

BDC Mgt. Servs., LLP v Singer
2016 NY Slip Op 30039(U)
January 7, 2016
Supreme Court, New York County
Docket Number: 652217/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BDC MANAGEMENT SERVICES, LLP, BDIP
HOLDINGS, INC., BDIP, LLC and TOPSPIN
PARTNERS LBO, LP,

Index No.: 652217/2015

DECISION & ORDER

Plaintiffs,

-against-

SCOTT SINGER, TODD SINGER, and REGNIS
MANAGEMENT LLC f/k/a BDC MANAGEMENT,
L.L.C.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiffs BDC Management Services, LLC (BDC or the Company), BDIP Holdings, Inc. (BDIP Holdings), BDIP, LLC (BDIP LLC), and Topspin Partners LBO, LP (Topspin) move, pursuant to CPLR 6301 & 6311-13, for a temporary restraining order (TRO) and preliminary injunction against defendants Scott Singer (Scott), Todd Singer (Todd), and Regnis Management LLC (Regnis). A TRO is currently in effect. For the reasons that follow, plaintiffs' motion for a preliminary injunction is granted.

I. Background

Unless otherwise indicated, the following facts are undisputed.¹

¹ While this is not a motion to dismiss, where the facts alleged in the complaint would ordinarily be presumed to be true, the facts relevant to this motion (i.e., the terms of the relevant contracts and the circumstances of the employees leaving to work for defendants) are mostly undisputed. That said, briefing on defendants' motion to dismiss is in progress. The court will assess the sufficiency of the complaint on the motion to dismiss. This decision merely decides plaintiffs' likelihood of success on the merits of the restrictive covenant claims.

The individual defendants, Todd and Scott, are brothers (collectively, the Singers). Todd is a dentist. Scott is an attorney. Todd owns several dental practices in New Jersey (the Practices). Prior to the involvement of plaintiffs, the Singers owned Brighter Solutions LLC (DSO), a company that provided non-clinical services to the Practices, such as marketing and human resources.² In 2011, the Singers sought to sell an equity stake in their DSO so they could use the sale proceeds to expand the Practices. Plaintiff Topspin, a “control fund”, was interested in investing, but only if it could control the DSO. The parties agreed that Topspin would purchase a controlling interest in the DSO, Scott would be named CEO, and Todd, in addition to remaining the owner of the Practices (which only he, as a licensed dentist, was permitted to do under New Jersey law), would be named President and Chief Clinical Officer. The Singers would also draw salaries set forth in their employment contracts.

The parties reached agreement on all material terms, and the deal closed on March 13, 2012. The transaction was memorialized in more than 30 related written agreements, including: (1) the Amended and Restated Operating Agreement of the DSO entity stating that Topspin was acquiring a controlling stake in plaintiff BDC (i.e., the Company);³ (2) the Singers’ employment agreements; (3) agreements governing the relationship between the Company and the Practices; and (4) the agreement governing the sale of BDC (the Acquisition Agreement) (*see* Dkt. 51). This action only concerns the Acquisition Agreement, which is governed by New York law and

² This type of company is known as a dental support organization (DSO). Defendants’ claims of illegality, discussed herein, concern the ability of private equity funds to invest in DSOs without contravening New Jersey law, which prohibits non-dentists from owning dental practices.

³ The details of why and how BDC became the operative DSO entity is not relevant at this juncture.

has a mandatory New York forum selection clause. *See* Dkt. 51 at 66. Many of the other contracts are governed by New Jersey law⁴ and contain New Jersey forum selection clauses, which is why plaintiffs' claims against defendants under those agreements are being pursued in a separate lawsuit in New Jersey federal court. *See BDC Mgmt. Servs., LLC v Brighter Dental Care (Princeton) P.A.*, No. 3:15-cv-04221 (D NJ).

Pursuant to the Acquisition Agreement, defendants were provided with more than \$16 million, approximately \$8 million of which was in cash. The Singers used that money to pay off their debts and open new dental practices in New Jersey. Plaintiffs BDIP Holdings and BDIP LLC later invested an additional \$1 million.

