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Powers & Santola, LLP

COUNSELLORS AT LAW
www.Powers-Santola.com
www.DelayedCancerDiagnosis.com
www.NYConstructionAccidentLaw.com

John K. Powers
Daniel R. Santola
Patrick J. Higgins
Laura M. Jordan

Albany Office
39 North Pearl Street
Albany, New York 12207-2785
Telephone: (518) 465-5995
Telecopier: (518) 426-4012

Syracuse Office
407 S. Warren Street
Syracuse, NY 13202
(315) 701-1030
(518) 426-4012

Margie A. Soehl†
Michael J. Hutter
Special Counsel

†*Also admitted in Ecuador*

PLEASE REPLY TO: ALBANY OFFICE

VIA LEXIS NEXIS

September 26, 2012

TO: ALL COUNSEL VIA LEXIS NEXIS
[See Attached Service List]

Re: SMALL SMILES LITIGATION
Index No. 2011-2128
Hon. John C. Cherundolo

Dear Counsel:

On behalf of plaintiffs, for service upon all parties (as identified herein), is Plaintiffs' Affidavit in Opposition to the Order to Show Cause for a Stay, together with exhibits, in the above referenced matter.

Very truly yours,

POWERS & SANTOLA, LLP

By: Patrick J. Higgins

PJH:kd
Enclosure

cc: Dr. Dimitri Filostrat (*via e-mail and first class mail*) djfilo@bellsouth.net
Grace Yaghmai, D.D.S. (*via e-mail and first class mail*) zyaghmai@yahoo.com
David Douglas, D.D.S. (*via first class mail*)

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

In Re: SMALL SMILES LITIGATION

PLAINTIFFS' AFFIDAVIT IN OPPOSITION TO THE ORDER TO SHOW CAUSE FOR A STAY

Index No: 2011-2128
LCP Case No.: 011/2011

STATE OF NEW YORK }
ss.:
COUNTY OF ALBANY }

Patrick J. Higgins, being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in the State of New York and a partner at Powers & Santola LLP, attorneys of record for the plaintiffs in the above actions. As such, I am fully familiar with the facts, circumstances and proceedings of this case.

2. I submit this affidavit in opposition to the application for a show cause order filed by the Wilson Elser Defendants and joined by Defendants FORBA Holdings LLCC n/k/a Church Street Health Management, LLC, FORBA NY, LLC, Small Smiles Dentistry of Albany LLC, Albany Access Dentistry, LLC, Small Smiles Dentistry of Rochester, LLC and Small Smiles Dentistry of Syracuse, LLC (collectively referred to as "New FORBA"), defendants FORBA, LLC n/k/a LICSAC, LLC, FORBA NY, LLC n/k/a LICSAC NY LLC; DD Marketing, DeRose Management, LLC; Daniel F. 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., and Michael Roumph, (collectively referred to as "Old FORBA") and defendant Gary

Gusmerotti, D.D.S. seeking to stay the coordinated litigation entitled *In re Small Smiles Litigation* while this Court considers Wilson Elser's appeals of the Court's rulings (1) denying the Wilson Elser Defendants' motion to dismiss some of the causes of action in the amended complaint and (2) establishing pre-trial deadlines in the coordinated cases.

3. The decision denying Old FORBA's, New FORBA's and the Wilson Elser Defendants' motions to dismiss were signed on August 23, 2012. To date, the Coordinating Justice has not signed an order implementing his decision. No appeal lies from a mere decision, so the appeal from the August 23, 2012 decision is premature and will be denied on this basis alone (*see Pino v. Harnischfeger*, 42 A.D.3d 980, 982 [4th Dept 2007]).
4. The Wilson Elser Defendants have filed two notices of appeal. Old FORBA and New FORBA have appealed only the decision denying their motion to dismiss claims for fraud, battery and breach of fiduciary duty. Defendant Gary Gusmerotti, D.D.S. has not filed a notice of appeal and did not file a motion to dismiss.
5. This case – as discussed more fully at ¶¶ 16-21 -- is a coordinated action pursuant to 22 NYCRR § 202.69. It is much more than a series of dental malpractice cases. These actions allege, *inter alia*, fraud, battery, breach of fiduciary duty, violations of General Business Law §§ 349 and 350, malpractice, negligence and other causes of action against a national chain of dental clinics and the three New York clinics and dentists who treated the plaintiffs. The plaintiffs are the young children who were subjected to improper, unnecessary, and harmful dental treatments by the defendants.

6. The amended complaint alleges, *inter alia*, that the defendants took such actions as part of a scheme to enrich themselves with taxpayer money by performing unnecessary and improper treatment on underprivileged children. The plaintiffs allege that they were needlessly restrained, suffered unnecessary, excessive and painful procedures, were misled about treatment options, and sometimes were not sufficiently anesthetized, all to meet the dental chain's production goals and desire for profit.
7. The allegations are set out in more detail in the first five pages of the August 23, 2012, decision denying the motion to dismiss. A copy of the August 23, 2012 decision is attached as exhibit "A."
8. A stay pending appeal should be denied for four reasons.
9. First, a stay would bring thirty coordinated cases to a screeching halt, wreck the Coordinating Justice's carefully crafted interlocking discovery schedules for those cases, postpone dozens of depositions scheduled between now and the end of the year, and abolish a series of trials that are set to begin on February 4, 2013 and continue each month throughout 2013. If the stay is granted, it will potentially lead to the trials of these actions not starting until late 2014 and concluding into 2015.
10. Second, a stay will not, as the Wilson Elser Defendants claim, avoid "an extraordinary amount of needless discovery." Indeed, a stay will not affect the amount of discovery at all. The parties have already exchanged documents and answered interrogatories. The plaintiffs, defendants and certain non-party witnesses will testify at deposition regardless of the outcome of the appeals, because the depositions on the malpractice element of the case are not

challenged by defendants. In short, a stay will only postpone discovery, not avoid it.

11. Third, the Coordinating Justice properly denied Old FORBA's, New FORBA's and the Wilson Elser Defendants' motions to dismiss select causes of action. Plaintiffs properly alleged each of the elements of those causes of action in their amended complaint. There is no reason to stay litigation to await the results of a meritless interlocutory appeal.

12. Fourth, the Coordinating Justice acted within his broad discretion by carefully fashioning a series of case management orders that will timely and efficiently supervise this coordinated action. The case management orders are far superior to the only alternative proposed by the defendants--- completion of all discovery in all the coordinated cases before scheduling the first case for trial. The parties estimated that under that approach, it would take three years before the first of many trials could begin. The Coordinating Justice properly exercised his discretion in rejecting that proposal and adopting the more traditional "test case" approach used in coordinated actions like this one.

13. The Coordinated Justice has also -- at the request of the defendants -- moved away from a two track discovery system and instituted a carefully crafted, interlocking series of discovery orders under his active management. The Coordinated Justice has also appointed a special master to assist in keeping discovery on track and to further manage the case.

14. That is the function of any trial justice. The appellate courts give the trial justices wide discretion to fashion discovery schedules to bring matters to trial. The discretion will only be questioned under the "abuse of discretion" standard.

15. This is particularly true in complex, multiparty cases. The trial courts in such matters, because of their obvious familiarity with the cases, hold broad discretion to supervise discovery process and can best determine what is material and necessary. A trial court actively involved in managing a complex litigation does not abuse its discretion when its rulings are logical, and such rulings will not be disturbed at the appellate division (*see Jackson v. Dow Chemical Co.*, 214 A.D.2d 827, 828 [3d Dept. 1995]).

16. This is even more true in cases which are specifically coordinated in a particular district by the four judges of the appellate division under 22 NYCRR § 202.69.

17. As stated by coordinating panel, "the panel unanimously agrees that coordination of all cases filed in New York State, will be advantageous and efficient for all parties, and will not prejudice any parties. The Panel further agrees that Onondaga County is the best choice for venue.....and that the Coordinated Justice .....is empowered to make appropriate rulings." A copy of this August 25, 2011 order is attached as exhibit "B."

18. Justice James C. Tormey, III, the Chief Administrative Judge for the Fifth Judicial District ordered that the Hon. John C. Cherundulo be appointed as the Coordinated Justice on this case, by letter order dated September 30, 2011, a copy of which is attached as exhibit "C." In so doing, the Chief Administrative Judge necessarily found that the Hon. John C. Cherundulo was best suited for this litigation considering the overall needs of the Fifth Judicial District, the familiarity of the justice with the litigation, the justice's managerial ability, and the previous experience of the justice with the field of law and coordinated litigation (*see* 22 NYCRR § 202.69 [c][1]).

19. The Chief Administrative Judge for the Fifth Judicial District, and the Litigation Coordinating Panel provided the Coordinating Justice with the extremely broad powers needed to effectively manage this complex series of 30 cases. Among other things, the Coordinating Justice is empowered to issue periodic case management orders, direct the uniform and combined service and response of discovery, to require steering committees to form and represent other parties, and to establish a uniform method for physical and mental examinations (*see* 22 NYCRR § 202.69[c][2]).

20. The litigation coordinating panel and its supporting regulations also empower the Coordinating Justice to "require" that discovery – which must include depositions – proceed jointly or in coordination with federal cases, while "respecting the right of the parties" under the CPLR (see 22 NYCRR § 202.69 [c][3]). As this Court knows, there is no priority in federal court of depositions. Defendants have not demonstrated here that the Coordinated Justice is not respecting the rights of the parties under the CPLR.

21. The defendants have never accepted the rulings of the litigation coordinated panel or of the Chief Administrative Judge of the Fifth Judicial District. They sought to have the Coordinated Justice removed from the case before he issued a single ruling, and then they moved for him to recuse himself from the bench. (They did not appeal this decision).

22. They continue their attack on this motion. Defendants spend pages misstating and mischaracterizing the procedural history of the case, rather than recognizing the legitimate role of the Coordinating Justice and his broad powers to manage a complex case. Since none of that history is relevant to the requested show

cause order, plaintiffs do not here address all of the inaccuracies in this affidavit. Plaintiffs must say, however, that they have never seen so many personal and defamatory attacks on a judge. As this Court will see from reviewing the record, including the 39-page decision denying the motions to dismiss, the attacks are unfounded, unprofessional and beyond the pale.

23. The Coordinating Justice assumed the difficult and challenging job of managing the coordinated cases and used his years of experience as a judge and a trial lawyer to craft a discovery and trial plan that he believed to be the best means of managing this coordinated proceeding. His plan is his own, having rejected the competing proposals offered by the plaintiffs and the defendants.

24. Plaintiffs face the same time limitations as the defendants. Limitations aside, a Coordinating Justice must have the freedom and discretion to devise a case management plan without being second-guessed by the parties or the appellate courts. The defendants complain about the Coordinating Justice when he rules against them, and equally so when he rules in their favor by granting their request to do away with a two track system. It appears as if the defendants' primary goal is to delay these trials indefinitely.

25. The appellate courts deny requests for stays where the movant has not demonstrated good cause, and the primary factor in seeking the stay appears to be delaying the litigation, and where it is unlikely that the appeal will resolve all issues in the litigation (*see Eisner v. Goldberger*, 28 A.D.3d 354, 355 [1st Dept. 2006]). This is such a case.

26. A stay of the litigation will unduly delay the progress of the litigation and prejudice the numerous parties to this case who wish to have their day in court.

The cases were filed in April and June 2011 and, therefore, have been pending for at least fifteen months. The parties include thirty plaintiffs and forty-five defendants. The plaintiffs are all children, most of whom are under ten years old. The case has now reached the point where depositions should begin, and this will substantially move the case to conclusion.

27. All parties, including the Wilson Elser dentists, have worked for weeks to devise a coordinated deposition schedule, a copy of which is attached, as exhibit "D."

28. Under the schedule, thirty-five witnesses will be deposed between October 15, 2012 and December 12, 2012 in at least six states. The Wilson Elser dentists will depose the parent or guardian of the nine plaintiffs who are to be trial-ready between February and April 2013. Ten defendant dentists, including eight Wilson Elser dentists, will also be deposed, but not until after their counsel has deposed the parent or guardian of every one of the first nine plaintiffs they treated.

29. Six Colorado defendants who did not treat the plaintiffs, but who owned the clinics, and authorized, directed and benefited from the wrongful conduct alleged, have agreed to deposition dates. In addition, plaintiffs have scheduled at least eight other non-party depositions of witnesses who live outside of New York and require foreign subpoenas.

30. If a stay is granted, all of these depositions will be cancelled and all of the effort in scheduling them will be wasted. The trials, set to begin in February, March and April will be postponed indefinitely. In sum, a stay will nullify all of the carefully crafted and interlocking scheduling orders issued by the Coordinating Justice aimed at managing a complex multi-jurisdictional case. Nothing could

further damage the progress and efficient management of this coordinated proceeding.

31. On the other hand, none of the parties seeking a stay have demonstrated any irreparable harm they will suffer if they are required to prosecute their interlocutory appeals without a stay. These defendants baldly assert that if they prevail on their appeal, they will be relieved of an extraordinary discovery burden, but do not explain how or why.

32. Earlier this month, the moving defendants produced documents and answered interrogatories so they have substantially completed their paper discovery. Most of the Wilson Elser dentists will testify at deposition in October and November. So will the Old FORBA witnesses. Since their motion to dismiss only was directed at some of the causes of action and not the entire case, they will be deposed no matter the result of their appeal.

33. New FORBA has even less reason for a stay. Having filed bankruptcy and sold all of its assets (other than its insurance policies), New FORBA has only a handful of employees, none of whom plaintiffs currently intend to depose.

34. Furthermore, the parties seeking a stay moved to dismiss the fraud, breach of fiduciary duty and battery claims as duplicative of the malpractice and negligence claims. The motions were properly denied, but are now being appealed to this Court. If the claims are duplicative—and plaintiffs deny that they are—then under the defendants' theory of appeal, the discovery should be the same for a malpractice claim as a "duplicative" fraud, battery, or breach of fiduciary duty claim. Therefore, the scope of discovery will not be affected by the result of the appeal of the order denying the motion to dismiss.

35. While characterizing this as a series of dental malpractice cases, the moving parties claim they need more time to review the large quantity of documents that New FORBA recently produced in this case. New FORBA does not need more time.

36. The documents at issue—captured on approximately 250 CDs-- came from the company's files or servers. New FORBA gathered the documents in 2008 in response to numerous federal and state subpoenas. It produced a set of the documents in 2011 to its insurance company, National Union, in coverage litigation between the two. Plaintiffs began asking for a set of the disks in November 2011 and finally got them, in New FORBA's bankruptcy, in April 2012. New FORBA and its various lawyers have had those disks for four years before they made them available to plaintiffs.

37. The Wilson Elser Defendants also have had access to the disks long before the plaintiffs got them. These defendants are insured by National Union, the company that obtained the disks in 2011. Many of the e-mails were written by or to the Wilson Elser Defendants while they worked at one of the Small Smiles clinics.

38. The Wilson Elser Defendants complain that the scheduling order is improper because it denies them preference or requires them to give multiple depositions. They are wrong on both counts. Plaintiffs have agreed to a schedule aimed at getting the first nine cases ready for trials in February, March and April 2013. Under the current schedule, each of the plaintiffs in those cases and their dentists will be deposed by December 10. The Wilson Elser Defendants will

give their depositions as to those nine plaintiffs only once, and only after they have deposed all nine plaintiffs they treated.

39. While it is possible that the Wilson Elser Defendants may, some day, have to give another deposition, involving different patients and different facts, it is equally likely that the results from the trial of nine plaintiffs may avoid the need for further depositions. The alternative, which the Wilson Elser Defendants have proposed, is to compel the dentists to appear for several days of depositions to cover many clients whose trials are not scheduled for another nine to twelve months. On balance, the Coordinating Justice properly concluded that it was more efficient and less prejudicial to all parties to stagger the discovery schedules to avoid the hardship to the dentists of appearing for weeklong depositions.

40. This is precisely the sort of discretionary case management and supervision that this case requires, and that the Coordinated Justice provides in this case. The fact that the defendants want a different schedule and that they prefer to take discovery in a way most advantageous to them does not constitute "good cause" to grant a stay, or disturb the Coordinated Justice's extremely broad discretion in these complex coordinated cases.

41. Without saying so, the defendants are asking the Fourth Department to usurp the Coordinated Justice's management of these coordinated proceedings, and to micromanage the case from the appellate bench. That is surely not the right outcome.

42. New FORBA and the Wilson Elser Defendants complain that they need a stay because under the case management order, they must depose plaintiffs before

they obtain relevant records. These defendants have had a full and fair opportunity to obtain all relevant records. Beginning in October 2011, plaintiffs sent defense counsel copies of all the plaintiffs' dental records in their possession, including the records of subsequent treaters. A copy of the affidavit of Kevin Leyendecker setting forth the history of this production is attached as exhibit "E."

43. In November 2011, plaintiffs provided *Arons* authorizations to defense counsel. (*Id.*) In December 2011, plaintiffs gave defense counsel HIPPA authorizations. (*Id.*) And in February 2012, plaintiffs gave defense counsel authorizations to obtain Medicaid records. (*Id.*) In sum, defense counsel for at least eight months have possessed the necessary authorizations to obtain all the relevant medical and dental information for plaintiffs. All of this was provided to defense counsel voluntarily, in order to advance discovery.

44. Only recently have defense counsel requested authorizations to obtain the plaintiffs' pharmacy records. While plaintiffs' counsel did not object to providing such authorizations, it is hard to imagine the relevancy of pharmacy records in these cases. Nevertheless, plaintiffs have agreed that should defense counsel discover evidence from pharmacy or other records obtained after a plaintiff is deposed that warrant a short second deposition, plaintiffs' counsel will make the witness available. Thus, the lack of a plaintiff's pharmacy records is not a basis to stay the litigation.

45. To attack the scheduling orders, the Wilson Elser Defendants point to 22 NYCRR § 202.19(b)(2). That rule, which says that discovery should be completed within twelve months in a standard case and fifteen months in a

move cases in an efficient and timely manner. But the rule expressly gives trial courts the discretion to shorten or extend the timeframes depending upon the circumstances of the case. Here, the Coordinating Justice has done just that. The cases were filed in April and June 2011. The first Request for Judicial Intervention was in September 2011.

46. The Court has issued a series of case management orders with different disclosure deadlines. The defendants citing to standards and goals is curious argument. For the defendants are proposing further delay in this case without good cause, which will only set back and retard the progress of the case. Defendants appear to show concern with standards and goals only when it furthers their interests. They have shown no interest in discussing that their proposals in discovery would take years to accomplish, and run afoul of the same standards and goals that they now cite to this Court.

47. None of the deadlines that the Coordinated Justice set forth in this case abuse his discretion for managing a complex series of coordinated cases, which is the standard for decision on this motion.

48. The defendants have had ample time to prepare for depositions. They have had the benefit of medical records, authorizations, and paper discovery while making multiple motions to dismiss. Defense counsel has been receiving discovery since October 2011. As noted above, plaintiffs voluntarily provided defense counsel with dental records and authorizations before the motions to dismiss were filed. Defense counsel has had the opportunity to obtain records and interview treating dentists for close to a year.

49. The Coordinating Justice's August 23, 2012 order denying the motions to dismiss part of the case is fully supported by the allegations in the amended complaint and the applicable law. Since the appeal itself lacks merit, there is no benefit to issuing a stay while the appeal is heard.

50. New FORBA and Old FORBA moved to dismiss causes of action for fraud, battery and breach of fiduciary duty. The Wilson Elser Defendants moved on those causes of action and also on the claim for violations of the General Business Law § 349, 350 ("GBL").

51. In deciding the adequacy of a complaint on a motion to dismiss under CPLR 3211(a)(7), the allegations of the complaint are accepted as true and the plaintiff is entitled to every favorable inference (*People ex re Cuomo v. Coventry First, LLC*, 13 N.Y.3d 108, 115 [2009]). The Coordinating Justice correctly applied that standard, and found the amended complaint stated causes of action for fraud, battery, breach of fiduciary duty, and violations of the GBL.

