;

(c) Dr. Pusateri built a large addition to the building, creating noise (e.g., jackhammers) that created disruptive noise levels that upset patients and generated dirt and debris that contaminated my surgical rooms;

(d) Construction workers who were building the addition accessed my office for electricity to run their equipment at my expense and to use the washroom facilities, often leaving the washrooms facilities in a filthy and unsanitary state;

(e) Pusateri failed to provide all of the cleaning services required Lease, forcing me to clean the windows, the washrooms and the office;

(f) Pusateri authorized the chiropractors to use my sterilization equipment. Specifically, when I was not present, the chiropractors were using my sterilization equipment to sterilize instruments that were contaminated with fecal matter;

(g) Pusateri arranged to have the lawn mowed on days the Dental Practice was open, causing patients and children to become upset by the loud machine noises blaring in the office during dental treatment;

(h) Pusateri authorized his father to put used cars in the parking lot with for sale signs. When I asked both Pusateri and his father to stop this practice and they refused; and

(i) After the chiropractors moved to another location, Dr. Pusateri allowed five other tenants to rent space in the dental office, including two groups of lawyers, a real estate agent, a financial advisor and a consultant. The lawyers engaged in loud and belligerent swearing on the phone and scattered boxes throughout the office. This behavior disturbed patients and interfered with the treatment of patients.

26. The Dental Practice in Orland Park failed because I did not receive the requisite number of "active patients" as promised under the Asset Purchase Agreement. The cost of paying the employees, along with the rent and the utilities, exceeded the revenues. Finally, in October 2007, I closed the Dental Practice in Orland Park.

27. I paid $125,884 to Pusateri under the terms of the Lease.

28. I have reviewed the affidavit of Dr. Pusateri that Defendants submitted in support of their Motion for Summary Judgment. I rebut the representations in Dr. Pusateri's Affidavit as follows:

(a) Pusateri never advised me of any documentation or information regarding how First Pacific Corporation ("FPC") defined "active patient"

(b) I was never provided with a document prepared by FPC with a definition of "active patient," such as Exhibit 2 to Pusateri's Affidavit, by Pusateri or FPC.

(c) Pusateri never showed me or provide me with copies of the "Practice Overview" reports, referenced in Pusateri's Affidavit as Exhibit 4, that allegedly were printed off the FPC billing database prior to the sale of the Dental Practice

(d) Until the mediation of this case in 2009, I had no knowledge regarding how the ADA defined "active patient" and had never seen the ADA document attached as

Exhibit 3 to Pusateri's Affidavit. Critically, the ADA definition of "active patient" is on a document dated 2007 and applies only to appraisals.

(e) Pusateri did not provide any documents to me, in discovery or otherwise, to support the financial information alleged in Paragraphs 36-39 of the Pusateri Affidavit.

(f) Prior to purchasing the Dental Practice, I never accessed the FPC terminal to determine the number of active patients. I never knew that the FPC even tracked so-called active patients. I simply understood that the FPC database had the names of the patients and their billing information.

(g) In April 2005, I offered to buy the building from Pusateri so I could either sell the Dental Practice Lease as a package with the building, or alternatively, to operate the Dental Practice without the interference of the chiropractors and the financial burdens of the Lease. Pusateri rejected my offer and made no counter-offer.

(h) In July 2006, FPC advised me that I could not generate a report showing the number of "active patients" of the Dental Practice that existed prior to the purchase in June 2004. FPC advised that a report with pre-purchase "active patients" could only be generated for 90 days after I purchased the Dental Practice. See Exhibit 9. I did not seek to generate a report of "active patients" during the first 90 days after I purchased the Dental Practice since, during that time period, I had made repeated requests for that information directly to Pusateri. Pusateri has no personal knowledge of the gross patient fees generated after I purchased the Dental Practice. Critically, Pusateri does not have any knowledge of the net income of the Dental Practice after I purchased the Dental Practice.

29. I have reviewed the affidavits of Dr. Richard Purdue, Jackie Galban, Tina Buben-Dowling and Janice Johnson that Defendants submitted in support of their Motion for Summary Judgment. I rebut the representations made in those affidavits as follows:

(a) Dr. Purdue, Ms. Galban, Ms. Buben-Dowling and Ms. Johnson have no knowledge regarding the number of active patients sold by Dr. Pusateri to me in June 2004. None of the affidavits address the number of active patients. Indeed, Ms. Galban admits in Paragraph 34 of her Affidavit that she "was not involved in the tracking of number of active patients of the Dental Practice"

(b) The statements regarding the dental equipment are untrue. I had to replace a number of pieces of equipment as set forth in Paragraph 15 above.

(c) Pusateri never informed me that he had agreed to provide patient care "regardless of the patient's financial status" or that he "always provided patients with payment options" as stated in Jan Johnson's Affidavit and Ex. 1 thereto.

(d) I did not charge for all missed appointments. Often, I waived the charge for the first offense or for a legitimate reason.

(e) For the first six months of operating the Dental Practice in Orland Park, I charged the same fees as charged by Dr. Pusateri. In January 2005, 6 months after the purchase, I raised the rates by a modest 5%.

(f) Before purchasing the Dental Practice, Pusateri informed me that Dr. Purdue had repeatedly failed to prescribe the appropriate treatment plan for patients. Pusateri recommended that I become more involved in examining the patients so that the appropriate dental treatment plan could be prescribed.

(g) Tina Dowling did not quit, but rather was terminated for failing to appear for work on more than one occasion. Dr. Purdue insisted that Ms. Dowling be terminated as he had been left unassisted on several occasions and he did not trust that she would act responsibly if given another opportunity.

30. Ms. Johnson in her March 10, 2009 statement states that Pusateri provided excellent care to patients "regardless of their financial status" and that "he always provided the patient with payment options and never refused to treat them." Dr. Pusateri never informed me that he had agreed to provide care "regardless of the patient's financial status" and "that he always provided patients with payment options and never refused to treat them."

31. Ms. Johnson also represents in her statement of March 10, 2009, that Dr. Pusateri rarely charged a patient for a missed appointment and never charged a patient for being late. This representation is contrary to what was represented to me by Dr. Pusateri before I purchased the Dental Practice.

32. Prior to purchasing the Dental Practice, I ran several successful dental practices. Further, I purchased several small dental practices and grew those dental practices.

33. Over the years, I had been involved in some lawsuits. As explained below, these lawsuits were resolved in my favor, settled or are still pending:

A. *Robert A. Green Ltd. v. Mary A. Tujetsch*: I bought a dental practice from Dr. Green. After Dr. Green died, there was dispute regarding whether I owed money to the Estate. I prevailed and the defendant paid my legal fees.

B. *Special Assets Inc. v. Tujetsch*: This lawsuit arose from a dispute with a landlord (Pittsfield Building) because the landlord had mistakenly rented an office containing my dental equipment. The landlord gave my dental equipment to a new tenant as part of a lease. The lawsuit was eventually resolved.

C. *Tujetsch v. Misher*: This lawsuit is related to the *Special Assets Inc.* lawsuit described above. Misher was the dentist who moved into an office in the Pittsfield Building and wrongfully took possession of my dental equipment. I sued Misher to recover my dental equipment. I prevailed.

D. *Tujetsch v. Fedin*: I shared office space with Dr. Fedin in 2004. I filed a lawsuit to recover office expenses which were wrongfully charged to my credit card. I prevailed and recovered the expenses charged to my credit card.

E. *Tujetsch v. Chang*: I entered into an oral agreement with Dr. Chang to share office space and expenses. Shortly after I moved into the office space being rented by Dr. Chang, Dr. Chang demanded that the terms of our oral agreement be changed. When I refused to change the terms of the agreement, Dr. Chang locked me out causing business interruption and loss of income. This lawsuit is still pending.

F. *Tujetsch v. Bradley Dental*: This was a sexual discrimination lawsuit brought by me against Bradley Dental. This matter was recently settled.

G. *Massel v. Tujetsch*. I was named in a lawsuit brought by Maria Massel relating to a billing dispute for crown work for her husband. Ms. Massel wanted a complete refund of the deposit, but there were off-setting charges due for dental work provided to Ms. Massel's children. Ms. Massel voluntarily dismissed her lawsuit against me.

34. The present lawsuit against First Dental, P.C. and Dr. Pusateri is the only lawsuit pertaining to the Dental Practice in Orland Park.

35. After I closed the Dental Practice in Orland Park in late 2007, I sought out other employment by looking in classified ads and elsewhere. I took positions at several dental offices, including Michigan Avenue Dental, Bradley Dental, Colby Dental, Armitage Dental and Transition Dental. I left the employment of those dental practices for the following reasons:

Dentist Office	Term	Reason for Departure
Bradley Dental	4/22/08 – 7/27/08	Discrimination; Breach of contract

Bourbonnais, IL		
Avenue Dental Chicago, IL	9/19/08 – 10/4/08	Resigned due to failure to pay.
Transition Dental, Merrillville, IN	6/7/09 -10/29/09	Refused to take cut in pay despite contract.
Armitage Dental, Chicago, IL	2009 – uncertain of specific dates	Temporary, part-time position. I resigned when Armitage failed to pay for my services and also failed to provide me with a written contract as promised.
Colby Dental Highland, IN	Few days in January 2010	Explored partnership; Decided not to pursue.

36. In 2004, I was not a member of the American Dental Association ("ADA"). At no time prior to March 2009, when a mediation in this case took place, did I know of any definition of "active patient" adopted by the ADA. The ADA Dental Records document attached as Exhibit 3 to Dr. Pusateri's Affidavit is dated 2007 and cites a definition of "active patient" for "practice appraisals." The Asset Purchase Agreement is not a "practice appraisal." Moreover, the ADA document states: "The above definition is typically used in practice appraisals and may not be the same definition of active patient used at dental offices in records maintenance."

37. I would never have purchased the Dental Practice and entered into a 5 year Lease had I known that the Dental Practice did not have approximately 1,200 active patients.

38. In May 2005, I made an offer to buy the building from Pusateri so as to free myself from the continual disruptions caused by the chiropractors and Pusateri. Pusateri never made a counter-offer.

Mary A. Tujetsch

SUBSCSRIBED and SWORN to before me this_____day of February, 2011.

_____
NOTARY PUBLIC

937807

EXHIBIT 1

ASSET PURCHASE AGREEMENT

between

MARY A. TUJETSCH, DDS
"PURCHASER"

and

FIRST DENTAL, PC
"SELLER"

Dated June 27, 2004

ASSET PURCHASE AGREEMENT

DATED: June 27, 2004

BETWEEN: Mary A. Tujetsch, DDS, "Purchaser"
55 East Washington Street, Suite 2121
Chicago, IL 60602

AND: First Dental, PC, an Illinois professional corporation, "Seller"
8 West Gartner, Suite 124
Naperville, IL 60540

Seller is the owner of the dental practice located at 7714 159th Street, Orland Park, IL 60462 (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has ~~1200~~ 1200 active patients, who have been treated within the previous ~~twelve months.~~ twenty four Months according to First Patient Corporation Software

In consideration of the mutual promises and covenants contained in this Agreement, the parties agree as follows:

ARTICLE I
Purchase and Sale of Assets

1.01 Purchase and Sale. Subject to all the terms and conditions of this Agreement and for the consideration herein stated, on the Closing Date, as that term is defined in Section 1.06, Seller agrees to sell, convey, assign, transfer and deliver to Purchaser, free and clear of all encumbrances, and Purchaser agrees to purchase and accept from Seller, all of the assets, properties and rights of Seller (other than the assets specified in Section 1.02), tangible and intangible, wherever located, that are used or useful to maintain and operate the Dental Practice, which assets (the Assets) shall include without limitation:

1.01-1 All patient lists, equipment , files and patient records, and all other operating data and records relating to the Dental Practice, including without limitation financial, accounting and credit records, correspondence, budgets, engineering and facility records and other similar documents and records. Inactive records are to be returned to Seller two years after closing.

1.01-2 All other items of tangible personal property of Seller used in connection with or associated with the Dental Practice, including furniture, fixtures, equipment, supplies, inventory and spare and replacement items therefor, and all such items acquired by Seller after the date hereof and on or before the Closing Date, other than to the extent such items are disposed of by Seller prior to the Closing Date in the ordinary cause of practice. Seller represents that all equipment is working and in good order. Seller asserts that all equipment is in compliance with municipal, county, state, and federal laws. Seller assumes risk of loss of tangible assets prior to, but not subsequent to, closing.

1.01-3 All rights, benefits and interests of the Dental Practice under the contracts and agreements specifically assumed by Purchaser for provision of dentistry services including without

limitation contracts with third payers, dentists or other professionals, and under any contracts, agreements, commitments, understandings, purchase orders, documents or instruments entered into between the date hereof and the Closing Date and expressly assumed by Purchaser in writing on the Closing Date, other than to the extent such items have terminated, expired or been disposed of by Seller prior to the Closing Date without breach of this Agreement (collectively, the Contracts);

1.01-4 All assignable rights to all telephone lines and numbers used in the conduct of the Dental Practice; and

1.01-5 For one year subsequent to closing, Purchaser may use the name "First Dental of Orland Park," but only for the purpose of marketing the Dental Practice within a 20-mile radius of it. Purchaser shall not use any other name which includes the words "First Dental". No later than eighteen months subsequent to closing, Purchaser shall cease and desist using the name "First Dental of Orland Park"

1.01-6 The assets include the following equipment: eight waiting room chairs, Canon copier, Telecheck credit card terminal, calculator, stapler, tape dispenser, file cabinet under copier, patient chart cabinet, corner desk in business front area, two office chairs, three business 4-line phones, one business 2-line phones, network hub, two waste cans, shredder, vacuum, microwave, card table and two chairs, three folding chairs in operatories, TV/VCR in operatory #4. The assets do not include the following equipment: any property of Innovative Chiropractic, fax machine, end table in waiting room, decorative pictures, refrigerator, large garbage can in furnace room, stereo, any property of Seller Landlord, ladder, broom, mop, light bulb changing stick.

1.02 Excluded Assets. The Assets shall not include the following:

1.02-1 All cash assets of the Dental Practice, notes and accounts receivable, automobiles, real estate, and personal items of Seller. Re-do's of work originally performed before closing and completed subsequent to closing may be charged and collected by Purchaser, and do not constitute accounts receivable. Completion of work subsequent to closing which was originally begun prior to closing may be charged and collected by Purchaser, and do not constitute accounts receivable.

1.02-2 No liabilities of Seller whatsoever, whether in tort or contract or otherwise, are being transferred to or acquired by Purchaser hereunder, unless specifically assumed and scheduled hereunder. Buyer does not assume and will not be responsible for any known, unknown, or contingent liabilities of Seller incurred by any means including, but not limited to, professional malpractice or personal injury of any nature, including liabilities related to Seller's employees prior to closing. Seller is responsible for all payroll, tax liability, sales tax liability, if any, prior to closing.

1.02-3 The assets do not include the following: any property of Innovative Chiropractic, file cabinet next to copier machine, shelves containing vitamins, cabinet under fax machine, cabinetry in operatory, cabinetry in sterilization area, cabinetry at front desk, carpets, light fixtures, countertops, window treatments, ceiling speakers, TV and computer monitor mounts, bathroom fixtures, and magazine rack. The assets do not include any property of First Pacific Corporation, including its computers, monitors, keyboards, battery backup, computer speakers, laser printer, color printer, computer software, and computer connections.

1.02-4 Plants, trees, decorations, and pictures may be changed by Purchaser in cooperation with Innovative Chiropractic or other current tenant.

1.03 **Purchase Price**. The purchase price for the Assets (the Purchase Price) shall be the following:

1.03-1 One Hundred Sixty Five Thousand and 00/100ths ($165,000.00) Dollars is the full purchase price. The sum of Five Thousand ($5,000.00) Dollars has been deposited, and represents Purchaser's earnest money deposit ("Earnest Money"). The full purchase price minus the Earnest Money shall be paid by Purchaser to Seller at closing, by certified or official check.

1.04 **Instruments of Conveyance and Transfer**. The sale of the Assets, and the conveyance, assignment, transfer and delivery of all of the Assets shall be affected by Seller's execution and delivery to Purchaser, on the Closing Date, of a bill of sale in substantially the form of the Assignment and Bill of Sale attached hereto as Exhibit A. At time of closing, personal property, bio-hazardous property, and inactive patient files are to be moved at Seller's expense.

1.05 **Further Assurances**. Seller agrees that, at any time and from time to time on and after the Closing Date, they will, upon the request of Purchaser and without further consideration, take all steps reasonably necessary to place Purchaser in possession and operating control of the Assets and will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all further acts, deeds, assignments, conveyances, transfers, or assurances as reasonably required to sell, assign, convey, transfer, grant, assure and confirm to Purchaser, or to aid and assist in the collection of or reducing to possession by Purchaser of, all of the Assets, or to vest in Purchaser good, valid and marketable title to the Assets.

1.06 **Closing**. The consummation of the transactions contemplated by this Agreement (the Closing) shall take place on July 1, 2004, or at another date, time and place agreed upon in writing by the parties (the Closing Date), but Purchaser shall take possession of the Dental Practice on June 30, 2004.

1.07 **Allocation of Purchase Price**. The Purchase Price shall be allocated among the Assets as follows, and Purchaser and Seller shall be bound by that allocation in reporting the transactions contemplated by this Agreement to any governmental authority (including without limitation the Internal Revenue Service):

(a) Twenty-Five Thousand ($25,000.00) Dollars for dental equipment;

(b) Four Thousand ($4,000.00) Dollars for hand instruments and dental supplies;

(c) Five Thousand ($5,000.00) Dollars for furniture and office equipment;

(d) One Hundred Thirty One ($131,000.00) Dollars for goodwill;

ARTICLE II
Representations and Warranties of Purchaser

Purchaser, represents and warrants to Seller as follows:

2.01 **Authorization**. This Agreement has been duly executed and delivered by Purchaser and is binding upon and enforceable against her in accordance with its terms;

2.02 **Compliance**. The execution, delivery and performance of this Agreement by Purchaser, the compliance by Purchaser with the provisions of this Agreement and the consummation of the transactions described in this Agreement will not conflict with or result in the breach of any of the terms or provisions of or constitute a default under:

2.02-1 any note, indenture, mortgage, deed of trust, loan agreement, lease or other agreement or instrument to which Purchaser is a party or by which Purchaser is bound; or

2.02-2 any statute or any order, rule, regulation or decision of any court or regulatory authority or governmental body applicable to Purchaser.

2.03 **Consents**. Except for the consent of Purchaser's principal bank, no consent, approval, authorization, order, designation or declaration of any court or regulatory authority or governmental body, federal or other, or third person is required to be obtained by Purchaser for the consummation of the transactions described in this Agreement.

2.04 **Accuracy of Representations & Warranties**. None of the representations or warranties of Purchaser contains or will contain any untrue statement of any material fact or omits or misstates a material fact necessary to make the statements contained in this Agreement not misleading

ARTICLE III
Representations and Warranties of Seller

3.01 **Corporate Existence; Authority**. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois, and has all necessary corporate power and authority to own, lease and operate the property and assets and to carry on the business as now conducted and as proposed to be conducted. Seller owns all of the assets of the Dental Practice. Seller has full power and authority to enter into this Agreement and to carry out its terms. This Agreement has been duly and validly executed and delivered by Seller and is binding upon and enforceable against Seller in accordance with its terms.

3.02 **No Adverse Consequences**. Neither the execution and delivery of this Agreement by Seller nor the consummation of the transactions contemplated by this Agreement will

3.02-1 result in the creation or imposition of any lien, charge or encumbrance on the Seller's assets or property,

3.02-2 violate or conflict with any provision of Seller's articles of incorporation or bylaws,

3.02-3 violate any law, judgment, order, injunction, decree, rule, regulation or ruling of any governmental authority applicable to Seller, or

3.02-4 either alone or with the giving of notice or the passage of time or both, conflict with, constitute grounds for termination or acceleration of, result in the breach of the terms, conditions

or provisions of, result in the loss of any benefit to Seller under or constitute a default under any agreement, instrument, license or permit to which Seller is a party or is bound.

3.03 **Brokers and Finders**. Purchaser acknowledges and understands that no brokers or finders have been used in this transaction or are otherwise entitled to any fee.

3.04 **Litigation**. There is no claim, litigation, proceeding or investigation of any kind pending or threatened by or against the Dental Practice, and, to the best knowledge of Seller, there is no basis for any such claim, litigation, proceeding or investigation.

3.05 **Compliance with Laws**. Seller has at all relevant times conducted the Dental Practice in compliance with their respective articles of incorporation and bylaws and all applicable laws and regulations. The Dental Practice is not subject to any outstanding order, writ, injunction or decree, and have not been charged with, or threatened with a charge of, a violation of any provision of federal, state or local law or regulation.

3.06 **Employment Matters**.

3.06-1 **Employment Agreements**. Each of the employees of the Dental Practice is an at-will employee. There are no written employment, commission or compensation agreements of any kind between Seller and any of its employees at the Dental Practice.

3.07 **Permits and Licenses**. Seller and the shareholders of Seller hold and at all times have held, all licenses, permits, franchises, easements and authorizations (collectively, Permits) necessary for the lawful conduct of the Dental Practice pursuant to all applicable statutes, laws, ordinances, rules and regulations of all governmental bodies, agencies and other authorities having jurisdiction over it or any part of its operations, and there are no claims of violation by any such party of any Permit.