After closing, there was significant conflict between plaintiffs and the Singers. The parties' disputes are set forth in the complaint and the parties' briefs and will be more extensively addressed on the motion to dismiss. Relevant here are the events of early 2015, shortly before the Singers' employment agreements were set to expire. After the parties unsuccessfully sought to negotiate a buy-out, the Singers purported to terminate the 10-year, governing service contracts between the Company and the Practices. In a letter dated May 13, 2015, the Singers contended that such contracts, purportedly, are illegal under New Jersey law. *See* Dkt. 6 at 45. The Singers' claim of illegality was viewed cynically by plaintiffs, since all of

⁴ It should be noted that defendants' falsely claim in their opposition brief [*see* Dkt. 189 at 29] that the Acquisition Agreement is the only contract not governed by New Jersey law. The operating agreement of BDC, a Delaware LLC, is governed by Delaware law and contains a New York forum selection clause. *See* Dkt. 52 at 2, 50. It also should be noted that while the employment agreements contain a New Jersey forum selection clause and similar restrictive covenants to those contained in the Acquisition Agreement [*see, e.g.*, Dkt. 53 at 10-13], that does not affect plaintiffs' right to enforce the Acquisition Agreement's restrictive covenants in this court.

the parties' contracts were drafted with the aid of sophisticated health-law counsel. *See id.* at 57 (plaintiffs' May 15, 2015 letter). The contracts, moreover, contain severability clauses that state that if any portion of them are illegal, such fact shall have no impact on the legal portions of the contracts, and that the parties have a good faith obligation to ensure their business relationship continues to operate legally. *See e.g.*, Dkt. 54 at 6-7; *see also* Dkt. 55 at 13.

Nonetheless, in June 2015, eleven of the Company's employees, including the Singers,⁵ left the employment of BDC, and proceeded to continue providing non-clinical services to the Practices through another of the Singers' companies, BDC Shared Services, LLC (Shared Services).⁶ The result was the Practices received uninterrupted, non-clinical services provided by the Company's former employees, whose salaries were paid by the Singers' Practices through Shared Services. The Practices ceased paying the contractually required management fees to the Company. Hence, by taking the Employees away from the Company, the Singers deprived the Company of the consideration for the Acquisition Agreement.⁷

⁵ The other nine are: Christine Vigilante, Christopher Guzman, Megan Madar, Jennifer Eckmeyer, Sully Costa, Michelle Hart, Nicole Lepre, Anita Nicholson and Nadine Singer. To distinguish between these nine employees and Scott and Todd, Scott and Todd are referred to as "the Singers" while the other nine employees are referred to as the "Employees". It should be noted that one of the nine, Nadine Singer, is Scott's wife.

⁶ Shared Services is not a party to this action and may not be subject to personal jurisdiction in New York. That said, since the Singers own Shared Services, they cannot evade enforcement of the subject restrictive covenants or the New York forum selection clause by operating through Shared Services. While Shared Services is not a necessary party to this action, it may, of course, seek to intervene. In light of Shared Services' pending bankruptcy proceedings, discussed below, its bankruptcy trustee would have to make such an application. However, if Shared Services does not join this action and if there is no jurisdiction over it, a claim against it for tortious interference with the Acquisition Agreement may only be pursued in New Jersey.

⁷ The Singers' frivolously assert that plaintiffs have been "siphoning" the Practices' profits. The Singers, however, negotiated the management fees, which are governed by contract. While such

In addition, section 9.2 of the Acquisition Agreement prohibits the Singers from soliciting or hiring the Company's employees within two years of the termination of the Singers' employment at the Company. *See* Dkt. 51 at 60-61. Moreover, section 9.5 prohibits the Singers from operating a competing DSO [*see id.* at 12, defining Competing Business] within 75 miles of the Practices for the longer of 4 years after closing or 18 months after the termination of the Singers' employment. *See id.* at 62-63.⁸ The Singers do not dispute their breach of sections 9.2 and 9.5. Rather, they contend that preliminary injunctive relief to remedy such breaches is unwarranted because these restrictive covenants are unenforceable. As set forth below, under the circumstances here – the sale of a business – it is well settled that these restrictive covenants are enforceable. New Jersey law has no relevance to the validity or enforceability of these restrictive covenants since the subject dispute is governed by a contract providing for New York law in a New York forum.