52. In their amended complaint, plaintiffs allege that the defendants engaged in a fraudulent scheme that included placing children in restraints and intentionally rendering unnecessary and painful dental procedures to meet company production goals. The scheme allegedly was designed to prey on poor children so the defendants could fraudulently capture taxpayer Medicaid dollars. Accepting these and the other allegations in the amended complaint as true, plaintiffs alleged more than malpractice, but a fraud, battery, and breach of fiduciary duty. Professionals are not immune from liability for intentional misconduct even when they engage in such conduct in their professional

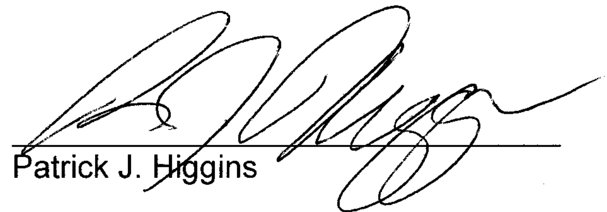
capacity (*see Simcuski v. Saeli*, 44 N.Y. 2d 442 [1978]; *Mitschele v. Schultz*, 36 A.D.3d 249 [1st Dept. 2006]).

53. Plaintiffs are also entitled, as they have here, to plead , alternatively, that the defendants engaged in the same conduct, but did so negligently and in total disregard of the rights and safety of the plaintiffs and the public in general (*see* CPLR 3014; *Cohn v. Lionel Corp*, 21 N.Y.2d 559, 563 [1968]). Whether the misconduct was careless or intentional will depend on the proof. New York law affords plaintiffs the chance to prove that the wrongs were intentional. Based on the allegations in the amended complaint, the claims for the intentional torts of fraud, battery and breach of fiduciary duty are alternative and not duplicative claims that plaintiffs are entitled to pursue.

54. The Coordinating Justice also correctly denied the motion of the Wilson Elser Defendants to dismiss the claims under GBL §§ 349 and 350. Plaintiffs allege that defendants engaged in a scheme, conceived and directed by FORBA, by which the Wilson Elser Defendants routinely induced patients to endure inappropriate treatment by misrepresenting that the treatment was appropriate when they knew it was not.

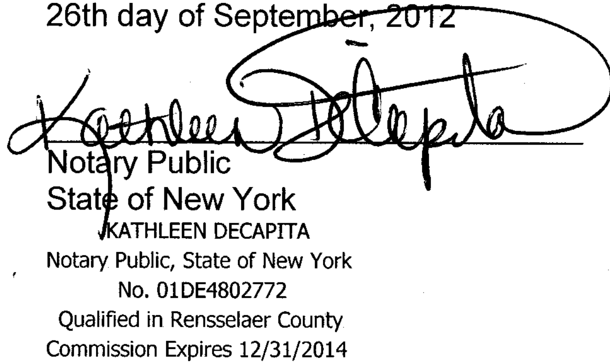
55. Plaintiffs further allege that the Wilson Elser Defendants and others utilized the same misleading and fraudulent forms to convince parents to consent to have their children restrained. These common practices, which affected not only the plaintiffs but the thousands of children who visited the clinics each year, are the types of deceptive practices that the statute was designed to redress (*see Wilson v. NW Mut. Ins. Co.*, 625 F.3d 54, 64 [2d Cir. 2010]).

WHEREFORE, plaintiffs respectfully request that all pending applications for a stay be denied, and for such, other, further and different relief as this Court deems just and proper.



Patrick J. Higgins

Sworn to before me this
26th day of September, 2012



Notary Public
State of New York
KATHLEEN DECAPITA
Notary Public, State of New York
No. 01DE4802772
Qualified in Rensselaer County
Commission Expires 12/31/2014

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In Re: SMALL SMILES LITIGATION

AFFIDAVIT OF SERVICE

Index No: 2011-2128
Hon. John C. Cherundolo

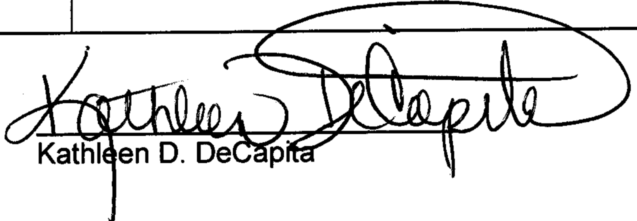
STATE OF NEW YORK }
} ss.:
COUNTY OF ALBANY }

Kathleen D. DeCapita, being duly sworn, deposes and says that a true and correct copy of the Plaintiffs' Affidavit in Opposition to the Order to Show Cause for a Stay, with exhibits, dated September 26, 2012, was served upon all parties *Via Lexis Nexis File & Serve* and/or by first-class mail or e-mail, as otherwise designated below, on said date as follows:

ATTORNEY	REPRESENTATION
Kevin S. Hulslander, Esq. khulslander@smithsovik.com Andrew S. Horsfall, Esq. ahorsfall@smithsovik.com Robert Cahalan, Esq. RCahalan@smithsovik.com Heather Zimmerman, Esq. HZimmerman@smithsovik.com Smith, Sovik, Kendrick & Sugnet, P.C. 250 South Clinton Street Syracuse, NY 13202 (315) 474-2911 *Fax:* (315) 474-6015	*Attorneys for Defendants, FORBA Holdings, LLC, FORBA NY, LLC, Small Smiles Dentistry of Albany, LLC, Albany Access Dentistry, PLLC, Small Smiles Dentistry of Rochester, LLC and Small Smiles Dentistry of Syracuse, LLC* [NEW FORBA]
Dennis A. First, Esq. first@oobf.com George J. Hoffman, Jr., Esq. Hoffman@oobf.com O'Connor, O'Connor, Bresee & First, P.C. 20 Corporate Woods Blvd. Albany, NY 12211 (518) 444-4172 *Fax:* (518) 465-0015	*Attorneys for Defendants, FORBA LLC n/k/a LICSAC LLC, FORBA NY LLC n/k/a LICSAC LLC, DD Marketing, Inc., DeRose Management, LLC, Daniel E. DeRose, Michael A. DeRose, Edward J. DeRose, Adolph R. Padula, D.D.S., William A. Mueller, D.D.S. and Michael W. Roumph* [OLD FORBA]
John A. McPhillamy, Esq. john.mcphilliamy@admlaw.com Jessica Terranova, Esq. Jessica.Terranova@admlaw.com Ahmuty, Demers & McManus, Esqs. 200 I.U. Willets Road Albertson, NY 11507 (516) 535-1815 *Fax:* (516) 294-5387	*Attorneys for Defendant, Adolph R. Padula, D.D.S.* [Angus, Varano & Johnson]

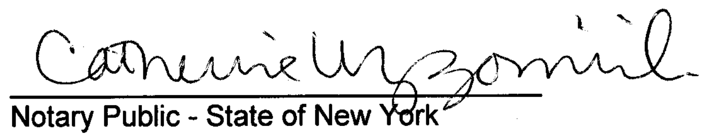
ATTORNEY	REPRESENTATION
Thomas B. Witz, Esq. *Thomas.witz@wilsonelser.com* Theresa B. Marangas, Esq. *Theresa.marangas@wilsonelser.com* Elizabeth Grogan, Esq. *Elizabeth.grogan@wilsonelser.com* Wilson, Elser, Moskowitz, Edelman & Dicker, LLP 677 Broadway Albany, NY 12207-2989 (518) 449-8893 *Fax:* (518) 449-8927	*Attorneys for Defendants, Judith Mori, D.D.S., Keerthi Golla, D.D.S., Maziar Izadi, D.D.S., Evan Goldstein, D.D.S., Edmise Forestal, D.D.S., Nassef Lancen, D.D.S., Koury Bonds, D.D.S., Yaqoob Khan, D.D.S., Naveed Aman, D.D.S., Tarek Elsafty, D.D.S., Ismatu Kamara, D.D.S., Shilpa Suresh Agadi, D.D.S., Sonny Khanna, D.D.S. and Kim Pham, D.M.D.*
Stephen T. Helmer, Esq. *shelmer@mackenziehughes.com* MacKenzie Hughes 101 S. Salina Street, Suite 600 Syracuse, NY 13202 (315) 233-8286 *Fax:* (315) 474-6409	*Attorneys for Defendants, Laura Kroner, D.D.S. and Wadia Hanna, D.D.S.* [Angus]
Kathleen M. Reilly, Esq. *kreilly@damonmorey.com* Damon Morey, LLP The Aviant Building, Suite 1200 200 Delaware Avenue Buffalo, NY 14202-2150 (716) 856-5500 *Fax:* (716) 856-5510	*Attorneys for Defendant, Kathleen Poleon, D.D.S.* [Johnson]
Andrew M. Knoll, Esq. *aknoll@scolaro.com* Scolaro, Shulman, Cohen, Fetter & Burstein, P.C. 507 Plum Street, Suite 300 Syracuse, NY 13204 (315) 471-8111 *Fax:* (315) 425-3641	*Attorneys for Defendant, Delia Morales, D.D.S.* [Varano]
Thomas D. Cronmiller, Esq. *tcronmiller@hblaw.com* Tara J. Sciortino, Esq. *tsciortino@hblaw.com* Paul A. Sanders, Esq. *psanders@hblaw.com* Hiscock & Barclay, LLP 2000 HSBC Plaza, 100 Chestnut Street Rochester, NY 14604 (585) 295-4424 *Fax:* (585) 295-8405	*Attorneys for Defendant, Gary Gusmerotti, D.D.S.* [Johnson]

ATTORNEY	REPRESENTATION
Gordon D. Tresch, Esq. gtresch@feldmankieffer.com Feldman Kieffer, LLP The Dun Building 110 Pearl Street, Suite 400 Buffalo, NY 14202 (716) 852-5875 *Fax:* (716) 852-4253	*Attorneys for Defendant, Ellen Nam, D.D.S.* [Johnson]
John Murad, Jr., Esq. jmurad@hancocklaw.com Christina Verone Juliano, Esq. cjuliano@hancocklaw.com Hancock Estabrook, LLP 1500 AXA Tower 1-100 Madison Street Syracuse, NY 13202 Direct Line: (315) 565-4543 [Murad] Direct Line: (315) 565-4556 [Juliano] Tel. No. (315) 565-4500 *Fax:* (315) 565-4600	*Attorneys for Defendants, Janine Randazzo, DMD* [Angus], *Loc Vinh Vuu, DDS [Varano], Lissette Bernal, DDS [Angus] and Keivan Zoufan, DDS* [Johnson]
*Dr. Dimitri Filostrat, *Pro Se* djfilo@bellsouth.net 6709 Gillen Street Metairie, LA 70003	*Defendant* [Varano] **Via E-Mail and First-Class Mail*
*Grace Yaghmai, D.D.S., *Pro Se* zyaghmai@yahoo.com 6837 Gillen Street Metairie, LA 70003 (858) 450-6777	*Defendant* [Varano] **Via E-Mail and First-Class Mail*
David Douglas, D.D.S. *[Johnson]* 1437 Harrison Drive Greenwood, IN 46143	*Defendant* **Via First-Class Mail*



Kathleen D. DeCapita

Sworn to before me this 26th
day of September, 2012.



Notary Public - State of New York

CATHERINE WYSZOMIRSKI
Notary Public, State of New York
Qualified in Albany County
No. 4974044
Commission Expires Nov. 5, 2014

Powers & Santola, LLP

COUNSELLORS AT LAW
www.Powers-Santola.com
www.DelayedCancerDiagnosis.com
www.NYConstructionAccidentLaw.com

John K. Powers
Daniel R. Santola
Patrick J. Higgins
Laura M. Jordan

Albany Office
39 North Pearl Street
Albany, New York 12207-2785
Telephone: (518) 465-5995
Telecopier: (518) 426-4012

Syracuse Office
407 S. Warren Street
Syracuse, NY 13202
(315) 701-1030
(518) 426-4012

Margie A. Soehl†
Michael J. Hutter
Special Counsel

†*Also admitted in Ecuador*

PLEASE REPLY TO: ALBANY OFFICE

August 24, 2012

TO ALL COUNSEL *via* LEXIS NEXIS

Re: SMALL SMILES LITIGATION
Index No. 11-2128
RJI No. 33-11-1413
Hon. John C. Cherundolo

Dear Counsel:

Enclosed for service, upon each of you, is a time-stamped copy of the Decision, dated August 23, 2012, of the Hon. John C. Cherundolo. As indicated, said Decision was filed with the Onondaga County Clerk's Office on August 23, 2012.

Thank you.

Very truly yours,

POWERS & SANTOLA, LLP

By: Patrick J. Higgins

PJH:kd
Enclosure

cc: Dr. Dimitri Filostrat (*via e-mail and first class mail*)
Grace Yaghmai, D.D.S. (*via e-mail and first class mail*)
David Douglas, D.D.S. (*via first class mail*)

Aug 24 2012
03:38PM

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

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

IN RE: SMALL SMILES LITIGATION

DECISION

11:35 08/23/12 ONONDAGA COUNTY CLERK MM

INTRODUCTION

There are four different defendant groups in this action, all have filed pre-answer motions, pursuant to CPLR 3211§ (a)(7), to dismiss certain causes of action alleged by plaintiffs for failure to state a cause of action. The first group is comprised of four dentists,[1] who move to dismiss plaintiffs' first, second, third, fourth and sixth causes of action, as well as the theories of concerted action, successor liability and punitive damages. The second group is comprised of fifteen dentists,[2] who move to dismiss plaintiffs' first, third, and fourth causes of action. The third group comprises New FORBA, et al.,[3] who move to dismiss plaintiffs' first, second, and third causes of action. Finally, the fourth group comprises Old FORBA, et al.,[4] who move to dismiss plaintiffs' first, second, and third causes of action. Plaintiffs oppose these motions.

[1] Defendants Loc Vuu, D.D.S., Janine Randazzo, D.D.S., Lisette Bernal, D.D.S., and Keivan Zoufan, D.D.S.
[2] Defendants Naveed Aman, D.D.S., Koury Bonds, D.D.S., Tarek Elsafty, D.D.S., Grace Yaghmai, D.D.S., Yaqoob Khan, D.D.S., Maziur Izadi, D.D.S., Judith Mori, D.D.S., Edmise Forestal, D.D.S., Evan Goldstein, D.D.S., Keerthi Golla, D.D.S., Nassef Lancen, D.D.S., Izmatu Karma, D.D.S., Kim Pham, D.D.S., and Shilpa Agadi, D.D.S.
[3] Defendants FORBA Holdings, LLC n/k/a Church Street Health Management, LLC; FORBA NY, LLC; Small Smiles Dentistry of Albany, LLC; Albany Access Dentistry, PLLC; Small Smiles Dentistry of Rochester, LLC and Small Smiles Dentistry of Syracuse, LLC.
[4] Defendants FORBA LLC n/k/a LICSAC LLC, FORBA NY LLC n/k/a LICSAC LLC, DD Marketing, Inc., DeRose Management, LLC, Daniel E. DeRose, D.D.S., Michael A. DeRose, Edward J. DeRose, Adolph R. Padula, D.D.S., William A. Mueller, D.D.S. and Michael W. Roumph.

FACTS

This is an action by thirty infants who received dental treatment at different Small Smiles Clinics in New York, including Syracuse, Rochester, and Colonie (hereinafter "the Clinics"). These children allegedly received inappropriate and unnecessary treatment as part of an alleged scheme that placed revenue generation as the top priority for defendants' business at the expense of quality of dental treatment. Because plaintiffs are infants, their parents or legal custodians bring this action on their behalf. Defendants are the former and current owners and/or managers of the New York Clinics (hereinafter "Old FORBA" and "New FORBA"), the corporate entities under which the Clinics operated, and the dentists (hereinafter the "Dentist Defendants") who were allegedly hired to execute this scheme.

Plaintiffs' allegations are set forth as follows: FORBA began in Pueblo, Colorado as a single office operated by defendants Edward J. DeRose, D.D.S., and Michael A. DeRose, D.D.S., until 1995. Over the next five years, these defendants opened four other dental clinics in Colorado and New Mexico specializing in treating children who receive Medicaid benefits. On or about 2001, they and defendants Daniel E. DeRose, Adolph R. Padula, D.D.S., William A. Mueller, D.D.S., and Michael W. Roumph created Old FORBA to operate and manage the existing clinics and expand the business operation across the United States. Each of these defendants was also an officer of the corporate entities making up Old FORBA and each was actively involved in its daily operations and management.

By 2004, Old FORBA was operating about twenty children's Medicaid dental clinics – more than any other company in the United States. Between 2004 and 2006, Old FORBA's business continued to grow by opening thirty more children's Medicaid clinics. During this time, Old FORBA was attempting to sell its business and was able to do so in September 2006,

when it sold to New FORBA for $435 million. The owners of New FORBA were and are not dentists. They had no experience running dental clinics or treating children. Allegedly, they were private equity funds and a Bahranian bank with one objective: to quickly and dramatically increase the company's EDITDA (earnings before interest, taxes, depreciation, and amortization) so they could re-sell the business for a sizeable profit.

As soon as it purchased Old FORBA, New FORBA announced plans to triple the company's size. It believed that the company was well placed to continue the strategy that caused its revenues to grow at an annual compound rate of more than 40% from 2000 through 2006. The new owners used the same business model that was utilized under Old FORBA, it also managed and operated the same clinics with the same dentists and the same employees as Old FORBA had used before the sale.

Plaintiffs' allege that as early as 2001 and continuing to the present, FORBA and its officers engaged in a course of conduct that was intended to create a culture at the clinics that put revenue generation as the top priority at the expense of quality of dental treatment. FORBA allegedly indoctrinated its dentists by requiring new dentists to attend FORBA training sessions in Colorado. At the training sessions, FORBA made clear that production was more important than quality of patient care and that they were expected to meet certain production goals. Dentists allegedly received bonuses if they produced revenue exceeding these goals.

Plaintiffs allege that in implementing this scheme, FORBA allegedly trained the dentists how to achieve production goals. First, to increase production, FORBA dentists were expected to perform unnecessary dental procedures. Second, FORBA dentists were expected to reduce the time spent with each child without regard for the health and welfare of the child. It is alleged

that FORBA dentists commonly placed children in restraints to perform dental work in order to speed up treatment and in an effort to meet and exceed FORBA's production goals.

FORBA allegedly created a script in order to obtain the consent of parents and guardians to place their children in restraints. Under this script, dentists were required to represent, as a routine practice, that the use of restraints had "no known risks," and that the alternative was sedation or general anesthesia, which they represented did "have an increased risk of injury." Faced with this decision, many parents allegedly chose what they believed to be the no-risk option for their children. Plaintiffs allege that the use of restraints subjected the children to an "emotional and physical nightmare," in which many of the infants were terrified, often struggling, screaming, and crying while dental procedures were conducted. Additionally, plaintiffs allege that all of the children were subjected to unnecessary dental procedures and treatments that were below accepted standards of dental care.

As part of their allegations, plaintiffs also make reference to the federal and state investigations of FORBA's alleged Medicaid fraud. In late 2007, after former Small Smile's employees had filed whistleblower lawsuits, the United States Department of Justice, along with the Federal Bureau of Investigation and National Association of Medicaid Fraud Control Units, commenced a nationwide investigation of FORBA's operations. The New York Office of Medicaid Inspector General and the New York State Attorney General also conducted their own investigation of the FORBA clinics operating in New York.

Both New York State and the Department of Justice alleged that FORBA billed Medicaid for dental services that were either unnecessary or performed in a manner that did not meet professionally recognized standards of care. At the end of the investigation, New FORBA agreed to pay both the United States and the State of New York as a result of fraudulent billings.

