

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

PLAINTIFFS' JOINT
AFFIDAVIT IN OPPOSITION
TO DEFENDANTS' SUMMARY
JUDGMENT MOTIONS

RJI No. 33-11-1413

Index No. 2011-2128
Hon. Deborah H. Karalunas

STATE OF NEW YORK)
COUNTY OF ALBANY)

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

1. I am a partner at Powers & Santola, LLP, one of the firms representing the coordinated plaintiffs in the above action. I submit this affidavit to oppose the defendants' motions for summary judgment dismissing the Bohn, Lorraine, and Gilmore actions¹ pursuant to CPLR 3212, and for such other further relief as this Court deems just and proper.

2. This affirmation opposes all motions for summary judgment served and filed in this case returnable on July 10, 2013.²

¹ Kelly Varano a/n/f Jeremy Bohn; Elizabeth Lorraine a/n/f Shiloh Lorraine; Sherrain Rivera a/n/f Shadaya Gilmore.

² Defendants FORBA, LLC n/k/a LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY LLC; DD Marketing, Inc.; DeRose Management, LLC; Daniel F. DeRose; Michael A. DeRose, DDS; Edward J. DeRose, DDS; Adolph R. Padula, DDS; William A. Mueller, DDS; and Michael W. Roumph served a motion for summary judgment on May 31, 2013 and filed the same on June 3, 2013. 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 filed and served a motion for summary judgment on May 31, 2013. Defendant Gary Gusmerotti, DDS filed and served a motion for summary judgment on May 31, 2013. Defendants Koury Bonds, DDS, Naveed Aman, DDS, Yaqoob Khan, DDS, Maziar Izadi, DDS, Nassef Lancen, DDS, Ismatu Kamara, DDS each served a motion for summary judgment on May 31, 2013.

3. Part 1 (par. 5 through 27) summarizes the history of the case. Part 2 (par. 28 through 33) identifies the defendants. Part 3 (par. 34 through 37) summarizes the plaintiffs' claims. Part 4 (par. 36 through 38) summarizes the standard of decision for this Court on the summary judgment motions, and why defendants have not met their burden in moving for summary judgment. Part 5 introduces into the record part of plaintiffs' evidentiary proof opposing defendants' motions. It also demonstrates why multiple issues of fact preclude summary judgment on all of plaintiffs' causes of action.

4. I discuss each part below.

Part 1 - History of the Case

The Beginning

5. In 2010, top law enforcement officials from the Department of Justice and representatives of numerous state governments (including New York), announced that they had uncovered a nationwide scheme directed at infant dental patients and the Medicaid system. A dental clinic chain known as "Small Smiles", operating in twenty-two states – including New York – performed unnecessary, inappropriate, unsafe and excessive dental procedures on young children. It received hundreds of millions of taxpayer dollars.³

6. In late 2007 and 2008, former employees at Small Smiles' clinics in Maryland, Virginia, and South Carolina filed whistleblower lawsuits in which each, independently and under seal, alleged that during 2007 and 2008 New FORBA was committing Medicaid fraud by abusing small children.

7. In late 2007, the United States Department of Justice, along with the Federal Bureau of Investigation and the National Association of Medicaid Fraud Control Units, commenced a nationwide investigation of the FORBA operation.

³ As to par. 5-20, *infra*, see amended complaint [defendant Joint Exhibit W] at par. 5-19.

8. The New York Office of Medicaid Inspector General, with the New York State Attorney General and the New York Office of Professional Discipline, investigated the FORBA clinics operating in New York.

9. The United States Department of Justice and the State of New York 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.

10. The government investigations took approximately two years. In January 2010, New FORBA agreed to pay \$24 million to the United States, including \$1.15 million for the State of New York, as a result of the fraud scheme. New FORBA also agreed to pay \$2.3 million directly to the State of New York, including a substantial sum for fraudulent billings that took place before September 2006.

11. The United States Department of Justice described FORBA's scheme by stating, "[i]llegal conduct like this endangers a child's well-being, distorts the judgments of health care professionals, and puts corporate profits ahead of patient safety" and "we will not tolerate Medicaid providers who prey on vulnerable children and seek unjust enrichment at taxpayers' expense."

12. FORBA, its owners, and dentists have regularly been charged by federal and state authorities with committing Medicaid fraud, violating dental standards of care, and breaching other state dental rules in connection with the treatment they provided to young children. Between 2003 and 2008, FORBA, and its management and dentists were disciplined for fraud or inappropriate dental care in, at least, the following matters:

13. In 2003, the Arizona Dental Board revoked the license of a FORBA dentist after a young child died while strapped down to a papoose board at a FORBA clinic.

The dentist admitted that the clinic routinely restrained children under the age of five for the convenience of the clinic and not because restraints were medically necessary.

14. In 2003 or 2004, the Tennessee Dental Board investigated defendant William A. Mueller, D.D.S., one of the founders of FORBA and a company senior executive, for routinely and arbitrarily restraining young children without justification. The same board reprimanded him for engaging in false and misleading advertising on FORBA's behalf.

15. In 2004, the Colorado Dental Board disciplined defendants and FORBA Vice-Presidents Michael A. DeRose, D.D.S. and Edward J. DeRose, D.D.S., for training unlicensed dentists in Colorado. The Colorado Dental Board ordered them to stop aiding and abetting dentists from practicing dentistry in Colorado without a license.

16. In 2005, North Carolina disciplined defendant Michael A. DeRose, D.D.S. for employing and training dentists who performed unnecessary dental procedures on children, and for establishing office policies causing such overtreatment. These treatments included unwarranted baby root canals and stainless steel crowns. The North Carolina Board of Dental Examiners suspended the dental license of defendant Michael A. DeRose, D.D.S.

17. In 2004, the Colorado Dental Board began a new investigation of defendants Michael A. DeRose, D.D.S. and William A. Mueller, D.D.S. It focused on the same conduct that subjected defendant Michael A. DeRose, D.D.S. to discipline in North Carolina. At the end of the investigation in 2009, defendants Michael A. DeRose D.D.S. and William A. Mueller, D.D.S. permanently surrendered their Colorado dental licenses.

18. In 2006, FORBA's lead dentist in its Rochester, New York clinic was convicted of Medicaid fraud, sentenced to six months in prison, and had his New York

dental license revoked. FORBA repaid the Medicaid program hundreds of thousands of dollars for fraudulent billings.

19. Later in 2006, the Kansas Dental Board suspended defendant Michael A. DeRose, D.D.S.'s dental license for six months for the same wrongful acts that caused his suspension in North Carolina.

20. In 2008, the United States Department of Justice and North Carolina completed their investigations of defendant Michael A. DeRose, D.D.S., and his North Carolina dental clinics. The Assistant Attorney General of the United States concluded that defendant Michael A. DeRose, D.D.S. and the dentists at his clinics "subjected their child patients to invasive and sometimes painful procedures, often for the sake of obtaining money from the North Carolina Medicaid program." Defendant Michael A. DeRose, D.D.S. and his partner paid \$10 million to reimburse the United States government for money it paid for unnecessary root canals, stainless steel crowns and other dental procedures performed without informed consent.

21. The investigations and enforcement actions recovered some of the fraudulently received Medicaid monies, but they did not address the harm and injuries that the Small Smiles scheme inflicted on the children who were the grist for that scheme.

22. This case speaks for the children and seeks recovery for their injuries from the Forba scheme.

The litigation for the children

23. On April 4, 2011 the first twenty of more than thirty child plaintiffs filed suit in the Schenectady County Clerk's office and in the Onondaga County Clerk's office. Ten other plaintiffs filed suit in the Monroe County Clerk's office on June 13, 2011. A copy of the summons and certificates of merit filed in the three actions are

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attached as Exhibit 1.⁴ All actions as of September 1, 2011 were coordinated in Onondaga County. Defendants' Joint Exhibit PP contains a copy of the coordination order.

24. A copy of a chart previously provided to this Court showing the plaintiffs in each coordinated action and the defendants sued in each county is attached as Exhibit 2.

25. The coordinated plaintiffs in all cases pled seven causes of action: fraud, breach of fiduciary duty, battery, negligence, malpractice, informed consent and violations of General Business Law (GBL) § 349-350. Plaintiffs also asserted negligence *per se* and concerted action. The parents did not plead individual claims or seek any damages. The children are the only parties seeking relief. The children as plaintiffs seek compensatory and punitive damages.

26. After issue was joined, the first coordinated justice collectively denied certain defendants' motion to dismiss the complaints by decision and order attached as Exhibit 3. Thereafter, the parties in Group 1⁵ – the Bohn, Gilmore and Lorraine actions⁶ – took and completed discovery.

27. Plaintiffs in the Bohn, Gilmore and Lorraine actions served and filed a note of issue on January 15, 2013. This Court, at an April 4, 2013 return date, set a briefing schedule for these summary judgment motions, by directive from the bench, a transcript of which is attached as Exhibit 4.

⁴ A full listing of all of plaintiffs' exhibits tendered in opposition to the defendants' motions is attached as an index to this affidavit. Plaintiffs are also providing a stand alone copy of the index for this court's convenience. Amended complaints in the three actions were filed on October 18, 2011. Defendants' Joint Exhibits W, I and P contain copies of the amended complaints.

⁵ The plaintiffs are divided into eleven groups. The Group 1 plaintiffs are Jeremy Bohn, Shadaya Gilmore and Shiloh Lorraine, Jr.

⁶ The Bohn action, along with nine other plaintiffs, was filed in Onondaga County on April 4, 2011. The Gilmore action, along with nine other plaintiffs, was filed in Schenectady County on April 4, 2011. The Lorraine action, along with nine other plaintiffs, was filed in Monroe County on June 13, 2011.