II. Procedural History

Plaintiffs commenced this action on June 22, 2015 by filing a summons and complaint. The complaint contains eight causes of action: (1) fraudulent inducement of the Acquisition Agreement, asserted against all defendants; (2-3) breach of the Acquisition Agreement (failure to execute New Practice Agreements), asserted against all defendants, for which plaintiffs seek monetary damages and specific performance; (4) breach of the Acquisition Agreement's restrictive covenants, asserted against all defendants; (5) breach of the duty of good faith and fair

fees are considerable, so were the millions of dollars plaintiffs paid to the Singers.

⁸ Section 9.3 also contains a customer non-solicitation and non-disparagement clause, and section 9.4 governs non-disclosure of trade secrets and confidential information. *See* Dkt. 51 at 61-62.

dealing, asserted against all defendants; (6) breach of fiduciary duty, asserted against the Singers; (7) unjust enrichment, asserted against all defendants; (8) conversion, asserted against all defendants. *See* Dkt. 2.

On July 9, 2015, the parties filed a stipulation in which defendants acknowledged service. On July 16, 2015, plaintiffs filed the instant injunction motion by order to show cause. Counsel for all parties appeared to argue the merits of plaintiffs' TRO application. The court granted a limited TRO requiring plaintiffs to be provided with books and records access. *See* Dkt. 13. The court was cognizant of the fact that the Employees, unlike the Singers, are not subject to restrictive covenants, but that the court had the power to prohibit defendants from employing them.

Shortly after the TRO was issued, defendants retained new counsel. On August 3, 2015, the parties contacted the court regarding defendants' alleged non-compliance with the TRO. On that call, it became clear the defendants' prior counsel may not have been completely forthright about how the Singers were employing the Employees. For instance, it was on that call that the court first learned that Shared Services was the employer.⁹ In light of this newly provided information, the court ordered certain discovery relevant to the injunction motion. *See* Dkt. 28.

On August 21, 2015, defendants filed opposition to plaintiffs' injunction motion. The opposition brief, remarkably, **was 81 pages in length** (*see* Dkt. 110), a violation of the rules of the Commercial Division and this part. Defendants did not seek prior leave to file an oversized brief. The court, therefore, struck the brief from the record and ordered defendants to file a new

⁹ Notably, in opposing the original TRO application, defendants did not argue that the court's ability to enjoin the Singers from employing the Employees was impacted by Shared Services' possible jurisdictional or necessary party arguments.

brief that complied with the court's page limits. *See* Dkt. 269. Defendants did so on September 3, 2015 (*see* Dkt. 189), and plaintiffs then filed their reply.

At oral argument on September 10, 2015, the court reserved on the motion, but expanded the TRO to immediately require defendants to comply with the Acquisition Agreement's restrictive covenants, which, by definition, required them to cease employing the Employees and providing non-clinical services to the Practices. *See* Dkt. 304 (9/10/15 Tr.). The court also held a preliminary conference and issued a discovery schedule. *See* Dkt. 289.