3.08 **Consents and Approvals**. No consent, approval or authorization of any court, regulatory authority, governmental body, or any other entity or person not a party to this Agreement is required for the consummation of the transactions described in this Agreement by Seller. Seller has obtained, or shall have obtained prior to the Closing, all consents, authorizations or approvals of any third parties required in connection with the execution, delivery or performance of this Agreement by Seller or the consummation of the transaction contemplated by this Agreement. Seller has made all registrations or filings with any governmental authority required for the execution or delivery of this Agreement or the consummation of the transaction contemplated hereby.

3.09 **Records**. The books of account of Seller and the Professional Corporation is complete and accurate in all material respects, and there have been no transactions involving the business of Seller and the Professional Corporation which properly should have been set forth therein and which have not been accurately so set forth. Complete and accurate copies of such books have been made available to Purchaser.

3.10 **Reliance**. Seller recognizes and agrees that, notwithstanding any investigation by Purchaser, Purchaser is relying upon the representations and warranties made by Seller in this Agreement.

3.11 **Accuracy of Representations and Warranties**. None of the representations or warranties of Seller contains or will contain any untrue statement of any material fact or omits or

misstates a material fact necessary to make the statements contained in this Agreement not misleading. Seller does not know of any fact that has resulted or that, in the reasonable judgment of Seller will result, in any material adverse change in Seller's business, results of operation, financial condition or prospects that has not been set forth in this Agreement.

ARTICLE IV
Covenants

4.01 Access to Properties, Books and Records. Prior to the Closing Date, Seller shall, at Purchaser's request, afford or cause to be afforded to the agents, attorneys, accountants and other authorized representatives of Purchaser reasonable access during normal business hours to all employees, properties, books and records of the Dental Practice and shall permit such persons, at Purchaser's expense, to make copies of such books and records. Purchaser shall treat, and shall cause all of their agents, attorneys, accountants and other authorized representatives to treat, all information obtained pursuant to this Section 4.01 as confidential. No investigation by Purchaser or any of her authorized representatives pursuant to this Section 4.01 shall affect any representation, warranty or closing condition of any party hereto or Purchaser's rights to indemnification.

4.02 Negative Covenants. Except as otherwise permitted by this Agreement or with the prior written consent of Purchaser, prior to the Closing Date, Seller shall not, in connection with the Dental Practice:

4.02-1 Mortgage, pledge, otherwise encumber or subject to lien any of its assets or properties, tangible or intangible, or commit itself to do any of the foregoing;

4.02-2 Except in the ordinary and usual course of its business and in each case for fair consideration, dispose of, or agree to dispose of, any of its assets or lease or license to others, or agree so to lease or license, any of its assets;

4.02-3 Acquire any assets which would be material to the Dental Practice other than assets acquired in the ordinary and usual course of business and consistent with past practices;

4.02-4 Enter into any transaction or contract or make any commitment to do the same;

4.02-5 Increase the wages, salaries, compensation, pension or other benefits payable, or to become payable by it, to any of its employees or agents, including without limitation any bonus payments or severance or termination pay, other than increases in wages and salaries required by employment arrangements existing on the date hereof or otherwise in the ordinary and usual course of its business;

4.02-6 Agree or commit to do any of the foregoing.

4.03 Affirmative Covenants. Except as otherwise permitted by this Agreement or with the prior written consent of Purchaser, prior to the Closing Date, Seller shall:

4.03-1 Operate the Dental Practice, including collecting receivables and paying payables, as presently operated and only in the ordinary course and consistent with past practices;

4.03-2 Advise Purchaser in writing of any litigation or administrative proceeding that challenges or otherwise materially affects the transactions contemplated hereby;

4.03-3 Use its best efforts to maintain all of the Tangible Personal Property in good operating condition, reasonable wear and tear excepted, consistent with past practices, and take all steps reasonably necessary to maintain their intangible assets;

4.03-4 Not cancel or change any policy of insurance (including self-insurance) or fidelity bond or any policy or bond providing substantially the same coverage;

4.03-5 Maintain, consistent with past practices, all inventories, spare parts, office supplies and other expendable items;

4.03-6 Use its best efforts to retain all employees;

4.03-7 Maintain its books and records in accordance with past practices;

4.03-8 Pay and discharge all taxes, assessments, governmental charges and levies imposed upon it, its income or profits or upon any property belonging to it, in all cases prior to the date on which penalties attach thereto; and

4.03-9 Comply with all laws, rules and regulations applicable to the Dental Practice.

4.04 Employees. Seller shall be responsible for and shall pay and discharge all obligations to such employees arising out of or in connection with their employment prior to Closing.

4.05 Indemnification by Seller

Seller indemnifies and agrees to defend, indemnify, and hold Purchaser harmless from, against, and in respect of the following:

(a) any and all debts, liens, liabilities, or obligations of Seller, direct or indirect, fixed, contingent, or otherwise existing before the Closing Date, including, but not limited to, any liabilities arising out of any act, transaction, circumstance, state of facts, actions or inactions of employees, or violation of law that occurred or existed before the Closing Date, whether or not then known, due, or payable, and irrespective of whether the existence thereof is disclosed to Purchaser in this Agreement or any schedule hereto;

(b) any and all loss, liability, deficiency, or damage suffered or incurred by Purchaser as a result of any default by Seller existing on the Closing Date, or any event of default occurring prior to the Closing Date that with the passage of time would constitute a default, under any material contract or other agreement assumed by Purchaser under this Agreement;

(c) any and all loss, liability, deficiency, or damage suffered or incurred by Purchaser by reason of any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Seller contained in this Agreement or in any certificate, document, or instrument delivered to Purchaser hereunder or in connection herewith;

(d) any claim for a finder's fee or brokerage or other commission by any person or entity for services alleged to have been rendered at the instance of Seller with respect to this

Agreement or any of the transactions contemplated hereby; and

(e) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs, and expenses, including, without limitation, legal fees and expenses, incident to any of the foregoing or incurred in purchaser's successful enforcement of this indemnity.

(f) any violations of municipal, state, or federal law committed prior to closing.

4.06 Indemnification by Purchaser

Purchaser hereby agrees to indemnify and hold Seller harmless from, against, and in respect of:

(a) any and all debts, liabilities, or obligations of Purchaser, direct or indirect, fixed, contingent, or otherwise accruing after the Closing Date;

(b) any and all loss, liability, deficiency, or damage suffered or incurred by Seller resulting from any untrue representation, breach of warranty, or non-fulfillment of any covenant or agreement by Purchaser contained in this Agreement or in any certificate, document, or instrument delivered to Seller pursuant hereto or in connection herewith;

(c) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs, and expenses, including, without limitation, legal fees and expenses, incident to any of the foregoing or incurred in Seller's successful enforcement of this indemnity, except those resulting from Seller's duties and obligations as landlord of Purchaser's leased premises.

4.07. Third-Party Claims

(a) In order for Purchaser or Seller, as the case may be, to be entitled to any indemnification provided for hereunder, in respect of, arising out of, or involving a claim made by any person, firm, governmental authority, or corporation other than the Purchaser or Seller, or their respective successors, assigns, or affiliates, against the indemnified party, the indemnified party must notify the indemnifying party in writing of such third-party claim promptly after receipt by the indemnified party of written notice of the third-party claim, and the indemnified party shall deliver to the indemnifying party, within 20 days after receipt by the indemnified party, copies of all notices relating to the third-party claim.

(b) If a third-party claim as set forth in subsection (a) hereof is made against an indemnified party, the indemnifying party will be entitled to participate in the defense thereof and, if it so chooses, to assume the defense thereof with counsel selected by the indemnifying party, provided such counsel is not reasonably objected to by the indemnified party. Should the indemnifying party elect to assume the defense of such a third-party claim, the indemnifying party will not be liable to the indemnified party for any legal expenses subsequently incurred by the indemnified party in connection with the defense thereof. If the indemnifying party elects to assume the defense of such a third-party claim, the indemnified party will cooperate fully with the indemnifying party in connection with such defense.

(c) If the indemnifying party assumes the defense of a third-party claim, then in no event will the indemnified party admit any liability with respect to, or settle, compromise, or discharge, any third-party claim without the indemnifying party's prior written consent, and the indemnified party will agree to any settlement, compromise, or discharge of a third-party claim that the indemnifying party may recommend that releases the indemnified party completely in connection with the third-party claim.

(d) In the event the indemnifying party shall assume the defense of any third-party claim, the indemnified party shall be entitled to participate in, but not control, the defense with its own counsel at its own expense. If the indemnifying party does not assume the defense of any such third-party claim, the indemnified party may defend the claim in a manner as it may deem appropriate, and the indemnifying party will reimburse the indemnified party promptly;

ARTICLE V
Joint Covenants

Purchaser and Seller covenant and agree that they will act in accordance with the following:

5.01 Governmental Consents. Promptly following the execution of this Agreement, the parties will proceed to prepare and file with the appropriate governmental authorities any requests for approval or waiver, if any, that are required from governmental authorities in connection with the transactions contemplated hereby, and the parties shall diligently and expeditiously prosecute and cooperate fully in the prosecution of such requests for approval or waiver and all proceedings necessary to secure such approvals and waivers. Purchaser is not responsible for obtaining governmental consents regarding the physical structure of the building owned by Seller.

5.02 Best Efforts; No Inconsistent Action. Each party will use its best efforts to effect the transactions contemplated by this Agreement and to fulfill the conditions to the obligations of the other parties set forth in Article 6 or 7 of this Agreement. No party will take any action inconsistent with its obligations under this Agreement or that could hinder or delay the consummation of the transactions contemplated by this Agreement, except that nothing in this Section 5.02 shall limit the rights of the parties under Articles 6, 7 and 8.

ARTICLE VI
Conditions to Obligations of Seller

The obligations of Seller under Article I are, at their option, subject to satisfaction, at or prior to the Closing, of each of the following conditions:

6.01 Representations, Warranties and Covenants.

6.01-1 All representations and warranties of Purchaser made in this Agreement shall in all material respects be true and complete on and as of the Closing Date with the same force and effect as if made on and as of that date.

6.01-2 All of the terms, covenants and conditions to be complied with and performed by Purchaser on or prior to the Closing shall in all material respects have been complied with or performed by Purchaser.

6.02 Adverse Proceedings.

No suit, action, claim or governmental proceeding shall have been instituted or threatened

against, and no order, decree or judgment of any court, agency or other governmental authority shall have been rendered against, Purchaser or Seller to restrain or prohibit this Agreement or the transactions contemplated by this Agreement.

6.03 Lease

At or before closing, Purchaser shall execute a five-year lease for the offices of the Dental Practice at 7714 159th Street, Orland Park, IL 60462, at which Seller is Lessor. Initial monthly rent shall be Two Thousand Four Hundred ($2,400.00) Dollars, and monthly rent will increase each year by a Five Per Cent (5%) increment over the previous year's monthly rent. The said required lease will also provide that Purchaser-Lessee shall pay monthly supplemental rent of Three Hundred Seventy-Five ($375.00) Dollars for reimbursement to Lessor of common area maintenance expenses, including but not limited to, lessee's pro-rata share of utility and other expenses for the entire building. Seller-Lessor shall account to Purchaser-Lessee at least semi-annually for such common area expenses, and shall either reimburse Purchaser for any over-payments made by Purchaser toward pro-rata common area maintenance expenses, or shall bill Purchaser for any such under-payments made by Purchaser, which billing Purchaser shall pay by its due date.

ARTICLE VII
Termination

7.01 **Right of Parties to Terminate**. This Agreement may be terminated:

7.01-1 by Purchaser, if any of the authorizations, consents, approvals, filings or registrations described above shall have been denied, not permitted to go into effect or obtained on terms not reasonably satisfactory to Purchaser and all reasonable final appeals shall have been exhausted;

7.01-2 by Purchaser, if Seller shall have breached any of their obligations hereunder in any material respect;

7.01-3 by Seller, if Purchaser shall have breached any of its obligations hereunder in any material respect; or

7.02 **Effect of Termination**. If either Purchaser or Seller decides to terminate this Agreement, such party shall promptly give written notice to the other party to this Agreement of such decision. In the event of a termination, the parties hereto shall be released from all liabilities and obligations arising under this Agreement, with respect to the matters contemplated by this Agreement, other than for damages arising from a breach of this Agreement.

ARTICLE VII
Confidentiality; Press Releases

8.01 Confidentiality.

8.01-1 No information concerning Seller not previously disclosed to the public or in the public domain that has been furnished to or obtained by Purchaser under this Agreement or in connection

with the transactions contemplated hereby shall be disclosed to any person other than in confidence to employees, legal counsel, financial advisers or independent public accountants of Purchaser or used for any purpose other than as contemplated herein. If the transactions contemplated by this Agreement are not consummated, Purchaser shall hold such information in confidence for a period of four years from the date of any termination of this Agreement, and all such information that is in writing or embodied on a diskette, tape or other tangible medium shall be promptly returned to Seller.

8.01-2 No information concerning Purchaser not previously disclosed to the public or in the public domain that has been furnished to or obtained by Seller under this Agreement or in connection with the transactions contemplated hereby shall be disclosed to any person other than in confidence to the employees, legal counsel, financial advisers or independent public accountants of Seller or used for any purpose other than as contemplated herein. If the transactions contemplated by this Agreement are not consummated, Seller shall hold such information in confidence for a period of four years from the date of any termination of this Agreement, and all such information that is in writing or embodied on a diskette, tape or other tangible medium shall be promptly returned to Purchaser.

8.01-3 Notwithstanding the foregoing, such obligations of Purchaser and of Seller shall not apply to information

(a) that is, or becomes, publicly available from a source other than Purchaser or Seller, as the case may be;

(b) that was known and can be shown to have been known by Purchaser at the time of its receipt from Seller, or by Seller at the time of its receipt from Purchaser, as the case may be;

(c) that is received by Purchaser from a third party without breach of this Agreement by Purchaser, or is received by Seller from a third party without breach of this Agreement by Seller, as the case may be;

(d) that is required by law to be disclosed; or

(e) that is disclosed in accordance with the written consent of Purchaser or of Seller, as the case may be.

ARTICLE IX
Other Provisions

9.01 Benefit and Assignment. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns forever. No party hereto may voluntarily or involuntarily assign such party's interest under this Agreement without the prior written consent of the other parties.

9.02 Entire Agreement. This Agreement and the Schedules and Exhibits referred to herein embody the entire agreement and understanding of the parties and supersede any and all prior agreements, arrangements and understandings relating to matters provided for herein.

9.03 **Fees and Expenses.** Purchaser shall be solely responsible for all costs and expenses incurred by her, and Seller shall be solely responsible for all costs and expenses incurred by Seller, in connection with the negotiation, preparation and performance of and compliance with the terms of this Agreement.

9.04 **Amendment, Waiver, etc.** The provisions of this Agreement may be amended or waived only by an instrument in writing signed by the party against which enforcement of such amendment or waiver is sought. Any waiver of any term or condition of this Agreement or any breach hereof shall not operate as a waiver of any other such term, condition or breach, and no failure to enforce any provision hereof shall operate as a waiver of such provision or of any other provision hereof.

9.05 **Headings.** The headings are for convenience only and will not control or affect the meaning or construction of the provisions of this Agreement.

9.06 **Governing Law.** The construction and performance of this Agreement will be governed by the laws of the State of Illinois.

9.07 **Notices**. Any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing; shall be delivered personally, including by means of telecopy, or mailed by registered or certified mail, postage prepaid and return receipt requested; shall be deemed given on the date of personal delivery or on the date set forth on the return receipt; and shall be delivered or mailed to the addresses or telecopy numbers set forth on the first page of this Agreement or to such other address as any party may from time to time direct, with copies to:

In the case of Seller:

(847) 212-5620 cell
(847) 424 0200-Office

Steven H. Jesser
790 Frontage Road
Suite 110
Northfield, Illinois 60093
Facsimile: (800) 330-9710

Todd C. Pusateri, DDS
8 West Gartner
Naperville, IL 60540

In the case of Purchaser:

Mary A. Tujetsch, DDS
55 E. Washington Suite 2121
Chicago IL 60602
312-782-1396

9.08 **Breach; Equitable Relief**. The parties acknowledge that the Dental Practice and rights of the parties described in this Agreement are unique and that money damages alone for breach of this Agreement may be inadequate. Any party aggrieved by a breach of the provisions hereof may bring an action at law or suit in equity to obtain redress, including specific performance, injunctive relief or any other available equitable remedy. Time and strict performance are of the essence in this Agreement.

9.09 **Attorneys' Fees**. If suit or action is filed by any party to enforce the provisions of this Agreement or otherwise with respect to the subject matter of this Agreement, each party shall bear its own legal fees, costs, and expenses.

9.10 **Counterparts**. This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same instrument.

9.11 **Covenant Not to Compete**.

9.11-1. For a period of five (5) years after date of this Covenant, Seller shall not, in any capacity, own, manage, operate, control, participate in, be employed by, or be connected in any manner with the ownership, management, operation, control, or practice of any dental practice within a five (5) mile radius of 7714 159th Street, Orland Park, IL 60462.

9.11-2 During and after the closing as set forth in the Asset Purchase Agreement, Seller shall not disclose to any person or entity the names and addresses of any patients or suppliers or confidential or proprietary information of Purchaser, shall not disparage Purchaser, or solicit patients previously treated at the address set forth above, including those patients whose names were provided to Purchaser upon closing. Seller will cooperate in attempting to refer active and inactive patients of the Dental Practice to Purchaser, and will not refer such patients to other dentists.

9.11-3. Seller acknowledges that the restrictions imposed by this Covenant are fully

understood and will not preclude it from the gainful practice of dentistry.

9.11-4. Seller agrees that this Covenant is intended to protect and preserve legitimate business interests of Purchaser. It is further agreed that any breach of this Covenant may render irreparable harm to Purchaser. In the event of a breach by Seller, Purchaser shall have available to it all remedies provided by law or equity, including, but not limited to, temporary or permanent injunctive relief to restrain Seller and its past or former dentists from violating this Agreement. If Seller is found to be in breach of any part of the Covenant Not to Compete, Seller must immediately cease practicing at the site wherein the breach is occurring, and Purchaser may seek all injunctive, equitable, and/or legal remedies available to it under law, including damages.

9.11-7. This Covenant Not to Compete constitutes the entire agreement between the parties hereto with respect to the restrictive covenant herein. No change, modification, or amendment shall be valid unless the same is in writing, signed by the parties hereto, and specifically provides for amendment, change, or modification of this Agreement. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the party to be charged.

9.11-8. If any portion of this Covenant shall be, for any reason, declared invalid or unenforceable, the remaining portion or portions shall nevertheless be valid, enforceable, and carried into effect to the fullest extent permitted, and the invalid or unenforceable portion shall be reformed, if possible, so as to be valid and enforceable.

9.11-9 This Covenant shall be subject to and governed by the laws of the State of Illinois.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first written above.

PURCHASER: Mary A. Tuetsch, DDS

SELLER: First Dental, PC

By: _____
Todd C. Puseteri, DDS, Its President

EXHIBIT A
ASSIGNMENT AND BILL OF SALE

Pursuant to the Asset Purchase Agreement dated June 27, 2004, (the Agreement) between Mary A. Tujetsch, DDS (Purchaser), and First Dental, PC (Seller), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller does hereby sell to Purchaser, all of Seller's right, title and interest in and to the Assets (as defined in the Agreement) and do hereby transfer, convey, grant and assign to Purchaser, all of Seller's right, title and interest in and to all of the Purchased Assets.

Seller hereby transfers the foregoing Assets free and clear of all liens, claims and encumbrances of every type whatsoever. This instrument will vest in Purchaser good and marketable title to the foregoing Assets, free and clear of all liens, claims and encumbrances.

IN WITNESS WHEREOF, Seller has caused this Assignment and Bill of Sale to be executed and delivered effective as of the close of business on June 30, 2004.

First Dental, PC
By: _____
Todd C. Pusateri, DDS, Its President

EXHIBIT 2

SA440

LEASE

Dated as of June 28, 2004

by and between

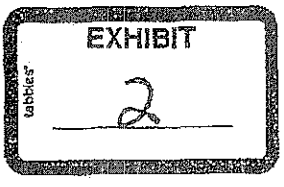
First Dental of Orland Park, PC

LANDLORD

and

Mary A. Tujetsch, DDS

TENANT



7714 159[IH] STREET, ROOMS __ AND __
ORLAND PARK, ILLINOIS 60462

LEASE COVER SHEET

For purposes of the Lease of which this Lease Cover Sheet is a part, the terms used therein shall have the following meanings:

Landlord:	First Dental of Orland Park, PC
Landlord's Address:	8 West Gartner Naperville, IL 60540
Tenant:	Mary A. Tujetsch, DDS
Tenant's Address:	55 East Washington Street, Suite 2121 Chicago, IL 60602
Leased Premises:	As delineated and described in **Exhibit A** hereto.
Common Address of Premises:	7714 159th Street, ~~Rooms __ and __~~ Orland Park, IL 60462
Commencement Date:	July 1, 2004
Termination Date:	June 30, 2009

Renewal Options: Provided that Tenant is not in default in the performance of this lease, Tenant shall have the option to renew the lease for an additional term of one (1) or three (3) years commencing at the expiration of the initial lease term. All of the terms and conditions of the lease shall apply during the renewal term except that the base monthly rent shall be determined by landlord. The option shall be exercised by written notice given to Landlord specifying a one (1) or three (3) year term not less than one hundred eighty (180) days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

Additional Rental Option: Provided that Tenant is not in default in the performance of this lease and the co-tenant chiropractic practice does not renew their lease, Tenant shall have the option to lease the entire private space and common space leased by the co-tenant chiropractic practice at the expiration of their lease on mutual terms and conditions, including, but not limited to, landlords base rent for the space

Purchase Options: If and when Landlord should decide to sell the building, co-tenant chiropractic practice will be offered the first opportunity to purchase the building, upon mutual terms and conditions including, but not limited to, Landlord's price for the

building, which price is within his sole judgment and determination. If the co-tenant chiropractic practice does not purchase the building, Tenant shall have the next opportunity to purchase the building, upon mutual terms and conditions including, but not limited to , Landlord's price for the building, which price is within his sole judgement and determination. The option shall be exercised by written notice given to Landlord not greater than fourteen (14) days after option to purchase building is given to Tenant. If notice is not given in the manner provided herein within the time specified, this option shall expire

Base Monthly Rent:

Lease Year	Monthly Rent	
7/1/04-6/30/05	$2,400.00	
7/1/05-6/30/06	2,520.00	
7/1/06-6/30/07	2,646 00	
7/1/07-6/30/08	2,778 00	
7/1/08-6/30/09	2,917 00	

Security Deposit: $2,400.00 plus $2,400.00 deposit of first month's rent plus $375 00 deposit of first month's additional rent.