Part 2 – The Parties

28. Plaintiffs are Jeremy Bohn, Shiloh Lorraine, and Shadaya Gilmore. Each is a young child who treated at one of the Forba dental clinics in New York. Shiloh was one, Jeremy three, and Shadaya six, at the time. Each received unnecessary baby root canals and crowns. Each was strapped to a board unable to move during their dental treatment. Each was separated from their parents who were told to stay in the waiting area while their young children were treated. And each was a victim of the Forba scheme, which caused them to suffer egregiously inappropriate dental care done for the sake of increasing Forba's profits.

29. The "Old Forba" defendants are FORBA, LLC, FORBA NY LLC, DD Marketing, Inc. and DeRose Management, LLC. Old Forba was engaged in the business of opening and operating Medicaid dental clinics throughout the country. Old Forba began and continued the scheme detailed in Part 5 below until the Individual Defendants sold the business to New Forba. The sale occurred on September 26, 2006.⁷

30. The "Individual Defendants" are Danny DeRose, Dr. Edward DeRose, Dr. Michael DeRose, Dr. Adolph Padula, Dr. William Mueller and Michael Roumph. They were the founders, owners, officers, and board members of Old Forba.⁸ They planned, directed, actively participated in, and were the intended and actual beneficiaries of the

⁷ Ex. 919 [excerpts from December 3, 2012 dep tr Rich Lane] at 64 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at TT).

⁸ Ex. 24 [December 23, 2005 Lane email] at 28032; ex. 7 [Asset Purchase Agreement] at 41076; ex. 909 [excerpts from October 23, 2012 dep tr Dan DeRose] at 25-7 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at SS); ex. 927 [excerpts from November 30, 2012 dep tr William Mueller] at 8 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at C).

scheme detailed in Part 5. Each Individual Defendant received between \$37 million and \$100 million from Forba's illicit scheme.⁹

31. In addition to planning and directing the scheme, the Individual Defendants each played discrete roles in its implementation. Dan DeRose was Old Forba's President.¹⁰ He and Roumph were in charge of the day to day operations of the clinics, with DeRose in charge of "all clinic activity" and Roumph in charge of "clinic performance."¹¹ Mueller was Old Forba's Medical Director.¹² He developed and conducted Forba's new dentist training program through which the Forba¹³ dentists were indoctrinated into the Forba clinic model.¹⁴

32. As discussed below in Part 5, the Forba treatment philosophy was to treat patients for Forba's profit interests rather than their medical needs. Mueller, Edward DeRose, Michael DeRose and Adolph Padula participated in training the new dentists.¹⁵ In addition, as discussed below in Part 5, in order to conceal Old Forba's illegal ownership and control of the clinical operations of the Small Smiles clinics, Padula held himself out as the owner of the New York clinics when in fact Old Forba was the owner.

33. The "New Forba" Defendants are FORBA Holdings, LLC, and FORBA NY LLC. As detailed below in Part 5, after New Forba purchased the business in September 2006, it continued to carry out the same fraudulent scheme by employing the same dentists, staff and regional managers and utilizing the same tactics.

⁹ Ex. 909 [Dan DeRose] at 119; ex. 6 [Old Forba Ans. to Interrog.] at Nos. 3 and 29 (as to Ed DeRose); ex. 929 [excerpts from November 29, 2012 dep tr Adolph Padula] at 51 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at XX); ex. 927 [Mueller] at 55-8; ex. 908 [excerpts from November 27, 2012 dep tr Michael DeRose] at 56 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at UU); ex. 6 at Nos. 3 and 29 (as to Roumph).

¹⁰ Ex. 24 at 28032-3.

¹¹ *Id.* at 28033; ex. 909 [Dan DeRose] at 127-8; ex. 919 [Lane] at 81-3.

¹² Ex. 909 [Dan DeRose] at 132-3.

¹³ Dentists means those dentists working at Small Smiles dental clinics, including the Dentist Defendants identified in footnote 2 above.

¹⁴ Ex. 927 [Mueller] at 83-4.

¹⁵ *Id.* at 81; ex. 919 [Lane] at 143-4, ex. 43 [September 9, 2004 Mueller email]; ex. 927 [Mueller] at 97-8, 138-9.

34. The Dentist Defendants are Drs. Koury Bonds, Naveed Aman, and Yaqoob Khan (treated plaintiff Jeremy Bohn at the Small Smiles Syracuse Clinic); Drs. Gary Gusmerotti and Ismatu Kamara (treated plaintiff Shiloh Lorraine at the Small Smiles Rochester Clinic); and Drs. Maziar Izadi and Naseef Lancen (treated plaintiff Shadaya Gilmore at the Small Smiles Albany Clinic). Each Dentist Defendant was employed by one of the New York clinics (Defendants Small Smiles Dentistry of Syracuse, LLC; Small Smiles Dentistry of Rochester, LLC; and Small Smiles Dentistry of Albany, LLC collectively referred to as the Clinic Defendants). The Dentist Defendants allowed Forba to influence them to treat the plaintiffs for Forba's profit interests rather than the plaintiffs' medical needs.

Part 3 – Summary of the claims

35. A dentist's most fundamental duty is to act solely in the best interests of her patients and to do them no harm. This case is about a fraudulent corporate scheme designed to interfere with that duty and the resulting abuse inflicted on young children.

36. The evidence detailed in Part 5 below shows the defendants engaged in a scheme that caused the Dentist Defendants to treat patients at the Forba dental clinics, including plaintiffs, for the purpose of increasing Forba's profits rather than for the medical needs of the patients.

37. As discussed in plaintiffs' memorandum of law, New York law prohibits ownership and thus control of the clinical operations of a dental clinic by anyone other than New York licensed dentists. The purpose of the prohibition is to protect patients from the danger that a lay corporation that controls the clinical operations will cause the dentists to treat patients for the purpose of increasing profit rather than for the best interests of the patient.

38. The evidence shows that both Old and New Forba intentionally and secretly controlled the clinical operations of the Clinic Defendants in knowing violation of this law. This caused the very conduct the law is designed to prohibit by pressuring and threatening dentists to adhere to a profit driven clinical model, and caused the inappropriate care and abuse of the plaintiffs that the law is designed to prevent. The evidence also shows that the Individual Defendants devised and directed the scheme.

Part 4 - The summary judgment standard and the defendants' failure to meet it

39. As discussed in the accompanying memorandum of law, summary judgment is a drastic remedy that will only lie when the moving party meets her burden of proof and eliminates all material issues of fact on each and every element of all causes of action at issue in the plaintiffs' case. Should the movant not meet this heavy burden, the courts deny summary judgment irrespective of the opposing parties' proof. It is therefore not enough to look for gaps in the opponent's case. If that is the extent of the motion, then it should not be made, as the movant will not have met her burden and the motion will be summarily denied.

40. Defendants have not met their summary judgment burden on these motions. As discussed more fully in the accompanying memorandum of law, the Dentist Defendants have submitted affidavits that contradict their deposition testimony. For example, Drs. Bond and Kamara testified at deposition that they did not recall their treatment of the children plaintiffs, and thus were relying on their records. On this motion, however, they submit an affidavit indicating that they are supporting their affidavit with their "general recollection" of such treatment. The appellate divisions have rightly looked down upon parties submitting inconsistent and contradictory affidavits and have disregarded them. This Court should do the same here.

41. The party affidavits submitted by the Dentist Defendants also attempt to rely on their custom and practice to explain away their damning dental records. But as discussed more fully in the accompanying memorandum of law, a party seeking to rely on habit must submit a highly detailed affidavit with specific evidence of reliability and frequency of usage and specific procedures and number of times of the procedures, as a pre-condition for this Court to accept the affidavit.

42. In this case, as discussed in the accompanying memorandum of law, the Dentist Defendants have not tendered the necessary detailed affidavits, and therefore this Court should disregard the party affidavits on this basis, leaving the Dentist Defendants unable to meet their burden on the motion.

43. As also more fully discussed in the accompanying memorandum of law, in a medical malpractice action, the movant must address all facts and allegations forming the basis of the plaintiffs' case in the complaint, the bill of particulars and the medical records to meet her burden on the motion. In this case, the Dentist Defendants have not addressed all such facts and allegations, and therefore they have not met their burden on the motion. Among other things, for example, they have not addressed plaintiffs' allegations and proof that they were not qualified to treat pediatric patients, use or recommend the use of restraints, or that they improperly did not refer pediatric patients out to trained pediatric dentists. Plaintiffs address the specifics of these failures in their memorandum of law.

44. The Dentist Defendants also tender expert affirmations and party affidavits to convince this Court that they have met their burden on this motion. But, as discussed in the accompanying memorandum of law, expert affirmations or affidavits cannot be conclusory, vague. They must address relevant facts in the medical records and record of the case. The appellate divisions instruct the motion court to disregard

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these affirmations or affidavits if they suffer any of these defects. As discussed in the accompanying memorandum of law, these defects present in the defendants' expert affidavits and affirmations, so the same result should follow. The defendants also ask this Court to accept their version of facts as true, as a precondition to finding that the defendants have met their burden on the motion, and as to whether a material issue of fact exists in the record. But creditability remains a classic bar to summary judgment.

45. It is not this Court's job to decide whether the defendants are now being truthful or whether their actions taken before the fraud was uncovered show their true colors. That is for the jury, and this is one of the historic jury functions in this society. So it does not meet the defendants' burden for certain of the defendants to claim that they never had an intent to deceive, or that they didn't participate in the scheme, or that they were not influenced by the scheme. This Court has to believe them to consider this competent evidence supporting the motion, and that is something that only a jury can decide.

46. As further discussed in the accompanying memorandum of law, even if the defendants had satisfied their initial burden - which plaintiffs show here that they did not - the court must search for issues of material fact. In doing so, the evidence is viewed in the light most favorable to the party opposing summary judgment, accepting as true all the evidence offered in opposition to the motion and all inferences that may be drawn from it. Summary judgment should be denied if there is any doubt as to the existence of disputed factual issues.