The injunction was not complied with, and discovery did not commence because defendants removed this case to federal court on September 15, 2015. *See* Dkt. 291; *see also* *BDC Mgmt. Servs., LLC v Singer*, No. 15-cv-7292 (SDNY) (Forrest, J.). As a result of removal, the two pending motions (Seq. 001, the injunction; and Seq. 002, the motion to dismiss) were dismissed without prejudice. *See* Dkt. 298 & 299.¹⁰ The proffered basis for removal was the September 15, 2015 filing of bankruptcy petitions by non-party Shared Services and defendant Regnis in the United States Bankruptcy Court in New Jersey. *See In re BDC Shared Servs. LLC & Regnis Mgmt. LLC*, Nos. 15-27374 & 15-27375 (Bankr D NJ).¹¹ Defendants contended federal jurisdiction exists over this action under 28 USC § 1334(b) on the ground that this case is related to the bankruptcy proceedings. The federal court disagreed. By order dated October 21, 2015, Judge Forrest remanded the case on the ground of mandatory abstention under 28 USC § 1334(c)(2). *See* Dkt. 302.

¹⁰ After remand, the motion to dismiss was refiled under a new motion sequence number (Seq. 003). The injunction motion sequence (Seq. 001) was reopened.

¹¹ The bankruptcy actions are being jointly administered by Judge Michael B. Kaplan.

Remand, however, did not immediately allow this case to proceed. On October 28, 2015, defendants e-filed a notice of the bankruptcy proceedings of Shared Services and Regnis. *See* Dkt. 303. In light of the bankruptcy proceedings, the court sought the parties' input on the applicability of the automatic stay, 11 USC § 362. The employees impacted by this court's TRO work for one of the debtors, Shared Services. It was agreed that the parties would report back to this court after the bankruptcy court judge (Kaplan, J.) ruled on the parties' respective motions concerning this court's ability to order injunctive relief affecting Shared Services. After a hearing [*see* Dkt. 336 (11/23/15 Tr.)], Judge Kaplan issued three orders dated December 2, 2015, which, as relevant here, permitted this action to proceed and an injunction to be issued. *See* Dkt. 315, 316, & 317. The only restriction imposed by Judge Kaplan – a restriction imposed solely for the benefit of the Employees (i.e., not defendants)¹² – was that this court's injunction, which would cause the Employees to cease their employment with Shared Services, should not go into effect until January 1, 2016. Judge Kaplan wanted to afford the Employees an opportunity to find new jobs. Judge Kaplan, however, made clear that this court was free to *immediately* issue injunctive relief against Scott Singer. *See* Dkt. 315 at 4; *see also* Dkt. 336 at 43-44.

After a further conference call with the parties, the court issued a new discovery schedule. *See* Dkt. 313. Additionally, after hearing further argument on the proper scope of the

¹² “I have concerns with respect to the welfare of [the Employees] ... And I’m going to admonish the debtors [i.e., defendants] that when you ask for 120 days you’ve overlooked the fact that this has been in bankruptcy since September 15th, this was in litigation during the summer. Anyone with commonsense could have seen these issues percolating, and certainly over the last 60 days. So steps to cross train, steps to hire anew should have commenced long ago.” *See* Dkt. 336 (11/23/15 Tr. a 41-42). The court appreciates the expediency with which Judge Kaplan ruled on the parties' motions and his offer to discuss this case should this court require further clarity. *See id.* at 44.

TRO in light of Judge Kaplan's rulings, on December 4, 2015, the court issued a TRO that provides:

[P]ending the determination of Plaintiffs' motion for a preliminary injunction,

(a) Scott Singer is hereby immediately enjoined from directly or indirectly working for, providing services to, for or on behalf of, or, without the consent of the Plaintiffs or leave of the Court, going to the premises of any business owned or operated, in whole or part, by Todd Singer, including without limitation, any dental practice or any entity that provides non-clinical management and administrative services to dental practices; **provided, however**, that Scott Singer is permitted to go to the offices located at 46 Vreeland Drive, Skillman, New Jersey until December 16, 2015, but solely for the purpose of removing his files, computers, or other equipment or materials relating to his law practice, and provided that Scott Singer does not communicate with Todd Singer or any of the former employees of Plaintiff BDC Management Services, LLC about any dental practice or any entity that provides non-clinical management and administrative services to dental practices; and

(b) Provided that Plaintiffs file an undertaking in the amount of \$50,000 on or before December 31, 2015, Scott Singer and Dr. Todd Singer, are, as of January 1, 2016, enjoined, from, directly or indirectly hiring or soliciting for hire or employing, inducing or attempting to induce any person who was, during the immediately preceding one year period prior to their hiring or solicitation, an employee or consultant of Plaintiff BDC Management Services, LLC, including without limitation, Christine Vigilante, Christopher Guzman, Megan Madar, Jennifer Eckmeyer, Sully Costa, Michelle Hart, Nicole Lepre, Anita Nicholson and Nadine Singer.