Exhibit/Schedules: Exhibit A – Description of Premises

License of Illinois Dental Institute: Tenant shall allow access to the leased office space and operatories twelve times yearly to the Illinois Dental Institute (IDI) . which is licensed to utilize said leased premises to present educational seminars. IDI will accommodate Tenant's scheduling, and will not schedule seminars for the times which Tenant schedules patients. IDI will provide Tenant at least sixty days notice of the dates and times at which it will use the premises, during which times no patients of Tenant are to be treated.

IDI will provide, on dates to be mutually agreed, coronal polishing or pit & fissure sealant certification training for up to twelve staff members of Tenant yearly, at no charge to tenant.

Vacation of Leased Premises: At the end of Tenant's lease term, Tenant will remove all of its dental equipment, and repair all holes in walls, floors, or ceilings; professionally cap and close all plumbing, repair any exposed wiring, electrical outlets, or plumbing

LEASE

This lease, including by this reference its Lease Cover Sheet ("Lease"), is made this 28th day of June, 2004, by and between Landlord and Tenant, who hereby mutually covenant and agree as follows:

I.
GRANT AND TERM

1.0 Grant. Landlord, for and in consideration of the rents herein reserved and the covenants and agreements herein contained on the part of the Tenant to be performed, hereby leases to Tenant, and Tenant hereby lets from Landlord, ~~Rooms __ and __~~ at 7714 159th Street, Orland Park, IL 60462, delineated on **Exhibit A** attached hereto (the "Leased Premises").

1.1 Term. The term of the Lease (the "Term") shall commence on the Commencement Date and shall end on the Termination Date (the "Initial Term"), unless sooner terminated as herein set forth

II.
POSSESSION

2.0 Possession Landlord shall deliver possession of the Leased Premises to Tenant on or before the Commencement Date in its condition as of the execution and delivery hereof, reasonable wear and tear excepted. Tenant has examined and inspected the Leased Premises and knows and understands its condition. No representations as to the condition and repair thereof, and no agreements to make any alterations, repairs or improvements in or about the Leased Premises have been made by Landlord, who makes no representations or warranties of any kind or nature whatsoever, whether written or oral, concerning the suitability of the Leased Premises for Tenant's intended use thereof as permitted by the terms of this Lease. Tenant has solely and exclusively relied on its independent investigation and evaluation of all such matters in entering into this Lease.

2.1 Signage. Tenant may place sign of similar material and matching lettering to the top half of existing outside free standing sign. If outside freestanding sign is replaced, Tenant will have first option for sign placement if multiple positions are available.

III.
PURPOSE

3.0 Purpose. The Leased Premises shall be used and occupied only for the operation of a dental practice and incidental office uses and for no other purpose whatsoever.

3.1 Uses Prohibited Tenant shall not use or occupy the Leased Premises, or permit the Leased Premises to be used or occupied, contrary to any statute, rule, order, ordinance, requirement or regulation applicable thereto, in any manner which would violate any certificate of occupancy affecting the same, cause structural injury to the improvements, cause the value or usefulness of the Leased Premises, or any part thereof, to diminish, or constitute a public or private nuisance or waste.

IV.
RENT

4.0 Rent. Beginning with the Commencement Date, and continuing on the first day of each Month during the Initial Term and during any Renewal Term, as the case may be, hereof, Tenant shall pay the Monthly Rent to Landlord, at such place or places as Landlord may designate in writing from time to time, and in default of such designation then at the Landlord's Address. Any Monthly Rent which is not paid by the fifth day of each month shall bear interest at a rate equal to eighteen percent (18%) per annum from the due date until paid and a late fee of 5% of the Monthly Rent shall become payable as Additional Rent. Landlord's right to receive the interest and late fee described in this Section 4.0 shall not, in any way, limit any of Landlord's other remedies available under this Lease, at law or in equity.

4.1 Additional Rent. For Tenant's proportionate share of common expenses of the building, including but not limited to office cleaning and supplies, all utilities including water, janitorial services, gas and electric, waste removal, snow removal and lawn and landscape maintenance, Tenant shall pay to landlord estimated additional rent of $375.00 per month with the regular monthly rent and shall be subject to the same late payment terms as set forth above. Additional rent shall be analyzed every six months and any overpayment or underpayment shall be determined and paid between the parties. Copies of all bills used in calculating additional rent will be provided to tenant upon written request. The Tenant shall provide her own phone system and all other usual and customary office equipment

4.2 Shared Expenses: Tenant will share in the expense of the following building expenses, by reimbursing Sharing Tenant 50% of their total expenditure: light bulbs, paper towels, toilet paper, facial tissue, garbage bags, hand soap.

V.
SECURITY DEPOSIT

5.0 Security Deposit. Tenant shall deposit with Landlord, upon the execution of this Lease, the Security Deposit as security for the full and faithful performance by Tenant of each and every term, provision, covenant, and condition of this Lease. If Tenant defaults in respect to any of the terms, provisions, covenants and conditions of this Lease including, but not limited to, payment of the Monthly Rent and Additional Rent, Landlord may use, apply, or retain the whole or any part of the Security Deposit for the payment of any such Monthly Rent or Additional Rent which is not paid when due, or for any other sum which the Landlord may expend or be required to expend by reason of Tenant's default including, without limitation, any damages or deficiency in the reletting of the Leased Premises, whether such damages or deficiency shall have accrued before or after any re-entry by Landlord. If any of the Security Deposit shall be so used, applied or retained by Landlord at any time or from time to time, Tenant shall promptly, in each such instance, on written demand therefor by Landlord, pay to Landlord such additional sum as may be necessary to restore the Security Deposit to the original amount set forth in the first sentence of this paragraph. If Tenant shall fully and faithfully comply with all the terms, provisions, covenants, and conditions of this Lease, the Security Deposit, or any balance thereof, shall be returned to Tenant within thirty (30) days after all of the following has occurred:

(a) the time fixed as the expiration of the Initial Term or the last Renewal Term, whichever the case may be; and

(b) the removal of Tenant and its property from the Leased Premises; and

(c) the surrender of the Leased Premises by Tenant to Landlord in accordance with this Lease; and

(d) All Additional Rent due hereunder has been computed by Landlord and paid by

Tenant.

VI.
INSURANCE

6.0 Tenant's Insurance Coverage.

(a) Tenant shall maintain general commercial liability insurance covering loss, cost or expense by reason of injury to or death of persons or damage to or destruction of property by reason of the use and occupancy of the Leased Premises by Tenant or Tenant's contractors, suppliers, employees, agents, customers, business invitees, subtenants, licensees and concessionaires ("Tenant's Invitees"). Such insurance shall have limits of at least $1,000,000 for each occurrence of bodily injury and for each occurrence of property damage.

6.1 Policy Requirements. All insurance required to be maintained by Tenant shall be issued by insurance companies authorized to do insurance business in the State of Illinois and reasonably acceptable to Landlord. A certificate of insurance evidencing the insurance required under this Article VI shall be delivered to Landlord prior to Tenant taking possession of the Leased Premises. No such policy shall be subject to cancellation or modification without thirty (30) days prior written notice (or such shorter period as is required by law in the event of cancellation for nonpayment of premiums) to all Interest Holders (as defined in Section 6.2). Tenant shall furnish Landlord with a replacement certificate with respect to any insurance not less than thirty (30) days prior to the expiration of the then current policy.

6.2 Additional Insured/Loss Payee. Landlord and any mortgagee or other interest holder designated in writing by Landlord ("Interest Holders") shall be named as a named insured party under Tenant's policies of general commercial liability insurance for the Leased Premises. Landlord shall be named the loss payee under Tenant's property insurance covering the improvements on the Leased Premises.

6.3 Increases in Insurance Coverage. Landlord may, from time to time during the term, upon not less than thirty (30) days prior written notice to Tenant, require Tenant to provide increased amounts of insurance coverage under the types of insurance policies described in this Article VI, only if such additional amounts of insurance are required by any lender holding a mortgage or similar security interest in the Leased Premises.

6.4 Mutual Waiver of Subrogation. Landlord and Tenant and their successors in interest hereby waive any legal rights each may later acquire against the other party for the loss of or damage to their respective property or to property in which they may have an interest, which loss or damage is caused by an insured hazard arising out of or in connection with the Building during the term.

6.5 Indemnification of Interest Holders. Tenant shall defend and save the Interest Holders (as defined in Section 6.2) harmless from any and all losses which may occur with respect to any person, entity, property or chattels on or about the Building, or to any other property, resulting from Tenant's acts or omissions, except (i) when such loss results from the

willful conduct, misconduct or gross negligence of Landlord, its agents, employees or contractors, or (ii) to the extent of any insurance proceeds received by Landlord or payable under Landlord's insurance.

VII.
DAMAGE OR DESTRUCTION

7.0 Restoration of the Leased Premises. If the improvements on the Leased Premises are partially damaged or destroyed during the Term, except during the last year of the Term, then, except as otherwise provided in Section 7.1 herein below, (i) Landlord, at its expense, shall repair, restore or rebuild the Building, excluding Tenant's Improvements and the improvements of the Building's other tenants, to substantially the condition it was in immediately prior to such damage or destruction; and (ii) Tenant, at its expense, shall repair, restore or rebuild the Tenant Improvements to substantially the condition they were in immediately prior to such damage or destruction, if such repairs are required due to her acts or omissions, and not that of Landlord or third parties. Tenant's rent and other charges due under this Lease shall abate on a proportionate basis to the extent that the Leased Premises are rendered unusable during any such period of damage, destruction, repair or restoration, until such time as Landlord has completed its repair, restoration or rebuilding. All such repair, restoration or rebuilding shall be performed with due diligence in a good and workmanlike manner and in accordance with applicable law and plans and specifications for such work reasonably approved by Landlord. Notwithstanding the foregoing, if the Building is damaged in an amount equal to fifty percent (50%) or more of the replacement cost of the Building, Landlord may terminate this Lease by giving Tenant written notice of termination within ninety (90) days of the occurrence of such damage or destruction. If the Leased Premises are partially damaged or destroyed during the last year of the Term, Landlord may terminate this Lease as of the date of the damage or destruction by giving Tenant at least thirty (30) days written notice of such termination of the Lease.

7.1 Option Not to Restore. Notwithstanding Section 7.0 hereinabove, if during the last year of the Term, or during the last year of any new term, the Leased Premises are damaged in an amount equal to fifty percent (50%) or more of the replacement cost of the Tenant Improvements, Tenant may terminate this Lease by giving Landlord written notice of termination within thirty (30) days after the occurrence of such damage or destruction. Upon termination of this Lease by Tenant, Landlord shall be entitled to receive any insurance proceeds paid with respect to the leasehold improvements on the Leased Premises under the property insurance policy required under Section 6.0(b) hereinabove.

VIII.
CONDEMNATION

8.0 Condemnation. If the whole of the Leased Premises shall be taken or condemned for a public or quasi-public use or purpose by any competent authority or if a portion of the Leased Premises shall be so taken and, as a result thereof, the balance cannot be used for the purpose as provided for in Article III, then in either of such events, the Lease term shall terminate upon delivery of possession to the condemning authority, and any award, compensation or damage

(hereinafter sometimes called the "Award"), shall be paid to and be the sole property of Landlord whether such award shall be made as compensation for diminution of the value of the leasehold or the fee of the Leased Premises or otherwise and Tenant hereby assigns to Landlord all of Tenant's right, title, and interest in and to any and all such award

IX.
MAINTENANCE AND REPAIRS

9.0 Maintenance. Landlord, at its expense, shall maintain the Building in good repair and condition during the term. Any maintenance or repair work by Landlord shall be performed in such manner as will minimize undue interference with Tenant's normal operations. Tenant shall provide Landlord with prompt notice of any damage to, or defective condition in, any part or appurtenance of the Building. Tenant will be responsible to change extinguished light bulbs in private area.

9.1 Alterations. Tenant shall not create any openings in the roof or exterior walls, nor shall Tenant make any material alterations or additions to the Leased Premises without the prior written consent of Landlord. Upon completion of any work by or on behalf of Tenant, Tenant shall provide Landlord with such documents as Landlord reasonably may require (including, without limitation, sworn contractor's statements and supporting lien waivers) evidencing payment in full for such work.

X.
ASSIGNMENT AND SUBLETTING

10.0 Consent Required. Tenant may not, without Landlord's prior written consent, which consent will not be unreasonably withheld (a) assign, convey, or mortgage this Lease or any interest under this Lease; (b) allow any transfer thereof or any lien upon Tenant's interest voluntarily, involuntarily, or by operation of law; (c) sublet the Leased Premises or any part thereof; or (d) permit the use or occupancy of the Leased Premises or any part thereof by anyone other than Tenant and its employees. No permitted assignment or subletting shall relieve Tenant of Tenant's covenants and agreements hereunder and Tenant shall continue to be liable as principal, and not as a guarantor or surety, to the same extent as though no assignment or subletting had been made. Landlord's consent to any assignment, subletting or transfer shall not constitute a waiver of Landlord's right to withhold its consent to any future assignment, subletting or transfer.

XI.
LIENS AND ENCUMBRANCES

11.0 Encumbering Title. Tenant shall not do any act which shall in any way encumber the title of Landlord in and to any claim by way of lien or encumbrance, whether by operation of law or by virtue of any express or implied contract by Tenant. Any claim to, or lien upon, the Leased Premises arising from any act or omission of Tenant shall accrue only against the leasehold estate of Tenant and shall be subject and subordinate to the paramount title and rights

of Landlord in and to the Leased Premises

11.1 Liens and Right to Contest. Tenant shall not permit the Leased Premises to become subject to any mechanics', laborers', or materialmen's lien on account of labor or material furnished to Tenant of claimed to have been furnished to Tenant in connection with work or any character performed or claimed to have been performed on the Leased Premises by, or at the direction or sufferance of, Tenant; provided, however, that Tenant shall have the right to contest, in good faith and with reasonable diligence, the validity of any such lien or claimed lien; provided, however, that on final determination of the lien or claim for lien, Tenant shall immediately pay any judgment rendered with all proper costs and charges and shall have the lien released and any judgment satisfied.

XII.
INDEMNITY AND WAIVER

13.0 Indemnity. Tenant will protect, indemnify, and hold harmless Landlord from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and expenses imposed upon or incurred by or asserted against Landlord by reason of any accident, injury to, or death of persons or loss of or damage to property occurring on or about the Leased Premises or any part thereof or the adjoining properties, sidewalks, curbs, streets or ways, or resulting from any act or omission of Tenant or anyone claiming by, through, or under Tenant.

Indemnity Landlord will protect, indemnify, and hold harmless Tentant from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and expenses imposed upon or incurred by or asserted against Tenant by reason of any accident, injury to, or death of persons or loss of or damage to property occurring on or about the Leased Premises or any part thereof or the adjoining properties, sidewalks, curbs, streets or ways, or resulting from any act or omission of Landlord or anyone claiming by, through, or under Landlord.

13.1 Waiver of Certain Claims. Tenant waives all claims it may have against Landlord for damage or injury to person or property sustained by Tenant or any persons claiming through Tenant or by any occupant of the Leased Premises, or by any other person, resulting from any part of the Leased Premises or any of its improvements, equipment, or appurtenances becoming out of repair, or resulting from any accident on or about its improvements, equipment, or appurtenances becoming out of repair or resulting from any accident on or about the Leased Premises or resulting directly or indirectly from any act or neglect of any person, other than Landlord. All personal property belonging to Tenant or any occupant of the Leased Premises that is in or on any part of the Leased Premises shall be there at the risk of Tenant or of such other person only and Landlord shall not be liable for any damage thereto or for the theft or misappropriation thereof.

XIII.
RIGHTS RESERVED TO LANDLORD

14.0 Rights Reserved to Landlord Without limiting any other rights reserved or available to Landlord under this Lease, at law or in equity, Landlord, on behalf of itself and its agents, reserves the following rights, to be exercised at Landlord's election:

(a) To conduct reasonable inspections of the Leased Premises during normal business hours of Tenant;

(b) To show the Leased Premises to prospective purchasers, mortgagees, or other persons having a legitimate interest in viewing the same, and, at any time within one (1) year prior to the expiration of the Term, to persons wishing to rent the Leased Premises; and

(c) During the last thirty (30) days of the Term, if during or prior to that time Tenant vacates the Leased Premises, to decorate, remodel, repair, alter, or otherwise prepare the Leased Premises for new occupancy

Landlord may enter upon the Leased Premises for any and all of the said purposes and may exercise any and all of the foregoing rights hereby reserved without being deemed guilty of an eviction or disturbance of Tenant's use or possession of the Leased Premises and without being liable in any manner to Tenant.

XIV.
QUIET ENJOYMENT

15.0 Quiet Enjoyment. So long as no event of default shall have occurred and be continuing under this Lease, except as specifically permitted thereunder, Tenant's quiet and peaceable enjoyment of the Leased Premises shall not be disturbed or interfered with by Landlord or by any person claiming by, through, or under Landlord

XV.
SUBORDINATION OR SUPERIORITY

16.0 Subordination or Superiority. The rights and interest of Tenant under this Lease shall be subject and subordinate to any mortgage or trust deed creating a mortgage that may be placed upon the Leased Premises by Landlord and to any and all advances to be made thereunder, and to the interest thereon, and all renewals, replacements, and extensions thereof, if the mortgagee or trustee named in any such mortgage or trust deed shall elect to subject or subordinate the rights and interest of Tenant under this Lease to the lien of its mortgage or trust deed and shall agree to recognize this Lease of Tenant in the event of foreclosure if Tenant is not in default (which agreement may, at such mortgagee's option, require attornment by Tenant). Any such mortgagee or trustee may elect to give the rights and interest of Tenant under this Lease priority over the lien of its mortgage or deed of trust. In the event of either such election and, upon notification by such mortgagee or trustee to Tenant to that effect, the rights and interest of Tenant under this Lease shall be deemed to be subordinate to, or to have priority over, as the case

may be, the lien of said mortgage or trust deed, whether this Lease is dated prior to or subsequent to the date of said mortgage or trust deed. Tenant shall execute and deliver whatever instruments may be required for such purposes and in the event Tenant fails so to do within ten (10) days after demand in writing, Tenant does hereby make, constitute, and irrevocably appoint Landlord as its attorney in fact and in its name, place, and stead so to do.

XVI.
SURRENDER

17.0 Surrender. Tenant shall quit and surrender the Leased Premises at the end of the Term in as good condition as the reasonable use thereof will permit, with all keys thereto, and shall not make any alterations in the Leased Premises without the written consent of Landlord; and all alterations which may be made by either party hereto upon the Leased Premises, except movable furniture and fixtures put in at the expense of Tenant, shall be the property of Landlord, and shall remain upon and be surrendered with the Leased Premises as a part thereof at the termination of this Lease.

17.1 Removal of Tenant's Property. Upon the termination of this Lease by lapse of time, Tenant may remove Tenant's trade fixtures; provided, however, that Tenant shall repair any injury or damage to the Leased Premises which may result from such removals. If Tenant does not remove Tenant's trade fixtures from the Leased Premises prior to the termination of this Lease, however ended, Landlord may, at its option, remove the same and deliver the same to any other place of business of Tenant or warehouse the same, and Tenant shall pay the cost of such removal (including the repair of any injury or damage to the Leased Premises resulting from such removal), delivery, and warehousing to Landlord on demand, or Landlord may treat such trade fixtures as having been conveyed to Landlord with this Lease as a Bill of Sale, without further payment or credit by Landlord to Tenant.

17.2 Holding Over. If Tenant retains possession of the Leased Premises or any part of the Leased Premises after the termination of this Lease by lapse of time or otherwise, Tenant shall pay Landlord, in order to compensate Landlord for Tenant's wrongful withholding of possession for the time Tenant remains in possession, for and during such time as Tenant remains in possession, an amount calculated at double the rate of Monthly Rent in effect immediately prior to such termination, plus any Additional Rent determined to be due pursuant hereto plus all damages, whether direct or consequential, sustained by Landlord by reason of Tenant's wrongful retention of possession unless Landlord makes the election provided for in the following sentence. If Tenant retains possession of the Leased Premises or any part of the premises after termination of this Lease, Landlord may elect, in a written notice to Tenant and not otherwise, that retention of possession constitutes a renewal of this Lease for one year at the same terms that were in effect on the last month of the Lease Term, in which event this Lease shall be deemed renewed. The provisions of this paragraph shall not constitute a waiver of Landlord's rights of reentry or of any other right or remedy provided in this lease or at law. Nothing contained in this Section 17.2 shall be construed to give Tenant the right to hold over at any time and Landlord may exercise any and all remedies at law or in equity to recover possession of the Leased Premises.