Plaintiffs have included in their allegations excerpts from the federal court filings, in which New FORBA states that Old FORBA "created a culture within the Small Smiles Centers that emphasized production over quality care, in clear contravention of ... accepted standards of dental care." Other statements include information regarding Old FORBA's methods for tracking production per patient and that Old FORBA "exerted significant pressure on Small Smiles dentists across the country" to ensure increased production. Plaintiffs also reference previous investigations that were conducted in other states regarding FORBA's alleged fraudulent conduct.

SUMMARY OF ARGUMENTS

In their Complaint, plaintiffs allege, *inter alia*, causes of action based on common law fraud, battery, breach of fiduciary duty, violations of General Business Law §§ 349 and 350, and negligence. With regard to their first cause of action based on fraud, plaintiffs allege that defendants misrepresented to the public, and to each infant plaintiff, that they intended to provide appropriate dental care when, in truth, they did not. This includes the defendants' alleged primary goal being revenue generation rather than the medical needs of children. Additionally, plaintiffs allege that defendants misrepresented to the parents of the infant plaintiffs that the dentists at the Clinics were qualified to perform advanced behavior management techniques, such as physical restraints. Defendants also allegedly represented that the use of restraints had no risk while the alternatives of sedation or general anesthesia did carry risk, which they allegedly knew not to be true. This was done to induce the parents to consent to treatment involving restraints. Finally, plaintiffs allege that defendants fraudulently operated some of the New York clinics in violation of New York law.

As a result of defendants' alleged fraudulent conduct, plaintiffs also allege that defendants breached their fiduciary duty to the infant plaintiffs in their capacity as treating dentists. Plaintiffs allege this duty was breached when defendants did not make truthful and complete disclosures to the parents of each infant plaintiff regarding treatment. This conduct allegedly led to defendants obtaining an improper advantage over plaintiffs after they had placed their trust and confidence in the Dentist Defendants.

In their second cause of action sounding in battery, plaintiffs allege that the Dentist Defendants intentionally touched the infant plaintiffs without consent and caused harmful or offensive bodily contact. Additionally, it is alleged that FORBA and the Clinics committed overt acts in furtherance of the battery, acted in concert to plan such battery, and requested that it be committed.

Finally, as to plaintiffs' fourth cause of action, plaintiffs allege that defendants misrepresented to the public that they intended to provide appropriate dental care at the Clinics. Furthermore, defendants allegedly misrepresented that the Clinics were authorized under New York law to provide dentistry services when, in actuality, they were not. Plaintiffs contend that this alleged deception is in violation of General Business Law §§ 349 and 350.

Defendants' central argument is that any causes of action based on intentional misconduct are duplicative of plaintiffs' malpractice claim and should be dismissed. Additionally, defendants argue that plaintiffs' fraud, battery, and breach of fiduciary duty causes of action should also be dismissed on that basis, and that plaintiffs have not pled their fraud claim with sufficient particularity as required by CPLR § 3016(b). Finally, defendants contend that the misconduct alleged by plaintiffs relates only to private interactions between them and the Dentist Defendants and are, therefore, insufficient to state a claim under General Business

Law § 349. It is also argued that any claim alleging violations of General Business Law § 350 should be dismissed for failure to set forth any concrete facts demonstrating a marketing scheme aimed at the public at large.

DISCUSSION

"When assessing the adequacy of a complaint in light of a CPLR § 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff...the benefit of every favorable inference." *People ex rel. Cuomo v. Coventry First, LLC*, 13 N.Y.3d 108, 115 (N.Y. 2009) quoting *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 591 (2005). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (N.Y. 2005). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (N.Y. 1977). "Motions to dismiss for failure to state a cause of action should be scrutinized very carefully. Unless it is clear that issues of fact and/or law do not exist, the courts should make every effort to preserve a party's day in court." *Irondequoit Bay Pure Waters Dist. v. Nalews, Inc.*, 123 Misc. 462, 469 (N.Y. Sup. Ct. Monroe Cnty. 1984).

I. Plaintiffs' Fraud Claim

A. Defendants' Assertion That Plaintiff's Fraud Claim Lacks Sufficient Particularity.

Defendants argue that plaintiffs have not pled their fraud claim with sufficient particularity, as required by CPLR § 3016(b), and should be dismissed. In order to state a cause

of action for fraud, "four elements must be shown: that there was (1) a misrepresentation or a material omission of fact which was false and known to be false by [plaintiff]; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury." *Major League Baseball Prop., Inc. v. Opening Day Prod., Inc.*, 385 F.Supp.2d 256, 269 (S.D.N.Y. 2005) (applying New York law); *see also Ayala v. Jamaica Sav. Bank*, 121 Misc.2d 564, 567 (N.Y. Sup. Ct. Queens Cnty. 1983).

In stating a cause of action with sufficient particularity, CPLR § 3016(b) "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud.'" *Lanzi v. Brooks*, 43 N.Y.2d 778, 780 (N.Y. 1977); *see also Eurycleia Partners, LP v. Seward & Kessel, LLP*, 12 N.Y.3d 553, 559 (N.Y. 2009). "Critical to a fraud claim is that a complaint alleges the basic facts to establish the elements of the cause of action ... Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (N.Y. 2008). Additionally, "where concrete facts 'are peculiarly within the knowledge of the party charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings." *Id.* at 491-92; *see also Jered Contracting Corp. v. N.Y. City Transit Auth.*, 22 N.Y.2d 187, 194 (N.Y. 1968).

As part of their argument, the Dentist Defendants claim that the Amended Complaint fails to allege the substance of the false representations and the identity of the person who made them. However, plaintiffs have sufficiently supplied this information, alleging that both the Dentist Defendants and the Clinics knowingly made numerous false representations, along with the substance of those representations, including that they allegedly intended to provide appropriate dental care when they did not so intend; the clinic was authorized under New York law to provide dentistry service when it was not; the dental procedures prescribed for the plaintiffs were appropriate when they knew they were not; the plaintiffs' dental treatment required them to be put in restraints when the Dentist Defendants and Small Smiles knew that was not true; and the use of restraints on young children had no risks and the alternatives were more risky when they knew those representations were not true. Am. Compl. ¶¶ 168 – 174.

Old FORBA contends that plaintiffs have failed to allege what information the Dentist Defendants and the Clinics concealed from plaintiffs. Once again, plaintiffs have supplied a sufficiently detailed list of those facts in their Amended Complaint, including that they were allegedly engaged in a course of conduct that placed revenue ahead of the medical needs of plaintiffs; they intended to treat the plaintiffs with revenue as their primary goal, and they did not intend to provide appropriate care to their patients; they had conflicted interests that caused them to put FORBA's profit interests ahead of plaintiffs' interests; they were not qualified to perform advanced behavior management techniques, that each plaintiff did not need to be physically restrained; and physical restraints had substantial risks and the risks of sedation or general anesthesia were no greater than those of physical restraints. Am. Compl. ¶ 178.

Additionally, Old FORBA claims that the damage allegations are generic and do not include a causal connection to the misrepresentations. However, to comply with CPLR §

3016(b), "there is no requirement that the measure of damages be stated in the complaint so long as facts are alleged from which damages may properly be inferred." *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 383 (N.Y. 1957); *see also Black v. Chittenden*, 69 N.Y.2d 665, 668 (N.Y. 1986); *Kempf v. Magida*, 37 A.D.3d 763, 764 (2nd Dept. 2007). Plaintiffs have alleged that they were induced by fraud to consent to inappropriate and unnecessary dental treatment, including being physically restrained during their dental procedures, and have suffered damages as a result. Am. Compl. ¶¶ 174-176; 183-184. These facts are sufficient to properly infer damages, satisfying this requirement.

Defendants further argue that the fraud allegations are insufficiently detailed because they do not specify dates on which the alleged misrepresentations were made. Courts have held that circumstances of a fraud must be "stated in detail, including specific dates and items." *Morales v. AMS Mtge. Servs., Inc.*, 69 A.D.3d 691, 692 (2nd Dept. 2010); *see also Orchid Const. Corp. v. Gottbetter*, 89 A.D.3d 708, 710 (2nd Dept. 2011). However, as the Court of Appeals has stated numerous times, "the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman, supra*. In this vein, many courts have upheld causes of action despite a plaintiff's failure to specify exact dates. *See, e.g.*, *Kaufman v. Cohen*, 307 A.D.2d 113 (1st Dept. 2003) (holding that plaintiff's fraud allegations satisfied CPLR § 3016(b) even though they failed to specify the exact date or time of the alleged misrepresentations); *see also Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 321 (1st Dept. 1997).

Whether pleading exact dates is a requirement or not, plaintiffs have nevertheless made an effort to specify them. Since the misrepresentations were allegedly made to induce the

plaintiffs to consent to dental treatment, they were made approximately during the time plaintiffs received treatment at the Clinics. These dates are set out, along with the names of the treating Dentist Defendants who allegedly made the misrepresentations, in the Amended Complaint. Am Compl. ¶¶ 155-164. These details are sufficient "to inform [defendants] with respect to the incidents complained of." *Lanzi, supra* at 780.

Finally, defendants argue that plaintiffs have not included sufficient details to support their allegations regarding inappropriate treatment, that the plaintiffs were improperly restrained, and that the dentists were not qualified to administer advanced behavior management techniques. As plaintiffs point out, however, they are not required to make an evidentiary showing in their pleadings. *See Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 98 (1st Dept. 2003) (holding that a plaintiff does not need to be able to make an evidentiary showing at the pleading stage of a fraud claim); *see also DaPuzzo v. Reznick Fedder & Silverman*, 14 A.D.3d 302 (1st Dept. 2005).

Therefore, the Court finds that the plaintiffs have pled their fraud claim with sufficient particularity, in compliance with CPLR § 3016(b). Their Amended Complaint alleges the context of the fraud, the details of the scheme, the substance of the misrepresentations and concealed facts, the identity of the persons making the misrepresentations, the approximate dates on which they were made, and the injury that was suffered. This is sufficient to apprise defendants of the incidents complained of and permits a reasonable inference of the alleged fraudulent conduct, nothing more is required. *Lanzi, supra* at 780; *see also Pludeman, supra* at 492.

B. Defendants' Assertion That Plaintiffs' Fraud Cause of Action Is Duplicative of the Malpractice Claim.

Defendants argue that plaintiffs' fraud claim must also be dismissed because it is duplicative of their fifth cause of action sounding in malpractice. In support of this argument, defendants cite a plethora of case law that sets forth the same precedent, namely that "it is only when the alleged fraud occurs separately from and subsequent to the malpractice that a plaintiff is entitled to allege and prove a cause of action for intentional tort ... and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice." *Coopersmith v. Gold*, 172 A.D.2d 982, 984 (3rd Dept. 1991); *see also Abraham v. Kosinski*, 305 A.D.2d 1091 (4th Dept. 2003); *Spinsoa v. Weinstein*, 168 A.D.2d 32 (2nd Dept. 1991); *Kaiser v. Van Houten*, 12 A.D.3d 1012 (3rd Dept. 2004).

Defendants contend that the alleged fraudulent acts, including rendering treatments that were unnecessary and placing the infant plaintiffs in restraints in order to meet FORBA's production goals, are the same acts that amount to malpractice. As such, it is argued that the fraud allegations are not separate and distinct from the malpractice actions, the damages for both are the same, and the fraud did not occur subsequent to the alleged malpractice.

Plaintiffs oppose these arguments and contend that this is a fraud case with allegations of medical malpractice, rather than an action based on malpractice. In establishing the validity of their fraud claim, they rely, almost exclusively, on the New York Court of Appeals case, *Simcuski v. Saeli*, where the court held that a complainant could set forth a cause of action based on intentional fraud as well as a cause of action in negligence for medical malpractice. *Simcuski v. Saeli*, 44 N.Y.2d 442, 446 (N.Y. 1978). *Simcuski* is similar to the case at bar, although it involved an attempt to cover-up a previous act of malpractice, whereas here, no such issue exists. In that case, the doctor allegedly induced improper treatment that caused the plaintiff

harm by intentionally misrepresenting that the treatment was appropriate when he knew it was not. *Simcuski*, *supra* at 447.

The Court of Appeals held, in part, that a doctor's failure to disclose his or her malpractice does not give rise to an independent tort claim separate from the customary malpractice action. However, where the alleged fraud is not simply a failure to disclose the malpractice, but amounts to a subsequent and intentional material misrepresentation to the client about the medical services that were rendered, upon which the patient relies to his detriment, a separate and distinct claim for fraud is stated. *Id.* at 452-53. The Court stated that when the doctor fraudulently induced treatment that he knew to be improper it was "more than another aspect of the malpractice." *Id.* at 451. Rather, it was "an intentional tort, separate from...the malpractice claim." *Id.* at 452.

Similarly, in *Mitschele v. Schultz*, the First Department rejected the contention that a plaintiff's fraud claim should be dismissed because it was not separate and distinct from a cause of action for malpractice. *Mitschele v. Schultz*, 36 A.D.3d 249 (1st Dept. 2006). In that case, an accountant had made false representations to his client for the benefit of his company so as to allow it to avoid certain taxes and expenses. *Id.* at 254. In holding that the fraud claim should not have been dismissed, the First Department cited *Simcuski*, and stated "the fraud claim is not based simply upon errors in professional judgment, but is also 'predicated on proof of the commission of an intentional tort.'" *Id.* at 255.

In pursuing a claim based on fraud, and an alternative claim of malpractice, plaintiffs will be required to prove different forms of liability, i.e. intentional misconduct and negligence. Here, plaintiffs have alleged that the Dentist Defendants and the Clinics knowingly made numerous false representations. Am. Compl. ¶¶ 168-173. These false representations, among

others, were allegedly made in pursuit of revenue generation ahead of the medical needs of the plaintiffs.

Accepting the plaintiffs' allegations as true, which this Court must (*see People ex rel. Cuomo, supra*; *Kempf, supra* at 764), it is clear that the defendants' actions constituted more than just malpractice. This scheme was allegedly created to take advantage of children in poorer families so that defendants could defraud the U.S. and several state governments of as much Medicaid monies as possible. Certainly, these allegations go beyond mere malpractice and establish a claim for fraud.

Similar to the courts in *Simcuski* and *Mitschele*, this Court is cognizant of the concern of exposing medical professionals to greater liability in consequence of errors of professional judgment. However, based on the allegations presented to this Court, defendants' exposure to liability is not based solely on errors of professional judgment, but rather on the commission of an intentional tort. As the Court of Appeals stated in *Simcuski*, "in human terms it would be unthinkable today not to hold a professional person liable for knowingly and intentionally misleading his patient in consequence of which, to the physician's foreknowledge, the patient was deprived of an opportunity to escape from a medical predicament." *Simcuski, supra* at 454.

Based on these allegations, it is clear that defendants have sufficiently stated a cause of action based on fraud, separate from a malpractice claim, where defendants have allegedly induced treatment they knew to be improper on numerous occasions.

C. Defendants' Assertion That Plaintiffs' Alleged Damages Are Insufficiently Pled to State a Cause of Action for Fraud.

As part of their argument to dismiss plaintiffs' fraud claim, defendants contend that the alleged fraud does not give rise to damages which are separate and distinct from those flowing from an alleged malpractice cause of action. *See e.g., Abraham, supra*; *Gianetto v. Knee*, 82

A.D.3d 1043 (2nd Dept. 2011); *Haga v. Pyke*, 19 A.D.3d 1053 (4th Dept. 2005); *Addorisio v. Schwartz*, 7 Misc.3d 1026(A) (N.Y. Sup. Ct. Bronx Cnty. 2005). Plaintiffs argue that the damages for the fraud and the alternative malpractice claim are the same only in the sense that both allege damages resulting from improper treatment. They further contend that the fact the same damages would support a malpractice claim if the conduct was negligent, rather than intentional, does not preclude a fraud claim.

Both *Gianetto* and *Addorisio* were dental malpractice cases where the courts dismissed fraud causes of action due to the plaintiffs' failure to allege damages that were separate and distinct from those caused by the alleged malpractice. Both cases alleged a dentist's attempt to conceal a previous act of malpractice and are distinguishable from the case at bar. Here, there is no malpractice prior to the fraud and thus no prior malpractice damages from which the fraud damages can be distinguished. Additionally, a valid fraud claim has been stated, involving numerous allegations that false misrepresentations were made to induce treatment that defendants allegedly knew to be improper.

The Court of Appeals in *Simcuski* did not state that damages had to be different, but rather that they just need be distinguishable from a malpractice claim. In that case, the court explained that the fraud would be the cause of damages only if it prevented plaintiff from treatment that would have alleviated the condition caused by the malpractice. If the plaintiff could not prove that the condition would have been alleviated, then the cause of the damages would have been the original act of malpractice rather than the fraud. *Simcuski*, *supra* at 454-55.

Therefore, if plaintiffs can prove that the intentional misconduct resulted in improper treatment, they are eligible to receive damages based on fraud. However, if the conduct is shown to be negligent rather than intentional, the damages will flow from the alternative

malpractice claim. *See Simcuski, supra* at 452-53 ("if [plaintiff succeeds on her fraud claim], the available measure of her damages will be that applicable in fraud actions, i.e., damages caused by the fraud, as distinguished in this case from damages occasioned by the alleged malpractice."); *see also Mitschele, supra* at 255 (holding that "the fraud claim is not based simply upon errors in professional judgment, but is also 'predicated on proof of the commission of an intentional tort.'") In this light, the damages are clearly distinguishable and separate from each other.

Finally, plaintiffs have also alleged punitive damages due to the egregious nature of defendants' alleged conduct. A medical malpractice claim does not ordinarily warrant a claim for punitive damages. *Spinosa v. Weinstein*, 168 A.D.2d 32, 43 (2nd Dept. 1991); *see also Dmytryszyn v. Herschman*, 78 A.D.3d 1108, 1109 (2nd Dept. 2010); *Kinzer v. Bederman*, 59 A.D.3d 496 (2nd Dept. 2009) ("Punitive damages are recoverable in a dental malpractice action only where the defendant's conduct evinces 'a high degree of moral culpability' or constitutes 'willful or wanton negligence or recklessness.'"). They are available "for the purpose of vindicating a public right, only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives." *Gravitt v. Newman*, 114 A.D.2d 1000, 1002 (2nd Dept. 1985).

In this instance, plaintiffs' request for punitive damages is only valid if attached to their fraud claim and, therefore, does not seek the same damages as the malpractice cause of action. *See Savattere v. Subin Assoc., P.C.*, 261 A.D.2d 236, 237 (1st Dept. 1999) (holding that in a legal malpractice case, a "cause of action for fraud is stated, which, by reason of its demand for punitive damages, does not seek the same damages as the malpractice cause of action."); *Vici*

Vidi Vini, Inc. v. Buchanan Ingersoll, PC, 2008 N.Y. Slip OP. 32226(U) (N.Y. Sup. Ct. N.Y. Cnty. 2008); *Green v. Leibowitz*, 118 A.D.2d 756 (2nd Dept. 1986); *cf. Waggoner v. Caruso*, 20 Misc.3d 1146(A) (N.Y. Sup. Ct. N.Y. Cnty. 2008).

D. Defendants' Assertion That the Basis for the Alleged Fraud Has to Occur Subsequent to the Alleged Acts of Malpractice.

Defendants' argument that the alleged fraud must occur "subsequent to the malpractice" does not apply to the case at bar. This precedent was stated in *Simcuski*, which was a malpractice cover-up case. In that case, it was necessary for there to be an original act of malpractice that the defendant attempted to conceal through affirmative misrepresentations, as opposed to mere non-disclosure, before the plaintiff could allege a claim for fraud. Conversely, there is no issue of an attempt to cover-up previous malpractice in the case at bar, rather, plaintiffs have alleged a valid claim for fraud with an alternative claim of malpractice. Plaintiffs are entitled to allege alternative causes of action pursuant to CPLR § 3014. To hold otherwise would mean that a fraud claim could never be alleged with alternative claims of malpractice and would work an injustice against a party that has otherwise stated valid causes of action.