See Dkt. 325 (emphasis in original).¹³ The court now converts the TRO into a preliminary injunction.

III. Discussion

It is well settled that “[i]njunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the absence of

¹³ Plaintiffs filed the required undertaking on December 11, 2015. See Dkt. 409. Given the millions of dollars paid by plaintiffs to the Singers, the court determined that a \$50,000 undertaking was sufficient.

an injunction, and that the balancing of the equities weighs in its favor.” *Goldstone v Grade Terrace Apt. Corp.*, 110 AD3d 101, 104-05 (1st Dept 2013), citing *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 (2005), accord *Doe v Axelrod*, 73 NY2d 748 (1988). It is equally well settled that courts should issue injunctions to enforce reasonable restrictive covenants where doing so is necessary to ensure a wrongdoer does not undermine the consideration in an agreement for the sale of a business. See *Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267, 271 (1963). The Court of Appeals explained:

Where ... there is a sale of a business, involving as it does the transfer of its good will as a going concern, the courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale. This rule is grounded, most reasonably, on the premise that a buyer of a business should be permitted to restrict his seller’s freedom of trade so as to prevent the latter from recapturing and utilizing, by his competition, the good will of the very business which he transferred for value. This court has applied the ‘sale of a business’ rationale where an owner, partner or major stockholder of a commercial enterprise has sold his interest for an immediate consideration which was, in part, payment for the good will of the business, in terms of ‘continuity of place’ and ‘continuity of name’. The sole limitation on the [enforceability] of such a restrictive covenant is that the restraint imposed be ‘reasonable,’ that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought.

Id. at 271-72 (citations omitted); see *Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 286 (1981) (“[a] man may not derogate from his own grant; the vendor is not at liberty to destroy or deprecate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the customer which he has parted with; it would be a fraud on the contract to do so.”) (citations and quotation marks omitted).

In the ordinary employment context (concerning, for instance, improper poaching and moving to a competing firm), restrictive covenants are enforceable only when they meet established reasonableness criteria. See *BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89

(1999) (“The modern, prevailing common-law standard of reasonableness for employee agreements not to compete applies a three-pronged test. A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public”); *see also Ashland Mgmt. Inc. v Altair Investments NA*, 59 AD3d 97 (1st Dept 2008), *aff’d as mod.* 14 NY3d 774 (2010); *Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263 (1st Dept 2004).

Moreover, New York’s public policy strictly prohibits the enforcement of non-compete clauses when the employee is not a member of a “learned profession” or does not render services that are “unique or extraordinary” unless the employee is misappropriating trade secrets or confidential information. *See BDO Seidman*, 93 NY2d at 389. But, as *Purchasing Assocs.* and its progeny make clear, the rules are different when the restrictive covenant is part of the consideration for the sale of a business. When a claim to enforce a restrictive covenant “is based on the sale of a business and accompanying goodwill, defendant’s violation of the covenant establishes irreparable injury.” *Lund v Agmata Washington Enterprises, Inc.*, 190 AD2d 577, 578 (1st Dept 1993), citing *Hay Group, Inc. v Nadel*, 170 AD2d 398, 399 (1st Dept 1991) (irreparable injury presumed “without the necessity of showing actual loss of customers”); *see Manhattan Real Estate Equities Grp. LLC v Pine Equity, NY, Inc.*, 16 AD3d 292 (1st Dept 2005) (same). Hence, contrary to defendants’ contentions, plaintiffs’ entitlement to injunctive relief to enforce the Acquisition Agreement’s restrictive covenants is not precluded by the usual rule that injunctive relief should not be granted when a monetary judgment can sufficiently compensate plaintiff. *See Schottenstein v Windsor Tov, LLC*, 85 AD3d 546, 547 (1st Dept 2011).

