

**STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY**

TIMOTHY ANGUS, as Parent and Natural Guardian of Infant JACOB ANGUS; JESSALYNN PURCELL, as Parent and Natural Guardian of Infant ISAIAH BERG; BRIAN CARTER, as Parent and Natural Guardian of Infant BRIANA CARTER; APRIL FERGUSON, as Parent and Natural Guardian of Infant JOSEPH FERGUSON; SHERAIN RIVERA, as Parent and Natural Guardian of Infant SHADAYA GILMORE; TONYA POTTER, as Parent and Natural Guardian of Infant DESIRAE HAGER; NANCY WARD, as Legal Custodian of Infant AALYIAROSE LABOMBARD-BLACK; NANCY WARD, as Legal Custodian of Infant MANUEL LABORDE JR.; JENNIFER BACON, as Parent and Natural Guardian of Infant ASHLEY PARKER; and COURTNEY CONRAD, as Parent and Natural Guardian of Infant ZAKARY WILSON,

Plaintiffs, vs.

FORBA HOLDINGS, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF ALBANY,LLC; ALBANY ACCESS DENTISTRY, PLLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; EDWARD J. DEROSE, D.D.S; ADOLPH R. PADULA, D.D.S; WILLIAM A. MUELLER, D.D.S; MICHAEL W. ROUMPH; MAZIAR IZADI, D.D.S.; LAURA KRONER, D.D.S.; JUDITH MORI, D.D.S.; LISSETTE BERNAL, D.D.S.; EDMISE FORESTAL, D.D.S.; EVAN GOLDSTEIN, D.D.S.; KEERTHI GOLLA, D.D.S.; NASSEF LANCEN, D.D.S.; WADIA HANNA, D.D.S.; and BERNICE LITTLE-MUNDLE, D.D.S.,

Defendants.

**NYS Litigation Coordinating Panel
Number: 0011/2011**

**PLAINTIFFS' REPLY AFFIDAVIT IN
SUPPORT OF COORDINATION**

**Index No: 2011-562
RJI No: 46-1-2011-416**

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

KELLY VARANO, as parent and natural guardian of infant JEREMY BOHN; SHANNON FROIO, as parent and natural guardian of infant SHAWN DARLING; BRENDA FORTINO, as parent and natural guardian of infant JULIE FORTINO; MARIE MARTIN, as parent and natural guardian of infant KENNETH KENYON; JENNY LYNN COWHER, as parent and natural guardian of infant WILLIAM MARTIN; HOLLAN CRIPPEN, as parent and natural guardian of infant DEVAN MATHEWS; JESSICA RECORE, as parent and natural guardian of infant SAMANTHA MCLOUGHLIN; LAURIE AND DOMINICK RIZZO, as legal custodians of infant JACOB MCMAHON; JASON MONTANYE, as parent and natural guardian of infant KADEM MONTANYE; AND FRANCES SHELLINGS, as parent and natural guardian of infant RAYNE SHELLINGS,

Index No. 2011-2128
RJI No. 33-11-1413

Plaintiffs,vs.

FORBA HOLDINGS, LLC N/K/A Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF SYRACUSE, LLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; EDWARD J. DEROSE, D.D.S.; ADOLPH R. PADULA, D.D.S.; WILLIAM A. MUELLER, D.D.S.; MICHAEL W. ROUMPH; NAVEED AMAN, D.D.S.; KOURY BONDS, D.D.S.; TAREK ELSAFTY, D.D.S.; DIMITRI FILOSTRAT, D.D.S.; YAQOOB KHAN, D.D.S.; DELIA MORALES, D.D.S.; JANINE RANDAZZO, D.D.S.; LOC VINH VUU, D.D.S.; AND GRACE YAGHMAI, D.D.S.,

Defendants.

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

SHANTEL JOHNSON, as parent and natural guardian of infant KEVIN BUTLER; VERONICA ROBINSON, as parent and natural guardian of infant ARIANA FLORES; DEMITA GARRETT, as parent and natural guardian of INFANT I'YANA GARCIA SANTOS; KATHRYN JUSTICE, as parent and natural guardian of infant BREYONNA HOWARD; ELIZABETH LORRAINE, as parent and natural guardian of infant SHILOH LORRAINE JR.; LAPORSHA SHAW, as parent and natural guardian of infant ALEXIS PARKER; ROBERT RALSTON, as parent and natural guardian of infant BRANDIE RALSTON; KATRICE MARSHALL, as parent and natural guardian of infant LESANA ROSS; TIFFANY HENTON, as parent and natural guardian of infant COREY SMITH; JANET TABER, as parent and natural guardian of infant JON TABER

Index No. I11/7100

Plaintiffs,

vs.