II. Plaintiffs' Claim For Battery

Plaintiffs' second cause of action alleges that defendants intentionally touched the infant plaintiffs without consent and caused harmful or offensive bodily contact while they were being treated as patients. Defendants argue that plaintiffs' battery claim is duplicative of their malpractice and/or informed consent claim and should be dismissed.

Traditionally, medical treatment that went beyond the scope of a patient's informed consent was viewed as an intentional tort, constituting assault and battery. *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (N.Y. 1914); *Fogal v. Genesee Hosp.*, 41 A.D.2d 468, 473 (4th Dept. 1973) (holding that "any non-consensual touching of a patient's body, absent an

emergency, is a battery and the theory is that an uninformed consent to surgery obtained from a patient lacking knowledge of the dangers inherent in the procedure is no consent at all."); *Darrah v. Kite*, 32 A.D.2d 208, 210 (3rd Dept. 1969). However, as defendants point out, the law has since changed, transitioning towards negligence law for failure to obtain consent without full disclosure of all known risks. *Retkwa v. Orentreich*, 154 Misc.2d 164, 166 (N.Y. Sup. Ct. N.Y. Cnty. 1992); *see also Oates v. New York Hosp.*, 131 A.D.2d 368, 369 (1st Dept. 1987) ("the theory of 'lack of informed consent,' where a physician performs an operation on a patient without the patient's informed consent, is generally considered a form of medical malpractice and not assault and battery.")

Recently, several courts have declined to elevate an alleged lack of informed consent to the intentional tort of battery. *Ponholzer v. Simmons*, 78 A.D.3d 1495, 1496 (4th Dept. 2010). Additionally, courts have declined to interpret a physician's lack of informed consent as one's intent to inflict injury. *Dries v. Gregor*, 72 A.D.2d 231, 236 (4th Dept. 1980) ("The [physician] in a malpractice case is ordinarily not an actor who intends to inflict an injury on his [or her] patient and any legal theory [that] presumes that intent appears to be based upon an erroneous supposition. Instead, the [physician] is not one who acts antisocially as one who commits assault and battery, but is an actor who in good faith intends to confer a benefit on the patient."); *see also Ponholzer*, *supra* at 1496.

While the view on the law in this area may have changed, "a claim for assault and battery may still be maintained in 'nonexigent situations involving no consent at all.'" *Spinosa*, *supra* at 41, quoting *Rigie v. Goldman*, 148 A.D.2d 23, 28 (2nd Dept. 1989); *see also Oates*, *supra* at 369.

It is also important to note that the "intent to do injury is an essential element in an assault and battery action." *Murriello v. Crapotta*, 51 A.D.2d 381, 382 (2nd Dept. 1976); *see also Spinosa*, *supra* at 41; *cf. Zgraggen v. Wilsey*, 200 A.D.2d 818, 819 (3rd Dept. 1994) ("An action for battery may be sustained without a showing that the actor intended to cause injury as a result of the intended contact, but it is necessary to show that the intended contact was itself 'offensive', i.e., wrongful under all the circumstances.").

In the present case, plaintiffs have alleged all of the elements to state a cause of action for battery. Am. Compl. ¶¶ 188-193. They further allege that they were induced to consent to unnecessary and harmful dental procedures by intentional and fraudulent misrepresentations. This was done by the corporate defendants, who allegedly scripted the consent process, including the consent forms used to persuade parents to consent to having their children restrained. Am. Compl. ¶¶ 66-69. Due to their consent having allegedly been obtained under fraudulent circumstances, it should be considered as having given no consent at all. *See Birnbaum v. Siegler*, 273 A.D. 817 (2nd Dept. 1948). Additionally, the situations in which consent was allegedly given do not appear to be "exigent" or urgent. *See Spinosa*, *supra*. Rather, the defendants appear to have intended to injure the infant plaintiffs by subjecting them to harmful and unnecessary dental procedures well before they stepped through the door at a Small Smiles clinic. This intentional misconduct was a part of the alleged scheme to generate revenue as quickly as possible. Based on these allegations, plaintiffs have stated a valid claim for battery.

A. Defendants' Assertion That the Battery Claim Is Duplicative of the Lack of Informed Consent and Malpractice Claims.

Defendants argue that plaintiffs' battery allegation is based on the same treatments that are alleged to have been carelessly and negligently rendered and done without plaintiffs being

fully informed of the nature of the treatments that they were receiving. As such, defendants argue that the battery cause of action is duplicative of plaintiffs' malpractice and/or informed consent claims and no separate damages exist.

Plaintiffs' battery claim is not duplicative of the malpractice and informed consent causes of action. Similar to the fraud and malpractice claim discussion, plaintiffs have pled the battery claim in the alternative, which is permissible pursuant to CPLR § 3014. Additionally, the battery claim requires proof of intentional misconduct, while the malpractice and negligence claims do not. It is therefore up to a prospective jury to decide whether the plaintiffs' consent was obtained fraudulently. If this is the case, then plaintiffs may prevail on their battery claim. If instead a jury finds the lack of consent to be accidental, then plaintiffs can pursue their informed consent and malpractice claims. *See, e.g., Panzella v. Burns*, 169 A.D.2d 824 (2nd Dept. 1991) ("once intentional offensive contact has been established, the actor is liable for assault and not negligence."); *Mazzaferro v. Albany Motel Enterprises, Inc.*, 127 A.D.2d 374 (3rd Dept. 1987).

Courts have allowed plaintiffs to plead causes of action for assault and battery and negligence based on the same alleged acts and damages. *See, e.g.*, *Yasuna v. Big V Supermarkets, Inc.*, 282 A.D.2d 744 (2nd Dept. 2001); *Averett v. Cnty. of Broome*, 16 Misc.3d 1120(A) (N.Y. Sup. Ct. Broome Cnty. 2007) (holding that where complaint contained inconsistent allegations pertaining to defendants' actions as both intentional and negligent, plaintiff was allowed to plead them alternatively); *Flamer v. City of Yonkers*, 309 N.Y. 114, 119 (N.Y. 1955) (lower court reversed for not allowing jury to consider both negligence and assault claims).

In *Yasuna*, the plaintiff allegedly sustained injuries when he was detained by the supermarket's employee for shoplifting merchandise. Plaintiff alleged defendants were negligent in assaulting him, that the supermarket negligently trained its employee, and that the employee intentionally made offensive contact with him when he threw plaintiff to the ground. The Second Department held that the trial court erred by "failing to charge the jury that it could not find both negligence on the part of the defendants and liability for the intentional torts of assault and/or battery based upon the same acts." *Yasuna, supra*. Additionally, the trial court further erred by "not separately charging the jury on any potential negligence by Big V Supermarkets." *Id.*

Similarly, in *Flamer*, the plaintiff sued to recover wrongful death damages under a theory of negligence and assault. The lower court dismissed the negligence claim but allowed the assault claim to go to the jury. The Court of Appeals held that it should have been for the jury to decide which of the two versions was more credible based on the evidence. Consequently, the Court held that the lower courts erred in dismissing the negligence claim. *Flamer*, *supra* at 119.

Clearly, plaintiffs' battery claim is not duplicative of their malpractice and informed consent claims when it has been pled in the alternative and sets forth allegations that indicate defendants' conduct was intentional rather than accidental or negligent. In this instance, plaintiffs are entitled to have a trier of fact evaluate the evidence and determine whether defendants' conduct was intentional or negligent.

B. Defendants' Assertion That Plaintiffs Alleged Damages Are Insufficient to State a Cause of Action for Battery.

As part of their argument to dismiss plaintiffs' battery claim, defendants contend that the alleged battery does not give rise to damages which are separate and distinct from those flowing from an alleged malpractice cause of action. *See e.g.*, *Abraham*, *supra*; *Gianetto v. Knee*, 82

A.D.3d 1043 (2nd Dept. 2011); *Haga v. Pyke*, 19 A.D.3d 1053 (4th Dept. 2005). In support of their argument, defendants primarily rely on *Haga*, where the Fourth Department refused to allow plaintiff leave to amend her complaint to add a battery cause of action where the alleged damages were not distinct.

Haga is distinguishable from the case at bar. Absent such allegations or proof of intentional conduct, courts will presume that a medical professional is acting in good faith and is "not an actor who intends to inflict an injury on his [or her] patient and any legal theory [that] presumes that intent appears to be based upon an erroneous supposition." *Dries*, *supra* at 236. This was the case in *Haga*. Here, plaintiffs have alleged that the defendants intentionally misrepresented facts to induce the plaintiffs to consent to treatment and that the Dentist Defendants intentionally, and as part of a scheme, put the financial interests of their employer ahead of the welfare of their infant patients.

Additionally, plaintiffs' request for punitive damages separates their battery claim from the malpractice claim since it will only be considered if plaintiffs are successful in proving battery. *See Savattere*, *supra*; *Freeman v. The Port Auth. of N.Y. & N.J.*, 243 A.D.2d 409, 410 (1st Dept. 1997). Once again, punitive damages are only available "where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives." *Gravitt*, *supra*. If plaintiffs are only successful on their malpractice claim, they will not be able to establish the moral culpability or evil motives required to seek punitive damages. Therefore, by reason of plaintiffs' demand for punitive damages on their battery cause of action, they do not seek the same damages as their malpractice claim.

III. Plaintiffs Claim for Breach Of Fiduciary Claim

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Rut v. Young Adult Inst., Inc.*, 74 A.D.3d 776, 777 (2nd Dept. 2010); *McGuire v. Huntress*, 83 A.D.3d 1418, 1420 (4th Dept. 2011). Plaintiffs have alleged, *inter alia*, that defendants had a fiduciary relationship with plaintiffs in their capacity as treating dentists, that defendants violated their duty by intentionally performing dental procedures on plaintiffs they knew were unnecessary and falsely represented the procedures were necessary in order to induce plaintiffs to consent to the treatment, and plaintiffs suffered harm as a result. Am. Compl. ¶¶ 168-178; 183-184. This is sufficient to state a breach of duty claim.

A. Defendants' Assertion That There Was No Fiduciary Relationship with Plaintiffs.

Defendants argue that a fiduciary relationship did not exist between plaintiffs and defendants. In support of their argument, the Four Dentist defendants contend that a fiduciary duty is rarely found outside of a relationship underlying a financial transaction. However, a fiduciary relationship has been found to exist between medical professionals and patients on numerous occasions. *See, e.g.*, *Tighe v. Ginsberg*, 146 A.D.2d 268 (4th Dept. 1989); *Burton v. Matteliano*, 81 A.D.3d 1272 (4th Dept. 2011); *Ross v. Cmty. Gen. Hosp.*, 150 A.D.2d 838, 841 (3rd Dept. 1989); *Sergeants Benev. Ass'n Annuity Fund v. Renck*, 19 A.D.3d 107, 111 (1st Dept. 2005) ("liability for breach of a fiduciary duty 'is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.'"). A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *EBC I,*

Inc., *supra* at 19, quoting Restatement (Second) of Torts § 874 cmt. a. In the context of the medical profession, a physician "stands in a relationship of confidence and trust to his patient" and a "special relationship akin to a fiduciary bond ... exists between the physician and patient." *Aufrichtig v. Lowell*, 85 N.Y.2d 540, 546 (N.Y. 1995). "The physician-patient relationship thus operates and flourishes in an atmosphere of transcendent trust and confidence and is infused with fiduciary obligations." *Id.* Other courts have noted that

> the relationship of physician and patient has its foundation on the theory that a physician is learned, skilled and experienced in those subjects about which the patient ordinarily knows little or nothing, but which are of the most vital importance and interest to him, and therefore the patient must necessarily place great reliance, faith and confidence in the professional word, advice and acts of the physician or other practitioner. Thus, the physician-patient relationship is a fiduciary one, based on trust and confidence and obligating the physician to exercise good faith.

Otto v. Melman, 25 Misc.3d 1235(A), 2009 WL 4348827 at 3 (N.Y. Sup. Ct. Queens Cnty. 2009).

A physician's fiduciary obligations include the duty to disclose to the patient all material facts related to treatment. *See Ross*, *supra* at 841 ("Because of the fiduciary relationship between physician and patient ... intentional concealment of material facts itself may be sufficient to create an estoppel."). Additionally, a physician is obligated to speak the truth about a patient's medical condition, *Aufrichtig*, *supra* at 546, and to maintain the patient's confidences. *Tighe*, *supra* at 270-71; *see also United States v. Ntshona*, 156 F.3d 318 (2nd Cir. 1998) (Because of fiduciary relationship with her patients, doctor convicted of Medicare fraud received longer sentence). Dentists, as well as doctors, have been held to owe fiduciary duties to their patients. *See Tillery v. Lynn*, 607 F.Supp. 399, 401 (S.D.N.Y. 1985).

B. Defendants' Assertion That Plaintiffs' Claim for Breach of Fiduciary Duty Is Duplicative of the Malpractice Claims.

Similar to previous arguments, defendants contend that plaintiffs' breach of fiduciary duty claim is duplicative of their malpractice claim and requires dismissal. However, plaintiffs' claim is based on intentional misconduct rather than negligence. Specifically, plaintiffs have alleged that the defendants breached their fiduciary duty not by accident, but by engaging in the same intentional scheme that supports their fraud cause of action.

There are aspects of an intentional fraud-based breach of fiduciary claim that make it separate and distinct due to the egregious nature of the alleged conduct. For instance, when a claim for breach of fiduciary duty is based on fraud, the statute of limitations is six years. *Kaufman*, 307 A.D.2d at 119. However, when it is based on negligence, it is three years. *See Kaszirer v. Kaszirer*, 286 A.D.2d 598, 598-99 (1st Dept. 2001). Additionally, plaintiffs will be able to seek punitive damages if the alleged intentional conduct is found to be gross, willful or wanton. *Tillery, supra* at 402; *See also Don Buchwald & Assocs., Inc. v. Rich*, 281 A.D.2d 329, 330 (1st Dept. 2001); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edleman & Dicker*, 56 A.D.3d 1, 13 (1st Dept. 2008). As discussed previously, plaintiffs would be unable to seek punitive damages if they are only successful on their malpractice claim.

In *Ulico Cas. Co.*, the defendant argued that plaintiff's breach of fiduciary duty should be dismissed as duplicative of the legal malpractice claim. The First Department held that the claims were based on two different forms of alleged conduct. *Ulico Cas. Co.*, 56 A.D.3d at 9. Furthermore, the malpractice and breach of fiduciary duty claims required proof of two different standards of recovery. *Id.* at 9-11. Therefore, the Court found that "the two claims are not premised on the same facts and seeking the identical relief and both can be asserted." *Id.* at 9; *see also Padilla v. Verczky-Porter*, 66 A.D.3d 1481 (4th Dept. 2009) (affirming an order

permitting a patient to simultaneously pursue breach of fiduciary duty and malpractice claims against her doctor).

The same is true in the instant matter. Here, plaintiffs have alleged a breach of fiduciary duty based on fraudulent misconduct. This requires proof of intentional conduct, while the malpractice claim does not. *See* C. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 732 (2006) (stating that the intentional infliction of harm by a fiduciary gives rise, "without question" to a separate claim for breach of fiduciary duty because it does not fit into traditional negligence doctrine). As such, plaintiffs' breach of fiduciary duty claim is not duplicative of their malpractice claim.

C. Defendants' Assertion That Plaintiffs Have Failed to Plead Their Breach of Fiduciary Duty Claim with Sufficient Particularity.

Finally, the Four Dentist defendants make a separate argument that the plaintiffs' breach of fiduciary duty claim is deficient, pursuant to CPLR § 3016(b), because it does not allege misconduct by them other than that they were employed at one of the Clinics. To the contrary, the Amended Complaint describes their misconduct, alleging, in part, that these defendants were conflicted by their loyalty to FORBA's profit interests and intended to put the financial interests of FORBA ahead of the quality of care provided to plaintiffs, which they concealed from the plaintiffs. Am. Compl. ¶¶ 56-80; 168-169; 178. Additionally, their conflicted interests allegedly caused the defendants to (1) intentionally perform dental procedures on the plaintiffs they knew were unnecessary and falsely represented that the procedures were necessary in order to induce plaintiffs to consent to the treatment (Am. Compl. ¶¶ 63; 171; 174; 178; 184); (2) intentionally place plaintiffs in restraints knowing the use of restraints was improper, that they were not qualified to use them and that they should have referred the plaintiffs to dentists who were (Am. Compl. ¶¶ 64-65; 172-173; 178); and (3) intentionally misrepresented that the use of restraints

was proper and had no known risks when they knew their use was improper and had serious risks (Am. Compl. ¶¶ 173-174; 178; 184).

These allegations are sufficiently detailed to establish the basic facts surrounding the dentists' alleged misconduct. *See Pludeman, supra*. As such, plaintiffs have pled their breach of fiduciary duty claim to satisfy CPLR § 3016(b).

IV. Plaintiffs' General Business Law §§ 349 and 350 Claims

The Dentist Defendants argue that plaintiffs' GBL §§ 349 and 350 claims fail to state a cause of action because they are generalized and consist of bare allegations. Plaintiffs oppose this argument and contend that the validity of their claims are established by the Court of Appeals cases, *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282 (N.Y. 1999), *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20 (N.Y. 1995), and *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314 (N.Y. 2002).

A. General Business Law § 349

GBL § 349 is a consumer protection statute. It is applied broadly to include "any service" in the conduct of "any business" and prohibits "all deceptive practices." *Karlin*, *supra* at 290. The statute's purpose is to provide "'needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.'" *Id.* at 291 quoting (N.Y. Dept. of Law, Mem. to Governor, 1963 N.Y. Legis. Ann., at 105). This includes deceptive practices used in the provision of medical services. *Id.* at 291-92.

To establish a claim under GBL § 349, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered an injury as a result of the allegedly deceptive act or practice. *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (N.Y. 2009). "The 'consumer-oriented'

requirement may be satisfied by showing that the conduct at issue 'potentially affect[s] similarly situated consumers.' Although consumer-oriented conduct does not require a repetition or pattern of deceptive conduct, a plaintiff must 'demonstrate that the acts or practices have a broader impact on consumers at large.'" *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 64 (2d Cir. 2010) quoting *Oswego, supra*. "The deceptive practice, whether a representation or an omission, must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.' Although reliance is not an element, plaintiffs must show that the 'material deceptive act' caused the injury." *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 213 (3rd Dept. 2010) quoting *Oswego, supra* at 26. A material omission is sufficient when "the business alone possesses material information that is relevant to the consumer and fails to provide it." *Oswego, supra* at 26.

The plaintiffs have stated a valid claim under GBL § 349. They allege that defendants engaged in a scheme, conceived and directed by FORBA, by which the Dentist Defendants routinely induced patients at the Clinics, including plaintiffs, to endure inappropriate dental treatment by, among other things, intentionally misrepresenting that the treatment was appropriate when the Dentist Defendants knew it was not. Am. Compl. ¶¶ 56-80; 167-187. By allegedly engaging in this conduct as a matter of routine practice at the Clinics, defendants engaged in materially deceptive acts that were consumer-oriented and injured plaintiffs in the form of improper treatment. Am. Compl. ¶¶ 149-164; 201-213. As such, plaintiffs' allegations clearly state a claim under GBL § 349.