XVII.
REMEDIES

18.0 Defaults. Tenant further agrees that any one or more of the following events shall be considered events of default, as such term is used herein, that is to say, if:

(a) Tenant shall be adjudged an involuntary bankrupt, or a decree or order approving, as properly filed, a petition or answer filed against Tenant asking reorganization of Tenant under the Federal bankruptcy law as now or hereafter amended, or under the laws of any State, shall be entered and any such decree or judgment or order shall not have been vacated or set aside within sixty (60) days from the date of the entry or granting thereof; or

(b) Tenant shall file or admit the jurisdiction of the court, and the material allegations contained in, any petition in bankruptcy or any petition pursuant or purporting to be pursuant to the Federal bankruptcy laws as now or hereafter amended or Tenant shall institute any proceedings or shall give its consent to the institution of any proceedings for any relief of Tenant under any bankruptcy or insolvency laws or any laws relating to the relief of debtors, or readjustment of indebtedness; or

(c) Tenant shall make any assignment for the benefit of creditors or shall apply for or consent to the appointment of a receiver for Tenant or any of the property of Tenant; or

(d) A decree or order appointing a receiver of the property of Tenant shall be made and such decree or order shall not have been vacated or set aside within sixty (60) days from the date of entry or granting thereof; or

(e) Tenant shall default in any payments of Monthly Rent or Additional Rent or in any other payment required to be made by Tenant hereunder when due as herein provided and such default shall continue for five (5) days after notice thereof in writing to Tenant; or

(f) Tenant shall fail to contest the validity of any lien or claimed lien or, having commenced to contest the same, shall fail to prosecute such contest with diligence, or shall fail to have the same released and satisfy any judgment rendered thereon and such default shall continue for thirty (30) days after notice thereof in writing to Tenant; or

(g) Tenant shall default in any of the other covenants and agreements herein contained to be kept, observed, and performed by Tenant and such default shall continue for thirty (30) days after notice thereof in writing to Tenant.

18.1 Remedies. Upon the occurrence of any one or more of such events of default,

Landlord may, at its election, terminate this Lease or terminate Tenant's right to possession only, without terminating the Lease. Upon termination of this Lease or of Tenant's right to possession, Landlord may re-enter the Leased Premises with or without process of law using such force as may be necessary and remove all persons, fixtures, and chattels therefrom and Landlord shall not be liable for any damages resulting therefrom. Upon termination of the Lease, or upon any termination of Tenant's right to possession without termination of the Lease, Tenant shall surrender possession and vacate the Leased Premises immediately and deliver possession thereof to the Landlord and Tenant hereby grants to Landlord the full and free right, without demand or notice of any kind to Tenant (except as hereinabove expressly provided for), to enter into and upon the Leased Premises in such event with or without process of law and to repossess the Leased Premises as Landlord's former estate and to expel or remove Tenant and any others who may be occupying or within the Leased Premises without being deemed in any manner guilty of trespass, eviction, or forcible entry or detainer and without incurring any liability for any damage resulting therefrom and without relinquishing Landlord's rights to rent or any other right given to Landlord hereunder or by operation of law. Upon termination of this Lease, Landlord shall be entitled to recover as damages all rent and other sums due and payable by Tenant on the date of termination, plus (1) an amount equal to the value of the rent and other sums provided herein to be paid by Tenant for the residue of the Term hereof, less the fair rental value of the Leased Premises for the residue of the Term (taking into account the time and expenses necessary to obtain a replacement tenant or tenants, including expenses hereinafter described relating to recovery of the Leased Premises, preparation for reletting, and for reletting itself), and (2) the cost of performing any other covenants to be performed by Tenant. If Landlord elects to terminate Tenant's right to possession only, without terminating this Lease, Landlord may, at Landlord's option, enter into the Leased Premises, remove Tenant's signs and other evidences of tenancy, and take and hold possession thereof as hereinabove provided, without such entry and possession terminating this Lease or releasing Tenant, in whole or in part, from Tenant's obligations to pay the rent hereunder for the full term or from any other of its obligations under this Lease. Landlord shall use its reasonable efforts to relet all or any part of the Leased Premises for such rent and upon terms as shall be satisfactory to Landlord (including the right to relet the Leased Premises for a term greater or lesser than that remaining under the Term, and the right to relet the Leased Premises as a part of a larger area and the right to change the character or use made of the Leased Premises). For the purpose of such reletting, Landlord may decorate or make any repairs, changes, alterations, or additions in or to the Leased Premises that may be necessary or convenient. If Landlord does not relet the Leased Premises, after having undertaken its reasonable efforts to do so, Tenant shall pay to Landlord on demand damages equal to the amount of the rent and other sums provided herein to be paid by Tenant for the remainder of the Term. If the Leased Premises are relet and a sufficient sum shall not be realized from such reletting, after paying all of the expenses of such decorations, repairs, changes, alterations, additions, the expenses of such reletting and the collection of the rent accruing therefrom (including, but not by way of limitation, attorneys' fees and brokers' commissions), to satisfy the rent herein provided to be paid for the remainder of the Term, Tenant shall pay to Landlord on demand any deficiency and Tenant agrees that Landlord may file suit to recover any sums falling due under the terms of this Section from time to time.

18.2 Remedies Cumulative. No remedy herein or otherwise conferred upon or reserved

to Landlord shall be considered to exclude or suspend any other remedy but the same shall be cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute, and every power and remedy given by this Lease to Landlord may be exercised from time to time and so often as occasion may arise or as may be deemed expedient.

18.3 No Waiver No delay or omission of Landlord to exercise any right or power arising from any default shall impair any such right or power or be construed to be a waiver of any such default or any acquiescence therein. No waiver or any breach of any of the covenants of this Lease shall be construed, taken, or held to be a waiver of any other breach or waiver, acquiescence in, or consent to any further or succeeding breach of the same covenant The acceptance by Landlord of any payment of rent or other charges hereunder after the termination by Landlord of this Lease or of Tenant's right to possession hereunder shall not, in the absence of agreement in writing to the contrary by Landlord, be deemed to restore this Lease or Tenant's right to possession hereunder, as the case may be, but shall be construed as a payment on account, and not in satisfaction, of damages due from Tenant to Landlord.

18.4 Costs Relating to Default The Tenant shall pay, upon demand, all of Landlord's costs, charges, and expenses, including, but not limited to attorney's fees, agents and others retained by Landlord in connection to performance or enforcement of any of Tenant's obligations under this Lease relating to any litigation, negotiation, or transaction in which Tenant causes the Landlord to become involved or concerned.

XVIII.
TENANT'S OBLIGATIONS

19.0 Compliance with Laws. Tenant shall, at its sole expense, comply with and conform to all of the requirements of all governmental authorities having jurisdiction over the Building which relate in any way to the condition, use and occupancy of the Leased Premises throughout the entire Term of this Lease, including but not limited to obtaining any license or permit which may be required. Without limitation of the foregoing, Tenant covenants and agrees not to bring into the Leased Premises or to use, store, treat or dispose, or permit the use, storage, treatment or disposal, in the Leased Premises of (i) any hazardous substance or regulated materials as defined under any present or future federal, state or local law, rule or regulation or (ii) any explosives or any flammable substances, including, but not limited to, gasoline, liquefied petroleum gas, turpentine, kerosene and naphtha (the substances and materials referred to in clauses (i) and (ii) hereof are collectively referred to herein as "Hazardous Materials").

XIX.
MISCELLANEOUS

20.0 Estoppel Certificates. Tenant shall, at any time and from time to time upon not less than five (5) days prior written request from Landlord, execute, acknowledge, and deliver to Landlord, in form reasonably satisfactory to Landlord and/or Landlord's mortgagee, a written statement certifying, if true, that Tenant has accepted the Leased Premises, that this Lease is

unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), that Landlord and Tenant are not in default hereunder, the date to which the rental and other charges have been paid in advance, if any, or such other accurate certification as may reasonably be required by Landlord or Landlord's mortgagee, and agreeing to give copies to any mortgagee of Landlord of all notices by Tenant to Landlord. It is intended that any such statement delivered pursuant to this subsection may be relied upon by any prospective purchaser or mortgagee of the Building and their respective successors and assigns.

20.1 Landlord's Right to Cure. Landlord may, but shall not be obligated to, cure any default by Tenant (specifically including, but not by way of limitation, Tenant's failure to obtain insurance, make repairs, or satisfy lien claims); and whenever Landlord so elects, all costs and expenses paid by Landlord in curing such default, including without limitation reasonable attorneys' fees, shall be so much Additional Rent due on the next rent date after such payment.

20.2 Amendments Must Be In Writing. None of the covenants, terms, or conditions of this Lease, to be kept and performed by either party shall in any manner be altered, waived, modified, amended, changed, or abandoned except by a written instrument, duly signed, acknowledged, and delivered by the other party.

20.3 Notices. All notices to or demands upon Landlord or Tenant, desired or required to be given under any of the provisions hereof, shall be in writing. Any notices or demands from Landlord to Tenant shall be deemed to have been duly and sufficiently given if: (i) personally delivered, to Tenant at Tenant's Address; or (ii) transmitted by confirmed facsimile transmission to Tenant's Fax Number, and/or mailed by United States registered or certified mail in an envelope properly stamped and addressed to Tenant's Address, or at such address or fax number as Tenant may theretofore have furnished by written notice to Landlord, and any notices or demands from Tenant to Landlord shall be deemed to have been duly and sufficiently given if: (i) personally delivered to Landlord at Landlord's Address, or (ii) transmitted by confirmed facsimile transmission to Landlord's Fax Number and/or mailed by United States registered or certified mail in an envelope properly stamped and addressed to Landlord at Landlord's Address or at such other address or fax number as Landlord may theretofore have furnished by written notice to Tenant. The effective date of such notice, if mailed in the manner aforesaid, shall be three (3) days after delivery of the same to the United States Postal Service.

20.4 Relationship of Parties. Nothing contained herein shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership, or of joint venture by the parties hereto, it being understood and agreed that no provisions contained in this Lease nor any acts of the parties hereto shall be deemed to create any relationship other than the relationship of Landlord and Tenant.

20.5 Captions. The captions of this Lease are for convenience only and are not to be construed as part of this Lease and shall not be construed as defining or limiting in any way the scope or intent of the provisions hereof.

20.6 Severability. If any term or provision of this Lease shall to any extent be held invalid or unenforceable, the remaining terms and provisions of this Lease shall not be affected thereby but each term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

20.7 Law Applicable. This Lease shall be construed and enforced in accordance with the laws of the State of Illinois.

20.8 Covenants Binding on Successors. All of the covenants, agreements, conditions, and undertakings contained in this Lease shall extend and inure to and be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties hereto the same as if they were in every case specifically named and wherever in this Lease reference is made to either of the parties hereto, it shall be held to include, and apply to, wherever applicable, the heirs, executors, administrators, successors and assigns of such party. Nothing herein contained shall be construed to grant or confer upon any person or persons, firm, corporation or governmental authority other than the parties hereto, their heirs, executors, administrators, successors and assigns, any right, claim or privilege by virtue of any covenant, agreement, condition or undertaking in this Lease contained.

20.9 Landlord Means Owner. The term "Landlord", as used in this Lease, so far as covenants or obligations on the part of Landlord are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Building, and in the event of any transfer or transfers of the title to such fee, Landlord herein named (and in case of any subsequent transfer or conveyances, the then grantor) shall be automatically freed and relieved, from and after the date of such transfer or conveyance, of all liability as respects the performance of any covenants or obligations on the part of Landlord contained in this Lease thereafter to be performed; provided that any funds in the hands of such Landlord or the then grantor at the time of such transfer, in which Tenant has an interest, shall be turned over to the grantee, and any amount then due and payable to Tenant by Landlord or the then grantor under any provisions of this Lease, shall be paid to Tenant.

20.10 Attorneys' Fees: In case suit should be brought for recovery of the premises, or for any sum due hereunder, or because of any act which may arise out oif the possession of the premises, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including reasonable attorneys' fees.

20.11 Common Space: This Lease contemplates the use of private offices by the Lessee of approximately 750 square feet, and the shared use of common area, including reception, hallways, and bathrooms, which common area total approximately 1,050 square feet. Tenant agrees to assist in maintaining the common areas in a neat and clean condition. Lessee will lock doors and windows, reset the thermostat, turn off lights and equipment after her work day, if she completes her appointments after other tenants have vacated the Premises for the day.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease the day and year first above written.

TENANT:

Mary A. Tujetsch, DDS

LANDLORD:

First Dental of Orland Park, PC by Todd C Pusateri, DDS, President

EXHIBIT 3

SA460

OPINION OF VALUE

FOR

First Dental,PC
(Dr. Todd Pusateri)

7714 159th Street
Orland Park, Illinois 60462

May 7, 2004

PREPARED BY:

Practice Transition Partners, Inc.
Robert Stanbery
(888) 789-1085

EXHIBIT
3

INTRODUCTION

By the request of Dr. Todd Pusateri we are pleased to submit this Opinion of Value for the subject dental practice of First Dental, PC located at 7714 159th Street, Orland Park, Illinois 60462.

INTENT

The intent of this Opinion of Value is to establish an estimate of the Fair Market Value of the goodwill of the subject dental practice including an estimate of the Fair Market Value of office and dental equipment, instruments, furnishings, leasehold improvements and supplies.

This Opinion of Value specifically does not include a value for accounts receivable or cash in the bank. Additionally, it is assumed that any liens or encumbrances on the office and dental equipment, including equipment leases, would be paid off at closing from the proceeds of a sale if such occurs.

PURPOSE

The purpose of this Opinion of Value is to establish the Fair Market Value of the practice, et al, to consider a possible sale of all or part of the practice. "Fair Market Value" is defined as the actual selling price (expressed in cash or cash equivalents) at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties are well informed about the asset and the market for such asset and are able, as well as willing, to trade.

The two basic components that are used to determine a practice value are classified as Tangible Assets and Goodwill. In expressing an opinion of value, I use three standard methods for calculating that value. In all three of the methods the figure for Tangible Assets remains constant.

TANGIBLE ASSETS

Tangible assets include professional equipment, general office equipment, leasehold improvements, office furnishings, hand instruments and dental supplies. Based on equipment invoices provided the estimate for professional dental equipment totals **$25,000**. The furniture and office equipment is estimated at **$10,000**. The hand instruments and dental supplies are estimated at **$4,000**. The **Total** estimated value of Tangible Assets is therefore **$39,000.**

GOODWILL

Goodwill represents the estimated future earning power beyond the value of the practice's tangible assets. It constitutes a significant portion of the practice value. Determination of the goodwill requires the use of judgment and varies based on a comprehensive evaluation of the following items:

- Facility Location
- Facility Size and Decor
- Staff Retention
- Potential for Increased Business
- New Patient Records
- Patient Base Payment Method
- Years in Location
- Equipment Age
- Lease Transferability
- 3 Year Business Pattern
- Collections
- Fee Schedule
- Number of Active Patients

In two of the methods for determining value, Goodwill is expressed as a variable factor or multiple. Method 1, Gross Collections, utilizes a multiple of the gross monthly collections ranging from 2 to 8 months and Method 2, Net Cash Flow, utilizes a factor from 75% to 200%. This is outlined in detail in the following illustrations using information provided by tax returns, profit and loss statements, and an evaluation of the above items in regard to the subject practice and local market conditions.

RATIONALE OF GOODWILL RATINGS

Goodwill Item	Multiplier	Factor	Rationale
Facility Location	7	175%	Street visibility from main street, desirable area
Facility Size and Décor	7	175%	Nicely appointed office, basic décor
Staff Retention	6	150%	Stable, hired between 99 and 02
Potential for Increased Business	8	200%	Facility equipped for growth, growing area
New Patient Records	7	175%	22 new patients per month
Patient Base Payment Method	6	150%	All regular indemnity, no HMO or PPO
Years in Location	8	200%	Est 6 years, loc 4 yrs, well marketed
Equipment Age	7	175%	Averages 4 years old
Lease Transferability	8	200%	Seller owns building, lease negotiable
3 Year Business Pattern	6	150%	Increase 01 to 02, slight decrease 02 to 03
Fee Schedule	6	150%	Average
Collection	8	200%	98% Collection/Production ratio on 2003
Number of Active Patients	7	175%	Estimated at 1,125 average base
TOTALS	91	2275%	
AVERAGE GOODWILL	7.00	175.0%	

Method 1, Gross Collections: Goodwill Multiplier: 7

Method 2, Net Cash Flow: Goodwill Factor: 175% (equivalent to the multiplier of 7)

(1) GROSS COLLECTIONS

Industry standards use a value for goodwill as a multiple of the gross monthly collections ranging from 2 to 8 months. For this practice a multiplier of 7 months was used based on an evaluation of the items described above in the goodwill ratings. Using 2001, 2002 and 2003 Profit and Loss Statement, the gross monthly collections for 2001, 2002 and 2003 averaged *$19,001 per month. The total value utilizing this method is as follows:*

GROSS INCOME:

2001	$225,037
2002	$227,497
2003	$231,508

Monthly average income for fiscal years 2001, 2002 and 2003 = **$19,001**

GOODWILL VALUE:

(Goodwill Multiplier) x (Monthly Average Income) = **$114,006** (7 x $19,001)

Tangible Assets	**$ 39,000**
Goodwill Value	**$133,007**

TOTAL PRACTICE VALUE UTILIZING THIS METHOD: **$172,007**

(2) NET CASH FLOW

The second method for determining goodwill is to use a factor of the net cash flow. The net income of the practice is adjusted to include all income to the dentist and benefits paid on the dentist's behalf. The following numbers are from 2001, 2002 and 2003 Profit and Loss Statements. Add Backs to Net Income include deductions for expenses that are not necessarily related to the operation of the practice but which the Internal Revenue Service allows to be included as deductions on tax returns. I was able to identify the following items to add back to the net income.

Net Income

	2001	2002	2003
Total Income	$225,037	$227,497	$231,508
Total Deductions	($187,521)	($177,557)	($193,273)
Net Income	**$37,516**	**$49,940**	**$38,235**

Add Backs to Net Income *(Please see explanations on the following page)*

Add Back Category	2001	2002	2003
1. Labor - Payroll Expense - Doctor	$34,151	$41,842	$46,636
Total Add Backs	**$34,151**	**$41,842**	**$46,636**
Adjusted Net Cash Flow	$71,667	$91,782	$84,871

For calculating the goodwill value using this method, I have used the adjusted net cash flow number of **$82,773.** This figure is the average annual net cash flow for the years 2001, 2002 and 2003. Factors commonly used to estimate goodwill range from 75% to 200%. The goodwill factors described in the goodwill ratings warrant using 175% as the factor. This results in the following value.

Tangible Assets	**$ 39,000**
Goodwill Value	**$144,853** (175% x $82,773)

TOTAL PRACTICE VALUE UTILIZING THIS METHOD: **$183,853**

Explanations Regarding Add Backs to Net Income

The add backs to the net income on the previous page were made to reflect an accurate picture of what the normal expenses of the practice have been and/or would likely be for a person if he/she were to buy the practice. Expenses were added back into the net income if they provided a personal economic benefit to the owner or were considered discretionary and if not incurred would not negatively impact the amount or quality of patient care provided in the practice. Expenses were increased if a new owner would have to incur additional expense in order to maintain the practice, i.e. staff replacement or addition, rent, etc. The expense adjustments made in this analysis are as follows:

1. **Labor – Payroll Expense - Doctor:** Payroll expense for the doctors is considered a personal economic benefit to the Owner and is therefore added back into the net income of the business. In other words the Owner could have increased the net income rather than compensating themselves as an expense from the practice revenue.

(3) CASH FLOW AVAILABLE FOR DEBT RETIREMENT

The third method does not distinguish between Tangible Assets and Goodwill. It is my opinion, as well as the opinion of any potential lender, that the total value of the practice cannot exceed the ability of the practice to provide a profit to the purchasing dentist and make payments on the debt required to purchase the practice. The most recent year's adjusted net cash flow of **$84,871** as determined above in the Net Cash Flow Method will be used.

Methods (1) and (2) were averaged producing a value of **$177,930**. At this value assuming a purchaser will borrow 100% of the purchase price, they will be required to make debt payments on **$177,930**. Using a 7-year debt retirement schedule and an average interest rate of 8%, annual debt retirement payments will be **$33,279**. The amount remaining for the owner's profit is **$51,592**. The calculation is as follows:

Adjusted net cash flow	$84,871
Debt retirement	($33,279)
Available for owners profit	$51,592

The total cash flow generated by the practice after all necessary operating expenses and debt retirement have been covered is the amount available for owner's profit, which is defined as owner's salary plus net profit of the practice, plus owner's discretionary expenses.

CONCLUSION

The practice value derived from the above methods is

$177,930

Notations, Limitations, and Assumptions

1. The average of the gross collections and net cash flow values equals the practice value.
2. This valuation is based on information provided in whole or in part by the client. Practice Transition Partners, Inc. has not audited the information, does not warrant it as accurate or complete, and neither makes claim or guarantee as to, nor assumes responsibility for, its validity and authenticity. Practice Transition Partners, Inc. has relied upon the representations of the client concerning the value and useful condition of the furniture and equipment used in the subject practice and any other assets.
3. Any drawings and/or diagrams are for illustrative purposes only and are not drawn necessarily to scale and should not be construed as surveys or engineering reports.
4. The above value does not include the accounts receivable of the practice. If the accounts receivable are included in the purchase price, they should be discounted by some factor. The amount of the discount would depend upon the quality of the receivables. Other similar situations have resulted in a discount between 25% and 50% of the current receivables.
5. This price assumes that the practice is purchased free and clear of all liens or encumbrances on the practice and/or equipment.
6. These values are calculated from tax returns, profit and loss statements, and oral statements as supplied by the Owner.
7. Practice Transition Partners, Inc. representatives are not required to give testimony or appear in court because of having made the valuation with reference to the practice in question, unless arrangements have been previously made.