FORBA HOLDINGS, LLC n/k/a CHURCH STREET HEALTH MANAGEMENT, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF ROCHESTER, LLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; EDWARD J. DEROSE, D.D.S.; ADOLPH R. PADULA, D.D.S.; WILLIAM A. MUELLER, D.D.S.; MICHAEL W. ROUMPH; SHILPA AGADI, D.D.S.; KOURY BONDS, D.D.S.; ISMATU KAMARA, D.D.S.; KEIVAN ZOUFAN, D.D.S.; KATHLEEN POLEON, D.D.S.; SONNY KHANNA, D.D.S.; KIM PHAM, D.D.S.; DOUG GARDNER, D.D.S.; GARY GUSMEROTTI, D.D.S.; ELLEN NAM, D.D.S. AND LAWANA FUQUAY, D.D.S.,

Defendants.

4. On June 14, 2011, four groups of defendants filed responses to the motion to coordinate. The first group—the Small Smiles clinics and their owners (“New FORBA”)—agrees that the cases should be coordinated before a single Coordinating Justice in Onondaga County. The second and third groups—a group of eleven dentists (“the Wilson Elser dentists”) and a group of three different dentists (“the Hancock Estabrook dentists”)—agree that the cases should be coordinated in Onondaga County, but contend that the Panel should also order a second coordination in Schenectady County.
5. The fourth group—the founders and former owners of the Small Smiles clinics (“Old FORBA”)—opposes coordination, but contends that if the Panel coordinates these actions it should appoint two Coordinating Justices in two different venues. The remaining defendants implicitly consent to the motion by not filing an opposition.
6. Of the defendants who did file a response, all but one group agree that these cases should be coordinated under 22 NYCRR §262.69. All agree that Onondaga County is a proper coordination venue. But three of the defendant groups ask the Panel to appoint a second Coordinating Justice in Schenectady County. Because having two Coordinating Justices in two venues would defeat all of the significant benefits of coordination and is unnecessary to manage this litigation, we urge the Panel to order that the proceedings be coordinated in Onondaga County before one Coordinating Justice.
7. In paragraphs 44 through 65 of my original affidavit, I addressed each of the relevant factors in deciding a motion to coordinate. The facts contained in my affidavit that support coordination are largely undisputed. These actions are complex, involving

eight causes of action and over twenty defendants in each action. They involve common issues of fact and law critical to the outcome of each case.

8. They focus on the existence of a nationwide fraudulent course of conduct to put corporate profits ahead of the physical and mental health of young children, the implementation of that scheme, and the damages it inflicted on the children who are the plaintiffs in the case. The existence of the scheme, who was involved, and how it was implemented are common factual issues to be discovered in each case.
9. The legal issues in each case are virtually identical because the legal claims are virtually identical. Instead of requiring multiple Justices, law clerks and court staff to prepare and decide each legal dispute, coordination will allow one Coordinating Justice to become intimately familiar with the issues and make timely and consistent legal rulings. As a result, coordination before one Justice will promote judicial economy, avoid the possibility of inconsistent rulings, conserve the time and resources of parties and witnesses and minimize the inconvenience for counsel.
10. The founders and former owners of the Small Smiles clinics, Old FORBA, are the only parties who oppose coordination. They established the Small Smiles clinics in New York and owned them during a time when about half of the plaintiffs were patients there. They also were the architects and major financial beneficiaries of the fraudulent course of conduct that is at the heart of this case. As such, they seek to distance themselves from the cases by trying to recast the cases as twenty individual acts of dental malpractice committed by twenty different dentists.
11. They claim that the cases do not contain the requisite "common questions of law or fact." But their argument ignores the common allegations in the first seventeen pages

of each Complaint and, in particular, the allegations against them that are central to every plaintiff's claim.