B. Defendants' Assertion That the Alleged Deceptive Conduct Was Not Consumer-Oriented.

The Dentists Defendants argue that plaintiffs have not alleged consumer-oriented conduct but only private interactions between plaintiffs and their dentists during the course of

treatment. As noted previously, "the 'consumer-oriented' requirement may be satisfied by showing that the conduct at issue 'potentially affect[s] similarly situated consumers.' Although consumer-oriented conduct does not require a repetition or pattern of deceptive conduct, a plaintiff must 'demonstrate that the acts or practices have a broader impact on consumers at large.'" *Wilson, supra.*

In *Oswego*, plaintiffs alleged that a bank routinely concealed from persons opening new accounts the existence of a limit on the balance on which interest would be paid and that an alternative account without that limit was available for non-profit organizations. *Oswego, supra* at 23-25. In alleging deceptive conduct, plaintiffs' representative had to rely on the individual circumstances that occurred when he went to open a savings account for his non-profit association. The Court of Appeals held that the act of plaintiffs' representative going into the bank to open a savings account fell within the consumer-oriented ambit of GBL § 349. *Id.* at 26. The Court reasoned that the bank dealt with the plaintiffs' representative "as any customer entering the bank to open a savings account ... The account openings were not unique to these two parties, nor were they private in nature or a 'single shot transaction.'" *Id.* Thus, the Court ruled that the acts complained of were "consumer-oriented in the sense that they potentially affect similarly situated consumers." *Id.*

Similarly, the plaintiffs in the instant matter have alleged that the Dentist Defendants were engaged in a fraudulent course of conduct pursuant to which they dealt with plaintiffs in the same way they, and other dentists at the Clinics, routinely dealt with their patients. Am. Compl. ¶ 204. Put another way, the defendants allegedly treated the plaintiffs as any other potential dental patient walking through their doors seeking treatment. Based on these allegations, the deceptive conduct was not unique to plaintiffs, nor was it private in nature or a

"single shot transaction." As was the case in *Oswego*, plaintiffs must prove the individual circumstances surrounding their interactions with defendants to establish they were victims of a routine practice. This conduct is clearly consumer-oriented as was held in *Oswego*, since the acts complained of potentially affect similarly situated consumers.

C. Defendants' Assertion that Plaintiffs' GBL § 349 Claim is Duplicative of Their Malpractice Claim.

The Fifteen Dentists further argue that the GBL § 349 claim should be dismissed because plaintiffs have not alleged conduct that is beyond the purview of a general medical malpractice claim. As has been discussed repeatedly above, plaintiffs have alleged that the defendants engaged in intentional fraudulent misconduct, which goes beyond a general malpractice claim based on negligence. *See Simcuski*, *supra* at 451 (when a doctor fraudulently induces treatment that he knows to be improper it is "more than another aspect of the malpractice on the part of the treating physician; the complaint alleges an intentional fraud.").

The Court of Appeals held in *Karlin* that a GBL § 349 and malpractice claim for lack of informed consent may be maintained together. *Karlin*, *supra* at 292-93. Here, plaintiffs are not merely alleging acts of negligence on the part of the treating dentists. Rather, they allege that defendants engaged in a fraudulent course of conduct by which they routinely induced improper treatment through deceptive practices. Am. Compl. ¶¶ 56-80; 167-187; 149-164; 201-213. This clearly goes beyond the purview of a general malpractice claim.

Finally, the Fifteen Dentist defendants contend that plaintiffs have not alleged that they advertised or deceived the public at large by publishing success rates or other similar misleading information, as was the case in *Karlin*. The Fifteen Dentists appear to use this argument to establish that the defendants' alleged misconduct has not risen to the level of a GBL § 349 claim and therefore only a malpractice cause of action can be maintained. Plaintiffs, however, do

allege deceptive advertising, including that the Clinics were not authorized by law to provide dental care. Am. Comp. ¶¶ 37-55. Additionally, plaintiffs allege that the Clinics and FORBA targeted Medicaid children with advertising and promotional materials which falsely represented that the Clinics were legally authorized to provide dental care and would provide appropriate dental care when they allegedly knew that to be false. Am. Comp. ¶¶ 206-212.

Regardless, *Karlin* does not establish that defendants must engage in deceptive advertising in order for plaintiffs to allege a violation of GBL § 349. To the contrary, *Karlin* holds that GBL § 349 prohibits "*all* deceptive practices." *Karlin, supra* at 287 (emphasis added). Thus, for example, the GBL § 349 claim in *Oswego* did not involve advertising; it was based entirely on concealment of material information. *Oswego, supra* at 23-24. As has been stated, the Court of Appeals in that case held that a material omission is sufficient to establish a deceptive act when "the business alone possesses material information that is relevant to the consumer and fails to provide it." *Id.* at 26. Plaintiffs have clearly alleged that defendants have withheld material information, such as administering treatments they knew to be improper or unnecessary. Therefore, plaintiffs have established a valid GBL § 349 cause of action that is not duplicative of their malpractice claim.

D. General Business Law § 350

GBL § 350 prohibits "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *Karlin, supra* at 290. As a part of the consumer protection law, GBL § 350 is given the same broad application as GBL § 349 and applies to medical services. *Id.* at 287. To establish a false advertising claim under GBL § 350, plaintiffs "must demonstrate that the advertisement: (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury." *Andre Strishak & Assocs.,*

P.C. v. Hewlett Packard Co., 300 A.D.2d 608, 609 (2nd Dept. 2002). "The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to Section § 349." *Goshen, supra* at 324 n.1.

In setting forth their claim under GBL § 350, plaintiffs have alleged that the Clinics were not authorized by law to provide dental care. Am. Comp. ¶¶ 37-55. Additionally, the defendants were engaged in a scheme by which the dentists put the interests of FORBA's profits ahead of the medical needs of the children, and, as a result, routinely performed treatment they knew to be improper. Am. Comp. ¶¶ 56-80; 167-187. The plaintiffs also allege that the Clinics and FORBA targeted Medicaid children with advertising and promotional materials which falsely represented that the Clinics were legally authorized to provide dental care and would provide appropriate dental care when they allegedly knew that to be false. Am. Comp. ¶¶ 206-212. This, in turn, lured plaintiffs to the Clinics where they allegedly sustained injury as a result of the improper treatment. Am. Comp. ¶¶ 210-212.

The Fifteen Dentists make the same arguments to dismiss this claim as they did under the GBL § 349 claim. This includes their contentions that the GBL § 350 allegations are conclusory and duplicative of the malpractice claim, and that plaintiffs do not allege conduct that was consumer-oriented. These arguments are not valid for the same reasons set forth in the GBL § 349 discussion.

Additionally, the Four Dentists argue that the GBL § 350 allegations implicate only FORBA and do not allege that the Dentist Defendants participated in drafting or perpetuating the advertisements. This Court is unaware of any authority holding that a defendant must draft a deceptive advertisement to violate GBL § 350. Plaintiffs have alleged that the Dentist Defendants were knowing and active participants in the scheme that violated GBL § 350 and

perpetuated the deceptive advertising by intentionally providing the improper treatment that rendered the advertising deceptive. Am. Compl. ¶¶ 56-80; 167-187; 201-213; 234-236. As plaintiffs argue, one who knowingly participates in unlawful conduct is liable regardless of whether he committed all the acts constituting the unlawful conduct. *Danna v. Malco Realty, Inc.*, 51 A.D.3d 621, 622 (2nd Dept. 2008) ("Liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud."); *see also Kuo Feng Corp. v. Ma*, 248 A.D.2d 168, 169 (1st Dept. 1998); *CPC Int'l v. McKesson Corp.*, 70 N.Y.2d 268, 286-87 (N.Y. 1987).

The Four Dentists also argue that plaintiffs have not identified specific advertising materials, have not stated how they were misleading, and have not alleged concrete facts demonstrating a marketing scheme aimed at the public. To the contrary, plaintiffs have specifically identified the deceptive materials by describing their content: those which falsely represented the Clinics were authorized to practice dentistry and that children would receive appropriate care. Am. Compl. ¶ 207. The identity of each particular advertisement or promotional material is not yet required as this information is peculiarly within the knowledge of the defendants and discovery has not yet been conducted. *See Pludeman*, *supra* at 491-92; *Jered Contracting Corp.*, *supra* at 194.

Plaintiffs have also sufficiently alleged how the materials were misleading. They allege that contrary to the advertising and promotional materials, defendants knew (1) the Clinic was not legally authorized to practice dentistry and (2) rather than providing appropriate care, the Dentist Defendants were routinely intentionally providing inappropriate treatment they knew to be inappropriate as a result of a fraudulent scheme to generate profits for FORBA at the expense of

appropriate care for the Clinic's patients. Am. Comp. ¶¶ 37-55; 56-80; 167-187. These are concrete facts that allege a marketing scheme aimed at Medicaid children generally.

Finally, the Four Dentists argue that plaintiffs have failed to show that they relied upon or were aware of the allegedly false advertisements at the time they sought treatment. However, plaintiffs' allegation that they were deceived, misled and lured to the clinic by advertisements or promotional materials necessarily carries with it an allegation of awareness of such materials. Am. Compl. ¶ 209. As such, plaintiffs have stated a valid claim under GBL § 350.

V. Plaintiffs' Negligence Claim Against The Dentist Defendants

The Four Dentists argue that plaintiffs' negligence per se claim is insufficient because it does not allege conduct committed by them in connection with the rendition of professional services. Rather, they contend that the claim is limited to their participation in, and operation of, the Clinics, which are alleged to have been operating in violation of New York law. Defendants argue that under New York Business Corporation Law ("BCL") § 1503 they are only liable for their own acts, or the acts of those over whom they have supervisory authority. Therefore, it is argued that the Dentist Defendants are not vicariously liable for the alleged negligence of the directors and officers who incorporated or ran the Clinics.

Plaintiffs argue that the claim is based on the dentists' improper conduct in treating plaintiffs. They allege (1) the law prohibits the practice of dentistry by a company unless the company is owned by New York licensed dentists (2) the Dentist Defendants, as employees of the Clinics, rendered dental services in violation of that law because FORBA was the true owner of the Clinics (3) they thereby subjected themselves to the precise conflicted interests the statute is allegedly intended to prevent (4) which caused them to put the profit interests of FORBA

ahead of plaintiffs' interests, and (5) as a consequence they rendered inappropriate dental treatment to plaintiffs. Am. Compl. ¶¶ 226-227; 36-55; 56-80; 167-187.

In alleging that the Clinics were formed and operated in violation of New York law, plaintiffs cite to Limited Liability Company Law ("LLCL") §§ 1203 and 1207, which prohibits the practice of dentistry by a limited liability company unless its owners are licensed to practice in New York and practice at the company's place of business. It should be noted that for purposes of this discussion, BCL § 1503 applies to professional corporations while the provisions of LLCL applies to limited liability companies. The Clinics were formed as LLCs but the provisions of BCL and LLCL at issue are similar and there are no material differences for purposes of this issue. Therefore, the requirement that the owner be the true owner of a practice is essentially the same under both provisions. *See Multiquest, PLLC v. Allstate Ins. Co.*, 17 Misc.3d 37, 39 (2nd Dept. 2007).

It has been well established in New York that the corporate practice of medicine is prohibited. *See* BCL § 1503; LLCL §§ 1203 and 1207; *see also Univ. Acupuncture Pain Servs, P.C. v. State Farm Mut. Auto Ins. Co.*, 196 F.Supp.2d 378, 389, n.5 (S.D.N.Y. 2002) (stating that BCL § 1503 was enacted "in keeping with the longstanding ban on the corporate practice of medicine."). The law prohibits lay ownership of professional companies because of "the accompanying potential for fraud." *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313, 321 (N.Y. 2005). In the context of the practice of law, the Court of Appeals explained the reasoning for this prohibition stating, "A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists for it." *In re Coop. Law Co.*, 198 N.Y. 479, 484 (N.Y. 1910).

Furthermore, as the Court observed, the relationship between a professional and his client involves the highest degree of trust and confidence. This is potentially jeopardized when a professional is employed by a company because the professional may be conflicted, becoming "subject to the directions of the corporation, and not to the directions of the client ... His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney." *Id.* There would be "no guide except the sordid purpose to earn money for stockholders" and "evil results ... might follow." *Id.*

Based on the allegations in the instant matter, the situation about which the Court of Appeals warned appears to have materialized in the case of FORBA and the Small Smiles Clinics. Plaintiffs have alleged that the Clinics were not owned by New York licensed dentists but the Dentist Defendants, as its employees, nonetheless rendered dental services. To get around the requirement that the owner of a professional practice be licensed in the state and work at the company's place of business, FORBA allegedly designated various dentists to register as the "owner" to make it appear the clinic was authorized to practice dentistry; however, these dentists were allegedly handpicked and let go at FORBA's whim and none were provided capital, assumed the risk of loss, or received any profit from the clinics. Am. Compl. ¶¶ 38-43. At all times, it is alleged that FORBA received all of the profits from, and was the true owner of, the clinics. Am. Compl. ¶¶ 44-55. It is clear that the operation of a professional company with a "nominal" owner where a prohibited entity gets the actual profit and operates the company violates the law. *Mallela*, *supra* at 320-21.

"When a statute designed to protect a particular class of persons against a particular type of harm is invoked by a member of the protected class, a court may, in furtherance of the statutory

purpose, interpret the statute as creating an additional standard of care. Violation of such a statutory standard, if unexcused, constitutes negligence per se so that the violating party must be found negligent if the violation is proved." *Dance v. Town of Southampton*, 95 A.D.2d 442, 445 (2nd Dept. 1983); *see also Dalal v. City of New York*, 262 A.D.2d 596 (2nd Dept. 1999); *Coogan v. Torrisi*, 47 A.D.3d 669 (2nd Dept. 2008). In the instant matter, it is clear that the BCL and LLCL provisions relate directly to the operation of the Clinics. The statutes were designed to protect a particular class of persons against particular types of harm. This includes situations where a professional develops conflicted interests while serving his patient and a corporate employer. *See, e.g., In re Coop. Law Co., supra.*

Accepting plaintiffs' allegations as true, which this Court must, it is clear that plaintiffs suffered the harm these statutes were intended to prevent. Plaintiffs, as the clinics' patients, are clearly part of the protected class. They were then subjected to inappropriate dental treatment resulting from the emphasis placed on FORBA's profit interests above the interests of the patients. The Dentist Defendants knew, or should have known, that practicing dentistry as employees of a company in violation of the corporate practice prohibition carried with it the strong likelihood that they could become conflicted between reaching FORBA's financial goals and rendering appropriate dental treatment to their patients. Having alleged that the Dentist Defendants were conflicted and the plaintiffs suffered harm as a result of their treatment, it is clear that the dentists' conduct is fraudulent if done intentionally, but negligent or negligent *per se* if not.

VI. Plaintiffs' Allegations of Punitive Damages Against the Dentist Defendants

The Four Dentists move to dismiss the punitive damages claim against them, arguing that plaintiffs have only alleged negligence on the part of the Dentist Defendants. *See Munoz v.*

Puretz, 301 A.D.2d 382, 384 (1st Dept. 2003) ("Punitive damages are not available for ordinary negligence."). The plaintiffs however, have alleged that the dentists' conduct was more than negligence; that it was egregious if not intentional, including that they were trained to and did indeed put the financial interests of FORBA ahead of the medical needs of their patients, including the plaintiffs. Am. Compl. ¶¶ 60-70; 155-164; 169; 171; 178. As a result, they allegedly misrepresented that dental treatment was appropriate when they knew it was not in order to induce the parents and guardians of young children to consent to have their children treated at Small Smiles. Am. Compl. ¶¶ 168, 171. This alleged misconduct was not isolated; rather it was the regular practice of the Dentist Defendants and FORBA. Am. Compl. ¶¶ 202-209.

As such, the plaintiffs have alleged that the dentists engaged in a course of conduct that was wanton, reckless, outrageous and malicious, and demonstrated a gross indifference to the safety and welfare of the members of the public, including plaintiffs. These allegations satisfy the requirements for punitive damages. *See Kinzer v. Bederman*, 59 A.D.3d 496 (2nd Dept. 2009); *Gravitt, supra*; *Graham v. Columbia-Presbyterian Med. Ctr.*, 185 A.D.2d 753, 754 (1st Dept. 1992).

VII. Dr. Filostrat's Motion To Dismiss Is Procedurally Deficient

After serving his answer, *pro se*, Dentist Defendant, Dr. Dimitri Filostrat, D.D.S, filed a two-page motion to dismiss. The motion fails to identify any legal flaw with one or more of the causes of action; rather, it merely denies a few of the factual allegations in the initial Complaint. These general denials and conclusory statements are not grounds for a motion to dismiss. Taking all allegations in the complaint as true, as this Court must, when deciding such a motion (*see People ex rel. Cuomo, supra*; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (N.Y. 1994), this

defendant has failed to establish entitlement to judgment as a matter of law at this juncture. Therefore, Dr. Filostrat's motion to dismiss the plaintiffs' Complaint as against him is denied in its entirety.

CONCLUSION

The defendants' motions to dismiss plaintiffs' causes of action are DENIED in their entirety.

The Four Dentist defendants' motion to dismiss plaintiffs' first, second, third, fourth and sixth causes of action, as well as the theories of concerted action, successor liability and punitive damages, is DENIED.

The Fifteen Dentist defendants' motion to dismiss plaintiffs' first, third, and fourth causes of action is DENIED

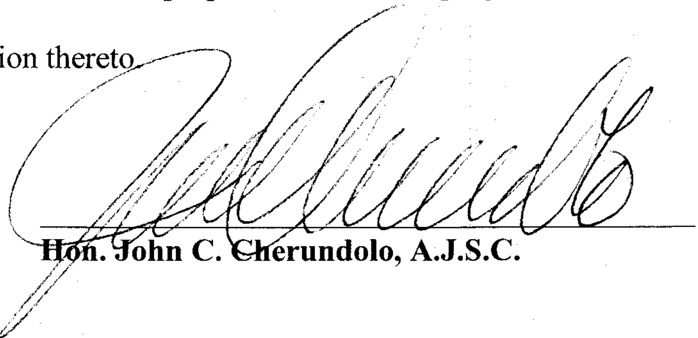
New FORBA, et al., motion to dismiss plaintiffs' first, second, and third causes of action is DENIED.

Old FORBA, et al., motion to dismiss plaintiffs' first, second, and third causes of action is DENIED.

Dentist Defendant, Dr. Dimitri Filostrat's motion to dismiss plaintiffs' first, second, and third causes of action is DENIED.

Counsels for plaintiffs are directed to submit a proposed order in keeping with this decision and attaching a copy of the decision thereto.

DATED: August 23, 2012.



Hon. John C. Cherundolo, A.J.S.C.

Sep 26 2012
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560001/11
308 #6

STATE OF NEW YORK
LITIGATION COORDINATING PANEL

X

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 DESIRAEE 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

Panel Case No. 0011/2011
Index No. 000562/2011
Pending in the
Fourth Judicial District
Assigned Justice
Hon. Barry D. Kramer
Filed: Schenectady Supreme Court

- against -

FILED
SEP - 1 2011
COUNTY CLERK'S OFFICE
NEW YORK

FORBA HOLDINGS, LLC N/K/A CHURCH STREET HEALTH MANAGEMENT, LLC; FORBA N.Y., LLC; FORBA, LLC, N/K/A LICSAC, LLC; FORBA NY, LLC N/K/A LICSAC 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

X

AND OTHER MATTERS LISTED ON THE ATTACHED APPENDIX

<u>DECISION AND ORDER</u>

Each of the cases before the Panel seeks compensatory and punitive damages for alleged injuries to children after treatment at Small Smiles clinics as a result of, inter alia, an illegal profit scheme

Plaintiffs move, by counsel, Powers & Santola, LLP, pursuant to section 202.69 of the Uniform Rules for the Trial Courts of the State of New York (22 NYCRR 202.69), by Order to Show Cause, dated May 12, 2011, for an Order of Coordination with regard to all of the cases listed above and on the attached appendix.

Specifically, *Angus* seeks to coordinate this Schenectady County action with the two pending actions listed in the Appendix and any other subsequently filed action, and any action that is pending at the time of this application but not included in this application, that alleges injuries to children at Small Smiles clinics as a result of an illegal profit scheme.