47. The evidence of defendants' fraudulent scheme creates material issues of fact that preclude summary judgment on all causes of action and claims.¹⁶ The evidence

¹⁶ Plaintiffs are not pursuing and, therefore, do not oppose summary judgment on the following claims or causes of action: (1) New Forba's successor liability (New Forba's Point VIII) ; (2) the liability of

of the scheme is discussed in detail in Part 5 of this affidavit. On the malpractice cause of action, the pediatric dentist affirmation tendered in opposition to the Dentist Defendants' motions demonstrates a genuine issue of material issue of fact that they deviated from the standard of care and that such deviation was a substantial factor in the plaintiffs' injuries.

a. Intentional Torts (Fraud, Battery, Breach of Fiduciary Duty)

48. New Forba and Old Forba argue for summary judgment as to the intentional torts (fraud, battery, and breach of fiduciary duty). They argue that there is no genuine issue of material fact that the Dentist Defendants had no intent to deceive. They rely on the self-serving testimony of the Dentist Defendants that the Dentist Defendants provided proper care to the plaintiffs in accordance with the standard of care and were not influenced by the Forba Defendants in their treatment. Notably, six of the seven Dentist Defendants do not even move for summary judgment on the intentional tort claims on this basis. This Court should deny this branch of the motion for two reasons.

49. First, intent to deceive by the Dentist Defendants is not essential to plaintiffs' intentional misconduct claims against the Forba Defendants and the Clinic Defendants. Whether the Dentist Defendants acted fraudulently or negligently in allowing themselves to be influenced by the Forba Defendants' fraudulent conduct, plaintiffs allege the Forba Defendants' and the Clinics' own conduct was fraudulent. The Forba Defendants and Clinic Defendants do not address those allegations on their

DeRose Management, LLC (Old Forba's Point VI); and (3) the liability of Dr. Gusmerotti as to causes of action for informed consent (his Point III), negligence per se (his Point IV), battery (his point VI), and violations of the General Business Law (his point VIII). As to all other matters as to which defendants have moved for summary judgment, plaintiffs oppose the motions.

argument based on the Dentist Defendants' intent. This precludes summary judgment on that basis.

50. Second, the record detailed below shows (1) defendants engaged in a scheme that caused the Dentist Defendants to treat patients at the Forba clinics, including plaintiffs, to increase Forba's profits rather than to address the medical needs of the patients, (2) defendants concealed from plaintiffs' parents that the treatment of their young children was for Forba's profit interests and not for the children's medical needs, (3) defendants used a fraudulent consent form that knowingly misrepresented there were "no known risks" to the use of restraints when defendants knew there were risks, and (4) the treatment plaintiffs received was egregiously below the standard of care.

51. This record contradicts the self-serving affidavits of the Dentist Defendants and creates a genuine issue of material fact as to whether they had an intent to deceive.

52. Plaintiffs do not believe New Forba is moving for summary judgment on the grounds that it (as opposed to the Dentist Defendants) did not have an intent to deceive. New Forba does not address this issue in its memorandum of law. But if New Forba has raised this issue in the Hulslander Affirmation, New Forba is in error. Whether New Forba had an intent to deceive is a genuine issue of material fact.

53. The record tendered by plaintiffs on this motion shows that the defendants engaged in a scheme that harmed the plaintiffs, and that they acted with an intent to deceive and fraudulently induced plaintiffs' treatment. Whether defendants had an intent to deceive and whether defendants fraudulently induced treatment are thus material issues of fact that preclude summary judgment.

54. Next, all defendants argue that even if they engaged in the scheme to and did provide care for Forba's profit interests rather than the medical needs of the plaintiffs and thereby committed the intentional torts of fraud, battery and breach of fiduciary duty, summary judgment on those claims should nonetheless be granted because they allegedly duplicate medical malpractice claims against the Dentist Defendants. Justice Cherundolo rejected this same argument in denying defendants' motions to dismiss. This Court should do the same. Contrary to defendants' argument and for the reasons set forth by Justice Cherundolo and in plaintiffs' memorandum of law, New York law does hold medical professionals accountable for intentional tortious conduct committed against their patients.

55. Dr. Gusmerotti also seeks summary judgment on the breach of fiduciary duty cause of action by denying that he holds a fiduciary duty to his patients. He further claims that plaintiffs have not sufficiently detailed the allegations against him. The identical arguments were made and rejected in the order denying the motions to dismiss. New York law recognizes that doctors and dentists have a fiduciary duty to their patients. Moreover, the allegations in the amended complaint fairly notified Dr. Gusmerotti of the factual basis for the breach of fiduciary cause of action.

b. General Business Law § 349

56. On the GBL § 349 cause of action, defendants argue that the allegedly undisputed evidence shows that their conduct was not consumer-oriented. Again, only the self-serving affidavits of the Dentist Defendants support this claim. From this, defendants argue that their conduct was private as to each plaintiff rather than a routine practice that could potentially affect other patients as well, and thus is not consumer-oriented.

57. The record tendered by plaintiffs on this motion demonstrating the scheme contradicts this evidence and creates genuine issues of material fact. Defendants schemed as a routine practice, to treat for Forba's profit interests rather than the medical needs of the patients. That scheme targeted all of the children in all of Forba's clinics and potentially affected them all. As discussed in plaintiffs' memorandum of law, that is consumer-oriented conduct. The evidence of the scheme thus creates a material fact issue as to whether defendants' conduct was consumer oriented.

c. The Individual Defendants

58. The Individual Defendants seek summary judgment as to all causes of action, including negligence,¹⁷ on a corporate veil argument. But a jury does not have to pierce the corporate veil to hold the Individual Defendants liable, and plaintiffs do not make such a claim in this case.

59. As discussed in plaintiffs' memorandum of law, corporate officers and directors are directly liable for a corporation's tortious conduct if they participated in that conduct. Plaintiffs do make such a claim in this case. This rule applies to all tortious conduct, including intentional and negligent conduct. As the Individual Defendants did not address this legal basis for the claims against them in the moving papers, their motion is properly denied.

60. The Individual Defendants do not argue for summary judgment by alleging that did not participate in the scheme. However, if they made such an argument, it would fail. The record overwhelmingly shows such participation. As

¹⁷ Plaintiffs assert the negligence claim against the Forba Defendants and the Individual Defendants. The Forba Defendants have not moved for summary judgment as to negligence.

discussed below, the Individual Defendants created the scheme, put it in place, directed it, had the motive for and benefitted from it.

61. On this record, whether they participated in Old Forba's tortious conduct is therefore at the very least a material issue of fact. Because the scheme amounts to intentional misconduct if done intentionally, and negligence if not intentional, whether the Individual Defendants participated in the scheme is a material issue of fact as to all the claims, which precludes summary judgment.

d. Malpractice

62. Plaintiffs allege the Dentist Defendants committed malpractice. Their motions for summary judgment on these causes of action should be denied. The record and plaintiffs' expert affirmation details the egregious treatment plaintiffs received from the Dentist Defendants, deviations in the standard of care, and that such deviations were a substantial factor in the plaintiffs' injuries.

e. Negligence *Per Se*, Concerted Action, And Punitive Damages

63. Plaintiffs allege the Forba Defendants were negligent *per se* by owning and operating the New York Small Smiles clinics in violation of the New York law that prohibits lay corporations from practicing dentistry. As set forth in plaintiffs' memorandum of law, the statute protects patients from lay corporations controlling dentists and causing them to treat for profits rather than for the medical needs of the patients.

64. The Forba Defendants' argument that violation of the statute is not negligence *per se* is wrong. A statute that restricts the manner in which conduct can be performed establishes a standard of care, the violation of which is negligence *per se*. Their argument that the evidence is undisputed that the violation did not cause harm to the plaintiffs is wrong. The record of the scheme shows that the Foba Defendants'

illegal operation of its clinics caused the Dentist Defendants to treat the plaintiffs for Forba's profit interests and not for the plaintiffs' medical interests. Plaintiffs are in the class the statute seeks to protect and suffered the harm the statute seeks to prevent, which precludes summary judgment.

65. This Court should also deny defendants' motion for summary judgment on plaintiffs' request for punitive damages. Plaintiffs have tendered proof in evidentiary form that the defendants were grossly negligent, reckless, intentional, and displayed indifference to and/or a reckless disregard of the health and safety of the plaintiffs and others. A jury could easily find punitive damages on the record that plaintiffs submitted on this motion under the above law.

66. The New Forba Defendants also argue that plaintiffs waived their punitive damages claim during the New Forba's bankruptcy proceeding. But that is simply not the case for the reasons set forth in plaintiffs' opposition to New Forba's motion to renew/reargue. Defendants' motion as to the concerted action claim should be denied because the evidence of the scheme creates a fact issue as to whether the defendants by their conduct implicitly agreed to engage in the scheme.

f. Informed Consent

67. The Dentist Defendants' motion as to the informed consent cause of action brought by Drs. Bonds, Izadi, Lancen and Kamara should be denied. The record raises material issues of fact as to whether a dentist should obtain consent before restraining a child, which risks of restraints should be disclosed and whether a reasonably prudent person in the position of one of the plaintiff's parents would consent to the restraints procedure if fully informed of the risks. These Dentist Defendants also did not meet their burden on this aspect of the motion, as they did not address whether a reasonable

person knowing of the risks of the procedures at issue would have consent to the procedure. Plaintiffs discuss this further in their accompanying memorandum of law.

g. Dr. Gusmerotti

68. Dr. Gusmerotti's motion as to the causes of action for fraud, breach of fiduciary and malpractice should be denied for the reasons stated above. He also moved for summary judgment claiming that Shiloh Lorraine is not seeking damages against him. This Court should deny this motion because the amended complaint, Shiloh Lorraine's expert disclosure, and answers in his discovery responses state that Shiloh was seeking to recover compensatory and punitive damages from Dr. Gusmerotti. These pleadings and responses also describe the nature of those damages.