12. This is not a garden variety group of dental malpractice cases. Rather, the core of these cases, as reflected by the allegations in each Complaint, is a nationwide fraudulent course of conduct implemented and directed by the owners of the Small Smiles clinics through their officers and employees that caused harm to each of the children who are plaintiffs in these cases.
13. The common factual allegations regarding the fraudulent course of conduct are set forth in detail in paragraphs 4 through 17 of my original affidavit and will not be repeated here. Because these actions share questions of fact arising out of the allegations regarding a common fraudulent course of conduct that is the focus of these cases, they should be coordinated.
14. The discovery related to the defendants' course of conduct and the evidence supporting the allegations is common in each case. Coordination does not require a complete identity or even a majority of common factual or legal issues. This Panel has frequently coordinated actions which arose out of a common course of conduct, but included causation and damages issues that were unique to each plaintiff. See *e.g.* *Viera v. The Delaco Co.*, Panel Case No. 0001/2003 (2003)(coordination of 23 PPA cases although different defendants, different products and different injuries alleged because "all actions remain rooted in complex core questions concerning the safety of PPA"); *Piscionari v. Commonwealth Land Title Insurance Co.*, Panel Case No. 0003/2002 (2002)(coordination of eight cases against eight different insurance companies finding that "while details of each case may differ the factual contexts are similar."); *Kitsos v. Weiner*, Panel Case No. 0004/2002 (2002) (coordination of eight

cases brought by or against a party but involving different parties and different causes of action because “the actions all arise out of the same circumstances.”).

15. In doing so, the Panel has recognized that even plaintiff-specific discovery “can be managed more efficiently by a single Justice particularly knowledgeable about the issues and the factual context of these cases than by . . . different Justices whose familiarities with relevant matters will necessarily be diffuse.” *Viera, supra* at 6-7; see also *Piscionari, supra* at 5 (“To the extent that a particular case may present a unique issue of fact, the Coordinating Justice will be able to address that issue . . . while at the same time facilitating efficiency of discovery for all parties.”).
16. Coordination is appropriate where there are common questions of fact or law. No one denies that these cases will involve numerous common questions of law. The few papers that were filed during the four weeks between the time the Complaints were served and the stay was issued illustrate the point. Two dentists in Schenectady and one in Syracuse (represented by Hancock Estabrook) filed identical motions to sever the ten plaintiffs into ten different cases—presumably for trial. (See Higgins Aff. ¶¶ 31-34; Exhs H & I).
17. The motions made the same legal arguments, relied on the same legal authorities, and asked for the same relief. When plaintiffs respond, they will make the same legal arguments, rely on the same legal authorities and ask for the same relief.
18. As soon as the stay is lifted, some defendants may challenge the legal sufficiency of the allegations in the Complaints. Since the causes of action and the allegations supporting them are identical in each Complaint, the legal issues raised by the motions to dismiss can be expected to be the same in every case. The plaintiffs’ replies will likewise be the same in each case.

19. One can expect that issues of law common to all the cases will continue to arise throughout the pre-trial phase of these cases. The efficiencies of having all the common legal issues decided consistently in one forum by one Justice familiar with the entire litigation would, alone, warrant coordination of these cases.
20. The Old FORBA defendants oppose coordination for a second reason: because they are not being sued by every plaintiff since they did not own the Small Smiles clinics at the time some of the plaintiffs were treated. The Old FORBA defendants are named parties in all three pending actions. But even if they were not, these cases should still be coordinated.
21. This Panel has held that “. . . Section [202.69] does not limit coordination to cases in which there is a complete identity of parties.” *Beattie v. Bovis Land Lease LMB, Inc.*, Panel Case No. 0001/2004 at 5 (2004). The Panel has repeatedly coordinated actions in which there is an overlap, but not identity of parties. See e.g. *Beattie* (coordination of approximately 26 cases in which there were “many overlapping defendants . . . whose presence gives rise to the potential for duplicative discovery.”); *Kitsos* (coordination of eight cases over objection of one party who was only named in two of them); *Piscionari* (coordination of eight cases in which each defendant was a party in only one case).
22. The Old FORBA defendants, the Wilson Elser dentists, and the Hancock Estabrook dentists ask the Panel to appoint two Coordinating Justices—one in Onondaga County (or Monroe County) and one in Schenectady County. The appointment of two Coordinating Justices here would defeat the purpose of coordination.
23. The cases should be coordinated to avoid duplicative discovery, the potential for inconsistent rulings on the same issues and the waste of scarce judicial and party