Opinion of Value prepared by:

Robert Stanbery
Practice Transition Partners, Inc.

May 7, 2004
Date

Practice Transition Partners
Realize the possibilities.

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EXHIBIT 4

GROUP 1
FILES RETURNED TO PUSATERI

TOTAL FILES	456	
CATEGORY:		
TOTAL CHANGED DENTIST		175
➢ CHANGED DUE TO MOVE/RELOCATION	38	
➢ CHANGE NOTED IF FILE	137	
TOTAL REFUSED TREATMENT OR FILE MARKED NO FUTURE APPOINTMENT (NFA)		234
TOTAL DECEASED/TERMINAL ILLNESS		12
TOTAL FRIENDS/FAMILY OF PUSATERI		13
TOTAL DUPLICATE FILES		1
TOTAL EMPTY FILES-NO PATIENT INFORMATION INCLUDED		21
TOTAL FILES RETURNED TO PUSATERI –CHART I		456

Doc Id 942359

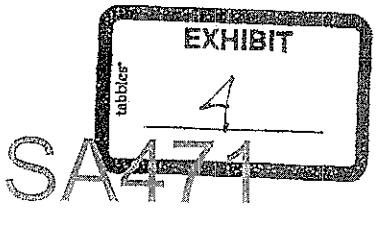


EXHIBIT 5

GROUP 2
BACKROOM FILES

TOTAL FILES	177	
CATEGORY:		
TOTAL CHANGED DENTIST		62
➢ CHANGED DUE TO MOVE/RELOCATION	5	
➢ CHANGE NOTED IF FILE	57	
TOTAL REFUSED TREATMENT OR FILE MARKED NO FUTURE APPOINTMENT (NFA)		97
TOTAL DECEASED/TERMINAL ILLNESS		2
TOTAL FRIENDS/FAMILY OF PUSATERI		6
TOTAL EMPTY FILES-NO PATIENT INFORMATION INCLUDED		10
TOTAL BACKROOM FILES–CHART II		177

Doc Id 942360

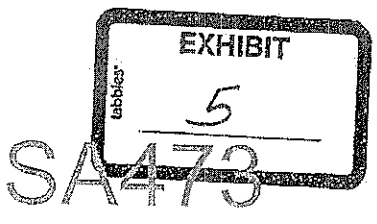
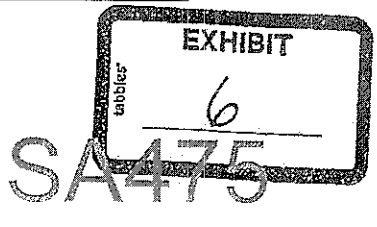


EXHIBIT 6

GROUP 3
PATIENT FILES RETAINED BY TUJETSCH
Document #765308v3

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
1	Edward Adams	
2	Charles Aimaro	
3	Rebecca Aimaro	
4	Joann Adjinovich	
5	Frances Albarello	
6	Peter Albarello	
7	Olindo "Lee" Alo	
8	Carmelene Amezcua	10/23/04
9	Jose Amezcua	11/20/04
10	Mary Jo Anderson	
11	Angela Andrus	
12	Edward Anhalt	
13	Kathleen Anhalt	
14	Trinidad "Nita" Arenas	
15	Barbara Axell	
16	Jacqueline Babb	1/1/05
16	Gianni Bandera	
17	Chris Barcelona	
18	Meghan Barcelona	1/4/05
19	Rick Barileau	2/8/05
20	Greg Barron	
21	Barbra Basile	
22	Josh Batterman	
23	Gerda Beck	
24	Bill Becker	
25	Richard Belcher	
26	Jeff Bell	



	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
27	Sam Bessember	8/19/04
28	Ben Bettenhausen	
29	Don Bettenhausen	
30	Susan Bettenhausen	
31	Louis Beuse	
32	Irma Bobroff	
33	Tim Bogue	7/15/04
34	Dan Bojar	
35	Linda Bojar	
36	Bonnie Bonert	
37	Sonja Boushard	
38	Sophie Boyer	1/4/05
39	Diana Bruninga	
40	Dr. Caryn Bryant	
41	Alexis Buben	
42	Jacob Buben	
43	Jeff Buben	
44	Kelly Buben	
45	Tina Buben	
46	Eric Budde	11/20/04
47	Maria Budimier	
48	Matthew Budlove	
49	Melissa Budlove	7/26/05
50	Mitchell Budlove	
51	Carole Bulmann	
52	Ben Burke	
53	Peter Burke	12/4/04
54	Sally Burke	
55	James Burlington	8/14/04

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
56	Marissa Burns	
57	Deanna Butler	
58	Terah Butler	
59	Kathy Camarillo	
60	Steven Camarillo	
61	Gina Campione	
62	Lisa Captain	
63	Mike Captain	
64	Austin Chaudhari	
65	Jorge Chaudhari	4/19/05
66	Ramila Chaudhari	4/28/05
67	Becky Chernisky	4/19/05
68	Cheryl Chinn	
69	Chui Choi	12/14/04
70	Alex Choi	3/10/05
71	Jamie Choi	
72	Peter Choi	
73	Tammy Choi	
74	Ben Christensen	
75	Chuck Christensen	
76	Jack Christensen	
77	Jade Christensen	
78	Sue Christensen	
79	Christine Cirone	
80	Bonnie Coccorullo	
81	Trina Coleman	
82	Cal Coniey	
83	Kenneth Cooper	7/13/04
84	Lisa Cooper	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
85	Jeffrey Corley	
86	Suzanne Couture	9/30/04
87	Marguerite Cox	5/24/05
88	Michelle Craig	8/4/05
89	Anthony Craven	
90	Macayla Craven	
91	Michelle Craven	
92	Peter Craven	
93	Josephine Crentsil	
94	Victor Cyril Crentsil	
95	Kathleen Crotty	
96	Tom Crotty	
97	Kevin Cunningham	
98	Andrea Curtis	
99	Danielle Curtis	
100	Rebecca Curtis	
101	Ron Curtis	
102	Genevieve Czyl	
103	Daniel Danaher	
104	Anthony Damiani	8/12/04
105	Benjamin Damiani	8/12/04
106	Leah Damiani	8/12/04
107	Nicholas Damiani	8/12/04
108	Bertha Dangles	8/3/04
109	John Dapkus	
110	Debra Davis	
111	Andrew DeFelice	
112	George DeFelippis	
113	Christina Degradi*	9/30/04

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
114	Daniel Degradi*	7/8/04
115	Rita Degradi*	7/13/04
116	James DePersia	
117	Jeanne DeRaimo	
118	Ursula Dimer	
119	Chris DiMundo	
120	Pat Donohue	
121	Kevin Doran	
122	Alexis Dowling	11/23/04
123	Jacob Dowling	11/23/04
124	Tina Dowling	11/11/04
125	William Dowling	
126	Mary Lou Duda	
127	Matt Duda	
128	Kevin Duda	
129	Paula Duda	
130	Emilia Durante	
131	Therese Dwyer	
132	Josh Ehrhart	
133	Emil Ernest	
134	Lindsay Esposito	
135	Kathy Fernandez	
136	John Fiorenzo	4/12/05
137	Avery Fisher	
138	Jasmine Fisher	7/31/04
139	Jordyn Fisher	
140	Londyn Fisher	
141	Tanisha Fisher	
142	Luke Fitzgerald	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
143	Mariclaii Fitzgerald	
144	Michael Fitzgerald	
145	Gary Fremouw	9/23/04
146	Gina Fremouw	
147	Tricia Fremouw	
148	Berci Fuerte	9/28/04
149	Taylor Gabbi	7/31/04
150	Jeff Gagne	
151	Diane Garay	1/11/05
152	Jeff Gardner	
153	Sarah Geiger	4/19/05-
154	Catherine Gesswein	
155	Lynn Gianetti	
156	Helen Gibson	9/16/04
157	Raymond Gibson	10/28/04
158	Barbara Girouard	10/28/04
159	Bryan Girouard	
160	Brian Glaza	
161	Eric Glaza	
162	Myra Glaza	
163	Dave Godyka	7/8/04
164	Patty Godyka	7/8/04
165	Terri Godyka	7/8/04
166	Jolene Godyka	10/11/04
167	Cheryl Goggin	
168	John Goodwin, III	
169	Juanita Goodwin	
170	Melissa Goodwin	
171	Colleen Grabenhofer	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
172	Rick Grabenhofer	
173	Danielle Graca	
174	Marcy Graca	
175	Jasmine Greenwood	
176	Jimmy Griffin	
177	Maria Griffin	
178	Mary Griffin	
179	Matthew Grudewicz	
180	Harold Grund	
181	Jeff Grunwald	6/29/04-
182	Lauren Grunwald	1/25/05
183	Noreen Grunwald	7/1/04
184	Elvis Guardado	
185	Jessie Guardado, Sr.	
186	Ruth Guardado	8/24/04
187	Joseph Gutierrez	7/31/04
188	Greg Hall	
189	Laura Hall	
190	Sean Hall	
191	Matthew Hamill	
192	Meghan Hamill	
193	Doug Harpold	
194	Victoria Harpold	
195	Lillian Hayes	
196	Ken Heeter	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
197	Dale Heining	
198	Glenn Helvy	9/7/04
199	Jorge Herman	4/28/05
200	Cindy Huff	11/4/04
201	Brian Huisebus	
202	Amanda Hunter	
203	Shannon Hunter	
204	Megan Imgruet	
205	Moly Imgruet	
206	Ryan Irons	8/28/04
207	Matt Jabaay	
208	Monty Jachymiak	
209	Matt Jachymiak	11/2/04
210	Carmelita Jakubowski	9/2/04
211	Valerie Jager	
212	Mark James	5/12/05
213	Harry Janisch	11/4/04
214	Christine Jaworski	4/12/05
215	Andrea Jensen	6/29/04
216	Angela Jensen	7/8/04
217	Elizabeth Jensen	7/8/04
218	Emily Jensen	7/8/04
219	Richard Jensen	7/1/04
220	Alice Jett	7/31/04
221	Breanna Jett	
222	Don Jett	9/28/04
223	Janice Johnson	10/19/04
224	Nicholas Johnson	
225	Barb Johnson	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
226	Bill Johnson	
227	Christopher Johnson	
228	Nicholas Johnson	
229	Ric Johnson	
230	Christie Judge	9/11/04
231	Daniel Judge	
232	George Karr	
233	Laverne Karr	
234	Bridget Kay	
235	Kathy Kay	
236	Patrick Kay	
237	Ray Kay	
238	Raymond Kay	
239	George Kelderhouse	
240	Debbie Kelly	
241	Margie Kelly	
242	Mike Kelly, Sr.	
243	Michael Kelly	
244	Nora Kelly	
245	Alyssa Kern	7/29/04
246	Amanda Kern	
247	John Kern	
248	Kristopher Kirchhoff	
249	Kyle Kirchhoff	
250	Laura Kirchhoff	
251	Kent Kleehammer	
252	Rebecca Krason	
253	Gary Krieger	
254	Doris Krupa	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
255	Alexander Ktenas	
256	Christopher Ktenas	
257	Melissa Ktneas	11/4/04
258	Nicholas Ktenas	
259	Betty Kurasz	
260	William Kwak	
261	Richard Labrec	
262	Ann Marie La Casha	
263	David Lang	
264	Susan Laughran	
265	Corlisa Lawrence	
266	Nero Lawrence	11/18/06-
267	Cassie Leigh	7/27/04
268	Joseph Leigh	9/2/04
269	Kayla Leigh	7/27/04
270	Tyler Leigh	7/27/04
271	Christine Lin	12/4/04
272	Marcus Lindsay	
273	Carl Lippner	7/29/04
274	Sophie Lippner	
275	Chelena Littleton	7/6/04
276	Donna Lloyd	3/17/05
277	Samantha Lloyd	11/23/04
278	Neal Logston	
279	Robert Lorz	
280	Scott Lowden	11/23/04
281	Al Luchene	
282	Matt Lundgren	8/24/04
283	Ethan Maca	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
284	Joshua Maca	
285	Kyle Maca	
286	Daniel Manock	8/10/04
287	Diana Manock	8/10/04
288	Katie Manning	
289	Kelly Manning	
290	Margo Theodore Markopoulos	
291	John Markou	
292	Alexis Marsh	
293	Ashley Marsh	
294	Michelle Marsh	
295	Yolanda Martinez*	7/17/04
296	Susan Maselli	
297	James Mathews	
298	Maria Mathews	
299	Roberta Matz	
300	Anna McClafferty	
301	Michael McClafferty	
302	Marie McClintock	
303	Jessica McEvoy	
304	Joan McGillivary	
305	Patricia McGraw	
306	Jimmy McGuire	
307	Ryan McGuire	
308	Daniel McHatton	
309	Joseph McHatton	12/21/04
310	Cheryl Melco	
311	Ruth Melco	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
312	Chary Mendoza	8/14/04
313	Raymond Meier	
314	Susan Meyer	11/2/04
315	William Meyer	7/15/04
316	Adam Millican	
317	Robert Mineiko	
318	Taylor Mineiko	
319	Carson Moesle	
320	Lynn Moesle	
321	Michael Moesle	
322	Taylor Moesle	
323	Leroy Monehan	
324	Elizabeth Moreau	10/28/04
325	Liz Moreau	10/19/04
326	Moises Munoz	7/27/04
327	David Neill, Jr.	
328	Kim (Buben) Neill	
329	David Neill, Sr.	
330	Terri Nelson	
331	Colleen Nicely	
332	Jacob Nicely	
333	Jack Nicely	
334	Kadie Nicely	
335	Matthew Nicely	
336	Christa Nicholas	
337	Lanetta Nunn	8/25/05
338	Marcus Nunn	6/4/05

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
339	John O'Brien	
340	Andrew O'Connell	
341	Robert O'Donnell	
342	Ed Olbrecht	
343	Mary Jane Orban	
344	Patrick Orr	
345	Paula Orr	
346	Kay Padgett	
348	Herlinda Padilla	
349	Luz Padilla	
350	Ramon Padilla, Jr.	
351	Barb Palomo	
352	Melissa Pankonin	5/24/05
353	Orlando Panozzo	12/7/04
354	Janet Parent	
355	Sheila Patras	
356	Arlean Patterson	
357	Chelen Patterson	7/6/04
358	Cheryl Patterson	
359	Dennis Patterson	
360	Phyllis Patterson	
361	Warren Patterson	
362	Kip Pavlovich	
363	Maxine Pavlovich	7/13/04
364	Zak Pavlovich	
365	Henry Payne	
366	David Pedigo	
367	Diane Pedigo	
368	Joe Pedigo	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
369	Kristy Pedigo	
370	Tim Pedigo	
371	Adam Pichman	
372	Brian Pichman	
373	Dawn Pichman	
374	Eric Pichman	
375	Cameron Poces	
376	Korie Poces	
377	Gloria Pospisil	3/10/05
378	John Pospisil	
379	Ashley Potempa	
380	Kelly Potempa	
381	Mike Potempa	
382	Devin Prokopiak	
383	Devin Ptaszny	11/11/04
384	Andrew Pukala	
385	Joseph Pukula	7/19/04
386	Rick Puiave	?/?/05
387	Joe Pusateri, Jr.	
388	Joe Pusateri, Sr.	
389	Rose Pusateri	
389	Frank Pytlk	
390	Donald Rada	
391	Joseph Rakstis	
392	Carol Rangel	11/23/04
393	Ann Reda	
394	Erin Reda	
395	Kevin Reda	
396	Michael Reda	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
397	Lauren Reske	8/3/04
398	Leslie Reske	8/3/04
399	Pat Reske	8/3/04
400	Richard Reske	8/19/04
401	Dorothy Rickert	
402	Angela Risser	6/21/05
403	Sandra Ritter	11/17/05
404	Erik Rocha	
405	Henry Rocha	
406	Judy Rocha	
407	Andy Rodriguez	
408	Brandon Roemer	8/10/04
409	Jacob Rohlicek	
410	Justin Rohlicek	
411	Michael Rohlicek	
412	Dan Roos	
413	Rafel Ruiz	
414	Karen Sadowski	8/5/04
415	Kyle Sandowski	8/17/04
416	Janet Samoska	
417	Adrian Sandoval	
418	Alyssa Sandoval	
419	Armand Sandoval	11/2/04
420	Brandon Sandoval	
421	Fabian Sandoval	
422	Lawrence Sandoval	
423	Rina Santamaria	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
424	Florence Santora	
425	Stella Sanza	
426	Jenna Scariano	5/26/05
427	Lisa J. Matz-Schletz	
428	Michael Scholtes	
429	Rodolfo Serna	
430	Sumin Shah	
431	Danielle Sheehan	
432	Renee Shereyk	
433	Charlene Smith	
434	Emma Smith	9/26/05
435	James Smith	8/24/04
436	Jackie Smolek	
437	JD Snaidauf	8/12/04
438	Zoe Soderstrom	
439	Bradley Soria	2/7/05
440	Bianca Spanos	
441	Dennis Spanos	
442	Christopher Spiel	
443	Regina Spiller	7/26/04
444	Matt Spreadbury	3/17/05
445	Andrew Staat	9/7/04
446	Andy Staat	
447	Hannah Staat	7/7/04
448	Tiffany Stachniak	
449	Mary Staffel	
450	Joseph Starostka	7/1/04
451	Dorothy Station	9/22/05
452	Vojislav Stevanovic	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
453	Michelle Stokoski	
454	Zac Stokowski	
455	Mike Stokoski	
456	Myron Stoller	9/6/05
457	Brenda Stomtsch	
458	Clara Strenski	
459	David Strezo	
460	Sharon Sullivan	
461	Diana Sweis	7/29/04
462	Frances Szczesniewski	
463	Sheri Szymanski	7/1/04
464	Stephen Termunde	7/8/04
465	John Theodore	
466	Tom Thornock	
467	Denise Tiggens	
468	Eliana Tiggens	
469	Heather Tobin	
470	Paul Tobin	
471	John Tongson, Jr.	
472	Rebecca Tongson	
473	Fernando Tongsy	7/23/05
474	Joshua Tongsy	
475	Rosemary Tongsy	
476	Laverne Toomey	
477	Andrea Trauscht	8/17/04
478	Adam Tylka	
479	Vickey Ulrich	8/12/04

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
480	Nenia Vallejo	10/5/04
481	Sari Vallow	
482	Emily Vargas	7/13/04
483	Kathy Vargas	
485	Dennis Vlasak	
486	Mary Vlasak	
487	Kenny Voight, Jr.	
488	Ken Voight, Sr.	
489	Stephanie Voight	
490	Erica Waddick	
491	Philip Wallenburg	
492	Tina Wallenburg	
493	Kristin Walsh	
494	Debbie Ward	5/5/05
495	Geneive Ward	1/13/05
496	Kelly Ward	10/21/04
497	Elizabeth Wardell	
498	Robert Wells	7/29/04
499	Josephine Wensel	
500	Tom Wessell	
501	Joyce Whittington	
502	Carole Wierus	
503	John Wierus	
504	Eva Wieslaw	
505	Wanda Willingham	
506	Kathleen Witowski	7/7/05
507	Grace Wojciechowski	

	Patient Name	First Treatment After Tujetsch Purchase on 6/27/04
508	Robert Wojciechowski	
509	Annette Wojotowicz	
510	Alyssa Yelnick	
511	Amanda Yelnick	
512	Megan Yelnick	
513	Richard Yelnick	
514	Sebastian Zaba	
515	Helen Zimmerman	
516	Katie Zimmerman	
517	Herbert Zimmermann	
518	Kathleen Zizzo	1/29/05
519	Jessica Zohrer	
520	Lisa Zohrer	
521	Marilynn Zohrer	
522	Kellie Zuro	
523	Alyssa Zymali	9/2/04
Totals		138 patients whose first treatment was after agreement

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO MEANING OF "ACTIVE PATIENT"

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division) Hon. Raymond W. Mitchell

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO MEANING OF "ACTIVE PATIENT"

Defendants hereby reply in support of their motion for summary judgment as to the meaning of "active patient."

A. This Case Is Ripe For Summary Adjudication

"[I]t is well settled that when the parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." Millennium Park Joint Venture, LLC v. Houlihan, ___ Ill. 2d ___, 2010 Ill. LEXIS 1893 (2010) (*citing* Allen v. Meyer, 14 Ill. 2d 284, 292 (1958); Andrews v. Cramer, 256 Ill. App. 3d 766, 769 (1st Dist. 1993)). Plaintiff's Opposition to Defendants' motion is coupled with a cross-motion for summary judgment, thereby confirming that this case is ripe for summary adjudication. Here the question of law raised by the parties is the meaning of "active patient," as used in the following recital from the parties' Agreement (hereinafter "the Recital"): "Seller has represented that the Dental Practice has approx. 1200 active patients, who have been treated within the previous twenty four months according to First Pacific Corporation software." In this action, Plaintiff complains that many of the active patients enumerated in the Recital should have been characterized as inactive.