69. Finally, Dr. Gusmerotti argues that he is entitled to summary judgment on the malpractice cause of action because his treatment was not a substantial factor in damaging Shiloh Lorraine. This Court should also reject this argument on this motion. Proximate cause is a material issue of fact for the jury - whether a substantial factor, or a concurrent substantial factor.

70. Plaintiffs in any event tendered the affirmation of a pediatric dentist in evidentiary form demonstrating that Dr. Gusmerotti's malpractice was a substantial factor in Shiloh Lorraine's damages and loss.

h. Summary

71. For these reasons and the reasons stated in plaintiffs' memorandum of law, this Court should deny defendants' motions for summary judgment.

Part 5 - Defendants' Fraudulent Scheme

72. The facts demonstrating the fraudulent corporate scheme are set forth below and arise from the tendered record. The exhibits accompanying this record are indexed for this Court in the attachment to this affidavit. The index is in numerical

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order and identifies and describes each exhibit. Documents marked with Bates numbers were produced in this case by a defendant.

A. Introduction: The Forba Clinical Model

73. Old Forba formed in 2001,¹⁸ to open and operate Medicaid dental clinics using the Forba clinic model.¹⁹ Forba operated all of its clinics the same.²⁰ The Forba clinic model was the foundation of Forba's scheme.

74. Forba opened the New York clinics in late 2004 (Rochester, Syracuse) and mid-2005 (Albany), with Albany as the thirtieth Forba clinic.²¹ By the time of the sale to New Forba in September 2006, Forba was operating 50 clinics.²² Forba's clinics typically operated under the trade name "Small Smiles."

75. New Forba continued the business Old Forba established by operating the clinics according to the Forba clinic model²³ and using Old Forba's dentists and Regional Directors to do so.²⁴

76. Deviation from the Forba clinic model was not an option under either Old or New Forba. The clinics operated as Forba dictated, as revealed by this December 29, 2004 directive concerning Forba's Atlanta clinic from Dan DeRose, President of Old Forba, to Roumph and another Forba manager:

¹⁸ Ex. 909 [Dan DeRose] at 19.

¹⁹ Ex. 58 [April 27, 2006 Dan DeRose email] at 1599862 ("Company Highlights – Replicable clinic model"); ex. 927 [Mueller] at 71; ex. 919 [Lane] at 14-15, 24-6; ex. 920 [excerpts from November 14, 2012 dep tr Michael Lindley] at 45-6 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at B).

²⁰ Ex. 927 [Mueller] at 71; ex. 919 [Lane] at 24-6; ex. 37 [December 29, 2004 Dan DeRose email]; ex. 530 [April 18, 2005 Rich Lane email]; ex. 514 [February 7, 2006 Rich Lane email]; ex. 59 [undated Andrus memo to Dan DeRose]; ex. 903 [October 25, 2012 dep tr Robert Andrus] at 133-7.

²¹ Ex. 11 [March 2, 2006 Reilly email].

²² Ex. 7 at 41179-85.

²³ Ex. 920 [Lindley] at 45-6.

²⁴ Ex. 920 [Lindley] at 80-1; ex. 24 at 28033; ex. 269 [October 18, 2006 Grossman email] at 132964.

Atlanta is a mess, a disappointment, a total disaster . . . referrals are being made daily this is not a FORBA clinic . . .

* * *

Here is what we are going to do . . . Sean will insure by his physical presence that . . . no more ideas that are not FORBA's will be fostered and they – each and EVERYONE – will do it our way or be terminated. . . .”²⁵

77. This was the way Forba ran all of its clinics. It was the Forba way or the highway. “Absolutely.”²⁶

78. Old Forba claims the “Forba way or the highway” did not apply to clinical matters.²⁷ The record, which creates issues of fact, shows it did.²⁸ Old Forba itself described its clinic model as including “specific dental procedures and how they should be performed.”²⁹

79. As with Old Forba, New Forba did not tolerate deviation from the model. New Forba's Regional Director for the New York clinics described it as follows:

[The dentists] can't get past the uncertainty of SS [stainless steel] crowns, pulpotomies, papoose, nitrous, the clinical kid related issues, and the Small Smiles treatment philosophies. They are scared.

* * *

As clinicians, we are formally trained to think much differently than the typical Small Smiles approach. Therefore, we must formally train to flip-flop our thinking.³⁰

B. Forba Secretly Owned the New York Clinics in Violation of The Law

80. As discussed in the accompanying memorandum of law, Forba's control of the clinical operations of the New York clinics was illicit and illegal. New York law

²⁵ Ex. 37.

²⁶ Ex. 909 [Dan DeRose] at 239.

²⁷ Ex. 909 [Dan DeRose] at 239-40; ex. 919 [Lane] at 150-3.

²⁸ Ex. 68 [January 1, 2005 Roumph email] at 59429; ex. 530; ex. 390 [July 17, 2005 Dan DeRose email]; ex. 514; ex. 59; ex. 903 [Andrus] at 133-7; ex. 44 [July 10, 2003 Andrus letter]; ex. 903 [Andrus] at 111-16; ex. 45 [October 7, 2005 Ken Knott email]; ex. 37; ex. 909 [Dan DeRose] at 240.

²⁹ Ex. 511 [September 12, 2003 Dan DeRose email] at 17816-7.

³⁰ Ex. 147 [December 17, 2007 Reilly email].

flatly prohibits ownership and thus control of the clinical operations of a dental clinic by anyone other than New York licensed dentists. The purpose is to protect dental patients from the danger of inappropriate care created when dentists are controlled by a lay corporation whose primary objective is profit. Forba violated this patient safety law by setting up sham local clinics purportedly owned by New York licensed dentists when in truth the clinics were owned and their clinical operations were controlled by Forba.

Old Forba

81. Old Forba was a family business, a small and tightly knit group.³¹ Individual Defendants Dan DeRose and Michael DeRose are Edward DeRose's sons. Adolph Padula is his brother in law.³² The three DeRoses, Adolph Padula and William Mueller were Forba's founders.³³ Together, these Individual Defendants constituted Old Forba's Board of Directors.³⁴ Together they owned 97.5% of Old Forba.³⁵

82. The Individual Defendants as Old Forba directors together decided all issues for Old Forba.³⁶ The decisions were unanimous.³⁷ The Individual Defendants decided that the clinics would be opened and operated according to the Forba clinic model.³⁸

83. Old Forba knew it could not own dental clinics in New York, as this would violate New York law against corporate ownership of dental practices.³⁹ Old

³¹ Ex. 909 [Dan DeRose] at 41; ex. 919 [Lane] at 80.

³² Ex. 909 [Dan DeRose] at 26-7.

³³ *Id.*

³⁴ *Id.*; ex. 24 at 28032

³⁵ Ex. 6 [Old Forba's Answers to Interrogatories] at No. 3.

³⁶ Ex. 919 [Lane] at 80.

³⁷ Ex. 929 [Padula] at 143.

³⁸ Ex. 919 [Lane] at 80-1; ex. 927 [Mueller] at 71; ex. 58 at 1599862.

³⁹ Ex. 929 [Padula] at 126-7.

Forba therefore made it appear to the State of New York and the public that Adolph Padula owned the New York clinics.⁴⁰

84. Before this decision, Adolph Padula was not licensed in New York. He obtained his New York dental license solely for the purpose to allow Old Forba to claim that he owned Old Forba's New York clinics.⁴¹

85. Despite this attempt to deceive, Old Forba was the true owner of the clinics. Under the Forba clinic model, all profit from all Forba clinics went to Forba.⁴² It funneled to Old Forba by Management Agreements with the clinics.⁴³ There was no negotiation of the Management Agreements.⁴⁴ Old Forba set the terms.⁴⁵

86. All cash in excess of expenses in all Old Forba clinics, including the New York clinics, went to Old Forba.⁴⁶ Padula did not receive any profit from the New York clinics.⁴⁷

87. The Individual Defendants knowingly decided to claim that Padula owned the New York clinics.⁴⁸ They also knowingly decided to direct all profits to Old Forba.⁴⁹

88. Adolph Padula ultimately "sold" the New York clinics for \$10 each because New Forba bought Old Forba and wanted to bring in its own designated owners.⁵⁰

⁴⁰ Ex. 929 [Padula] at 131; ex. 9 [April 14, 2004 Certified Copy of Syracuse filings with NY Secretary of State]; ex. 26 [April 14, 2004 Certified Copy of Rochester filings with NY Secretary of State]; ex. 27 [October 28, 2004 Certified Copy of Albany filings with NY Secretary of State].

⁴¹ Ex. 929 [Padula] at 64-5.

⁴² Ex. 909 [Dan DeRose] at 61-2; ex. 919 [Lane] at 58-60; ex. 929 [Padula] at 120-1.

⁴³ Ex. 929 [Padula] at 112-3.

⁴⁴ *Id.* at 116-7.

⁴⁵ *Id.* at 114-5.

⁴⁶ Ex. 919 [Lane] at 58-60.

⁴⁷ Ex. 929 [Padula] at 121.

⁴⁸ *Id.* at 131.

⁴⁹ *Id.*

⁵⁰ Ex. 929 [Padula] at 119-20; ex. 118 [January 1, 2007 Syracuse Purchase Agreement]; ex. 307 [January 1, 2007 Rochester Purchase Agreement]; ex. 308 [January 1, 2007 Albany Purchase Agreement].