Defendants utterly disregarded these principles. Defendants wrongly focus on the public policy and reasonableness inquiries applicable to ordinary employment restrictive covenants. The cases cited in their brief are mostly inapposite because such cases do not, as here, involve the sale of a business. Plaintiffs, in contrast, correctly aver that courts are far more willing to enforce restrictive covenants when a business is sold. The reasons are obvious – the good will is what is being bought. The inability to enforce restrictive covenants would likely have decreased the purchase price; it was a material part of the bargain.

Defendants ask the court to deny the requested injunctive relief because public policy and equity are on their side due to alleged illegality of the parties' contracts. As discussed below, these arguments do not warrant withholding injunctive relief. The equities on this motion do not lie with defendants, who brazenly and unapologetically crippled the Company by stealing the Employees and competing through Shared Services in direct contravention of sections 9.2 and 9.5 of the Acquisition Agreement.

That said, as plaintiffs persuasively contend, the restrictive covenants in sections 9.2 and 9.5 are reasonable. A two-year employee non-solicit clause and a maximum four-year non-competition clause limited to a 75-mile radius are reasonable given the millions of dollars plaintiffs invested in defendants' business. *See FTI Consulting, Inc. v PricewaterhouseCoopers LLP*, 8 AD3d 145, 145-46 (1st Dept 2004) (upholding three-year non-compete ancillary to sale of business); *Brintec Corp. v Akzo, N.V.*, 129 AD2d 447, 447-48 (1st Dept 1987) (upholding similar five-year non-compete clause); *Kaplan v BST Advisory Network, LLC*, 2009 WL 5225215 (Sup Ct, NY County 2009) (“The subject restrictive covenant of three years within a 50-mile radius is a reasonable means of protecting [the purchaser’s] investment”). As the events

that unfolded demonstrate, permitting defendants to violate the restrictive covenants would result in the destruction of the Company. An injunction enforcing the restrictive covenants is the only way to stop the Practices from cutting out the Company and using its services (i.e., those provided by the Singers and the Employees) without compensating the Company.¹⁴

Injunctive relief, therefore, is appropriate. Plaintiffs have established a likelihood of success on the merits since breach of the restrictive covenants is undisputed. Their scope is reasonable, and defendants have not cited any comparable case (that is, in the context of a sale of a business) holding otherwise. Moreover, the case law cited above makes clear that irreparable harm is present. Finally, the equities clearly lie with plaintiffs.

Turning now to defendants' illegality objections, the court holds that such alleged illegality is irrelevant to this motion. *First*, the Acquisition Agreement is governed by New York law, which precludes consideration of New Jersey law. *Second*, even if New Jersey law applied, New York's illegality doctrine does not preclude enforcement of the Acquisition Agreement's restrictive covenants. *Third*, even if New Jersey law applied, and even if its violation might impact the enforceability of the subject restrictive covenants, defendants have not made a compelling showing of illegality. With respect to the latter point, while plaintiffs bear the burden of establishing a likelihood of success on the merits to justify an injunction, illegality is

¹⁴ While the equities clearly lie with plaintiffs, this court, like Judge Kaplan, is cognizant that this situation is unfair to the Employees. But that is solely the fault of the Singers, who the Employees have every right to blame for their current predicament. Ideally, the Employees could be re-employed by the Company, but they would only have work to do if the Singers were willing to do business with plaintiffs. The Company has offered to rehire them. The ball is in the Singers' court.

an affirmative defense for which defendants bear the burden of proof. Defendants have failed to meet their burden.