B. **The ADA Defined Active And Inactive Patients 20 Years Ago**

As demonstrated in the Opening Brief, twenty years ago the House of Delegates of the American Dental Association ("ADA") adopted its Resolution 30H (Trans. 1991:621) (hereinafter "Resolution 30H"). Resolution 30H defines "active" and "inactive" dental patients as follows:

> **Active and Inactive Dental Patients of Record (1991:621)**
>
> **Resolved,** that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms "active" and "inactive" dental patients of record apply:
>
> **Active Dental Patient of Record:** An active dental patient of record is any individual in either of the following two categories: Category I—patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II—patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.
>
> **Inactive Dental Patient of Record:** An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

See ADA publication, *Current Policies, Adopted 1954-2009* (attached as Exhibit 6 to the Opening Brief), at p.91. Since Resolution 30H was adopted in 1991, numerous publications promulgated by the ADA (and attached to the opening brief as its Exhibits 3-7) have referenced Resolution 30H, and reaffirmed that a) an active patient is a patient treated in the past 24 months

and b) "[a]n inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months." In 2009, the ADA published a survey, based on a statistically significant nationwide sample of all dentists (not just ADA members), reporting that in 2008 95.9% of all dentists "defined 'active patients' as those treated within the last 12 to 24 months." *See* Exhibit 7 to Opening Brief.

The opening brief provided ample, uncontroverted evidence that "active patients," as used in the Recital, refers to patients treated in the Dental Practice during the previous 24 months, as reported by First Pacific practice management software; that the First Pacific software defines "active patient" as a patient treated in a dental practice during the previous 24 months; that that "active patient" is a term of art in dentistry, defined by the ADA as a patient treated in the previous 24 months, and that, conversely, "[a]n inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months." These definitions preclude the notion, espoused by Plaintiff, that an inactive patient is a patient treated in the previous 24 months who has expressed reluctance to accept further treatment, moved away, or lost insurance coverage.

Plaintiff responds to this overwhelming evidence with an affidavit stating that she did not know the ADA definition of active or inactive patient; that those definitions do not apply here; and that she cannot be charged with knowledge of those definitions because she was not a member of the ADA in 2004. She further claims that Resolution 30H, adopted in 1991, does not apply because some of the ADA publications that cite Resolution 30H (and are attached to the Opening Brief) were issued after 2004. Finally, Plaintiff claims that she was not put on inquiry notice as to the First Pacific definition of "active patient" because she "understood" the reference to First Pacific in the Recital merely as a reference to a data base where patient information

could be found. Opp., pp.1-2. None of these arguments raises an issue of material fact that precludes entry of summary judgment. Significantly, Plaintiff does not assert, and therefore has waived, any argument that the term "active patient" is ambiguous. A contract term is not rendered ambiguous because the term is not defined in a contract or one of the parties can suggest creative possibilities for its meaning. *See* Lapham-Hickey Steel Corporation v. Protection Mutual Ins. Co., 166 Ill.2d 520, 529 (1995).

The Opposition does not cite a single case in support of any of Plaintiff's various arguments. The only case mentioned in the Opposition (other than in boilerplate about the standard of review) is Wenzell v. Ingrim, 228 P.3d 103 (Alaska 2010), a case cited by Defendants to demonstrate that courts rely on ADA definitions to resolves disputes as to the meaning of language in contracts among dentists. Plaintiff complains that Wenzell did not rule that "active patient" is a "term of art." Opp., 12. This completely misses the point. The Wenzell court relied on an ADA definition to determine the meaning of a term in the parties' agreement, and thereby to decide the case. This Court may do the same.

Uncontroverted affidavits placed before this Court establish that First Pacific Corporation Software in fact reported that the Dental Practice had treated approximately 1,200 patients in the 24 months before June 2004, and therefore had approximately 1,200 "active patients." In response, Plaintiff asserts that a patient treated in a dental practice ceases to be an "active patient" if after receiving treatment he or she "changed dentists, moved, refused to schedule appointments, refused treatment, had lost insurance, had billing disputes[,] or [died]." Opp., p.3. Why is this so? Because Plaintiff says so. The only support for this theory is Plaintiff's bald assertion that that is what she "intended" and "understood." Plaintiff's argument – and entire case -- is based on her subjective "understanding" that "'active patient' as used in the Agreement

means 'a patient who maintains a continual, ongoing relationship where treatment is obtained on a fee basis.'" The issue, then, is whether "active patient" is a tally of patients actually treated in the past, as Defendants, the ADA, and First Pacific software assert, or a prediction as to the number of patients who – based on various subjection criteria --- are predicted to return for treatment in the future.

In her Opposition, Plaintiff does not controvert any of the overwhelming evidence presented in the opening brief. Plaintiff does not present evidence demonstrating that there is a disputed issue of material fact as to the meaning of "active patient" employed by First Pacific software or persons skilled in the dental arts – let alone that such dispute cannot be resolved without live trial testimony. Rather, Plaintiff attempts to re-write the terms of the parties' contract by asserting that "[she] *understood and intended* that the term 'active patient' as used in the Agreement to mean a patient who maintains a continual, ongoing relationship where treatment is obtained on a fee basis," and that she "*understood* the reference to 'First Pacific Corporation software' was simply a reference to the database where the identity of the active patients could be found."

Based on these unexpressed, subjective "understandings," Plaintiff argues that she is not bound by the meaning of "active patient" employed by First Pacific or the dental profession. Substituting her own definition of active and inactive patients for those that should apply, Plaintiff contends some of the patients treated in the Dental Practice had ceased to be active patients as of the date of the sale. This argument – the lynchpin of Plaintiff's case -- not only disregards the meaning of active patient employed by First Pacific and the dental profession, it also stands Illinois law on its ear by suggesting that unexpressed, subjective intentions override objective manifestations in construing a bilateral contract.

C. Plaintiff's Unexpressed, Subjective Understanding of "Active Patient" and "Inactive Patient" Are Irrelevant

In the Opposition, Plaintiff suggests that her "understanding" and her "intent" as to the meaning of active patient precludes summary judgment, because she did not subjectively intend to be bound by the definition of active patient employed both by First Pacific and dentists generally, and wants the opportunity to invite a jury endorse her conclusion. Plaintiff suggests that the correct meaning of active patient must be decided by a jury. However, Illinois courts follow the objective theory of intent in construing contracts. *See* Laserage Technology Corp. v. Laserage Laboratories, Inc., 972 F.2d 799, 802 (7th Cir. 1992). In following the objective theory of contract formation, Illinois courts look first to written records, not undisclosed, internal mental processes. Id. (*citing* East Richard Educ. Ass'n v. Illinois Educ. Labor Rel. Bd., 173 Ill. App. 3d 878, 888 (4th Dist. 1988) (affirming decision based in part on principle that "[u]nder ordinary circumstances, the understandings of the parties are identified on the basis of their objective manifestations; [a party's] subjective belief alone . . . is insufficient")).

When a "meeting of the minds" question arises about a contract, Illinois courts consider the manifestations of intent in the words of the contract and the actions of the parties; they do not consider one party's secret, undisclosed intention or purely subjective understanding. *See* Village of South Elgin v. Waste Mgt. of Ill., Inc., 348 Ill. App. 3d 929, 941 (2d Dist. 2004) ("'Intent' refers to objective manifestations of intent in the words of the contract and the actions of the parties; it does not encompass one party's secret, undisclosed intentions or purely subjective understandings . . .") The Seventh Circuit's opinion in Skycom Corp. v. Telstar Corp., 813 F.2d 810 (7th Cir. 1987), is instructive here. In Skycom, the court rejected the notion that one party's reference to his undisclosed subjective "intent" as to a contract term precluded summary judgment. The court said:

> Disputable inferences of [intent], if material, are for the jury (or the judge in a bench trial).
>
> Yet "intent" does not invite a tour through [Plaintiff's] cranium, with [Plaintiff] as the guide. Like most other states, Wisconsin takes an objective view of "intent." "The intent of the parties [to be bound] must necessarily be derived from a consideration of their words, written and oral, and their actions." [citation omitted.] *See also* [E. Allan Farnsworth, Contracts] at 113-16. Secret hopes and wishes count for nothing. The status of a document as a contract depends on what the parties express to each other and to the world, not on what they keep to themselves. It is therefore unimportant whether [Plaintiff] expected [a] letter to be the definitive agreement; the binding force of the document depends on public or shared expressions. These often will be undisputed, making summary judgment appropriate. [citations omitted.] Material disputes may remain even under an objective approach to intent, [cit omitted], but the recitation that "intent matters" does not on its own call for a trial.
>
> The objective approach [to contractual intent] is an essential ingredient to allowing the parties jointly to control the effect of their document. If unilateral or secret intents could bind, parties would become wary, and the written word would lose some of its power. The ability to fix the consequences with certainty is especially important in commercial transactions that are planned with care in advance.

Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814-15 (7th Cir. 1987) (emphasis supplied).

The same reasoning – and result – applies with equal force here. Plaintiff's reference to her subjective "intent" does not require this Court to take a tour through Plaintiff's cranium. The intent of the parties is derived from their words and their actions. Plaintiff's secret hopes and wishes count for nothing. The meaning of "active patient," as used in the Agreement, depends on what the parties expressed to each other and to the world, not on what they kept to themselves. It is therefore unimportant whether Plaintiff "intended" active patient to mean something other than the accepted definition of that term of art and what the First Pacific software said it meant. The binding force of the Agreement, including the Recital, depends on shared expressions. In this case, the *shared* expressions of the parties are undisputed, and demonstrate that "active patient" is defined by the ADA, First Pacific software and dental

practitioners as a tally of patients treated in the past – thereby making summary judgment on that point appropriate. Because of the uncontroverted evidence of the parties' shared expressions, Plaintiff's recitation as to her subjective intent does not necessitate a trial.

D. None Of Plaintiff's Enumerated Arguments Has Any Merit

In a final make-weight section of the Opposition, Plaintiff argues that this Court should not enter an Order finding that an "active patient" is a patient treated in a dental practice because: (1) the term "active patient" does not have a common and well established meaning in the dental industry; (2) the definition of "active patient" published by the American Dental Association ("ADA") only applies, by its express terms, to valuations, not to representations in a sales agreement such as the one at issue in this case; (3) the ADA documents attached to the Motion either post-date the sale of the Dental Practice at issue (2004) or are undated; (4) Tujetsch was not a member of the ADA and thus cannot be charged with knowledge of the ADA definitions, and (5) the ADA definitions of "active patient" were not cited in the Purchase Agreement and were not discussed with Tujetsch prior to the execution of the purchase agreement. Opp., p.1. As demonstrated below, none of these arguments has any merit.

1. The Term "Active Patient" Is Expressly Defined By The First Pacific Software In A Manner Consistent With That Term's Common And Well Established Meaning In The Dental Industry

Even if it were legally relevant (it is not), Plaintiff's profession of ignorance as to the correct meaning of active patient is patently disingenuous. Plaintiff knows and has herself used the correct definition of "active patient" in the context of a dental asset purchase agreement, the exact context of this case. Plaintiff herself utilized "active patient" in accordance with its accepted meaning as a dental term of art when she entered into an asset purchase agreement with another dentist, Roy Carlson, in September 2002. That agreement, which Plaintiff produced in

discovery, recites, at the bottom of its first page (bearing Bates number T01106) that: "Seller has represented that 481 active patients remain in the practice. Active patients represents the number of individuals treated within past 12 month period." See Exhibit A. It appears that Plaintiff borrowed the foregoing language from her earlier asset purchase agreement and asked that it be incorporated into the Agreement at issue in this case.

In addition, Plaintiff's affidavit fails to provide a curriculum vitae or any foundation as to why Plaintiff is entitled to express an opinion as to whether active patient has acquired the status of a term of art in dentistry. While Plaintiff may be ignorant of the correct meaning of that term (if we disregard her own use of it in the Carlson asset purchase agreement), her own ignorance does not mean that all dentists are similarly afflicted.

2. The Definition of "Active Patient" Published By the American Dental Association Is Authoritative, and Applies Here

There is no principled reason why the correct, ADA definition of active patient should not apply to the Recital – especially given its consistency with the definition employed by First Pacific software, the source of the Recital. Even if there were no definition of active patient from the ADA, the Recital nonetheless identifies First Pacific software as the source of its tally, thereby implicating First Pacific's definition of that term. Certainly the definition of active/inactive patient promulgated by the ADA and utilized in the practice management software purchased by Plaintiff has more jurisprudential heft than another definition offered as an expression of undisclosed intent. The Alaska Supreme Court chose to rely on an ADA definition to decide the Wenzell case. Plaintiff argues that the ADA definition of active patient applies only to the appraisal of a dental practice. That is not what Resolution 30H says. It says that the definitions of active and inactive patient apply to "evaluating or appraising the assets of a dental practice." This case concerns the sale of the assets of a dental practice, and Plaintiff's

evaluation of those assets. Resolution 30H therefore certainly applies. However, even if Resolution 30H had not been adopted 20 years ago, the Recital, and its use of active patient, must nonetheless be construed in conformity with the definition employed by First Pacific software.

3. The ADA Documents Attached To the Motion Uniformly Refer to Resolution 30H, a Policy Adopted by the ADA in 1991

Plaintiff's third argument is demonstrably incorrect. The ADA publication, "Valuing a Dental Practice, is copyrighted 2006, 2001, 1996, and 1992. *See* Exhibit B. The ADA publication "Dental Records" is dated 2007, but expressly relies on, at its page 8, Resolution 30H:

> As defined by policy of the American Dental Association, (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months.
>
> The above definition is typically used in practice appraisals and may not be the same definition of an active patient used in a dental office in records maintenance.

See Exhibit 4 to Opening Brief. The ADA publication, "*Guide to Closing a Dental Practice*" is copyrighted 2004/2009 and refers to, and expressly relies on Resolution 30H, in its Endnotes, at p.47. *See* Exhibit 5 to Opening Brief. The ADA publication "*Current Policies*" includes Policies adopted by the ADA from 1954 through 2009, and sets forth, at its page 91, Resolution 30H. *See* Exhibit 6 to Opening Brief. The September 2009 ADA publication, *2008 Survey of Dental Practice*, reports that by 2008, 18 years after the adoption of the 1991 ADA Policy, 96.3% of independent dentists defined active patients as those treated within the last 12 to 24 months. *See* Exhibit 7 to Opening Brief. This ample, uncontroverted evidence demonstrates the

authoritative power of ADA Policies among practicing dentists.

4. Plaintiff Need Not Be a Member of the ADA to Be Charged With Knowledge of the First Pacific and ADA Definitions

Plaintiffs fails to cite any relevant legal authority in support of this argument. Consequently, the Court should give it the same consideration that Illinois appellate courts give to briefs lacking proper legal support: none. *See* Avery v. State Farm Mut. Auto. Ins. Co., 321 Ill. App. 3d 269, 277 (5th Dist. 2001) (reversed in part on other grounds) (court gave unsupported arguments "all the attention they deserve. None!"); In re Marriage of Wassom, 352 Ill. App. 3d 327, 333 (4th Dist. 2004) ("[t]he failure to cite legal authority in the argument section of a party's brief forfeits the issue for review") (citation omitted).

Significantly, the Alaska Supreme Court did not consider whether the dentist to be charged with the ADA definition of "dentistry" was an ADA member in Wenzell v. Ingrim, 228 P.3d 103 (Alaska 2010). Even if Plaintiff were somehow entitled to disregard the ADA definition of active definition as a term of art, she is not entitled to pretend that she did not know that First Pacific software was the source of the tally in the Recital, such that she was on inquiry notice as to the definition of active patient used therein.

5. It Is Irrelevant that "Active Patient" Was Not Defined In the Purchase Agreement and Not Discussed Prior to the Execution of the Purchase Agreement

Plaintiff claims that she is entitled to substitute her idiosyncratic definition of active patient for that of the First Pacific software, the ADA, and the dental profession generally because Seller did not discuss the correct definition of active patient with Plaintiff prior to the execution of the Agreement. Sauce for the goose is sauce for the gander: Plaintiff does not claim that she discussed her idiosyncratic definition of active patient with Seller before the

parties executed the Agreement. This Court must therefore construe the term based on the evidence as to what that term means for First Pacific software and the dental profession. As amply demonstrated in the opening brief, where a term of art is used in a contract the Court should apply that meaning. Here, active patient is not only a defined term of art. It is also defined by the First Pacific software upon which the Recital was expressly based. It is no injustice to hold Plaintiff to the construction of active patient that she herself under in the asset purchase agreement she entered into with Dr. Carlson, in 2002; that the First Pacific software employed, and that dentists generally employ.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants respectfully move this Honorable Court to enter and Order finding that "active patient," as used in the Recital, and as defined by the ADA, First Pacific and dental professionals generally, refers to a patient treated in a dental practice in the previous 24 months, and that an inactive patient is a patient who has not been treated in the previous 24 months; and providing for such other and further relief as the Court deems just and appropriate.

Dated: May 3, 2011

Respectful submitted,

TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.,

By:_____

One of Their Attorneys

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Firm Id. No. 41822

EXHIBIT A

AGREEMENT FOR PURCHASE AND SALE OF
BUSINESS ASSETS OF
DR. ROY V. CARLSON DENTAL PRACTICE
LANSING, ILLINOIS

This Agreement is made and entered into as of the _____ day of September, 2002, by and between DR. ROY V. CARLSON (hereinafter referred to as "Seller"), and DR. MARY A. TUJETSCH, (hereinafter referred to as "Buyer"),

WHEREAS, the Seller is a sole proprietorship, established and doing business under the laws of the State of Illinois; and

WHEREAS, Seller owns, operates and maintains a dental practice located at 18025 Wentworth Avenue, Lansing, Illinois 60438; and Seller's license is in good standing and in compliance with state, county, and local laws.

WHEREAS, Seller desires to sell the practice and certain assets, hereinafter sometimes referred to as the "business assets";

WHEREAS, Buyer desires to purchase and acquire said practice and assets as hereinafter more fully set forth;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained in this Agreement, and in consideration of the payment of the purchase price, and other good and valuable consideration which is hereby receipted, it is hereby agreed as follows:

1. AGREEMENT TO SELL AND TO BUY.

Under the terms hereof, Seller agrees to sell, convey, transfer, assign and deliver to Buyer and Buyer agrees to buy, acquire and accept all of the business assets of Seller.

2. ASSETS INCLUDED.

The business assets included in this purchase and sale are substantially all of Seller's business assets located at Seller's existing dental practice and 18025 Wentworth Avenue, Lansing, Illinois 60438, including all inventory and supplies, dental equipment and tools, all furniture and furnishings, shelving and cabinets, and the goodwill of the business.

Seller has represented that 481 active patients remain in the practice. Active patients represents the number of individuals treated within past 12 month period. Seller will send letter to

481 active patients, at Seller's expense, explaining the sale of the practice and the introduction of Buyer.

3. ASSETS EXCLUDED.

The business assets not included in this purchase and sale are cash, Seller's accounts receivable, ~~copy machine~~, lighting fixtures and other items which are a permanent part of the premises.

4. PURCHASE PRICE.

The purchase price hereof shall be Twenty Thousand Dollars ($20,000.00).

5. EARNEST MONEY.

The Buyer shall pay the Seller earnest money in the amount of One Thousand Dollars ($1,000.00) upon acceptance of this Contract.

6. BALANCE OF PURCHASE PRICE.

The balance of the purchase price in the amount of Nineteen Thousand Dollars ($19,000.00) shall be paid in cash by certified or cashier's check at the time of Closing.

7. CLOSING DATE AND PLACE.

The Closing shall take place at 6:00 p.m. on September 30, 2002 or at such other date and time as the parties agree to (hereinafter referred to as the "Closing Date"), at the office of Seller's attorney, Barry C. Bergstrom, Ltd.

8. LIABILITIES.

Buyer assumes none of the Seller's liabilities except for telephone listing.

9. TELEPHONE NUMBER AND LISTING.

Buyer shall be entitled to Seller's telephone number and listings, if any, and Seller agrees to get consent to and approve such transfer and execute any documents evidencing same as may be required by the telephone company or publisher's of directories.

10. SELLER'S ACCOUNTS RECEIVABLE.

As accounts receivable are not being included in this purchase and sale, Seller shall take full responsibility for collecting Seller's own accounts receivable which are due Seller as of the Closing Date and Buyer shall have no legal responsibility for their collection or bookkeeping and accounting in connection therewith. Buyer does, however, agree that any remittances

received by Buyer which are specifically applicable to Seller's accounts receivables will be forwarded by Buyer to Seller intact within three (3) business days of such receipt.

11. PRORATIONS.

All usual items shall be prorated as of the Closing Date, including utilities and telephone and any other items mutually agreed upon.

12. SALES PRICE ALLOCATION.

The sales price shall be allocated as follows:

Goodwill, telephone number and listing and patient records	~~$15,000.00~~	$1000.00
Inventory and supplies	$ ~~500.00~~	Zero
Equipment, other personalty, furniture and fixtures	~~$ 2,500.00~~	$19,000.00
Total	$20,000.00	

13. NON COMPETITION.

Seller agrees not to establish a dental practice or work as a dentist following Closing.

14. LEASE OF PREMISES.

Effective at the time of Closing, Buyer shall be entitled to occupy the premises of the dental practice for the rental amount of One Dollar ($1.00) per month on a month to month basis at the option of the Buyer until March 31, 2003. In addition to the payment of rent, the Buyer shall pay one-half (1/2) of utilities including water, gas and electric for the entire premises at 18025 Wentworth Avenue, Lansing, Illinois 60438, and One Hundred Per Cent (100%) of the telephone bill for the dental practice. Seller agrees to maintain the premises during the term of the lease except for interior cleaning and replacement of lights and light bulbs.

15. EXTENSION OF LEASE.

The parties may agree to enter into a month to month extension of the lease after March 31, 2003 upon terms to be negotiated by the parties. If the Buyer desires to extend the lease after said date, the Buyer shall give the Seller sixty (60) days prior written notice of Buyer's intention and the parties shall enter into an agreement

within thirty (30) days. If an agreement is reached to extend the lease after March 31, 2003, either party may terminate the lease on forty-five (45) days prior written notice.