89. Padula had no say in who bought the clinics or for how much.⁵¹ New Forba designated the “buyers”,⁵² and the \$10 nominal price.⁵³

New Forba

90. New Forba also knew and disregarded New York law prohibiting Forba from owning the New York clinics.⁵⁴ The ownership fraud continued after the sale in September 2006. New Forba, however, needed some time to name a new sham owner. Adolph Padula therefore kept his sham owner status of the New York clinics until January 1, 2007.

91. In September 2006, New Forba revised the Management Agreements with the New York clinics.⁵⁵ Again, there were no negotiations. New Forba set the terms.⁵⁶ And, once again, all clinic revenue in excess of expenses funnelled to New Forba under the Management Agreements.⁵⁷ Although he was the designated owner during this time, Padula admitted in sworn testimony that he had nothing to do with the clinics and thought New Forba was the owner.⁵⁸

92. New Forba decided that the new “owners” would be Dr. Bob Andrus and Dr. Ken Knott. Both were New Forba officers.⁵⁹ Andrus and Knott each paid \$5 for a 50% interest in each clinic.⁶⁰ There were no negotiations and the \$5 was a “nominal”

⁵¹ Ex. 929 [Padula] at 109.

⁵² Ex. 920 [Lindley] at 322-5.

⁵³ *Id.*

⁵⁴ Ex. 920 [Lindley] at 330.

⁵⁵ Ex. 929 [Padula] at 117.

⁵⁶ *Id.* at 117-8.

⁵⁷ Ex. 920 [Lindley] at 314; ex. 929 [Padula] at 111; ex. 903 [Andrus] at 59-60.

⁵⁸ Ex. 929 [Padula] at 100-1, 111.

⁵⁹ Ex. 920 [Lindley] at 323-4; ex. 269.

⁶⁰ Ex. 920 [Lindley] at 320-5; ex. 118; ex. 307; ex. 308.

amount dictated by New Forba.⁶¹ Andrus and Knott could not and did not receive any profit from the New York clinics. It all went to New Forba.⁶²

93. To ensure that the designated owners could never obtain any economic benefit from the clinics they purportedly owned, New Forba created and imposed a series of complicated agreements to prevent them from doing so.⁶³ The designated owners could only sell their interest to a New Forba officer or a person designated by New Forba, and then only for a nominal amount.⁶⁴ Furthermore, New Forba could force the designated owners to sell if New Forba fired them as employees of New Forba⁶⁵ (which it ultimately did on June 10, 2008).⁶⁶ New Forba could also force the sham owners to sell their interest in the New York clinics for a nominal amount to a person designated by New Forba.⁶⁷ Effectively, New Forba could and did fire Andrus and Knott as the owners, at its sole discretion.⁶⁸

Control

94. As the real owner, Forba controlled the clinics, including their clinical operation. It did this,⁶⁹ by among others, hiring and firing dentists and determining their compensation.⁷⁰

⁶¹ Ex. 920 [Lindley] at 322-3.

⁶² Ex. 920 [Lindley] at 313-4, 327-8; ex. 903 [Andrus] at 59-60; ex. 917 [December 10, 2012 dep tr Ken Knott] at 57-8.

⁶³ Ex. 920 [Lindley] at 328-9.

⁶⁴ Ex. 920 [Lindley] at 325-7; ex. 917 [Knott] at 68; ex. 120 [September 26, 2006 Syracuse Buy Sell Agreement] at 217528; ex. 488 [September 26, 2006 Albany Buy Sell Agreement] at 217502; ex. 489 [September 26, 2006 Rochester Buy Sell Agreement] at 217515; ex. 346 [September 26, 2006 Nash Employment Agreement].

⁶⁵ Ex. 917 [Knott] at 69; ex. 120 at 217528.

⁶⁶ Ex. 920 [Lindley] at 307.

⁶⁷ Ex. 917 [Knott] at 70; ex. 903 [Andrus] at 83.

⁶⁸ Ex. 917 [Knott] at 69-70.

⁶⁹ Ex. 927 [Mueller] at 71; ex. 919 [Lane] at 14-5, 24; ex. 920 [Lindley] at 45-6.

⁷⁰ Ex. 917 [Knott] at 45-7; ex. 919 [Lane] at 122-6; ex. 31 [December 10, 2004 Lane email]; ex. 920 [Lindley] at 57.

C. The Motive for the Fraud

95. The motive for the illegal scheme was simple – greed. The first Forba clinic opened in October 2001.⁷¹ By November 2003, Forba had engaged investment bankers to sell the company.⁷² The investment bankers advised the Individual Defendants that the value of the business was at least \$400 million.⁷³ To sell the business, Old Forba had to demonstrate the Forba clinical model was successful and could be replicated – “Company Highlights – Replicable clinic model”.⁷⁴

96. In the meantime, the profits from all of the clinics continued funnelling to Old Forba and the Old Forba founders (the Individual Defendants - the three DeRoses, Padula and Mueller). They each received hundreds of thousands of Medicaid dollars every month in distributions from Old Forba.⁷⁵ By 2004, each received \$200,000 per month.⁷⁶ By 2005, the amount had increased to \$250,000 each per month.⁷⁷ In 2006, it increased again to \$300,000 per month.⁷⁸

97. In September 2006, the Individual Defendants sold the business for \$435 million.⁷⁹ It was a bonanza for the Individual Defendants.⁸⁰

- Dan DeRose received \$100 million.
- Ed DeRose received \$65 million.
- Padula received \$56 million.
- Mueller received \$56 million.

⁷¹ Ex. 919 [Lane] at 10.

⁷² Ex. 10 [November 25, 2003 CIBC Proposal]; ex. 909 [Dan DeRose] at 74.

⁷³ Ex. 10 at 174580; ex. 927 [Mueller] at 32-5.

⁷⁴ Ex. 909 [Dan DeRose] at 63-5; ex. 58 at 1599862.

⁷⁵ Ex. 909 [Dan DeRose] at 94.

⁷⁶ Ex. 929 [Padula] at 44.

⁷⁷ Ex. 927 [Mueller] at 47-8; ex. 12 [October 2, 2005 Board Meeting]; ex. 909 [Dan DeRose] at 90-1.

⁷⁸ *Id.*

⁷⁹ Ex. 18 [July 28, 2006 First Amendment to APA] at 214218; ex. 919 [Lane] at 64.

⁸⁰ Ex. 909 [Dan DeRose] at 119; ex. 6 [Old Forba Answers to Interrogatories] at nos. 3 and 29; ex. 929 [Padula] at 49-51; ex. 927 [Mueller] at 55-8; ex. 908 [Michael DeRose] at 56; ex. 6 at Nos. 3 and 29.

- Mike DeRose received \$56 million.
- Michael Roumph received \$37 million.

98. These were the numbers the Individual Defendants had in their sights from at least as early as November 2003, when Forba's investment bankers first put a \$400 million value on the business.⁸¹

99. Everyone knew that clinic production would set the selling price of Forba. This is shown by a 2004 email from Dan DeRose to Forba's investment bankers concerning the production at the Forba clinics: "This was yesterday. Not bad at all. Surely worth 500m . . ." ⁸² The ultimate purchase price paid by New Forba was determined as a multiple of EBITDA, an earnings number. The \$435 million price was 10 times EBITDA.⁸³

100. New Forba's motive was the same. The group that purchased Forba in September 2006 had no dentists and no prior experience in the dental business.⁸⁴ They were, however, experts on profit. Forba was purchased by a group led by Arcapita, a private equity firm owned by a Bahrainian bank.⁸⁵

101. Forba's new owners were intent on turning this Medicaid dental practice business into a financial bonanza for them as well. Arcapita invested \$180 million in Forba and owned 92% of the company.⁸⁶ The plan was to triple both the revenues and the profits over the next five years.⁸⁷ Using the same value basis used for the purchase from Old Forba and the planned EBITDA of \$130 million after five years, Arcapita's \$180 million investment would be worth \$1.2 billion.

⁸¹ Ex. 10 at 174580.

⁸² Ex. 103 [February 5, 2004 Dan DeRose email].

⁸³ Ex. 920 [Lindley] at 19, 21-3.

⁸⁴ *Id.* at 80-1.

⁸⁵ *Id.* at 22-5.

⁸⁶ *Id.* at 23-4.

⁸⁷ *Id.* at 39-40.

D. Forba Illicitly Influenced Dentists To Increase Forba's Profits

102. As the secret and illicit owner of the New York clinics, Forba and the Individual Defendants did precisely what the law was passed to prevent. Just as the law anticipates, they put Forba's financial interests ahead of the well being of the clinics' patients. They did so by: (1) influencing dentists to adopt and follow treatment plans to increase Forba's revenues rather than properly care for young children, (2) pressuring and incentivizing dentists to increase production while at the same time not providing any review of the quality of care to measure how increased production might harm the young children, (3) threatening and terminating dentists who were not team players, (4) influencing dentists, who they knew were not properly trained, to restrain children in circumstances that violated the standard of care and (5) influencing dentists to obtain consent for the use of restraints by misrepresenting, contrary to the standard of care, that the use of restraints had no known risks.

103. The reasonably foreseeable result of Forba's scheme was the inappropriate care and resulting abuse of young children, including the plaintiffs in this case.

Treatment Planning for Dollars

104. Increased production and profit could only occur under the aggressive use of the Forba illegal corporate clinical practice model. This meant something had to give at the treatment level, because in dentistry, diagnosis and treatment planning is a matter for a dentist to decide in her independent judgment, uninfluenced by a company whose priority is profit.⁸⁸ This was obviously inconsistent with the Forba profit model.