There is limited opposition to the application. Only one affidavit opposes coordination in its entirety. Counsel for the *Old Forba* defendants maintain that the claims asserted in each case are distinct, and are not united by common questions of law and fact. Objections with regard to the issue of venue are submitted by various individual defendant-dentists. Counsel for these defendants oppose plaintiffs' selection of Onondaga County as the coordination venue and propose that more than one county should be designated, arguing that the convenience of the parties, as well as other factors, warrants multiple venues.

The Panel, having now considered all of the issues with respect to this application, including that of judicial economy, finds that the purposes of Section 202.69 of the Uniform Rules for the Trial Courts of the State of New York, are best served by granting the application for Coordination for pre-trial management only. In this regard, the Panel unanimously agrees that coordination of all cases filed in New York State, will be advantageous and efficient for all parties, and will not prejudice any party. The Panel further agrees that Onondaga County is the best choice for venue.

The Panel thus directs that the New York State cases are to be coordinated, and that said coordination shall take place in Onondaga County. As always, any concerns regarding the particular circumstances of the individual cases can be addressed to the Coordinating Justice, who is empowered to make appropriate rulings. The Panel further determines that the out-of-state cases are not within the purview of this Order and shall not be included in the coordination.

The Panel thereby directs that coordination of these related matters be before a Coordinating Justice in the Fifth Judicial District, Supreme Court, County Of Onondaga.

According, upon due deliberation, and for the reasons stated, it is hereby:

Ordered, that the actions set forth above and in the appendix shall be coordinated pursuant to Section 202.69 of the Uniform Rules for the Trial Courts of the State of New York, in the Supreme Court, Onondaga County, before a Coordinating Justice of that county; and it is further

Ordered, that any action that alleges injuries to children at Small Smiles clinics as a result of an illegal profit scheme, that was filed in the Supreme Court of the State of New York heretofore and which remains active, but is not listed in the caption above or on the Appendix and any such action that is filed hereafter shall, in accordance with Subdivision F of the Procedures of the Panel, likewise be coordinated pursuant to Section 202.69 of the Uniform Rules for the Trial Courts of the State of New York, before the Coordinating Justice, unless the Panel rules otherwise pursuant to Subdivision F of the Procedures of the Panel; and it is further

Ordered, that, pursuant to section 202.69(c)(1) of the Uniform Rules for the Trial Courts of the State of New York, the **Honorable James C. Tormey, III**, the Administrative Judge of the Fifth Judicial District shall assign the Coordinating Justice; and it is further

Ordered, that the Clerk of the Panel shall forthwith transmit a copy of this Decision and Order to counsel for all parties herein, the Justices to whom each of the above actions is currently assigned and the **Honorable Tormey**, Administrative Judge for the Fifth Judicial District; and it is further

Ordered that, within 15 days from receipt of a copy of this Order, counsel for the applicants shall serve a copy of this Decision and Order, with notice of entry, upon the Clerks of the Supreme Court for Schenectady and Monroe Counties, and said Clerks are directed, upon payment of appropriate fees, if any, to transmit the files in the two listed actions that are pending in said Counties to the Clerk of the Supreme Court, Onondaga County; and it is further

Ordered, that with respect to any additional action that is to be coordinated as provided in the second order provision hereof, upon service of a copy of the Decision and Order of the Panel with notice of entry, together with the affidavit of compliance or the decision of the Panel set forth in Subdivision F of the Procedures of the Panel, upon the Clerk of the Court in which any such additional action is or hereafter shall be pending (other than the Supreme Court, Onondaga County) as provided in Subdivision F, the said Clerk shall forthwith transfer to the Supreme Court, Onondaga County, after the payment of the appropriate fees, if any, the file in any such additional action that is to be coordinated as provided in this Decision and Order and Subdivision F; and it is further

Ordered, that the Clerk of the Supreme Court, Onondaga County, shall assign an Onondaga County index number, without fee, to any such additional action transferred to that county from another as provided above and such number shall serve as a means of identification and orderly processing of any such case while it remains in Onondaga County for the purpose of

coordination.

This constitutes the Decision and Order of the Panel. The Panel, by its Presiding Justice and with their consent, signs this Decision and Order.

Dated: August 25, 2011

Justices of the Panel:

Hon. Helen E. Freedman
Presiding Justice, First Department

Hon. Joseph J. Maltese
Associate Justice, Second Department

Hon. E. Michael Kavanagh
Associate Justice, Third Department

Hon. Matthew Rosenbaum
Associate Justice, Fourth Department

For the Panel:

Hon. Helen E.
Freedman Presiding
Justice

APPENDIX

CASE	INDEX NO.	COUNTY	JUSTICE ASSIGNED
Varano v Forba Holdings.	002128/11	Onondaga	Hon. John C. Cherundolo
Johnson v Forba Holdings	007100/11	Monroe	Unknown

STATE OF NEW YORK
LITIGATION COORDINATION PANEL

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 ESIRAEE 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,

NOTICE OF ENTRY

Panel Case No.: 0011/2011
Index No: 2011-562
Assigned Justice:
Hon. Barry D. Kramer
Filed: Schenectady Supreme Court

Plaintiffs,

vs.

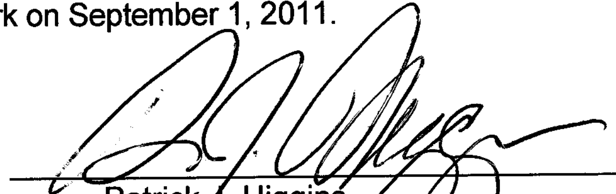
FORBA HOLDINGS, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSAC, LLC; FORBA NY, LLC n/k/a LICSAC NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF ALBANY,LLC; ALBANY ACCESS DENTISTRY, PLLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; 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.

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Hon. Helen E. Freedman, Presiding Justice, dated August 25, 2011 which was entered

in the Office of the New York County Clerk on September 1, 2011.

DATED: September 15, 2011



Patrick J. Higgins
POWERS & SANTOLA, LLP
Attorneys for Plaintiffs
Office and P.O. Address
39 North Pearl Street
Albany, New York 12207
(518) 465-5995

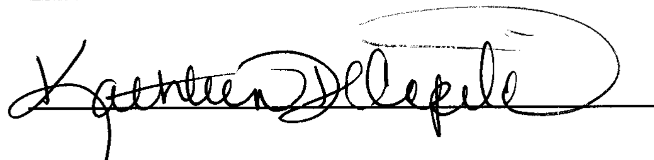
To:

Thomas B. Cronmiller, Esq. Hiscock & Barclay, LLP 2000 HSBC Plaza 100 Chestnut Street Rochester, NY 14604	John L. Murad, Jr., Esq. Hancock Estabrook, LLP 1500 AXA Tower 1 100 Madison Street Syracuse, NY 13202
Dennis A. First, Esq. O'Connor, O'Connor, Bresee & First, P.C. 20 Corporate Woods Blvd. Albany, NY 12211	Joseph P. McGovern, Esq. Law Offices of Joseph P. McGovern 5 Wilson Street Albany, NY 12207
Kevin E. Hulslander, Esq. Smith, Sovik, Kendrick & Sugnet, P.C. 250 S. Clinton Street, Suite 600 Syracuse, NY 13202	Simeon M. Schopf, Esq. King & Spalding 1700 Pennyslvania Avenue, N.W., Ste. 200 Washington, DC 20006
Andrew M. Knoll, Esq. Scolaro, Shulman, Cohen, Fetter & Burstein, P.C. 507 Plum Street, Suite 300 Syracuse, NY 13204	Kathleen M. Reilly, Esq. Damon Morey LLP The Avant Building, Suite 1200 200 Delaware Avenue Buffalo, NY 14202-2150
Theresa B. Marangas, Esq. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP 677 Broadway, #901 Albany, NY 12207-2996	Gordon D. Tresch, Esq. Feldman Kieffer, LLP The Dun Building 110 Pearl Street, Suite 400 Buffalo, NY 14202
Laura Kroner, D.D.S. 800 Clematis Street, Suite 20234 West Palm Beach, FL 33402	Dr. Dimitri Filostrat 6709 Gillen Street Metairie, LA 70003
Dr. Bernice Little-Mundle P.O. Box 10204 Silver Spring, MD 20904	

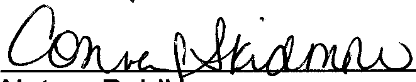
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

The undersigned, being duly sworn, deposes and says that a true and correct copy of the above and foregoing LITIGATION PANEL DECISION AND ORDER, dated August 25, 2011, was mailed on September 15, 2011 to:

Thomas B. Cronmiller, Esq. Hiscock & Barclay, LLP 2000 HSBC Plaza 100 Chestnut Street Rochester, NY 14604	John L. Murad, Jr., Esq. Hancock Estabrook, LLP 1500 AXA Tower 1 100 Madison Street Syracuse, NY 13202
Dennis A. First, Esq. O'Connor, O'Connor, Bresee & First, P.C. 20 Corporate Woods Blvd. Albany, NY 12211	Joseph P. McGovern, Esq. Law Offices of Joseph P. McGovern 5 Wilson Street Albany, NY 12207
Kevin E. Hulslander, Esq. Smith, Sovik, Kendrick & Sugnet, P.C. 250 S. Clinton Street, Suite 600 Syracuse, NY 13202	Simeon M. Schopf, Esq. King & Spalding 1700 Pennyslvania Avenue, N.W., Ste. 200 Washington, DC 20006
Andrew M. Knoll, Esq. Scolaro, Shulman, Cohen, Fetter & Burstein, P.C. 507 Plum Street, Suite 300 Syracuse, NY 13204	Kathleen M. Reilly, Esq. Damon Morey LLP The Avant Building, Suite 1200 200 Delaware Avenue Buffalo, NY 14202-2150
Theresa B. Marangas, Esq. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP 677 Broadway, #901 Albany, NY 12207-2996	Gordon D. Tresch, Esq. Feldman Kieffer, LLP The Dun Building 110 Pearl Street, Suite 400 Buffalo, NY 14202
Laura Kroner, D.D.S. 800 Clematis Street, Suite 20234 West Palm Beach, FL 33402	Dr. Dimitri Filostrat 6709 Gillen Street Metairie, LA 70003
Dr. Bernice Little-Mundle P.O. Box 10204 Silver Spring, MD 20904	



Sworn to before me on September 15, 2011.



Notary Public
State of New York

CORINA J. SKIDMORE
Notary Public, State of New York
Qualified in Greene County, #01SK6241938
My commission expires 05/31/2015

Sep 26 2012
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STATE OF NEW YORK
UNIFIED COURT SYSTEM
FIFTH JUDICIAL DISTRICT
ONONDAGA COUNTY COURTHOUSE
SYRACUSE, NEW YORK 13202
(315) 671-1100
FAX: (315) 671-1183
E-MAIL: jtormey@courts.state.ny.us

ANN PFAU
Chief Administrative Judge

MICHAEL V. COCCOMA
Deputy Chief Administrative Judge
Courts Outside New York City

JAMES C. TORMEY
Justice of Supreme Court
District Administrative Judge
Fifth Judicial District

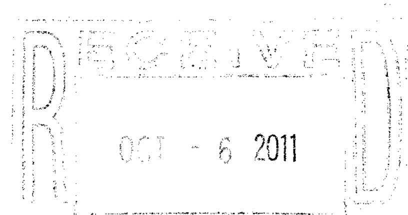
GERARD J. NERI, ESQ.
Special Counsel/Court Attorney Referee

DAVID S. GIDEON, ESQ.
Principal Law Clerk

KATHERINE M. VAETH
Confidential Secretary

September 30, 2011

Wilson, Elser, Moskowitz,
Edelman & Dicker LLP
677 Broadway, 9th Floor
Albany, New York 12207
Attn: Theresa B. Marangas, Esq.



Powers & Santola, LLP
39 North Pearl Street
6th Floor
Albany, New York 12207
Attn: Patrick J. Higgins, Esq.

RE: Kelly Varano, et al v. FORBA Holdings, LLC, et al
Timothy Angus, et al v. FORBA Holdings, LLC, et al
Shantel Johnson, et al v. FORBA Holdings, LLC, et al

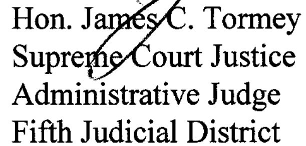
Dear Counselors:

On September 27, 2011, this Court ordered that the Honorable John C. Cherundolo of the Fifth Judicial District, Onondaga County, was appointed as coordinating Justice for all actions within the scope of the coordinating order of LCP Case No. 0011/2011, Index Nos.: 2011-2128, 2011-0562 and 111-7100.

Subsequent to assigning this Order, correspondence was sent dated September 27, 2011 from Wilson, Elser, Moskowitz, Edelman & Dicker LLP by Theresa B. Marangas, Esq. asking this Court to re-consider the appointment of the Honorable John C. Cherundolo. Once an appointment is made within the District appointing a Judge to handle any matter or case, it

becomes that Judge's decision whether or not to recuse himself/herself in the matter pending. As such, any recusal request should be brought before the Honorable John C. Cherundolo.

SO ORDERED,



Hon. James C. Tormey
Supreme Court Justice
Administrative Judge
Fifth Judicial District

JCT:kmv

Sep 26 2012
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

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

IN RE: SMALL SMILES LITIGATION

COORDINATION ORDER

Group No.	Schenectady Index No. 11-562	Monroe Index No. 2011-7100	Onondaga Index No. 11-2128	Trial Ready	Trial Date
1.	Rivera o/b/o Gilmore	Lorraine	Varano o/b/o Bohn	2/1/13	2/4/13
2.	Bacon o/b/o Ashley Parker	Shaw o/b/o Alexis Parker	Cowher o/b/o Wm. Martin	3/1/13	3/11/13
3.	Nancy Ward o/b/o LaBrode	Taber	Montanye	4/1/13	4/15/13
4.	Angus	Robinson o/b/o Flores	Rizzo o/b/o McMahon	7/1/13	7/20/13
5.	Nancy Ward o/b/o Labombard Black	Garrett o/b/o Garcia-Santos	Shellings	8/1/13	8/19/13
6.	Courtney Conrad o/b/o Zakery Wilson	Justice o/b/o Howard	Recore o/b/o McLoughlin	9/1/13	9/23/13
7.	Purcell o/b/o Berg	Ralston	Froio o/b/o Darling	11/1/13	11/4/13
8.	Carter	Marshall o/b/o Ross	Fortino	1/1/14	1/13/14
9.	Ferguson	Henton o/b/o Smith	Marie Martin o/b/o Kenyon	3/1/14	3/10/14
10.	Potter o/b/o Hager	Johnson o/b/o Butler	Crippin o/b/o Mathews	4/1/14	4/___/14

DATED: August 31, 2012.

Hon. John C. Cherundolo, A.J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

Rivera o/b/o Gilmore; Lorraine; Varano o/b/o Bohn

GROUP 1

(1) **Written Discovery**: All written discovery shall be completed on or before October 1, 2012.

(2) **Depositions**: All depositions shall be completed on or before November 1, 2012.

(3) **Medical Examinations**: All medical examinations shall be completed on or before December 1, 2012.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before December 1, 2012.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before December 15, 2012.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before January 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on February 1, 2013.

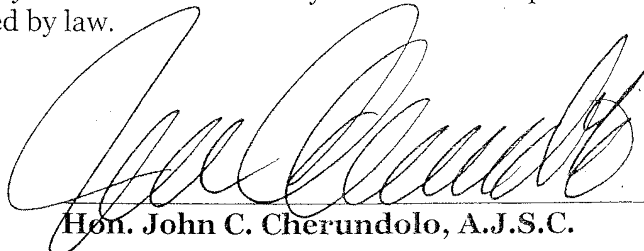
(8) **Plaintiffs Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than November 15, 2012.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than December 15, 2012.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:53 08/31/12 ONONDAGA COUNTY CLERK CP

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

Bacon o/b/o Ashley Parker; Shaw o/b/o Alexis Parker; Cowher o/b/o Wm. Martin

GROUP 2

(1) **Written Discovery**: All written discovery shall be completed on or before November 1, 2012.

(2) **Depositions**: All depositions shall be completed on or before December 1, 2012.

(3) **Medical Examinations**: All medical examinations shall be completed on or before January 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before January 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before January 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before February 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on March 1, 2013.

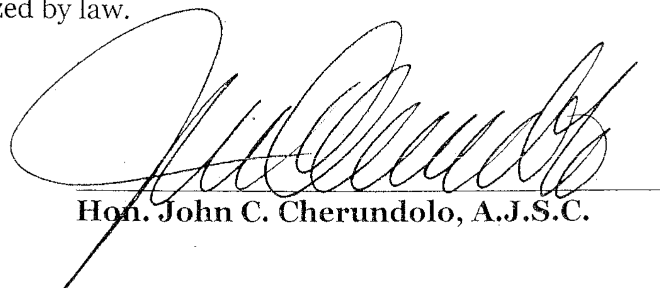
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than December 15, 2012.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than January 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:53 08/31/12 ONONDAGA COUNTY CLERK OP

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

Nancy Ward o/b/o LaBrode; Taber; Montanye

GROUP 3

(1) **Written Discovery**: All written discovery shall be completed on or before December 1, 2012.

(2) **Depositions**: All depositions shall be completed on or before January 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before February 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before February 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before February 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before March 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on April 1, 2013.

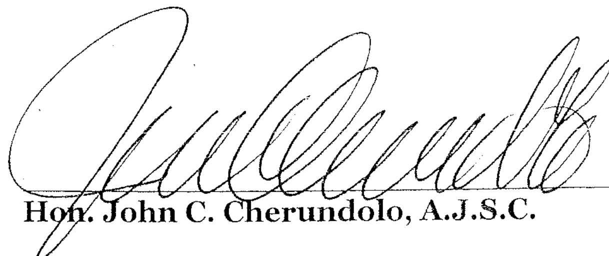
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than January 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than February 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:53 08/31/12 ONONDAGA COUNTY CLERK OP

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Angus; Robinson o/b/o Flores; Rizzo o/b/o McMahon

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

GROUP 4

(1) **Written Discovery**: All written discovery shall be completed on or before March 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before April 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before May 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before May 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before May 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before June 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on July 1, 2013.

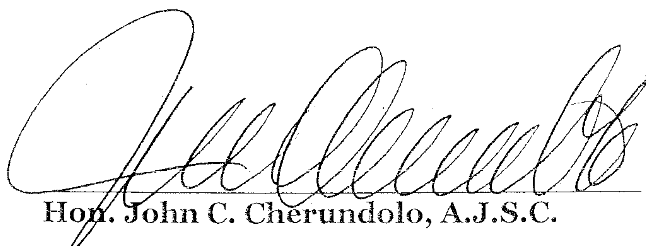
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than April 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than May 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:53 08/31/12 ONONDAGA COUNTY CLERK CP

STATE OF NEW YORK
SUPREME COURT   COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Nancy Ward o/b/o Labombard Black; Garrett o/b/o Garcia-Santos; Shellings

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

GROUP 5

(1) **Written Discovery**: All written discovery shall be completed on or before April 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before May 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before June 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before June 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before June 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before July 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on August 1, 2013.

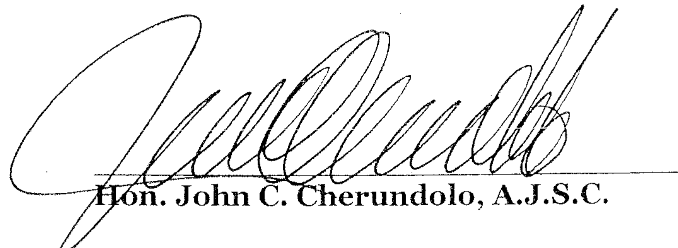
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than May 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than June 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:53 08/31/12 ONONDAGA COUNTY CLERK CP

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Courtney Conrad o/b/o Zakery Wilson; Justice o/b/o Howard; Recore o/b/o McLoughlin

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

GROUP 6

(1) **Written Discovery**: All written discovery shall be completed on or before May 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before June 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before July 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before July 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before July 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before August 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on September 1, 2013.