16. PATIENT RECORDS.

Upon Closing, all patient treatment cards and x-rays shall be transferred by the Seller to the Buyer. All white patient ledger cards shall remain the property of the Seller. The Buyer agrees to maintain all patient records and x-rays for a period of ten (10) years after Closing for the benefit of the Seller and the Buyer. The Buyer agrees to make the patient records available to the Seller at reasonable times during said period for purposes of claims and insurance. Seller will provide a listing of 481 active patient names and addresses. Active patients is defined as having been treated by Seller within the last 12 month period.

17. INSURANCE.

At Closing, Buyer shall present Seller with proof of malpractice insurance coverage. In addition, during the time of occupancy of the premises by the Buyer, the Buyer shall carry liability insurance which shall name the Seller as an additional insured in the amount of $300,000. Buyer will provide Seller with a certificate of insurance for such coverage. Further, Buyer shall be responsible for carrying contents insurance on the assets of the practice and provide Seller with proof thereof. Seller will maintain insurance coverage on physical structure of building as stated in home owner's insurance policy.

18. BIOHAZARDS.

Buyer agrees to be responsible for the pick up and disposal of any biohazards remaining on the premises at the time of closing and at the termination of the lease. The expense for biohazard material disposal shall be borne by the Buyer with no reimbursement from the Seller.

19. REMOVAL OF PROPERTY.

At time of Closing, Seller shall give Buyer a Bill of Sale for all personal property, tools, equipment, furniture and fixtures as provided under this Agreement. However, at the time of termination of the lease and vacation of the premises by the Buyer, if the Buyer does not remove or dispose of any of the items being transferred at the time of Closing, the parties agree that anything remaining on the premises shall become the property of the Seller to be disposed of as he wishes with no further liability or compensation between the parties.

20. BUYER'S AND SELLER'S REPRESENTATIONS AND WARRANTIES.

Buyer and Seller make to each other the representations and warranties set for the in Schedule A and Schedule B which representations and warranties shall survive the Closing for the benefit of each party.

21. NON-ASSIGNMENT.

This Agreement shall be non-assignable by either party without the prior written consent of all parties.

22. AGREEMENT SHALL SURVIVE CLOSING.

The terms and provisions of this Agreement shall survive the Closing.

23. GENERAL CONDITIONS AND PROVISIONS.

The additional general conditions and provisions appearing on Schedule C are incorporated herein by reference and made a part hereof.

24. INCORPORATION OF SCHEDULES BY REFERENCE.

The parties agree that Schedule A through and including Schedule C attached hereby are incorporated herein by reference and made a part hereof for all legal intents and purposes as fully set forth herein.

IN WITNESS WHEREOF, the parties hereby have caused this Agreement to be executed as of the year and date first written above.

BUYER:

By: _____
MARY A. TUJETSCH

SELLER:

By: _____
ROY V. CARLSON

BUYER'S ADDRESS:

55 E. Washington Street
Suite 2121
Chicago, IL ~~60621~~ 60602

SELLER'S ADDRESS:

18025 Wentworth Avenue
Lansing, IL 60438

BUYER'S REPRESENTATIVE

SELLER'S REPRESENTATIVE:

Barry C. Bergstrom, Ltd.
3330-181st Place
Suite 104
Lansing, IL 60438
(708) 895-7040 - Phone
(708) 895-7045 - Fax

SCHEDULE A

BUYER'S REPRESENTATIONS AND WARRANTIES

Buyer represents and warrants as follows:

1. That Buyer has inspected the Business Assets and financial statements of Seller, including a physical inspection of the business premises.

2. That Buyer accepts the business premises and Business Assets being purchased hereunder in their present condition.

Buyer accepts Seller's assertion that all equipment is working and in good order. Seller asserts that equipment is in compliance with state, local, county laws.

Buyer does not assume nor will be responsible for any known, unknown, or contingent liabilities of Seller incurred by any means including, but not limited to, professional malpractice or personal injury of any nature.

SCHEDULE B

SELLER'S REPRESENTATIONS AND WARRANTIES

Seller represents and warrants as follows:

1. Seller is the owner of the business and Business Assets being sold hereunder.

2. That said Business Assets are or will be free and clear of any and all encumbrances as the date of Closing.

3. That there are no suits or actions pending or threatened against the business or Business Assets as of this date and there will be none as of the date of Closing.

4. That there are no audits or governmental or administrative agency investigations or proceedings pending or threatened against the business or the Business Assets.

5. Seller will be responsible for all payroll tax liability and sales tax liability, if any, prior to October 1, 2002.

Seller will not solicit any of his former patients for any dental practice reasons. Seller has represented that 481 active patients remain in practice at time of closing.

Seller will not engage in patient referrals that would extend beyond the scope of Buyer's practice. All active patients will be transitioned to Buyer and no other dentists will be acquiring patients of Seller's practice via Seller referral or sale.

SCHEDULE C

GENERAL CONDITIONS AND PROVISIONS

1. BOOKS AND RECORDS.

Seller will retain ownership of all books and records with the business except as provided in Paragraph 16 of the Agreement.

2. TRANSFER OF ASSETS.

At Closing, the transfer of assets and other rights of Seller to Buyer hereunder shall be effected by a full covenant and warranty bill of sale and such other endorsements, assignments and other good and sufficient instruments of transfer and conveyance as Buyer shall reasonable request.

3. ACTS AND DOCUMENTS AFTER CLOSING.

The parties agree that they will at any time and from time to time after Closing, upon reasonable request of the other party, do, execute and acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all such other and further acts, documents, assurances and assistances as my be necessary in conformity with this Agreement.

4. INDEMNIFICATION OF BUYER.

Seller covenants and agrees to indemnify Buyer, and save Buyer harmless from and against any and all liabilities, claims, expenses, or other obligations of Seller imposed or sought to be imposed against Buyer and which are arising out of transactions or events prior to the Closing Date unless Buyer has assumed them hereunder.

5. MAINTENANCE OF ASSETS.

Seller shall maintain the Business Assets being sold prior to Closing in their present condition, reasonable wear and tear excepted.

6. RISK OF LOSS.

Seller shall assume risk of loss prior to Closing and Buyer thereafter.

7. NO BROKER.

The parties represent and warrant to each other that there has been no broker or finder in connection with

the Agreement, and that neither knows of any facts that would give rise to any claim for brokers' or finders' fees.

8. CONFIDENTIALITY.

The parties agree that after Closing, neither will disclose any confidential matters relating to the business, its records, patients or relating to the other party, unless otherwise provided herein.

9. INTRODUCTION TO PATIENTS AND SUPPLIERS.

Seller, at his expense, will send a letter to the patients and suppliers announcing the transfer of the practice and introducing Buyer. In addition, the Seller may also advertise in the newspaper his retirement and the transfer of the practice to the Buyer.

10. INJUNCTIVE RELIEF.

This Agreement may be enforced by injunctive relief as well as at law in a suit for damages for the breach hereof.

11. NOTICES.

Any notice, request, instruction or other documents required or desired to be given hereunder by either party shall be in writing and may be delivered to the other party in person, in which case said notice shall be effective as of its date of delivery. Notices may also be given in writing by Certified Mail addressed to the other party at the address shown herein and shall be deemed given as of the date such notice is deposited, with postage prepaid in the United States Mails. In addition, the party shall also mail a notice to the party's attorney, if any, at the address provided below by certified mail with postage prepaid.

12. CONTROLLING LAW.

This Agreement shall be construed and interpreted under the laws of its place of execution and be enforceable in said venue and jurisdiction as well as any other place where jurisdiction of the parties and subject matter can be obtained.

13. BINDING EFFECT.

The provisions of this Agreement shall be binding upon and inure to the benefit of and be enforceable by the heirs, personal representatives, successors and assigns of the parties.

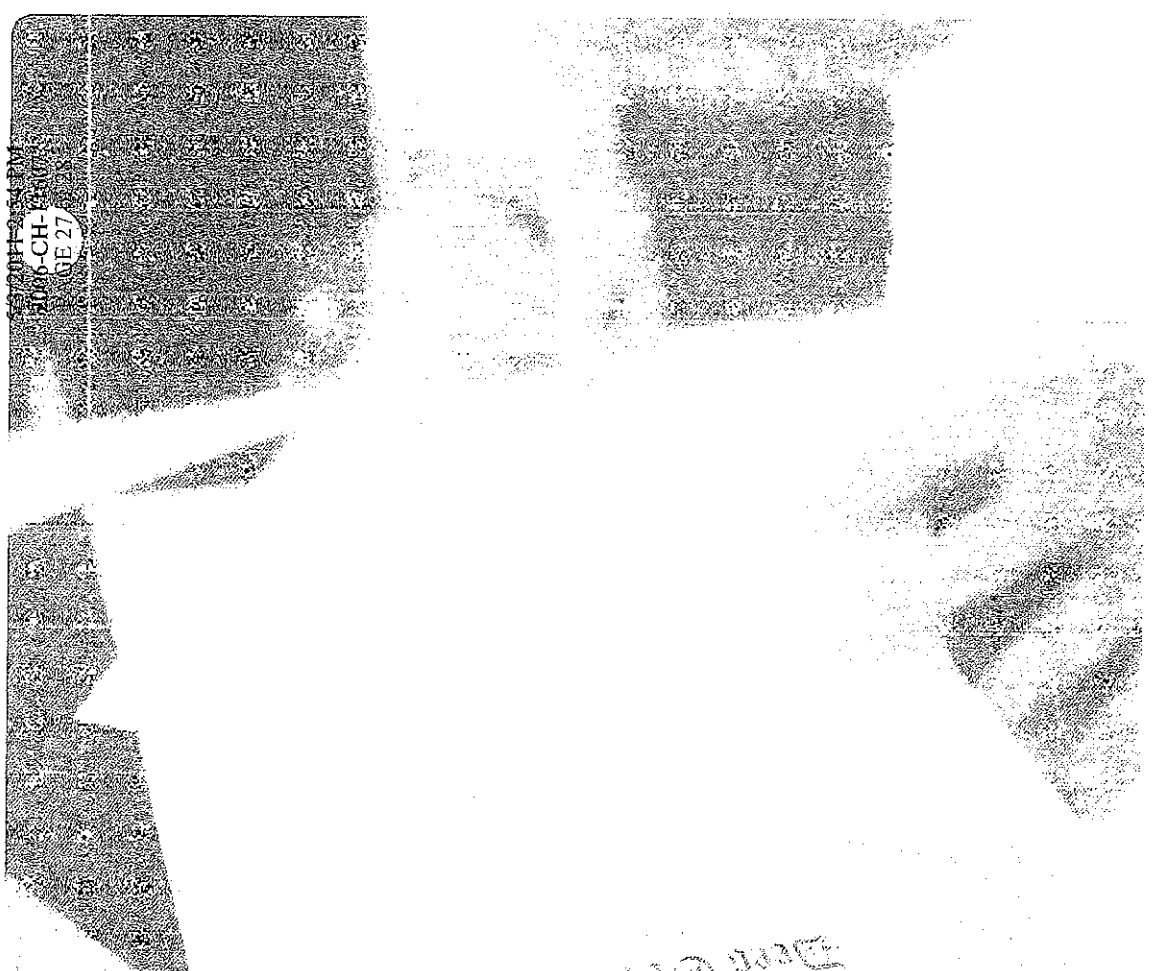
14. ENTIRE AGREEMENT.

This Agreement, including all schedules, contains the entire Agreement between the parties hereof, and no amendments, changes or other modifications shall be deemed binding, unless reduced to writing and signed by the parties. All negotiations between the parties are merged in this Agreement, and there are no understandings or agreements other than those incorporated in this Agreement.

EXHIBIT B

VALUING A PRACTICE:

A GUIDE FOR DENTISTS



- Critical Valuation Issues
- Buying a Practice vs. Starting a Practice
- Legal and Tax Issues

ADA American Dental Association®

Acknowledgments

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Larry R. Domer, MBA, DBA, AVA

Dr. Domer is a nationally recognized expert in dental practice valuation and transition. He is currently Professor Emeritus at the University of Colorado School of Dentistry and is co-owner of Domer Valuation & Consulting, a Denver based firm that provides valuation services exclusively to the dental profession. He has over 30 years experience in dental practice valuation, transition and management and has taught these subjects for the same length of time at three different dental schools. In addition to having Masters and Doctorate degrees in Business Administration, he holds the designation of Accredited Valuation Analyst from the National Association of Certified Valuation Analysts and is a member of the Institute of Business Appraisers. Questions concerning this book can be directed to Dr. Domer at, larry@domervaluation.com or 720-936-7325.

Randall Berning, J.D., LL.M.

Mr. Berning is a health care attorney, nationally recognized expert consultant in dental practice transitions and President of Berning Affiliates, Inc. For over 25 years he has provided dentists and dental specialists with specific practice plans to implement vision, practice profitability, valuation and associateship/partnership/sale. Mr. Berning is the publisher of The Expert Series for Dentists™. A frequent speaker, he has presented at numerous meetings. He is past Adjunct Professor of Dental Jurisprudence and Director of Practice Administration at the University of Illinois Chicago College of Dentistry and is adjunct faculty at UCSF School of Dentistry and the University of Maryland Baltimore College of Dental Surgery. Prior to entering private practice Mr. Berning served as an Assistant Attorney General for the State of Illinois. The firm has offices in Chicago, IL, Washington, DC, Naples, FL and Burlingame, CA. He can be reached at 800-999-8121 or RKBerning@BerningAffiliates.com or at the firm's website www.BerningAffiliates.com.

Staff contributions to this manuscript were made by Ms. Carolyn Talar, M.B.A., Senior Manager, Product Development and Management, Department of Salable Materials; and Ms. Joan Dietrich, Manager, Dental Team Activities and Publications, Council on Dental Practice.

MISSION STATEMENT

The mission of the Council on Dental Practice is to recommend policies and provide resources to empower our members to continue development of the dental practice, and to enhance their personal and professional lives for the betterment of the dental team and the patients they serve.

REPORT OF PROCEEDINGS

SA523

STATE OF ILLINOIS)

) SS:

COUNTY OF C O O K)

ORIGINAL

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - CHANCERY DIVISION

MARY A. TUJETSCH)

Plaintiff,)

vs.) Case No. 06 CH 11607

TODD C. PUSATERI, FIRST)

DENTAL, P.C., and FIRST)

DENTAL OF ORLAND PARK, P.C.,)

Defendants.)

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable RAYMOND W. MITCHELL, Judge of said Court, on the 3rd day of June, 2011, at the hour of 11:00 o'clock a.m.

Reported by: ATHANASIA MOURGELAS, CSR

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APPEARANCES:

WILLIAMS MONTGOMERY & JOHN, LTD., by
MR. DAVID STEVENSON,
233 South Wacker Drive, Suite 6100,
Chicago, Illinois 60606,
(312) 443-3200,
Representing the Plaintiff;

KENT MAYNARD & ASSOCIATES, LLC, by
MR. KENT MAYNARD, JR.
17 North State Street, Suite 1700,
Chicago, Illinois 60602,
(312) 423-6586,
Representing the Defendants.

THE COURT: We're here on cross motions for summary judgment as well as an additional motion for summary judgment by the defendant and the motion to strike an affidavit. And it's all related; right?

MR. STEVENSON: Yes, your Honor.

THE COURT: Can I get the names of counsel for the record?

MR. STEVENSON: David Stevenson on behalf of the plaintiff Mary Tujetsch.

MR. MAYNARD: And Kent Maynard for the defendants.

THE COURT: Okay. While I have read all of the materials that you have submitted including the respective motions and responsive brief and the reply briefs and with regard to each motion as well as the various exhibits so you can certainly take that into account with your comments here today.

Given that we have cross motions, why don't we hear from the plaintiff first and then we'll hear from defense counsel.

MR. STEVENSON: Thank you very much, your Honor. This is an action brought by Mary Tujetsch who is a dentist who bought a dental practice from

the defendants in 2004. It's a claim for breach of contract and fraud. We're here on summary judgment motion with respect to the breach of contract.

There were warranties in the agreement to provide 1200 active patients by -- that the practice had 1200 active patients at the time of the sale.

THE COURT: Let me ask you this, and I know there's considerable disagreement about what an active patient is among the runs through the briefing.

According to the First Pacific Corporation Software, in the prior twenty-four months prior to the sale, were there approximately 1200 patients active?

MR. STEVENSON: Based on the information that they supplied, it appears that the record is but that's with respect to patients who have been treated. That's all that the First Pacific Software was addressing in the agreement. As it says, seller has represented that the dental practice has approximately 1200 active patients, comma, who have been treated within the previous twenty-four months according to First Pacific

Software. So they're really disjunctive about that comma.

THE COURT: It's a dependent clause; right? It's who is functioning to the subject that relates back to active patients.

MR. STEVENSON: Right. But according to First Pacific Software is relating to the twenty -- who had been treated within twenty-four months. That's what it's modifying. It's not stating what active patients is. And it's pretty --

THE COURT: But that would kind of defy grammar; right? Because --

MR. STEVENSON: No. Well, active patients stands upon its own as to what that term means.

THE COURT: Right, but it's a dependent clause that relates back to the independent clause.

MR. STEVENSON: But reading it who have been treated within the previous twenty-four months. So you have to go find where they've been treated in the last twenty-four months. You go to the First Pacific Software to determine that but you aren't saying --

THE COURT: Right.

MR. STEVENSON: -- that 1200 active patients is

simply patients who have been treated in the prior twenty-four months because as the record is showing by a painstakingly thorough review of the patient files that most of those patients were not active patients, that they changed dentists, moved.

THE COURT: Well, somebody died.

MR. STEVENSON: Died. They're still including that.

THE COURT: But according to this definition, right, that appears in the first -- it's the first line in the contract or the purchase agreement, a dead patient could fall within this definition; right?

MR. STEVENSON: Well, that's even -- I submit, your Honor, that's fraud if that is the way that you are able to read this agreement because we're ~~cheese~~ buying is practice to get active patients, and I'll point out in the agreement that there are other provisions regarding the accuracy and representations of the warranty in section 2.04 --

THE COURT: Sure. So you're saying that somehow that's not a good faith reasonable reading.

MR. STEVENSON: No, it's absolutely not.

THE COURT: But isn't that defined by the ADA

she's

what

definition, which is consistent with this?

MR. STEVENSON: Neither parties knew about the ADA definition.

THE COURT: Right. But I'm saying -- I'm not saying that it informed their intent at the time. What I'm saying it's some sort of -- it's evidence that this would be -- could be a reasonable reading, a good faith reading of what this means.

MR. STEVENSON: The ADA documents all speak in terms of valuation, not in terms of how it's set forth as far as how patient records are to be understood. And even the ADA documents that were produced it says -- in there it says a system should be established in your office to identify a change from active to inactive status on a timely basis.

They didn't do that in Pusateri's office. His staff had testified that they moved patients from active to inactive status when they couldn't -- when they've changed dentists, when they have repeatedly refused to schedule appointments. So there was an implicit in the way the operations were of the business that that was to not have active patients.

And also it says in a qualifier in the ADA, quote, the above definition is typically used in practice appraisals and may not be the same definition of an active used in dental offices, records maintenance.

THE COURT: Sure. So you're suggesting that there's some ambiguity in this --

MR. STEVENSON: Right.

THE COURT: -- clause?

MR. STEVENSON: And I think at a minimum there's ambiguity and you have to go -- active has a very well understood meaning. And Pusateri himself in answering a questionnaire gave the exact same meaning that my client gave to it. In answering a questionnaire for a valuation that he provided to my client, he stated in there, and this is Exhibit F which I tendered to the Court and probably you've seen it before.

THE COURT: I have seen it.

MR. STEVENSON: If you look at question 29, I'll tender it to counsel as well, it asks him how many active patients there are and he says 1,125. And then it says, please describe how you define, quote, active patients, i.e., seen within the past

twenty-four months, et cetera.

THE COURT: Right.

MR. STEVENSON: Seen within twelve months and has appointments scheduled including six month follow-up.

THE COURT: Let me ask you this, suppose prior to the sale there's a questionnaire and a party valuates a business in accrual basis of contract and then in the actual closing documents decides to value the business on a cash basis. That it's clearly set out, it's a different definition; right? So --

MR. STEVENSON: Yupe.

THE COURT: -- I guess I'm not sure what --

MR. STEVENSON: Well, this seems to me that it's confirming that the common understood meaning of active patients is whether you had an ongoing relationship with those patients, not that they've moved away or died or refused to schedule appointments, been sent to collections or were relatives of Pusateri which typically in the business is not -- you don't count the relatives as being active patients you're selling.

I mean, that's the core of what's being

sold when a practice is being -- someone is purchasing a dental practice, the object of the contract is to get access to a patient, to patients. Now, whether he can convert those to active patients for her is another story, but she at least has to have the opportunity to try and deal with active patients.

You're getting 32.6 percent of the total population of 1200 to try to treat after you purchase the practice, you're not going to have the financial stream to maintain the practice.

THE COURT: Let me ask you about that, when did that really manifest itself? Because the first issue of this active patient business, right, the first time it really came up was in October of '05 in a letter that your client sent to the defendant. That's well over a year after the closing.

MR. STEVENSON: I could explain that, your Honor.

THE COURT: So it had drop off.

MR. STEVENSON: Well, your Honor, the practice did not have enough patients to sustain itself. Tujetsch was -- at the time she bought the practice was operating two other dental offices.