⁸⁸ Ex. 908 [Michael DeRose] at 32; ex. 901 [excerpts from October 17, 2012 dep tr Naveed Aman] at 23-4 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at CC); ex. 907 [excerpts from November 19, 2012 dep tr Koury Bonds] at 40-1 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at DD); ex. 915 [excerpts from December 6, 2012 dep tr Ismatu Kamara] at 14-15 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at U); ex. 913 [excerpts from December 7, 2012 dep

So using the Forba clinic model, the Individual Defendants set a “Company Strategy” that included dictating “specific dental procedures and how they should be performed.”⁸⁹

105. All new dentists’ indoctrination into this model began on day one – right at the start of a new dentists’ employment. As a part of the model, the Individual Defendants created and imposed a new dentist training mandatory program.⁹⁰ Forba trained the new dentists when to do specific dental procedures, including when to use restraints, when to do pulpotomies, when to do crowns, and when to refer patients⁹¹ - all of which are undeniably clinical matters.

106. Mueller developed the program.⁹² Mueller, Ed DeRose, and Mike DeRose set the program up.⁹³ They, Padula, and Robert Andrus all participated in training the new dentists.⁹⁴ New Forba continued the same new dentist training program with Andrus in charge.⁹⁵

107. Andrus was a central participant in the scheme for both Old and New Forba. In addition in training the new dentists, Andrus was also a Regional Director for Old Forba.⁹⁶ He was the highest paid Old Forba employee other than the owners.⁹⁷ He

tr Gary Gusmerotti] at 29-30 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants’ Joint Exhibits at V); ex. 914 [excerpts from November 19, 2012 dep tr Maziar Izadi] at 341-2 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants’ Joint Exhibits at N); ex. 932 [November 30, 2012 dep tr Kim Pham] at 93-94.

⁸⁹ Ex. 511 at 17816-17.

⁹⁰ Ex. 927 [Mueller] at 78-9.

⁹¹ *Id.* at 99-101; ex. 510 [November 20, 2003 Mueller letter to Colorado State Board of Dental Examiners] at 13661.

⁹² *Id.* at 84.

⁹³ *Id.* at 88.

⁹⁴ *Id.* at 81; ex. 919 [Lane] at 143-4; ex. 43; ex. 927 [Mueller] at 97-8, 138-9; ex. 8 [Forba Offering Memorandum] at 109662; ex. 113 [Dentist Training Agenda]; ex. 938 [November 15, 2012 dep tr Al Smith] at 17-18, 21-23.

⁹⁵ Ex. 938 [Smith] at 21-23.

⁹⁶ Ex. 24 at 28033; ex. 7 at 41214.

⁹⁷ *Id.*

continued with New Forba as a Senior Vice President and Regional Director.⁹⁸ He was the highest paid New Forba executive, with his compensation even higher than New Forba's Chief Executive Officer.⁹⁹ New Forba also designated Andrus as a sham owner in over 30 New Forba clinics, including the New York clinics.¹⁰⁰

108. As Andrus revealed in a communication to Dan DeRose, the Forba model, including the new dentist training, was designed to influence the dentists to diagnose and treat as Forba wanted them to for the purpose of increasing Forba's profits:

I'm going to try and go work in Aurora next month. Not to bore you with the dental side but they are 'leaving money on the table' because diagnosis is the most important thing we do in the clinics. (1st Dr. Mike 3:16).

* * *

Chief, I can make that thing bust ass with Dr. Amir, I just think you and Dr. Eddie need to know that the 'Orientation' of his new doctors is critical.¹⁰¹

109. Ken Knott was also a central participant in the scheme for both Old and New Forba. Knott was a Regional Director for Old Forba.¹⁰² He was the third highest paid Old Forba employee other than the owners.¹⁰³ Knott continued with New Forba as a Senior Vice President and Regional Director,¹⁰⁴ including over the New York clinics.¹⁰⁵ He was the third highest paid New Forba executive behind only Andrus and the Chief Executive Officer.¹⁰⁶ New Forba also designated Knott as the sham owner in over 30 clinics, including the New York clinics.¹⁰⁷

⁹⁸ Ex. 269 at 132964.

⁹⁹ Ex. 920 [Lindley] at 100; ex. 903 [Andrus] at 43.

¹⁰⁰ Ex. 920 [Lindley] at 311-3; ex. 303 [July 30, 2008 Moody email] at 134653-5; ex. 903 [Andrus] at 54-5, 61.

¹⁰¹ Ex. 44; ex. 903 [Andrus] at 111-6.

¹⁰² Ex. 24 at 28033.

¹⁰³ Ex. 7 at 41214.

¹⁰⁴ Ex. 269 at 132964.

¹⁰⁵ Ex. 114 [October 9, 2006 Grossman email] at 28574.

¹⁰⁶ Ex. 115 [February 28, 2008 Gardner email].

¹⁰⁷ Ex. 303 at 134653-5; ex. 917 [Knott] at 54-6.

110. Knott described and furthered the same corrupt practice in one of his emails to Dan DeRose and Rounph. Knott suggested that Forba's indoctrination efforts to influence dentists and increase Forbas's profits be done daily. He wanted meetings every day in which the lead dentist was "to discuss treatment planning to assist the younger Doctors in developing more comprehensive tx plans."¹⁰⁸

111. If there were any doubt as to what these communications meant, Dan DeRose removed it in his response to a report from Rounph that "production sucks" at one of the Small Smiles clinics:

[W]e need to teach them how to do dentistry. . . . Daily communication and creating an awareness that we are aware of the lack of treatment will in itself help.¹⁰⁹

112. The dentists' independent clinical judgment had no place in the Forba model. Richard Lane, an Old Forba senior executive and non-dentist¹¹⁰, reported to Dan DeRose and Rounph his instructions for "re-training" a clinic that had strayed from the model:

Treat the training as if it were a new clinic. We need to break them of the old ways and get them on board with the FORBA model. . . . Dr. Ken will focus on . . . treatment planning.¹¹¹

113. If the dentists did not "do dentistry" according to the Forba model, they were asked to go elsewhere:

As the Lead Dentist, you have the authority to make staffing decisions as necessary. They either buy in or they are gone. . . . If you feel that Dr. Kerr is not matching up with our philosophy, then make the recommendation to terminate his contract.¹¹²

¹⁰⁸ Ex. 45.

¹⁰⁹ Ex. 390 [July 17, 2005 Dan DeRose email to Rounph and Knott].

¹¹⁰ Ex. 919 [Lane] at 9, 10.

¹¹¹ Ex. 514.

¹¹² Ex. 530 [Lane email to lead dentist sent to Dan DeRose and Rounph].

114. With Knott and Andrus as key participants, New Forba continued the scheme. New Forba told its regional directors, including Knott and Andrus to increase Forba's revenues by 27%.¹¹³ Andrus was to achieve the revenue increase in part by "treatment planning assessment" for low and marginal performers.¹¹⁴ And Knott, who was New Forba's regional director for the New York clinics,¹¹⁵ was to increase revenues by evaluating "diagnosis and treatment planning tendencies of clinics that fall below average per patient production."¹¹⁶ This meant simply that the dentists had to follow the Forba model of treatment.

115. And that model, as exhibit 148 reveals, was to direct treatment planning to increase the "per patient production" or PPP. This was the core of Forba's scheme:

- "PPP is the golden goose."¹¹⁷
- "[I]f you increase PPP, MTD [Month To Date] miraculously goes to 5% OVER budget . . . why can't I get this simple concept through to others?"¹¹⁸
- "PPP is magic!"¹¹⁹

116. Having received his marching orders, Knott reported to New Forba's Chief Executive Officer and President that he was carrying out the company policy:¹²⁰

- Cincy II: "way off-budget . . . will visit to review treatment planning"
- Roselawn: "Production for Previous Week: well below budget . . . will visit to audit treatment planning."

¹¹³ Ex. 148 [Forba Holdings 2007 Goals and Objectives] at 18041-43; ex. 938 [Smith] at 152-9.

¹¹⁴ Ex. 148 at 18041.

¹¹⁵ Ex. 114 at 28574; ex. 6 at No. 8.

¹¹⁶ Ex. 148 at 18043.

¹¹⁷ Ex. 152 [May 30, 2007 Knott Central Regional Report] at 1546842.

¹¹⁸ *Id.* at 1546844.

¹¹⁹ Ex. 168 [September 14, 2007 Knott Central Regional Report] at 1119916.

¹²⁰ Ex. 150 [January 31, 2007 Knott Central Regional Report] at 514320, 514320-1, 514322.

- Rochester: "per patient production and # of cases over \$500 SUCKS . . . with some on-site leadership this should be an easy fix."
- Syracuse: "# of cases over \$500 is weak . . . will discuss treatment planning."

117. Forba tactically and regularly pressured all clinics – including those in New York – to increase Forba's revenues through treatment plans:

Q. You were watching that production per patient on a regular basis, weren't you?

A. Yes.

Q. And if it got below what you were expecting or what was acceptable to you, then you would go have a discussion with the dentists in the clinic to get it back up, didn't you?

A. That would be my intent, yes.

Q. And you did that on a regular and routine basis at all of these clinics, didn't you?

A. True.

Q. Including the New York clinics?

A. Yes.¹²¹

118. At times, New Forba referred to this process of influencing the dentist's treatment to increase Forba's revenues as "maximizing treatment":

"Toledo: Production still sucks. . . . Dr. Ruby and I talk a lot about . . . maximizing treatment but so far I haven't broken through."¹²²

"Youngstown: After no fewer than 4 serious discussions he [the lead dentist] continues to resist efforts to convert, maximize treatment, hesitant to provide treatment and quick to refer the 'difficult child' even when his Associate Doctors are willing to treat."¹²³

¹²¹ Ex. 917 [Knott] at 210-11.

¹²² Ex. 154 [September 10, 2007 Knott Central Regional Report] at 617824.

¹²³ Ex. 168 at 1119913.