With respect the first issue, the Court of Appeals recently expanded its holding in *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 NY3d 310 (2012), extending the prohibition of looking to out-of-state law when adjudicating claims for breach of a contract governed by New York law to situations where New York General Obligations Law § 5-1401 does not apply.¹⁵ See *Ministers & Missionaries Benefit Bd. v Snow*, 2015 NY Slip Op 09186 (Ct App Dec. 15, 2015) (*Snow*). In *Snow*, the Court held that when a contract states that it governed by New York law, courts are forbidden from applying out-of-state law because courts must assume a choice of law clause evidences the parties' intent that their contractual rights are not to be subject to the laws of another state. The Court explained that "when parties include a choice-of-law provision in a contract, they intend application of only that state's 'substantive law'," and therefore "New York's common-law conflict-of-laws principles should not apply when the parties have chosen New York law to govern their dispute." See *Snow*, 2015 NY Slip Op 09186, at *4. "Stated differently, New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract, even if the contract is one that does not fall within General Obligations Law § 5-1401." *Id.* The Court reasoned that "logic dictates that, by including a choice-of-law provision in their contracts, the parties intended for only New York substantive law to apply." *Id.* at *5. Consequently, "when parties include a choice-of-law provision in a contract, they intend that the law of the chosen state -- **and no other state** -- will

¹⁵ Hence, while § 5-1401 may apply to the Acquisition Agreement, that is no longer a relevant fact.

be applied. In such a situation, the chosen state's substantive law ... is to be applied, unless the parties expressly indicate otherwise." *Id.* at *6 (emphasis added).¹⁶ *Snow* precludes this court from considering New Jersey law when adjudicating the parties' rights under the Acquisition Agreement.

That said, even if *Snow* did not call for such a result, well-established New York law precludes defendants from seeking to nullify the restrictive covenants on the ground of illegality. In *McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 470 (1960), the Court of Appeals rejected the proposition that:

any small illegality in the performance of an otherwise lawful contract will deprive the doer of all rights, **with the result that the other party will get a windfall and there will be great injustice.** ... It is not every minor wrongdoing in the course of contract performance that will insulate the other party from liability for work done or goods furnished. There must at least be a direct connection between the illegal transaction and the obligation sued upon. Connection is a matter of degree. Some illegalities are merely incidental to the contract sued on.

Id. at 471 (emphasis added). The Court held that a contract, even if it implicates illegal conduct, will nonetheless be enforced unless there is "**gravely immoral and illegal conduct** in accomplishing its performance." *Id.* (emphasis added).

As this court recently explained:

To constitute a valid defense to an action on a contract, the alleged illegality must be central to or a dominant part of the [plaintiffs'] whole course of conduct in performance of the contract. The illegality defense is inapplicable where it would result in a substantial forfeiture to one party while allowing the other party, who has already reaped the benefit of the transaction, to avoid the corresponding obligation. This is particularly true where the two parties are equally culpable with respect to the illegal conduct. Forfeitures by operation of law are disfavored where the party who is alleged to have breached the contract is attempting to

¹⁶ Judge Abdus-Salaam wrote a compelling dissent [*see Snow*, 2015 NY Slip Op 09186, at *6-16], but her reasoning is neither binding nor applicable here since no New York statutory choice-of-law provision is at issue.

improperly use public policy as a sword for personal gain rather than a shield for the public good. Thus, once the party seeking such enforcement has performed his obligations, the court should consider the quality of the illegality, the extent of public harm, the relative guilt of the parties, and the cruelty of the forfeiture involved in a denial of remedy.

Grape Solutions, Inc. v Majestic Wines, Inc., 2015 WL 2207528, at *4 (Sup Ct, NY County 2015) (citations and quotation marks omitted).