THE COURT: Right. But she acknowledged that in the letter, right, during the negotiation phase but I think with hard work this practice can be built up and --

MR. STEVENSON: But she still had to have the 1200 active patients to build on it otherwise there wasn't a cash flow to make a go of it. She was paying more -- she was doing a loss leader trying to pay the hygienist and the dentist who was there, and then she closed down her other practices because this practice was bleeding her so much, she felt she had to because she's locked into a five year lease that went along with this deal and trying to make a go of it at that point but realized that a lot of these patients did not -- had been using, you know, discounted fees, they were one time patients.

THE COURT: But nobody's definition of active patient refers to fees; right?

MR. STEVENSON: No. But the idea -- and that's going back to the contract itself that I was trying to point out. Section 2.04 says accuracy of representations of warranties. None of the representations of warranties of purchaser shall

contain or will contain any untrue statement of any material fact or omit or misstate the material fact necessary to make the statements contained in this agreement not misleading.

So I think that that brings his duty to explain what 1200 active patients mean, and she didn't have any idea, it was not told what, how the First Pacific Software counted active patients or listed active patients whatsoever. Then item -- going on in the contract, section 3.10, reliance, quote, seller recognizes and agree notwithstanding any investigation by purchaser. The purchaser is relying on the representations of warranties made by seller in this agreement, closed quote.

Then going onto section 3.11, the accuracy of representations of warranties, quote, none of the representations of warranties of seller contains or will contain any untrue statement of any material fact or omits or misstates a material fact necessary to make the statement contained in this agreement not misleading, period. Seller does not know of any fact that has resulted or that in a reasonable judgment of the seller will result in any material adverse change in the seller's

business, results of operation, financial condition or prospects that have not been set forth in this agreement.

There was nothing else disclosed to her at the time she purchased this practice other than that it had 1200 active patients and had a staff that she retained after the sale.

THE COURT: What's the data that's on the First Pacific computer ~~term~~? That was made available, right, prior to the sale for your client to view?

MR. STEVENSON: All she did was go in to visit the practice twice. Pusateri didn't want her to interact with the staff there in case she didn't go through with the deal, and all he did was go to the terminal and say, you know -- she didn't know how to work the terminal. She's not computer savvy and said, well, here is the number of patients, but she didn't get a log, she didn't get a printout of patients or anything of that nature.

And as noted in the contract, she didn't have any due diligence obligation. I mean, she did visit the practice to see what was there and understood from, you know, what he was saying that all these patient files were active patient files.

terminal?

THE COURT: But certainly after when she takes over the practice, she's going to be looking at the patient files; right?

MR. STEVENSON: Her staff was going to be looking at the patient files and following up to make appointments. That was what the receptionist did. I mean, she was an absent -- essentially she was an absentee owner at that point in time being a solo practitioner at her own dental practice. So that's --

THE COURT: But in her affidavit, she reviewed the patient files and she grouped them into --

MR. STEVENSON: Three different groups.

THE COURT: Right.

MR. STEVENSON: And the groups are -- under the law, the dentist who last treated is supposed to have an -- has an obligation to retain the patient files. When they went through the patient files and found out, you know, the staff found out that there was no future treatment that was going to be made, her staff returned those files to Pusateri which numbered I think over 450 files.

THE COURT: It also included patients who refused X-rays or other dental treatment; right?

MR. STEVENSON: Right.

THE COURT: Why wouldn't it be an active patient just because they don't want X-rays? Maybe my insurance won't pay for X-rays.

MR. STEVENSON: Well, the treatment -- I mean, basically they would not follow-up, implement any treatment plan that was recommended by her. And when it's -- when a patient won't follow your recommendation as to how you're supposed to be treated --

THE COURT: Right, a dentist offers a personal service and it's -- there's a relationship there.

MR. STEVENSON: There is a substantial amount of patients that were -- they tried repeatedly to schedule appointments and marked file NFA, no future appointment, which is a little different than refusing to do X-rays. I mean, typically if you dealt with a dental practice, you go in, you get your teeth cleaned and you make a follow-up appointment. I mean, that's what everybody -- you know, you hope that's what everyone does, but you end up finding out that there's hardly any follow-up appointments here that -- you know, even Pusateri defined it that as someone who has a

scheduled appointment.

I mean, just having a one timer come into the office and he was advertising with coupons and fliers and things like that for I think it was $45.00 teeth cleaning and dental examination, which doesn't generate a lot of revenue. So that's the explanation as to the -- I don't think that bars her claim or entitles her to relief. I just --

THE COURT: On this issue of what 1200 active patients means, assuming that you're right that it's ambiguous and that summary judgment is inappropriate on the issue, then you're going to go to a jury trial What is jury -- what is a jury going to hear? How are they going to decide what that means?

MR. STEVENSON: I think that they can have the common sense understanding of what active patient means. What it -- has a common -- people know what active means, and you can find out what Pusateri understood it meant because you could see his signed -- I mean, his questionnaire that he filled out.

You can also talk to other dentists I guess that could be entered -- do you think a

dentist comes in here and will say that someone who refuses treatment is an active patient? I realize that the valuation people that use different metrics, and the ADA definition is a metric that's used by valuation experts but we're dealing here with the nuts and bolts of operating a dental practice to have people who are going to come through the door, and to have just 30 percent of what you anticipated in getting and it makes it impossible to make a go of the practice and still, you know, pay the rent.

The opinion of value again was based, you know, that was given to her not telling her about the questionnaire said that this practice was worth nearly $178,000. She didn't know that it was based on a questionnaire that was totally misleading about what was truly the situation at the dental practice.

And the three groups, I mean, there's -- you know, there was one in the back office of 177 files, the ones that were returned. And there was 553 in the third group, which is the ones -- the files that she retained. 138 of those were patients that were first treated after the sale.

So at best there was 391 who may qualify as active patients. And believe me, Tujetsch was very interested in trying to make a go of it, and she's not going to return files to Pusateri if you think there's any hope of converting those into active patients and that's what the staff and everyone was desperately trying to do to make a go of it.

THE COURT: At what point were those files returned?

MR. STEVENSON: They were turned over the months after the sale. I don't have the exact date and I don't know of any record that shows exactly. Pusateri was the landlord. I mean, he would come by every once in a while and drop off, you know, pick up and drop off mail as I understand.

As you may have read in the record, there was all kinds of what I call mischief after the sale as far as dealing with signs, construction of an addition, the imposition of the chiropractors, the for sale signs in the window. I mean, it made it very -- I mean, part of our claim is also there was interference after she bought the practice that made it difficult --

THE COURT: Well, that's why I had a question about that.

MR. STEVENSON: Sure.

THE COURT: I didn't see where that related to your claims.

MR. STEVENSON: Well, it doesn't relate to the breach of contract at the beginning but as to the -- you know, if it comes to any issue about her trying to mitigate her damages or what she was trying to do or why her revenues weren't as great, there was essentially some forces out there that were working -- I mean, she was going to get ahead with, that's what I would suggest to the Court.

And where the -- you know, under the law that material breach is the failure to deliver and afford her substantial undertaking set forth in the contract, submit that the 1200 active patients is the important and substantial object of the contract and whether it's material under the case law is whether the breach of such a nature and importance if anticipated in advance, the agreement would not have been made.

Clearly as stated in Tujetsch's affidavit, and I think it's self-evident, she wouldn't have

bought the practice if she found out there was only 32 percent of the patients that could even be considered active patients because of, you know, they moved, they refused to schedule appointments, they changed dentists. It's a pretty dismal record.

THE COURT: How are you entitled to summary judgment if you concede that the term active patients --

MR. STEVENSON: I don't concede. I think it has a commonly understood meaning of what active is.

THE COURT: I thought you suggested it was ambiguous.

MR. STEVENSON: No, I don't concede that it's ambiguous. I wouldn't be here looking for summary judgment.

THE COURT: Okay. That's why I was a little confused. Because earlier in the argument you agreed with me that it was --

MR. STEVENSON: At worst it's ambiguous.

THE COURT: Okay. I get it.

MR. STEVENSON: I mean, at worst it's ambiguous but I think for purposes of what it was used for

and has been acknowledged by Pusateri as to what it meant that these are supposed to be patients that have an ongoing relationship. And where they don't, they can't be considered active patients.

I mean, the percentage of conversion I think of people that have moved and changed dentists is pretty slim to none. So the -- and I think I've gone through, you know, the arguments regarding why we contend that the ADA definitions don't apply as they just apply to valuations plus at the time. Pusateri didn't know about the ADA definition until November of 2009.

THE COURT: Neither side knew about it.

MR. STEVENSON: No. And to say that that's the common understood meaning and then they did, you know, a Google search recently trying to find what active patient was or what it meant and it's twelve months, eighteen months, twenty-four months.

There's a lot of different ways to categorize it, but it doesn't answer the key question as to whether a dentist in selling a dental practice can properly represent as active patients, patients who have moved, changed dentists, refused to schedule appointments,

relatives of the seller, et cetera.

And I don't think that the ADA documents is sanctioning dentists to sell practices as representing the 1200 active patients when the only fact of treatment and not with respect to whether they are truly active patients.

THE COURT: Okay. Well, that's very helpful. And let's hear from your friend here, counsel for the defendant.

MR. MAYNARD: Thank you, your Honor. Well, first of all, with respect to the ADA definition, the definition doesn't say that it's only applicable to appraisals. It says for the purpose of evaluating or appraising the assets of a dental practice.

And that's precisely what this case is about. It's about the plaintiff evaluating and appraising as she herself says in the correspondence that she sent to my client in May of 2004, she's evaluating the practice. And she said that she has done so and that she consulted with her experts and that she's concerned that the practice has leveled off and it would probably be a ~~deem~~ of effort for her to turn it around but she's

willing to offer $150,000. That's in May of 04.

She later sweetens her offer and offers 165 again in May of '04. Now, one point I'd like to make quickly, your Honor, before we go too much farther and before I forget is that in discovery we specifically asked plaintiff when were you first -- when did this representation of -- this whole case concerns this one recital, and we've been categorizing it as a rep and warranties. And by the way, the reps and warranties are in a different section of the agreement. It's labeled reps and warranties.

It's not -- so there's some concern I have about whether it's appropriate to call a recital rep and warranty under these facts. But leaving that aside, the first time that the one sentence that we're talking about, which I will refer to as the recital is filled in -- it's a blank. And it's filled in on June 27th, which was a Sunday of 2004 when the plaintiff and Dr. Pusateri are signing the purchase agreement for the first time.

And so we asked in discovery, and we actually attached an exhibit, it's Exhibit F to our motion for summary judgment where we specifically

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And so we asked in discovery, and we actually attached an exhibit, it's Exhibit F to our motion for summary judgment where we specifically

asked the plaintiff when was this representation first made and her response was ~~in~~ June 27th, 2004. In other words, she could not have relied on a statement that was first made in June 27th, 2004 when she made her offer of $150,000 the previous month. Neither the 150, neither offer nor the subsequent offer at 165.

If her claim is that she overpaid because there were fewer active patients that she didn't get all the active patients that she bargained for, then it doesn't make any sense. It makes sense if you look at the affidavit of our expert where he talks about how generally people value dental practices based on cash flow. Why? Because it's extraordinarily difficult as our expert says to predict precisely which patients are going to -- some people die or they may move away or they may decide they want to go to a different dentist for ~~different purpose~~. It's very difficult.

So what the active patient definition is, it's a rough indication of the size of a practice based on a backward ~~working~~ objective criteria -- which is precisely ~~which~~ makes it useful.

THE COURT: Sure. But let me just ask you,

isn't there a certain sort of common sense, you hear the phrase active patient, the 1200 active patients and then you learn that includes people who are dead, isn't there a certain inconsistency there between what a common sense understanding of what that term would mean versus the fact that that's somebody who's obviously never coming back for dental work.

MR. MAYNARD: And I would concede the point, your Honor. If someone is dead, they're not coming back. But everybody else, it's all a question of -- it's a crap shoot. Just because someone says I don't want X-rays, I have said I don't want X-rays to my dentist or I don't want to come in or I don't -- I'm going to Argentina for three months and I don't want to schedule an appointment until I come back. Does that mean I'm never coming back?

And, you know, the other problem here is just because someone moves, they might move to another continent but that doesn't mean that they're never coming back.

All of these soft criteria are not included in the definition of active patients. It was promulgated in 1991 where we first point out

the ADA's definition was because we don't think that the term is ambiguous either. Is it unfortunate, would it be more clear if the term wasn't active patient but patients treated in the previous twelve months, would that be clearer.

I would concede that point readily. Would this case be a lot easier if they had not used that term and said patients just left, not even used the term and just gone with the dependent clause. I would concede that point as well

But here is the problem, in 1991, the ADA promulgates this term. And they do surveys -- and by the way, it's not just about appraisals. It's valuations, which is what this case is about. We also cited in this case, well, it's an ~~Illinois~~ Supreme Court, where we -- if there's a dispute about terminology, the ADA has clearly -- the Supreme Court thought it was the appropriate tie breaker, if you will

And here the Google search was just to show that in common ~~partisans~~, we can't find anyone who subscribes to this self-serving definition that has been suggested here.

THE COURT: And forbid to your client in his

answer to the question.

MR. MAYNARD: No. Because what he's saying is not that they have not died, not that they have not declined X-rays. All he's saying is that they have -- and by the way, the reason that he used this definition was because there is another report in the First Pacific database that talks about active patients and it's more restrictive.

It's active patients who have a check-up scheduled in the next six months. So he's not a computer guy. That was the report he happened to pull up and so he copied that definition here. It's not the same as this definition that's being suggested here. It's just the computer is used to schedule appointments.

So it tells you this number of people have been treated in the previous twenty-four months. And of those people, this number also has something scheduled in the next six months. And by the way, the number is incredibly consistent. It's about the same. People were coming back. And, in fact, they did come back.

But let me just say this, there can't be any reliance on this recital that they call rep and

warranty. There can't be. Because the first time she saw the number was on the 27th of June when she was signed the agreement. She already decided what she was paying. She's already had an opportunity to review whatever she wanted to do.

But even more telling than that, she claims she doesn't know what active patient means. We attached to one of our pleadings and reply brief as Exhibit F to our reply in support of the motion for summary judgment that we filed early on, a purchase agreement that Dr. Tujetsch entered into with Dr. Carlson. She purchased the practice before. And indeed in that agreement in two places on the bottom of the first page and then the next flag also shows the second place where she not only interlineates the correct definition but she initials it.

In the context of a purchase agreement, active patient has a defined specific term of art meaning, and she knows it. This was in September of 2002. The other point that we can make about the ADA, the real telling factor is that --

THE COURT: But this is a different definition from what's in the --

MR. MAYNARD: Well, it's only different with respect if you look back here.

THE COURT: Right.

MR. MAYNARD: And we concede in our briefs that active patient may be for twelve, it may be for twenty-four months, but the thing that's always consistent is it is only a tally of patients actually treated in a defined --

THE COURT: Let me ask you this, if you can back up to the point that you made previously this reliance point because I don't think I understand it. You suggest because this definition was used, it first arose at the time of the closing, that she could not have relied on it when she was valuating the practice, I don't see how that -- that's your point; right?

MR. MAYNARD: She already offered $165,000.

THE COURT: I don't see how that helps you. That's the point he should have made because she's relying on this definition.

MR. MAYNARD: She never saw that. That's not another point. She never saw that. This is completely irrelevant. Counsel is here -- much of the points he's making are not in any of the

pleadings, certainly not in the affidavit, and this was never provided to her. And that is an absolute undisputed fact, she did not see this until she got it in discovery.

THE COURT: Okay.

MR. MAYNARD: So there was -- and, in fact, she herself said -- she admits in responses to discovery --

THE COURT: Maybe she's using based on twelve months in this prior agreement.

MR. MAYNARD: In fact, that's what she did. She inserted that same definition, if you look at it in our case, and she put it in as twelve months. And so what did my client do.

THE COURT: Crossed.

MR. MAYNARD: Crossed out the twelve and put twenty-four to make it consistent with the First Pacific definition. So here is what we have, we have her inserting language, which was from her previous agreement including the twelve month but making absolutely clear that she was aware of and, in fact, that she previously used it in its precise context the same correct definition, the definition that's consistent with what the ADA says it means,

with what our expert says it means, which is an affidavit which has not been controverted.

Indeed that ADA definition goes back to 1991. They quibble and they say, well, you know, it's cited in these documents that occurred post 1991. It doesn't matter. The definition was promulgated in 1991, and it is normative. And here is how we know, because in 2008, we cited to this dental practice survey that was done of the dental -- the dentists practicing in North America. And when we cited this, their response was, well, this is only ADA members. That's demonstrably incorrect.

The survey included general practitioners and specialists as well as members and non-members of the American Dental Association. This is a random sample. It is a rigorous statistically significant study addressing a number of issues. It is not simply a fluff piece that was sent to members of the ADA. And in -- it says that we cite pages. We didn't include all of the book, but it says in -- and repeatedly it says most independent dentists 96.3 percent define active patients as those treated within the last twelve to twenty-four

months.

Again, the difference in the look back period is there is variation there, but it is never going to include anything about whether someone has declined X-rays or died. The irony here is if we are including death, for example, Dr Pusateri would have had to have said, you know, I can't sign this because I have to go and search the vital records and find out if any of these people have died unexpectedly. Some people may have died a month ago. Or if they moved away, what are their intentions, are they going to drive to come back, how far is it too far to drive?

And if they didn't want to schedule an appointment, why, because they don't want to come back or are they inconvenienced, they're just -- going to the dentist is no one's favorite thing.

But in this survey, 95.9 percent of solo dentists -- all these pages are marked. In other words, there's -- it's almost unanimous among the practitioners who are sampled, it's not limited just to the ADA members, they all understand what the term means and so does our plaintiff.

And so what are we going to have a trial

where she gets to come in and say, yeah, well, I used the term correctly here and 99 percent of -- and our expert is going to come in and say this term is used precisely because it is objective and it doesn't have all this wiggle room and fluff stuff about do you think someone is coming back or not based on some soft criteria, you know.

None of these -- the definition is unworkable and what it really is an attempt to convert a recital, which was inserted at her behest and left blank until the day it was signed.

The practice didn't go well. Oh, well, that's because you exaggerated it. And by the way, the way she first pled this -- there's three counts in this complaint. The first count was I didn't get any patient records.

Now, we filed ~~what was on a~~ motion for summary judgment. ~~You~~ We said there's no evidence of that and there was no response. That's gone. They claim in their amended motion for summary judgement, they're seeking summary judgement on Count I. which has to be wrong because all they're talking about is Count II. That's the exaggeration of active patients.

And what we've done is basically is said, look, you don't get to come in and redefine this term, the same term that you, yourself used in September of '02.

THE COURT: Right.

MR. MAYNARD: You don't get to come in and suddenly say that this includes all these other criteria which are not -- and there's no support anywhere for her definition.

THE COURT: Okay. Thank you. I understand. Brief.

MR. STEVENSON: I've got a number of points to go back.

THE COURT: Make your best.

MR. STEVENSON: Attached to this contract without any testimony from my client, active patients, all these things about twelve month period are simply determining that the look back period for defining active patients, it isn't defining active patient as to whether it's dead or moved or changed dentists.

I submit that you have an obligation if you know someone is dying, you know that someone has moved away, you know that someone has changed

dentists, to tell the person that's buying the practice what the status is, and they never cleaned up their database and never told Tujetsch what they had done.

The questionnaire is very telling as to what exactly common understanding is of active patients. And this comment today that the First Pacific Software is only spitting out totals of people that have scheduled appointments, that's nonsense. I've never heard that before. It's simply a list of people who have been treated and that's it.

The other part, you know, when he said you can't be sure -- you're always going to lose some patients when you buy a practice and everyone understands that. But here as you got -- the magnitude is nearly 70 percent. I mean, that is huge. I submit that if you don't -- you know, that these numbers aren't real accurate and you never purge the database to determine whether they're active or inactive, and even the ADA says that you should change the status from active to inactive.

THE COURT. Just a couple housekeeping matters before we wrap up here. Your motion is on Count

II; right?

MR. STEVENSON: Right, Count II.

THE COURT: Not Count I?

MR. STEVENSON: Correct.

THE COURT: And with regard to Count I, what do you have to say to that, the business about no patient records?

MR. STEVENSON: Well, it is a claim that we were making that we didn't get any patient lists. My client was repeatedly asking for patient lists. I mean, their basic claim is we had the patient files so you could find it out plus you could access the First Pacific database.

But when she did use the First Pacific database afterwards but did not access it while -- during some period of time trying to get patients who were treated before the sale. And by the time she looked at the database is just before she sent the letter objecting which it finally dawned on her, my God, there really aren't 1200 active patients.

I do submit that the ADA documents are talking about valuations. This survey is again hearsay. It's a 2008 survey of various dentists.

All it's talking about is the look back period. It doesn't say in there active patient is -- they're trying to determine how people look back to say active patients is twelve months, eighteen months, twenty-four months.

THE COURT: I get it. And I want to thank both sides for a very fine argument, excellent briefing.

The motions will be taken under advertisement. We'll have a written disposition for you sometime in the relatively near future. Let me go ahead and give you a case management date. How does the first week of August look for you? Are you folks on vacation?

MR. STEVENSON: No, I'm around. I've got a trial.

THE COURT: August 1 at 9:30 for case management. If you put that on the case management order and indicate in that order that the motions here today are taken under advertisement. Thank you again.

MR. STEVENSON: Thank you very much, your Honor.

THE COURT: You're welcome.

(Whereupon, all proceedings were had.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

ATHANASIA MOURGELAS, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing.

ATHANASIA MOURGELAS, CSR

LIC. NO. 084-004329