119. Knott admitted that he talked to the dentists about maximizing treatment on a regular and routine basis¹²⁴ and that he did so to increase the number of procedures on the young children to increase Forba's revenues.¹²⁵

120. Simply put, independent clinical judgment had no place in the Forba model and dentistry was to be done the Forba way. New Forba admits the dentists should have been treating the patients as they were taught to do in dental school.¹²⁶ Yet, the record demonstrates New Forba trained and pressured the dentists to "flip-flop" their clinical thinking to conform to the Forba clinical model to increase Forba's revenues.¹²⁷

121. Forba's illegal corporate model did not go unnoticed. In March 2006 the Colorado Dental Board (1) concluded that Old Forba trained dentists to practice dentistry in violation of the standard of care and that dentists trained in the program were in fact influenced to and did provide treatment below the standard of care, and (2) it referred a complaint against Mueller, Forba's Medical Director and head of the training program, to the Colorado Attorney General to prosecute a disciplinary action.¹²⁸

122. Mueller nonetheless continued to conduct Forba's new dentist training until the sale to New Forba.¹²⁹ In March 2009, the action was resolved by Mueller's relinquishment and permanent surrender of his Colorado dental license with "the same force and effect as a revocation ordered by the Board."¹³⁰

¹²⁴ Ex. 917 [Knott] at 212.

¹²⁵ *Id.* at 214.

¹²⁶ Ex. 920 [Lindley] at 57-8.

¹²⁷ Ex. 147.

¹²⁸ Ex. 50 [March 28, 2009 Colorado Dental Board Order] at 1, 3, 4; ex. 927 [Mueller] at 146-8, 155-6; ex. 909 [Dan DeRose] at 312-17.

¹²⁹ Ex. 919 [Lane] at 143.

¹³⁰ Ex. 50 at 4; ex. 927 [Mueller] at 156.

Pressuring Dentists To Produce

123. New Forba admits the clinic model in the business it bought from Old Forba was to threaten, berate and pressure dentists to produce with the result that the company's financial interests took priority over the health and safety of the children. As admitted by New Forba in pleadings in Federal Court authorized by the New Forba Board of Directors.¹³¹

- Old Forba engaged in a "practice of pressuring dentists to produce in order to inflate revenues."¹³²
- "This practice created a culture within the Small Smiles Centers that emphasized production over quality care, in clear contravention of the Applicable Laws and accepted standards of dental care."¹³³
- "Old Forba's management, including, but not limited to, Dan DeRose and Michael Roumph, threatened and berated Small Smiles dentists in an effort to increase production."¹³⁴
- "Old Forba exerted significant pressure on Small Smiles dentists across the country, including dentists in . . . New York"¹³⁵
- This practice of pressuring dentists to produce was "inappropriate" and "improperly inflate[d] Old FORBA's EBITDA [earnings]."¹³⁶

124. This was the business New Forba bought. Not surprisingly, after the sale, nothing changed. The same dentists continued on.¹³⁷ The same regional directors continued on.¹³⁸

¹³¹ Ex. 273 [January 22, 2010 New Forba Amended Complaint]; ex. 920 [Lindley] at 88-90.

¹³² Ex. 273 at 23471.

¹³³ *Id.*

¹³⁴ *Id.* at 23464.

¹³⁵ *Id.*

¹³⁶ *Id.* at 23465.

¹³⁷ Ex. 920 [Lindley] at 80-1.

¹³⁸ Ex. 24 at 28033; ex. 269 at 132964

125. And the same conduct continued on. Ultimately, New Forba acknowledged in response to an investigation of its operations by the United States Department of Justice that "... certain FORBA regional personnel (many or all of whom have been separated from FORBA) had frequent contact with Center personnel regarding production levels, expressed displeasure if certain production metrics were not met, and followed up frequently to encourage greater production" and "certain of these conversations may have been unpleasant and unseemly."¹³⁹

126. Under the Forba model, it was always all about the money. Dan DeRose established the message early on ("The deal is production"¹⁴⁰) and that message was delivered to clinics across the country first by his lieutenants and later by New Forba.

- "Excellent job this week on the production emails. Keep the pressure on. It will make a difference."¹⁴¹
- "You need to be constantly aware of the large amt you make and make it worth the company's time to pay you like a king. IE you need to get that place above 17G a day."¹⁴²
- "In order to play with the big boys you have got to get your Docs to ... complete more treatment."¹⁴³
- "We can only pay for increased productivity."¹⁴⁴

127. Knott admits this was the consistent message to all the Forba dentists:

Q. So the message you gave to Dr. Swan was that ... Forba only paid for increased productivity, right?

A. Correct.

¹³⁹ Ex. 134A [December 5, 2008 Rodriguez email] at 11192; ex. 920 [Lindley] at 264-71.

¹⁴⁰ Ex. 480 [June 3, 2004 Dan DeRose email to Roumph].

¹⁴¹ Ex. 94 [June 23, 2006 Roumph email sent to Dan DeRose].

¹⁴² Ex. 166 [March 16, 2007 Andrus email to a lead dentist].

¹⁴³ Ex. 667 [March 9, 2007 Knott email to a lead dentist].

¹⁴⁴ Ex. 515 [July 17, 2006 Knott email sent to Dan DeRose and Roumph]; ex. 917 [Knott] at 302-3.

Q. Same message you gave to all the dentists, wasn't it?

A. In essence, yes.¹⁴⁵

128. These unseemly conversations to get the dentists to increase production were at times reported to New Forba's Chief Executive Officer and President:

- "I lit these clowns up."¹⁴⁶
- One clinic did well, "Al[l] others sucked! I'm up there ass ! ! ! !"¹⁴⁷
- "Fear of god . . ." has caused production to increase.¹⁴⁸
- "Monday I'll walk in here [a Forba clinic] like Darth Vader and begin the conversion."¹⁴⁹
- "I smoke him Friday. Looking forward to it."¹⁵⁰
- "I'm going to destroy them!"¹⁵¹
- "I will be there [a Forba clinic] on Tuesday. Que theme from Jaws. . ."¹⁵²

129. The message was not lost on the lead dentists, one of whom described the children as cows to be milked dry. The clinic had plenty of patients, "but getting the cow in the barn seems less of a challenge at this point than milking that cow dry."¹⁵³ A few months later, that same lead dentist, in commenting about a production report, told New Forba's President:

This is totally unacceptable. . . . I can not (sic) longer tolerate these meager stats! I will not have LP become the laughing stock of the entire Small Smiles nation. If only 35 patients

¹⁴⁵ Ex. 917 [Knott] at 302-3.

¹⁴⁶ Ex. 169 [March 10, 2007 Andrus Western Regional Report to Lindley and Smith] at 1836942.

¹⁴⁷ Ex. 296 [March 6, 2007 Andrus email to Lindley].

¹⁴⁸ Ex. 170 [January 18, 2007 Andrus email to Lindley] at 381880.

¹⁴⁹ Ex. 169 at 1836941.

¹⁵⁰ Ex. 170 [March 12, 2007 Andrus email in response to concerns a dentist is going to hurt production] at 617142.

¹⁵¹ Ex. 170 [August 2, 2007 Andrus email] at 616351.

¹⁵² Ex. 172 [September 10, 2007 Andrus Western Regional Report to Lindley and Smith] at 1550492.

¹⁵³ Ex. 327 [May 2, 2007 Williams email sent to the President of New Forba].

manage to cross our threshold . . . these Docs had better approach them with **vampiric intentions**.¹⁵⁴ (emphasis added).

130. Both Old and New Forba knew which dentists and clinics to pressure because they regularly tracked production statistics for each dentist and clinic.¹⁵⁵ Dan DeRose and Roumph directed and participated in the tracking of production statistics for Old Forba.¹⁵⁶ Likewise, Dan DeRose and Roumph directed Old Forba's constant pressure on dentists to increase production.¹⁵⁷

131. Both Old Forba and New Forba were keenly aware that this conduct was improper and powerful evidence of fraudulent misconduct. As Dan DeRose admitted in an email sent to Roumph and to New Forba:

We will not be forwarding production per dentist as it is an irrelevant calculation. Never used it never will. Meaningless and dangerous (number one trigger point for fraud).¹⁵⁸

132. Forba constantly pressured the dentists to produce.¹⁵⁹ It reviewed and analyzed the production numbers, including production per dentist, every day.¹⁶⁰

¹⁵⁴ Ex. 281 [September 12, 2007 Williams email to Smith].

¹⁵⁵ Ex. 917 [Knott] at 224, 227-8.

¹⁵⁶ Ex. 88 [June 14, 2005 Roumph email to Dan DeRose]; ex. 91 [March 10, 2006 Roumph email to Dan DeRose]; ex. 101 [emails involving Dan DeRose and Roumph] at 198131, 46257; ex. 398 [June 13, 2006 Knott email to Roumph and Dan DeRose]; ex. 479 [July 5, 2006 Roumph email to Dan DeRose] at 112875; ex. 649 [July 21, 2006 Dentist Efficiency Report sent to Dan DeRose and Roumph]; ex. 90 [January 20, 2006 West email to Roumph]; ex. 92 [April 13, 2006 West email to Roumph]; ex. 93 [June 20, 2006 Roumph email]; ex. 399 [Knott email to Roumph].

¹⁵⁷ Ex. 94; ex. 96 [June 1, 2006 Roumph email to Dan DeRose]; ex. 98 [April 18, 2006 Dr. Sean email to Dan DeRose and Roumph]; ex. 99 [March 2, 2006 emails involving Dan DeRose and Roumph]; ex. 101 at 137878, 137855, 46057, 46059, 197855; ex. 390; ex. 381 [April 21 and 22 emails involving Dan DeRose and Roumph] at 288912, 203954, 197189; ex. 397 [February 15, 2006 Bower email to Dan DeRose and Roumph] at 19715-6; ex. 475 [April 20, 2006 Roumph email to Dan DeRose]; ex. 515; ex. 664 [June 6, 2006 Roumph email to Dan DeRose]; ex. 95 [March 22, 2006 Roumph email]; ex. 97 [February 10, 2006 emails involving Roumph]; ex. 665 [August 31, 2005 email to Roumph]; ex. 666 [September 1, 2005 Knott email to Roumph].