Here, there is no gravely immoral or illegal conduct. The New Jersey legal issues involve regulatory restrictions governing the manner in which private equity investment in a DSO may be contingent on the performance of a dental practice. The business decisions controlled by plaintiffs related to non-clinical functions, such as marketing and business development, not patient care. Any contingent (as opposed to fixed) compensation appears to be a function of non-clinical business efficiencies, and the incentive structure prohibited by New Jersey law (sharing dental practice profits with non-dentists) is not implicated here. The notion that this case presents a public health concern or that patients in New Jersey stand to see their dental care adversely impacted is nothing more than a conclusory scare tactic proffered by the Singers.

Instead, what this case is really about is the Singers accepting millions of dollars from plaintiffs to invest in expanding the Practices, and eventual buyers' remorse when the Singers decided they were not drawing sufficiently lucrative salaries despite paying substantial, *but agreed-upon* management fees to plaintiffs. Under these circumstances, it is clear the Singers seek to invoke "public policy as a sword for personal gain rather than a shield for the public good." *See Benjamin v Koeppe*, 85 NY2d 549, 553 (1995). At best, even if there is illegality, the Singers are equally culpable. After all, the Singers, with the help of sophisticated

transactional, health-law counsel, helped design the very corporate structure they now complain is illegal. Consequently, defendants' illegality defense does not militate in favor of denying plaintiffs' injunction motion.

Finally, and notwithstanding all of the above, defendants have not convinced this court that they are likely to prevail on their claim that New Jersey law has been violated. Indeed, defendants also tried to persuade the judge presiding over the litigation in New Jersey federal district court, where the issue of illegality is far more relevant, to make a similar preliminary finding of illegality. He declined to do so. *See* Dkt. 333.

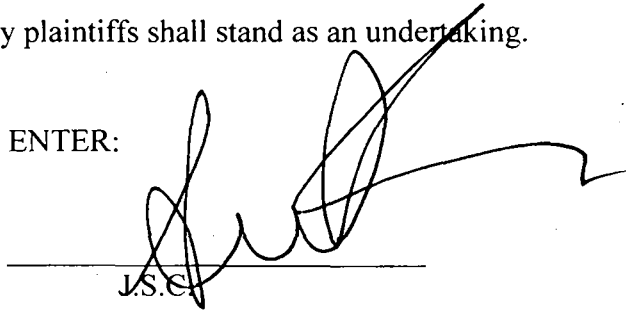
This court declines to preliminarily address the merits of the defendants' illegality defense. As noted, it appears that any possible illegality under New Jersey law is not a defense to the claims asserted in this action. It certainly is not a valid reason to deny the injunction sought by plaintiffs. This court will not decide complex, possibly unsettled questions about another state's law when such issues are not dispositive of this case, particularly where, as here, the relevant laws are being litigated in the very state whose laws are at issue. Accordingly, it is

ORDERED that the motion by plaintiffs BDC Management Services, LLC, BDIP Holdings, Inc., BDIP, LLC, and Topspin Partners LBO, LP for a preliminary injunction against defendants Scott Singer, Todd Singer, and Regnis Management LLC is granted to the following extent: during the pendency of this action: (1) Scott Singer is enjoined from directly or indirectly working for, providing services to, for or on behalf of, or, without the consent of the plaintiffs or leave of the court, going to the premises of any business owned or operated, in whole or part, by Todd Singer, including without limitation, any dental practice or any entity that provides non-clinical management and administrative services to dental practices; (2) Scott Singer and Todd

Singer are enjoined from directly or indirectly hiring or soliciting for hire or employing, inducing or attempting to induce any person who was, during the immediately preceding one year period prior to their hiring or solicitation, an employee or consultant of plaintiff BDC Management Services, LLC, including without limitation, Christine Vigilante, Christopher Guzman, Megan Madar, Jennifer Eckmeyer, Sully Costa, Michelle Hart, Nicole Lepre, Anita Nicholson and Nadine Singer; and (3) the \$50,000 posted by plaintiffs shall stand as an undertaking.

Dated: January 7, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'Shirley Werner Kornreich', is written over a horizontal line. Below the line, the initials 'J.S.C.' are printed.

SHIRLEY WERNER KORNREICH
J.S.C