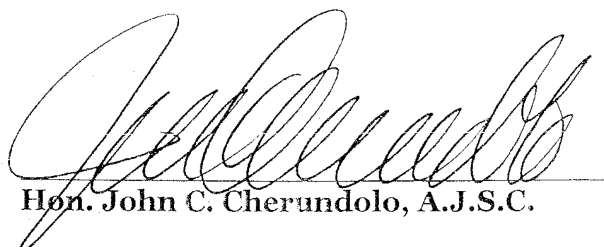
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than June 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than July 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:54 08/31/12 ONONDAGA COUNTY CLERK CP

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Purcell o/b/o Berg; Ralston; Froio o/b/o Darling

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

GROUP 7

(1) **Written Discovery**: All written discovery shall be completed on or before July 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before August 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before September 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before September 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before September 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before October 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on November 1, 2013.

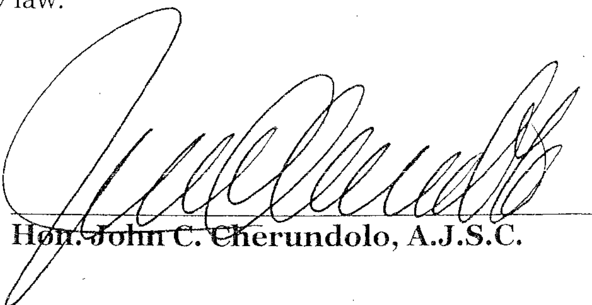
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than August 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than September 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:54 08/31/12 ONONDAGA COUNTY CLERK CP

STATE OF NEW YORK
SUPREME COURT　　　　　COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Carter; Marshall o/b/o Ross; Fortino

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

GROUP 8

(1) **Written Discovery**: All written discovery shall be completed on or before September 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before October 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before November 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before November 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before November 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before December 15, 2013.

(7) **Trial Ready**: This case shall be deemed trial ready on January 1, 2014.

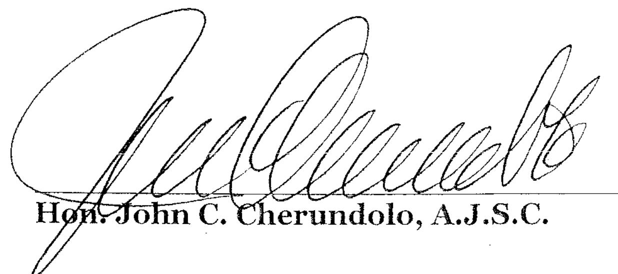
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than October 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than November 15, 2013.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:54 08/31/12 ONONDAGA COUNTY CLERK OP

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

Ferguson; Henton o/b/o Smith; Marie Martin o/b/o Kenyon

GROUP 9

(1) **Written Discovery**: All written discovery shall be completed on or before October 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before November 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before December 1, 2013.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before December 1, 2013.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before December 15, 2013.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before January 15, 2014.

(7) **Trial Ready**: This case shall be deemed trial ready on March 1, 2014.

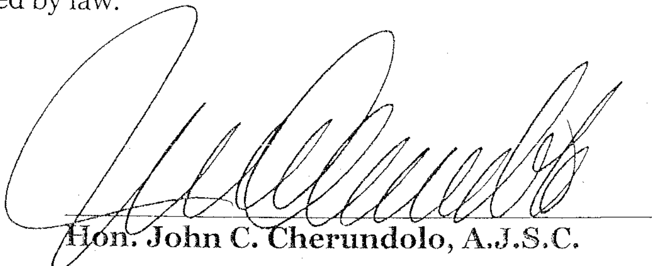
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than December 15, 2013.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than January 15, 2014.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:54 08/31/12 ONONDAGA COUNTY CLERK OP

STATE OF NEW YORK
SUPREME COURT   COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

Index No. 11-2128

SCHEDULING ORDER
(Pursuant to Uniform Rules §§202.8 and 202.12)

Potter o/b/o Hager; Johson o/b/o Butler; Crippin o/b/o Mathews

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GROUP 10

(1) **Written Discovery**: All written discovery shall be completed on or before November 1, 2013.

(2) **Depositions**: All depositions shall be completed on or before December 1, 2013.

(3) **Medical Examinations**: All medical examinations shall be completed on or before January 1, 2014.

(4) **End Date for All Disclosure**: All disclosure shall be completed on or before January 1, 2014.

(5) **Trial Note of Issue**: Plaintiff shall file a Trial Note of Issue/Certificate of Readiness on or before January 15, 2014.

(6) **Dispositive Motions**: All dispositive motions shall be made on or before February 15, 2014.

(7) **Trial Ready**: This case shall be deemed trial ready on April 1, 2014.

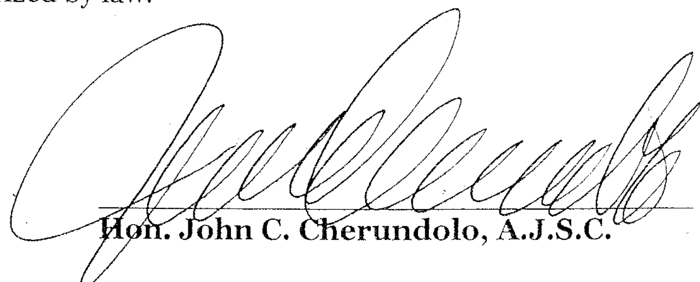
(8) **Plaintiffs' Expert Disclosure**: Exchange of expert disclosure, if any, by the plaintiffs, shall be due no later than January 15, 2014.

(9) **Defendants' Expert Disclosure**: Exchange of expert disclosure, if any, by the defendants, shall be due no later than February 15, 2014.

(10) If there is a discovery dispute, the parties, prior to making a motion pursuant to CPLR §§3042, 3124 and/or 3126, shall comply with the good faith requirements of Rule 202.7(c) of the Uniform Rules of Trial Courts and shall request and conclude a conference with the Court Referee Judge Jack Brandt to resolve the discovery issues.

(11) Failure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law.

DATED: August 31, 2012.



Hon. John C. Cherundolo, A.J.S.C.

15:54 08/31/12 ONONDAGA COUNTY CLERK CP

Sep 26 2012
03:29PM

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

AFFIDAVIT OF P. KEVIN LEYENDECKER IN OPPOSITION TO MOTION TO VACATE SCHEDULING ORDER

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

Hon. John C. Cherundolo

STATE OF TEXAS)
)
COUNTY OF HARRIS)

P. Kevin Leyendecker, being duly sworn, deposes and says:

1. I am a lawyer in Houston, Texas. I am licensed to practice law in Texas and have been admitted *pro hac vice* to appear before the Court in this case. I am one of the attorneys of record for the plaintiffs in the above actions. As such I am fully familiar with the facts, circumstances and proceedings described below.

2. I submit this affidavit in opposition to the motion to vacate the Court's June 28, 2012 scheduling order and for a stay of all discovery pursuant to CPLR 2201 filed by defendants Maziar Izadi, D.D.S., Judith Mori, D.D.S., Edmise Forestal, D.D.S., Evan Goldstein, D.D.S., Keethi Golla, D.D.S., Nassef Lancen, D.D.S., Naveed Aman, D.D.S., Koury Bonds, D.D.S., Tarek Elsafty, D.D.S., Yaqoob Khan D.D.S., Shilpa Agadi, D.D.S., Ismatu Kamara, D.D.S.,

Sonny Khanna, D.D.S., and Kim Pham D.D.S. (collectively "the Wilson Elser Dentist Defendants") and joined by defendant Gary Gusmerotti, D.D.S.

3. Since October 2011, I have communicated with defense counsel regarding the production of information, records and authorizations by each of the 30 plaintiffs. Between October 2011 and February 2012, I sent defense counsel a wealth of information about each of the plaintiffs, including copies of their dental records, *Arons* authorizations, record authorizations, powers of attorney to be used with authorizations, HIPPA authorizations, and Medicaid authorizations. Defense counsel have had all of these records and authorizations for at least six months and, in some cases, eleven months. A more detailed description of the production of plaintiff information is as follows:

4. On October 7, 2011, I sent defense counsel copies of each plaintiff's dental records from Small Smiles as well all the dental records that we had in our possession from other dentists who had treated the plaintiffs. (Ex. A).

5. On November 1, 2011, I sent defense counsel *Arons* authorizations for 23 of the 30 plaintiffs. (Ex B).

6. On November 22, 2011, I sent defense counsel *Arons* authorizations for four more plaintiffs and authorizations to obtain records from the plaintiffs' subsequent treating dentists for 26 of the 30 plaintiffs (Ex. C).

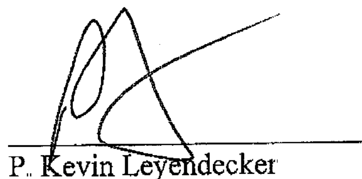
7 Defense counsel requested a revised *Arons* authorizations and on November 29, 2011, I sent them revised authorizations for 27 of the 30 plaintiffs. (Ex D).

8. On December 2, 2011, I sent defense counsel powers of attorney for use with the authorizations I had previously provided for 27 of the 30 plaintiffs. (Ex. E).

9. On December 5, 2011, I sent defense counsel HIPPA authorizations for 27 of the 30 plaintiffs as requested by defense counsel in a letter dated November 28, 2011. (Ex. F).

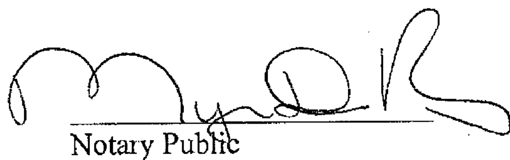
10 On February 15, 2012, we sent defense authorizations to obtain Medicaid records along with corresponding powers of attorney for 28 of the 30 plaintiffs. (Ex G).

11. As far as the plaintiffs' dental records go, defense counsel have either had the same information, or the ability to get the same information, as plaintiffs' counsel since October 2011 and have further had the ability, through the various authorizations, to obtain additional records and information from other treating dentists and the Medicaid office.

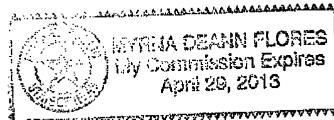


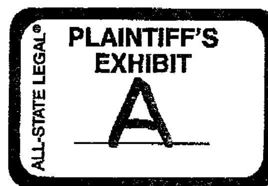
P. Kevin Leyendecker

Sworn to before me this
13th day of August, 2012.



Notary Public





MORIARTY LEYENDECKER
A Professional Corporation
Attorneys at Law

JAMES R MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty com

P KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty com

HILARY S GREENE
Licensed in Texas
Hilary@Moriarty com

ANDREW T GREEN
Licensed in Texas
Andy@Moriarty com

October 7, 2011

VIA REGULAR MAIL

Thomas B Cronmiller
Hiscock & Barclay
2000 HSBC Plaza, 100 Chestnut Street
Rochester, New York 14604

Dimitri Filostrat, D D S
6709 Gillen Street
Metairie, LA 70003

Dennis A First
O'Connor, O'Connor, Bresee & First, P C
20 Corporate Woods Boulevard
Albany, NY 12211

Stephen T Helmer
Mackenzie Hughes, LLP
101 S Salina Street, Suite 600
Syracuse, NY 13202

Kevin S. Hulslander
Smith, Sovik, Kendrick & Sugnet, P C
250 South Clinton St
Syracuse, NY 13202

Andrew Knoll
Scolaro Shulman Cohen Fetter & Burstein
507 Plum Street, Suite 300
Syracuse NY 13204

Theresa B Marangas
Wilson Elser Moskowitz Edelman
677 Broadway
Albany, NY 12207

Joseph P McGovern
Law Offices of Joseph P McGovern
5 Wilson Street
Albany, NY 12207

John A McPhilliamy
Ahmuty, Demers & McManus
200 I U Willets Road
Albertson, NY 11507

Bernice Little-Mundle, D D S
PO Box 10204
Silver Springs, MD 20904

John Murad, Jr
Hancock Estabrook, LLP
1500 AXA Tower
100 Madison Street
Syracuse NY 13202

Kathleen M Reilly
Damon Morey, LLP
The Avant Building, Suite 1200
200 Delaware Avenue
Buffalo, NY 14202

Gordon D Iresch
Feldman Kieffer, LLP
110 Pearl Street, Suite 400
Buffalo, NY 14202

Re: Plaintiffs' Dental Records

Dear Counsel:

Enclosed you will find a CD containing dental records for the 30 plaintiffs whose claims are filed in the Angus, Varano and Johnson cases The CD contains a single pdf for each

of the 30 plaintiffs In that pdf, you will find the Small Smiles' records we obtained from the clinics as part of our pre-suit requests

To the extent we have received them, each pdf also contains various other dental records we have obtained from other dentists/clinics that have treated these plaintiffs. We will forward additional dental records as they are received

We are also enclosing a list of presently known dental and other medical providers that have treated the 30 plaintiffs. We anticipate providing you with various authorizations for these 30 plaintiffs in the near future so that you can begin the process of obtaining these records on your own should you choose to do so

We also anticipate forwarding a form of a Protective Order for your consideration and review in the coming days In the meantime, we request that you keep these records confidential and not disclose them beyond your clients or any consultants with whom you may be working until such time that the parties either agree to an Order or the issue is otherwise resolved by the Court. Please note, if you are unwilling to keep these records confidential on these terms, please advise me immediately and return the CD at your earliest convenience.

Thanks in advance for your consideration and if you have any questions, please feel free to contact me.

Sincerely,

P. Kevin Leyendecker

Enclosures
CC: Pat Higgins (w/out enclosure)

Plaintiff	Dentists/Health Care Providers	Address
<u>Jacob Angus</u>		
producing documents JA 1 - 109		
JA 1 - 77	Colonie Clinic	
JA 78 - 109	Pediatric Dentisty of Clifton Park	532 Moe Road; Clifton Park, NY 12065
	William A Gratton	55 Mohawk Street; Cohes, NY 12047
	Four Seasons Pedatrics	532 Moe Road; Clifton Park, NY 12065
	Samaritan Hospital	2215 Burdett Avenue; Troy, NY 12180
	St. Marys Hospital	4611 Massachusetts Avenue; Troy, NY 12180
	Ellis Hospital	1101 Nott Street; Schenectady, NY 12308
	Community Care - Capital Region Health Park	711 Troy-Schenectady Road; Latham, NY 12110
<u>Isaiah Berg</u>		
producing documents IB 1 - 66		
IB 1 - 66	Colonie Clinic	
<u>Jeremy Bohn</u>		
producing documents JB 1 - 66		
JB 1 - 51	Small Smiles Dentistry of Syracuse	
JB 52 - 66	Dr Albino Ballini - Rome Family Dental Service	215 N. Washington Street; Rome, NY 13440
JB 51	Dr Mukesh Patel	107 W Hinds Avenue; Sherrill, NY 13461
	Dr Vivian Taylor - Rome Family	1801 Black River Boulevard; Rome, NY 13440
	Dr Danielle A Katz - Upstate Medical University	750 Adams Street; Syracuse, NY 13210
	St Lukes Hospital	1656 Champlin Avenue; Utica, NY 13501
<u>Kevin Butler</u>		
producing documents KB 1 - 48		
KB 1 - 30	Small Smiles Dentistry of Rochester	
KB 31 - 48	Eastman Institute For Oral Health	601 Elmwood Avenue; Rochester, NY 14620
	Westside Health Services - Brown Square Center	322 Lake Avenue; Rochester, NY 14608
	Dr. Debbie Kranz - Highland Family Medicine	777 South Clinton Avenue; Rochester, NY 14620
	Strong Memorial Hospital	601 Elmwood Avenue; Rochester, NY 14642
	Highland Hospital	1000 South Avenue; Rochester, NY 14620
	Unity St Mary's Urgent Care	89 Genessee Street; Rochester, NY 14611
<u>Briana Carter</u>		
producing documents BC 1 - 33		
BC 1 - 33	Colonie Clinic	
	Dr. Bethany Broderick or Dr Sinan Abdullaj - Hometown Health Center	1044 State Street; Schenectady, NY 12307
	Dr. Lynn Hickey	1184 State Route 50; Ballston Lake , NY 12019
	Ellis Hospital McClellan Campus	600 McClellan Street; Schenectady, NY 12304
	Family Medical Care	7 Culligan Drive; Scotia, NY 12302
<u>Shawn Darling</u>		
producing documents SD 1 - 60		
SD 1- 60	Small Smiles Dentistry of Syracuse	
	St Joseph's Hospital - Dental Services	101 Union Avenue; Syracuse, NY 13203
	St Joseph's Hospital Health Center	301 Prospect Avenue; Syracuse, NY 13203
	Strong Memorial Hospital	601 Elmwood Avenue; Rochester, NY 14642
<u>Joseph Ferguson</u>		
producing documents JF 1 - 41		
JF 1 - 41	Colonie Clinic	
	Family & Cosmetic Dentistry	756 Madison Avenue, #1; Albany, NY 12208
	Albany Medical Pediatric Group	1 Clara Barton Drive; Albany, NY 12208
	New York- Presbyterian Hospital - Weill Cornell Medical Center	525 E 68th Street; New York, NY 10065
	Albany Medical Center	45 New Scotland Avenue; Albany , NY 12208

Plaintiff	Dentists/Health Care Providers	Address
Ariana Flores producing documents AF 1 - 33		
AF 1 - 25	Small Smiles Dentistry of Rochester	
AF 26 - 33	Dr Mooney- Pluta Dental Center at Rochester General Hospital	1425 Portland Avenue; Rochester, NY 14621
	Rochester General Pediatrics	1425 Portland Avenue; Rochester, NY 14621
	Rochester General Emergency - Health Information Management	1425 Portland Avenue; Rochester, NY 14621
	Joseph C Wilson Center - Lifetime Health Group	800 Carter Street; Rochester, NY 14621
Julie M. Fortino producing documents JMF 1 - 41		
JMF 1 - 41	Small Smiles Dentistry of Syracuse	
	Cicero Dental Associates	7770 Frontage Road; Cicero, NY 13039
	Brewerton Family Dentistry	5501 Bartel Road; Brewerton, NY 13209
	Dr Cathy Barry - Chestnut Ridge Health Center	8280 Willett Parkway, Suite 201; Baldwinsville, NY 13027
	Dr Mark McConn - North Medical Family Physicians	5100 W Taft Road; Liverpool, NY 13088
	Crouse Irving Hospital	736 Irving Avenue; Syracuse, NY 13210
	Central Square Health Center	3045 East Avenue; Central Square, NY 13036
Shadaya Gilmore producing documents SG 1 - 26		
SG 1 - 26	Colonie Clinic	
	Dr Kenneth Schwartz	833 Union Street; Schenectady, NY 12308
	Pediatric Dentistry of Clifton Park	532 Moe Road; Clifton Park, NY 12065
	Ellis Pediatric Health Center	624 McClellan Street #G05; Schenectady, NY 12304
Desiraee Hager producing documents DH 1 - 38		
DH 1 - 34	Colonie Clinic	
DH 35 - 38	Dr Stanley Snyder	2825 South Main Street; Maryville, MO 64468
	Dr Eric McMahon - Pediatric Denstistry of Clifton Park	532 Moe Road; Clifton Park, NY 12065
	Hometown Health Center	1044 State Street; Schenectady, NY 12307
	Heartland Hospital	5325 Faraon Street; St Joseph, MO 64507
BreYonna Howard producing documents BH 1 - 64		
BH 1 - 50	Small Smiles Dentistry of Rochester	
BH 51 - 56	Eastman Institute for Oral Health	601 Elmwood Avenue; Rochester, NY 14620
BH 57 - 64	Dr Aslani Breit	1655 Elmwood Avenue, Suite 120; Rochester, NY 14620
	Dr. Steven Scofield - Culver Medical Group	913 Culver Road; Rochester, NY 14609
	Rochester General Medical Group (Allergist)	224 Monroe Avenue; Rochester, NY 14607
	Strong Memorial Hospital	601 Elmwood Avenue; Rochester, NY 14642
	Rochester General Hospital (Pediatrics)	1425 Portland Avenue; Rochester, NY 14621
	Rochester General Hospital (Dental)	1425 Portland Avenue; Rochester, NY 14621
Kenneth Kenyon producing documents KK 1 - 63		
KK 1 - 47	Small Smiles Dentistry of Syracuse	
KK 48 - 63	Cicero Dental Associates	7770 Frontage Road; Cicero, NY 13039
	Upstate University Hospital	750 East Adams Street, #5142; Syracuse, NY 13210
	Parish Health Center - Oswego Hospital	10 Carlton Drive; Parish, NY 13131
Aalyiarose Labombard-Black producing documents ALB 1 - 19		
ALB 1 - 19	Colonie Clinic	
	Dr Downs - Schenectady Family Health	615 Union Street; Schenectady, NY 12305