resources. All of the benefits that would be achieved by coordination would immediately disappear if the Panel appointed two Coordinating Justices in two different venues. Based on a review of the decisions posted on the Panel's website, the Panel has never ordered multiple coordination venues or Coordinating Justices, even with as many as 225 pending related cases. See e.g., *Delaney v. Pfizer, Inc.*, Panel Case No. 002/2006 (2006).

24. In any event, there is no justification in this situation, with three cases involving 30 plaintiffs, to appoint two Coordinating Justices in two venues.¹ Three reasons are presented in support of this extraordinary request. None withstand scrutiny.

25. The Hancock Estabrook dentists argue that a second Coordinating Justice in Schenectady is necessary so that "each party would then maintain their right to appeal any pre-trial proceeding decisions to the respective Appellate Division for the county in which the case is venued." But there is no right to a particular pre-trial venue and they offer no authority to the contrary.

26. The decision by the Panel as to where pre-trial proceedings should take place (and, therefore, which Department should hear appeals from the orders of the Coordinating Justice) is an administrative matter that does not involve the substantive rights of the parties. *Beattie, supra* at 5 ; See also Procedures of the Litigation Coordinating Panel, Section D3.

27. If the Panel had to assign multiple venues every time that a coordination included cases originally filed in counties from different Appellate Divisions, then nearly every

¹Although we represent approximately 350 children who were victimized at the Small Smiles New York clinics, we have no immediate plans to file additional lawsuits. As stated in my first affidavit, we may sue on behalf of some or all of these clients, but only if the existing cases do not establish a basis for resolving the claims of all of our New York clients. The letters we sent to defense counsel last week were intended to notify certain dentists and their insurance carriers of the identity of additional claimants. They said nothing about "filing suit in the near future."

coordinated proceeding would have multiple venues. Instead, research has not disclosed a single case in which the Panel has chosen multiple venues for a coordination proceeding.

28. On the other hand, there are at least nine cases in which the Panel appointed one Justice in one county to oversee a coordination proceeding that included cases from counties from different Appellate Divisions. And in each of those cases, the coordinated action covered any later-filed cases in the Supreme Courts of counties throughout New York, regardless of the Appellate Division.

29. The Wilson Elser dentists argue that a second Coordinating Justice is needed in Schenectady for another reason: because it is 150 miles from Syracuse. But Wilson Elser represents dentists in all three cases— Rochester, Syracuse and Schenectady. Its lawyers will have to travel to Syracuse regardless of whether the Panel appoints a second Coordinating Justice in Schenectady.

30. Furthermore, appointing a second Coordinating Justice in Schenectady would inconvenience the Syracuse law firms that represent New FORBA and the Hancock Estabrook dentists. The distance between Syracuse and Schenectady is no reason to undermine all the benefits of coordination by appointing a second Coordinating Justice in Schenectady.

31. The Hancock Estabrook dentists suggest a third reason for establishing two coordination venues: the convenience of the parties in the Schenectady action. But the only parties who raised that concern, the three Hancock Estabrook dentists, reside in Maryland, Virginia and Oregon. Schenectady is no more convenient for them than Syracuse. While some of the plaintiffs and perhaps some non-party witnesses reside in Schenectady County, they will not be inconvenienced by a single coordination in

Onondaga County. And these plaintiffs do not oppose coordination – they are the parties seeking such relief. Furthermore, unless the parties consent, the Coordinating Justice will remand the cases to their counties of origin for trial.

32. The Small Smiles clinics and their owner, New FORBA, concur with plaintiffs that the cases should be coordinated and that the coordination should be in Onondaga County. They contend, however, that the Panel should restrict the Coordinating Justice to “pre-Note of Issue activity only” without the authority to hear dispositive motions.

33. As support for their argument, they cite to 22 NYCRR §202.69(a). But that rule clearly states, “[c]oordination pursuant to this section shall apply to pretrial proceedings, *including dispositive motions.*” (emphasis added). Ordinarily, the Coordinating Justice transfers cases included in the coordination proceeding to their counties of origin for trial only. 22 NYCRR §202.69(d). Indeed, if the parties to a particular case consent to trial of that action before the Coordinating Justice, the case is never remanded.