Plaintiff	Dentists/Health Care Providers	Address
Manuel Laborde		
producing documents ML 1 - 17		
ML 1 - 17	Colonie Clinic	
Shiloh Lorraine		
producing documents SL 1 - 16		
SL 1 - 15	Small Smiles Dentistry of Rochester	
SL 16	Dr Jordan Highman - Eastman Institute for Oral Health	601 Elmwood Avenue; Rochester, NY 14620
	Dr Stefanie King	500 Island Cottage Road; Rochester, NY 14612
	Strong Memorial Hospital	601 Elmwood Avenue; Rochester, NY 14642
	Dr Tebor -University Orthopedic Associates	49001 Lac De Ville Blvd ; Rochester, NY 14618
William Martin		
producing documents WM 1 - 27		
WM 1 - 23	Small Smiles Dentistry of Syracuse	
WM 24 - 27	Dr David Pearce - Gentle Dentistry Cosmetic & Aesthetic	30 West Genessee Street; Baldwinsville, NY 13027
	Dr Margaret Madonian - Dentistry for Children	600 Oswego Road, Suite B; Liverpool, NY 13088
	Community General Hospital	4900 Broad Road; Syracuse , NY 13215
	Fulton Health Center	422 S 4th Street, #500 ; Fulton , NY 13069
	North Medical Family Physicians Orthopedics & Rehabilitation	5100 West Taft Road, #1F; Liverpool, NY 13088
	Baldwinsville Family Medical Care	3452 New York 31; Baldwinsville, NY 13027
	Summerwood Pediatrics	5700 West Genessee Street, Suite 1; Camillus, NY 13031
Devan Mathews		
producing documents DM 1 - 41		
DM 1 - 41	Small Smiles Dentistry of Syracuse	
	Sitrin Dental	221 Broad Street, Suite 204; Oneida, NY 13421
	Kool Smiles	1852 Bluffton Road; Ft. Wayne, IN 46809
	Oneida Pediatric Group	421 Main Street; Oneida, NY 13421
	Dr Hamid J Obeid	107 East Chestnut Street, Suite 105; Rome, NY 13440
	Dr. Lakshmi Yalamanchali	2402 Lake Avenue; Ft Wayne, IN 46805
	Rome Memorial Hospital	1500 North James Street; Rome, NY 13440
	Oneida Healthcare Center	321 Genessee Street; Oneida, NY 13421
Samantha McLoughlin		
producing documents SM 1 - 22		
SM 1 - 22	Small Smiles Dentistry of Syracuse	
	Brewerton Family Dentistry	5501 Bartel Road; Brewerton, NY 13029
	Dr Shashikant Bhopale	33 East 1st Street; Oswego, NY 13126
	Oswego Hospital	110 West Sixth Stree; Oswego, NY 13126
	Upstate Childrens Hospital	750 East Adams; Syracuse, NY 13210
	Dr VanGorder - Oswego Health Clinic	522 South 4th Street; Fulton, NY 13069
Jacob McMahon		
producing documents JM 1 - 51		
JM 1 - 37	Small Smiles Dentistry of Syracuse	
JM 38 - 51	Dr Edward Robinson - Pediatric Dentistry & Orthodontist	8016 W Genessee Street; Fayetteville, NY 13066
	Dr Robert Dracker - Summerwood Pediatrics	4811 Buckley Road; Liverpool, NY 13088
	Dr Michael Parker - Center for Sinus & Allergy Care	5639 West Genessee Street; Camillus, NY 13031

Plaintiff	Dentists/Health Care Providers	Address
Kadem Montanye producing documents KM 1 - 39		
KM 1 - 38	Small Smiles Dentistry of Syracuse	
KM 39	Lourdes Oral Health Center	219 Front Street; Binghamton, NY 13905
	Patricia Digiovanna, FNP - Cortland Health Center	1259 Fisher Avenue; Cortland, NY 13045
	Paul Hodgeman, PA - Lourdes Family Practice	1130 Upper Front Street; Binghamton, NY 13905
Alexis Parker producing documents AP 1 - 104		Address
AP 1 - 84	Small Smiles Dentistry of Rochester	
AP 85 -86	Q Dental Group	1338 E Ridge Road, Rochester, NY 14621
AP 87 - 104	Eastman Institute for Oral Health	625 Elmwood Avenue; Rochester, NY 14620
	Genessee Pediatrics	222 Alexander Street, Suite 4100; Rochester, NY 14605
	Strong Memorial Hospital	601 Elmwood Avenue; Rochester, NY 14642
	Rochester General Health System	1425 Portland Avenue; Rochester, NY 14621
Ashely Parker producing documents AP 1 - 20		
AP 1 - 20	Colonie Clinic	
	Dr. James McDonnell - Pediatric Dentistry of Clifton Park	532 Moe Road; Clifton Park, NY 12065
	Dr Kenneth Schwartz	833 Union Street; Schenectady, NY 12308
	Hometown Health Center	1044 State Street; Schenectady, NY 12307
Brandie Ralston producing documents BR 1 - 25		
BR 1 - 21	Small Smiles Dentistry of Rochester	
BR 22 - 25	Eastman Institute for Oral Health	625 Elmwood Avenue; Rochester, NY 14620
	Lovejoy Family Medicine Center	777 South Clinton Avenue; Rochester, NY 14620
	University of Rochester Highland Hospital	1000 South Avenue; Rochester, NY 14620
Lesana Ross producing documents LR 1 - 60		
LR 1 - 51	Small Smiles Dentistry of Rochester	
LR 52 - 60	Q Dental	1225 Jefferson Road, Rochester, NY 14623
	Dr Correne Wirt - Brighton Pediatric Group	900 W Fall Road, Suite 1C; Rochester, NY 14618
	Strong Memorial Hospital	601 Elmwood Avenue; Rochester, NY 14642
	Rochester General Hospital	1425 Portland Avenue; Rochester, NY 14621
I'Yana Garcia Santos producing documents IGS 1 - 48		
IGS 1 - 48	Small Smiles Dentistry of Rochester	
	Eastman Institute for Oral Health	625 Elmwood Avenue; Rochester, NY 14620
Rayne Shellings producing documents RS 1 - 26		
RS 1 - 26	Small Smiles Dentistry of Syracuse	
	Dr Mohammad Djafari	15 Kennedy Parkway; Cortland, NY 13045
	Dr Joan Pelegrino - SUNY Upstate Medical University	725 Irving Avenue, Suite 112; Syracuse , NY 13210
	Dr. Mirza Berg - SUNY Upstate Medical University	725 Irving Avenue, Suite 112; Syracuse , NY 13210
	SUNY - Upstate Medical University - Division of Dentistry	90 Presidential Plaza, Fl 4; Syracuse, NY 13202
	St Joseph s Hospital Health Center	301 Prospect Avenue; Syracuse, NY 13203
	Cortland Memorial Hospital	134 Homer Avenue; Cortland, NY 13045

Plaintiff	Dentists/Health Care Providers	Address
Corey Smith		
producing documents CS 1 - 82		
CS 1 - 69	Small Smiles Dentistry of Rochester	
CS 70 - 82	Eastman Institute for Oral Health	625 Elmwood Avenue; Rochester, NY 14620
	Dr James Campbell - Rochester General Hospital	1425 Portland Avenue; Rochester, NY 14621
Jon Taber		
producing documents JT 1 - 16		
JT 1 - 16	Small Smiles Dentistry of Rochester	
	Eastman Institute for Oral Health	625 Elmwood Avenue; Rochester, NY 14620
Zakary Wilson		
producing documents ZW 1 - 24		
ZW 1 - 24	Colonie Clinic	
	Dr Farzad Sani - Pediatric Dentistry of Glen Falls	88 Broad Street; Glens Falls, NY 12801
	Pediatric Dentistry of Clifton Park	532 Moe Road; Clifton Park, NY 12065
	Dr Andrea Carrasco - Five Corners Family Practice	3040 Broadway Street; Schenectady, NY 12306
	Burnt Hills Healthcare	815 State Route 50; Burnt Hills, NY 12027
	Glenville Health Center	460 Saratoga Road; Scotia, NY 12302

M|L
MORIARTY LEYENDECKER
A Professional Corporation
Attorneys at Law

JAMES R MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty com

P KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty com

HILARY S GREENE
Licensed in Texas
Hilary@Moriarty com

November 1, 2011

VIA REGULAR MAIL

Thomas B Cronmiller
Tara J. Sciortino
Paul A. Sanders
Hiscock & Barclay
2000 HSBC Plaza, 100 Chestnut Street
Rochester, New York 14604

Dimitri Filostrat, D D S
6709 Gillen Street
Metairie, LA 70003

Dennis A First
O'Connor, O'Connor, Bresee & First, P C
20 Corporate Woods Boulevard
Albany, NY 12211

Stephen T Helmer
Mackenzie Hughes, LLP
101 S Salina Street, Suite 600
Syracuse, NY 13202

Kevin S. Hulslander
Smith, Sovik, Kendrick & Sugnet, P C
250 South Clinton St.
Syracuse, NY 13202

Theresa B. Marangas
Thomas M Witz
Wilson Elser Moskowitz Edelman
677 Broadway
Albany, NY 12207

John A McPhilliamy
Ahmuty, Demers & McManus
200 I U Willets Road
Albertson, NY 11507

John Murad, Jr
Hancock Estabrook, LLP
1500 AXA Tower
100 Madison Street
Syracuse NY 13202

Kathleen M Reilly
Damon Morey, LLP
The Avant Building, Suite 1200
200 Delaware Avenue
Buffalo, NY 14202

Gordon D. Tresch
Feldman Kieffer, LLP
110 Pearl Street, Suite 400
Buffalo, NY 14202

Andrew Knoll
Scolaro Shulman Cohen Fetter & Burstein
507 Plum Street, Suite 300
Syracuse NY 13204

Re: Plaintiffs' Arons Authorizations

Dear Counsel:

Enclosed you will find a CD containing the Arons Authorizations for 23 of the 30 plaintiffs We will forward the remaining authorizations once we receive the necessary power of attorney forms

Thanks in advance for your consideration and if you have any questions, please feel free to contact me

Sincerely,

P. Kevin Leyendecker

P Kevin Leyendecker

Enclosures
CC: Pat Higgins (w/out enclosure)

M|L

MORIARTY LEYENDECKER

A Professional Corporation
Attorneys at Law

JAMES R MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty com

P KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty com

HILARY S GREENE
Licensed in Texas
Hilary@Moriarty com

November 22, 2011

VIA REGULAR MAIL

Theresa B. Marangas
Thomas M Witz
Elizabeth J Grogan
Wilson Elser Moskowitz Edelman
677 Broadway
Albany, NY 12207

Thomas B Cronmiller
Tara J. Sciortino
Paul A. Sanders
Hiscock & Barclay
2000 HSBC Plaza,
100 Chestnut Street
Rochester, New York 14604

Dennis A. First
George J. Hoffman, Jr
O'Connor, O'Connor, Bresee & First
20 Corporate Woods Boulevard
Albany, NY 12211

John A McPhilliamy
Ahmuty, Demers & McManus
200 I U Willets Road
Albertson, NY 11507

John Murad, Jr
Christina Juliano
Hancock Estabrook, LLP
1500 AXA Tower
100 Madison Street
Syracuse NY 13202

Kathleen M Reilly
Damon Morey, LLP
The Avant Building, Suite 1200
200 Delaware Avenue
Buffalo, NY 14202

Gordon D. Tresch
Feldman Kieffer, LLP
110 Pearl Street, Suite 400
Buffalo, NY 14202

Kevin S Hulslander
Andrew S Horsfall
Smith, Sovik, Kendrick & Sugnet
250 South Clinton St.
Syracuse, NY 13202

Stephen T Helmer
Mackenzie Hughes, LLP
101 S Salina Street, Suite 600
Syracuse, NY 13202

Andrew Knoll
Scolaro Shulman Cohen Fetter & Burstein
507 Plum Street, Suite 300
Syracuse NY 13204

Dimitri Filostrat, D D S.
6709 Gillen Street
Metairie, LA 70003

Re: Plaintiff Record and Arons' Authorizations

Dear Counsel:

Enclosed you will find a CD containing Records Authorizations for the subsequent treating dentists for 26 of the 30 plaintiffs. We will forward the remaining authorizations once we receive the necessary power of attorney forms

Additionally, we have enclosed Arons' Authorizations for Jessalyn Purcell A/N/F of Isaiah Berg, Brenda Fortino A/N/F of Julie Fortino, Demita Garrett A/N/F of I'Yana Garcia Santos and Frances Shellings A/N/F of Rayne Shellings

Thanks in advance for your consideration and if you have any questions, please feel free to contact me

Sincerely,

P. Kevin Leyendecker

P Kevin Leyendecker

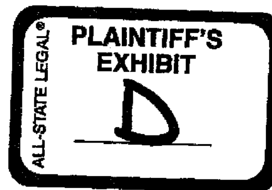
Enclosure
CC: Pat Higgins (w/enclosure)

JAMES R MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty.com

P KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty.com

M|L

MORIARTY LEYENDECKER
A Professional Corporation
Attorneys at Law
www.moriarty.com



HILARY S. GREENE
Licensed in Texas
Hilary@Moriarty.com

November 29, 2011

VIA EMAIL

John McPhilliamy
Ahmuty, Demers & McManus
200 I U Willets Road
Albertson, New York 11507

Theresa Marangas
Wilson Elser Moskowitz Edelman & Dicker
677 Broadway
Albany, New York 12207

Re: Revised Arons' Authorizations

Dear John & Teresa:

Enclosed you will find a single bookmarked PDF containing revised Arons Authorizations per your request These authorizations are directed to all presently known dental providers (other than Small Smiles) who have seen the plaintiffs

The PDF contains authorizations for 27 of the 30 plaintiffs I will forward authorizations for the 3 remaining Plaintiffs once I receive the necessary power of attorney forms from those clients

If you have any questions, please feel free to contact me

Sincerely,

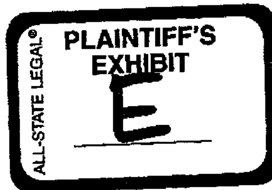
P Kevin Leyendecker

Enclosures
CC: All Counsel
Pat Higgins

JAMES R MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty.com

P KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty.com

M|L
MORIARTY LEYENDECKER
A Professional Corporation
Attorneys at Law
www moriarty com



HILARY S GREENE
Licensed in Texas
Hilary@Moriarty.com

December 2, 2011

VIA EMAIL

John McPhilliamy
Ahmuty, Demers & McManus
200 I. U Willets Road
Albertson, New York 11507

Re: Powers of Attorney

Dear John:

Enclosed you will find a single bookmarked PDF containing the executed Powers of Attorney for use in connection with the authorizations we have and will provide in this case

The PDF contains POAs for 27 of the 30 plaintiffs. I will forward the POAs for the 3 remaining Plaintiffs once I receive them from those clients

If you have any questions, please feel free to contact me.

Sincerely,

P Kevin Leyendecker

Enclosure
CC: All Counsel
Pat Higgins

FAX: 713 528 1390
4203 MONTROSE STE 150 HOUSTON TEXAS 77006 713 528 0700 | 800 677 7095
1123 SPRUCE STREET STE 200 BOULDER COLORADO 80302 303 495 2658

JAMES R. MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty.com

P. KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty.com

M|L
MORIARTY LEYENDECKER
A Professional Corporation
Attorneys at Law
www.moriarty.com

HILARY S. GREENE
Licensed in Texas
Hilary@Moriarty.com

December 5, 2011

VIA EMAIL

John McPhilliamy
Ahmuty, Demers & McManus
200 I. U. Willets Road
Albertson, New York 11507

Re: Hippa Authorizations (Dental)

Dear John:

Enclosed you will find a single bookmarked PDF containing Hippa Authorizations (Dental) for use in connection with this case. I have included the dental providers identified in your letters from November 28th for twenty-seven (27) of the thirty (30) plaintiffs.

The three (3) plaintiffs not included are Joseph Ferguson, Manual Laborde and Aalyiarose Labombard-Black. I will forward authorizations for these three as soon as I receive the necessary powers of attorney.

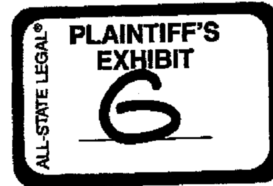
If you have any questions, please feel free to contact me.

Sincerely,

P. Kevin Leyendecker

Enclosure
CC: All Counsel
Pat Higgins

FAX: 713.528.1390
4203 MONTROSE STE. 150 HOUSTON TEXAS 77006 713.528.0700
800.677.7095
1123 SPRUCE STREET STE. 200 BOULDER COLORADO 80302 303.495.2658



M|L

MORIARTY LEYENDECKER
A Professional Corporation
Attorneys at Law

JAMES R MORIARTY
Licensed in Texas and Colorado
Jim@Moriarty com

P KEVIN LEYENDECKER
Licensed in Texas
Kevin@Moriarty com

HILARY S GREENE
Licensed in Texas
Hilary@Moriarty com

February 15, 2012

VIA FEDERAL EXPRESS
7980 6290 3629

John A McPhilliamy
Ahmuty, Demers & McManus
200 I U Willets Road
Albertson, NY 11507

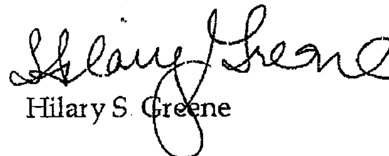
RE: Small Smiles Litigation – Lead Index Number 2011-2128

Dear John,

In response to your February 7, 2012 letter, enclosed please find the completed authorizations requested by the New York State Department of Health for 28 of the 30 trial plaintiffs The power of attorney forms are attached to each authorization

If you need any additional information please contact our office at 713-528-0700.

Sincerely,



Hilary S Greene

Enclosures

From: LexisNexis File & Serve
To: Kathleen D. DeCapita
Subject: ALERT: Transaction 45874230
Date: Monday, August 13, 2012 6:48:53 PM

To: Kathleen D DeCapita
Subject: Alert of Transaction 45874230

A new transaction with transaction ID 45874230 matches your alert criteria for:
Untitled

The details for this transaction are listed below.

Court: NY Supreme Court Onondaga County E-Service
Case Name: In re: Small Smiles Litigation
Case Number: 2011-6084, 2011-2128, 2011-6223
Transaction ID: 45874230
Document Title(s):
Affidavits in Opposition to Motion to Vacate Scheduling Order with exhibits and AOS
Affidavit of Service re NOM to Strike Objections to Discovery Requests
Authorized Date/Time: 8/13/2012 6:48:11 PM
Authorizer: Richard Frankel
Authorizer's Organization: Hackerman Frankel PC
Sending Parties:
Plaintiff

Check for additional details online at https://fileandserve.lexisnexis.com/Login/Login.aspx?FA=45874230 (login is required).

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