34. There is no basis for the Panel to limit the scope of the authority provided to a Coordinating Justice under 22 NYCRR §202.69. If the Justice determines that coordination has been completed or that the purposes of section 22 NYCRR §202.69 can best be served by termination of the coordination, he may terminate the coordination proceeding. 22 NYCRR §202.69(d). But that decision is one that must be made by the Coordinating Justice at the time and under the circumstances then existing -- not by the Panel at the outset of the coordination proceeding.

35. In each of their affidavits to the motion for coordination, defense counsel discusses the attributes of a desirable Coordinating Justice. One affidavit actually nominates two candidates. But “the decision with respect to the assignment of the Coordinating Justice lies within the authority of the Administrative Judge of the District of

Coordination, as set forth in 22 NYCRR §202.69(c)(1) and is not a decision that is made by this Panel.” *Dulin v. Pfizer, Inc.*, Panel Case No. 0002/2008 at 3 (2008).

36. The Administrative Judge of the District of Coordination will be charged with selecting the Coordinating Justice after considering all of the factors expressly set out in 22 NYCRR §202.69(c)(1) including, “among other things, the existing caseload of each prospective appointee and the overall needs of the court in which that justice serves; the familiarity of that justice with the litigation at issue; the justices’ managerial ability; and the previous experience of the justice with the field of law involved and with coordinated litigation.”

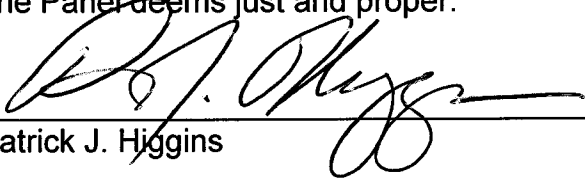
37. The selection of the Coordinating Justice belongs to the appropriate Administrative Judge. It is improper to instead raise these arguments to this Panel, as this Panel does not decide that issue.

38. Finally, two affidavits submitted in response to the motion to coordinate mention the motions to sever the Schenectady and Onondaga County actions into twenty separate cases. The motions appear to address whether the cases should be tried one plaintiff at a time or with multiple plaintiffs.

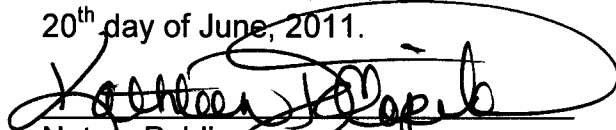
39. While New York law authorizes multi-plaintiff trials in a case such as this one that arises out of a common nucleus of facts, we concur with counsel for New FORBA that it is premature to decide at the outset of the litigation how the cases will be tried. That decision is best left until after discovery is completed and the issues for trial are crystallized. It certainly is not a matter for this Panel. Therefore we will address those arguments at the appropriate time before the appropriate court.

WHEREFORE, Plaintiffs respectfully request an order that (1) the three actions set forth above shall be coordinated pursuant to 22 NYCRR § 202.69 of the Uniform Rules of the Trial Courts,

in the Supreme Court of the state of New York, County of Onondaga, before a Coordinating Justice of that county; (2) any actions for personal injury alleged to have occurred at a New York Small Smiles clinic as a result of an alleged course of conduct that put corporate profits ahead of the quality of dental care and that were filed in the Supreme Court of the State of New York heretofore and that remain active but are not listed in the caption above and any such actions that are filed hereafter shall likewise be coordinated pursuant to 22 NYCRR §202.69; (3) pursuant to 22 NYCRR § 202.69(c)(1), the Administrative Judge of the applicable Judicial District shall designate the Coordinating Justice; (4) that upon the designation of the Coordinating Justice, the stay issued by the Panel on May 16, 2011, shall be lifted; and (5) for such other, further, and different relief as the Panel deems just and proper.


Patrick J. Higgins

Sworn to before me this
20th day of June, 2011.


Notary Public

KATHLEEN DECAPITA
Notary Public, State of New York
No. 01DE4802772
Qualified in Rensselaer County
Commission Expires 12/31/14