¹⁵⁸ Ex. 76 [June 20, 2006 Dan DeRose email].

¹⁵⁹ Ex. 917 [Knott] at 228-30; 235-6.

¹⁶⁰ Ex. 399; ex. 917 [Knott] at 230.

Forba's regional directors frequently contacted the clinics and dentists, including those in New York, to get them to increase their production.¹⁶¹

133. As Knott admitted, these constant efforts to get the dentists to increase their production was his job: "My job was not clinical dentistry. It was management."¹⁶²

Incentivizing Dentists To Produce

134. While the Forba clinic model was heavy on the stick, it also included carrots. Both Old and New Forba implemented a bonus program that set production goals for each clinic.¹⁶³ The bonus was paid if the production goal was met and the goal increased as the production increased.¹⁶⁴ Quality of care was neither relevant, nor a component of the bonus.¹⁶⁵ The objective was to get the dentists to "chase numbers."¹⁶⁶

135. The Forba clinic model also included production contests that required clinics to compete with each other to see which clinics produced the most, with money paid to those with the highest production.¹⁶⁷ There were no contests for quality of care.¹⁶⁸

Threatening Dentists Who Were Not Team Players

136. Forba eliminated dentists that did not "do dentistry" according to the Forba model.

¹⁶¹ Ex. 917 [Knott] at 229-30, 235.

¹⁶² *Id.* at 235-6.

¹⁶³ Ex. 682 [October 10, 2006 Grossman email]; ex. 917 [Knott] at 289-90; ex. 909 [Dan DeRose] at 487-8; ex. 84 [September 16, 2005 Lane email] at 195776.

¹⁶⁴ Ex. 682; ex. 917 [Knott] at 288-92; ex. 909 [Dan DeRose] at 501; ex. 84 at 195779.

¹⁶⁵ Ex. 917 [Knott] at 292; ex. 938 [Smith] at 188.

¹⁶⁶ Ex. 164 [May 25, 2007 Andrus email].

¹⁶⁷ Ex. 683 [December 21, 2006 Road To The Super Bowl contest]; ex. 684 [March 1, 2007 March Madness contest]; ex. 685 [May 21, 2007 Quest For The Cup contest]; ex. 687 [July 14, 2006 July Challenge]; ex. 917 [Ken Knott] at 293-301.

¹⁶⁸ Ex. 917 [Knott] at 299, 301.

137. Before Knott became a Regional Director, he was a lead dentist in Forba's Tuscon clinic.¹⁶⁹ In April 2005, Old Forba admonished him to impose the Forba way in Phoenix: "They either buy in or they are gone . . . If you feel that Dr. Kerr is not matching up with our philosophy, then make the recommendation to terminate his contract."¹⁷⁰ Old Forba terminated Dr. Kerr the next month.¹⁷¹

138. As a Regional Director, Knott continued enforcing this corrupt and illegal practice. In August 2005, he threatened the dentists in the Boise clinic that "their production was unacceptable."¹⁷² The next day, Knott reported to Roumph that he had the attention of 3 of the 4 dentists, but as to the fourth, the plan was to pressure her to leave: "With continued pressure I think Dr. Maryam will depart in the near future."¹⁷³ As Knott admitted:

Q. You were applying the pressure –

A. Yes.

Q. – to try to get Dr. Maryam to leave, weren't you?

A. Yes.¹⁷⁴

139. In March 2006, Old Forba put the lead dentist in Rochester on notice that the clinic's production was not acceptable and she could be fired if it did not improve.¹⁷⁵ The next month, the regional director for the New York clinics reported to Dan DeRose and Roumph on his discussions with the Rochester dentists:

¹⁶⁹ Ex. 917 [Knott] at 18-9; ex. 530.

¹⁷⁰ Ex. 530.

¹⁷¹ Ex. 917 [Knott] at 98-9.

¹⁷² Ex. 665.

¹⁷³ Ex. 666.

¹⁷⁴ Ex. 917 [Knott] at 244-6.

¹⁷⁵ Ex. 32 [March 20, 2006 Dan DeRose Performance Review of Dr. Pham]; ex. 909 [Dan DeRose] at 199, 206-7.

"Yesterday, over victuals, I discussed with the doctors . . . the concept of expendability. . . . They all understood my meaning."¹⁷⁶

140. Lest there be any doubt as to the meaning, in August the lead dentist in Rochester was gone: "Shes out! We don't want her back."¹⁷⁷

141. Ultimately, Knott admitted the Forba practice was to pressure the dentists to produce or go elsewhere: "Without productivity, there's no opportunity for employment. There's no doubt. So it comes down to that."¹⁷⁸

Causing Unqualified Dentists to Improperly Restrain Children

142. As set forth in the Guidelines of the American Academy of Pediatric Dentistry (AAPD), the use of restraints on young children has serious risks of physical and psychological harm.¹⁷⁹ As a result, the AAPD Guidelines specifically provide that dentists should not use restraints unless they have extensive training in "the appropriate diagnosis of behavior and the safe and effective implementation of these techniques" through "a residency program, a graduate program, and/or an extensive continuing education course."¹⁸⁰

143. Old Forba knew the dentists it was hiring in the New York clinics did not have the restraints training the AAPD Guidelines warned was necessary.¹⁸¹ The decision to hire dentists even though they did not have that training was made by the Individual Defendants.¹⁸²

144. In fact, Forba preferred hiring dentists who did not have extensive restraints training over those who did. They did so by recruiting general dentists (those

¹⁷⁶ Ex. 98.

¹⁷⁷ Ex. 33 [August 31, 2006 Dan DeRose email to Rourmph].

¹⁷⁸ Ex. 917 [Knott] at 251-2.

¹⁷⁹ Ex. 66 [August 30, 2005 Lane email transmitting AAPD Guidelines] at 163205.

¹⁸⁰ *Id.* at 163204.

¹⁸¹ Ex. 929 [Padula] at 193-4.

¹⁸² *Id.* at 142.

who have not completed a pediatric residency) over pediatric dentists (those who have).¹⁸³

145. Forba therefore had very few pediatric dentists who had the necessary restraints training.¹⁸⁴ Most Forba clinics did not have a single pediatric dentist.¹⁸⁵ As of April 2007, there were no more than five pediatric dentists in all of Forba's clinics.¹⁸⁶

146. Whether a dentist should use restraints is a clinical decision governed by the clinical standard of care that the dentist should make uninfluenced by a company whose number one priority is profit.¹⁸⁷ But an internal communication from Andrus to Dan DeRose makes clear that the use of restraints was a fundamental part of the Forba model, and that Forba pressured its dentists to use restraints:

We need to get all of the crying and restraint and basic pedo restraint issues taken care of up front and let them know they will need to decide to do it our way or go find another place to work. I don't need ass holes trying to reinvent the wheel.¹⁸⁸

147. The Forba clinic model as to restraints violated the standard of care. Restraints are appropriate only in rare emergency circumstances when a child is uncooperative, efforts to calm the child are unsuccessful, and the child must be treated urgently, such as in the case of an abscess or other trauma.¹⁸⁹

¹⁸³ Ex. 532 [April 20, 2006 Lane email] at 160357; ex. 919 [Lane] at 298.

¹⁸⁴ Ex. 919 [Lane] at 295.

¹⁸⁵ Ex. 531 [November 15, 2005 Lane email] at 28812; ex. 919 [Lane] at 295.

¹⁸⁶ Ex. 900 [excerpts from December 6, 2012 dep tr Steve Adair] at 152 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at E).

¹⁸⁷ Ex. 903 [Andrus] at 133; ex. 915 [Kamara] at 14-5.

¹⁸⁸ Ex. 59 at 35186; ex. 903 [Andrus] at 133-7.

¹⁸⁹ Ex. 132 [December 28, 2007 Lindley email] at 613257; ex. 283 [Small Smiles Website] at 3; ex.900 [Adair] at 89-90; ex. 901 [Aman] at 49-50; ex. 914 [Izadi] at 275-81; ex. 932 [Pham] at 34.

148. Restraints are not appropriate for routine treatment.¹⁹⁰ But under the Forba clinic model, dentists were trained to use, and did use, restraints for routine treatment that did not involve an emergency.¹⁹¹

149. Using restraints for routine treatment increased Forba's profits because the use of restraints speeds up treatment.¹⁹² Restraining children for routine treatment also increased Forba's profits because it allowed the dentists to treat children whose behavior they could not handle instead of referring them to dentists who were qualified in behavior management.¹⁹³

150. Forba would not and did not tolerate losing profits because patients were being referred out. If a clinic referred patients out to qualified dentists rather than restraining them to keep them in the Forba clinic, Forba's response was unequivocal:

Atlanta is a mess, a disappointment, a total disaster. . . . referrals are being made daily this is not a Forba clinic.

* * *

Here is what we are going to do. . . . Sean will insure by his physical presence that . . . no more ideas that are not FORBA's will be fostered and they – each and EVERYONE – will do it our way or be terminated . . .”¹⁹⁴

151. New Forba did the same. On June 20, 2007, Andrus learned that the dentists in the Small Smiles Reno clinic were referring out young children rather than restraining them.¹⁹⁵ On June 25, Andrus reported these events to the Chief Executive Officer and President of Forba:

¹⁹⁰ *Id.*

¹⁹¹ Ex. 927 [Mueller] at 169-71.

¹⁹² Ex. 279 [November 5, 2007 McGrath email] at 528543; ex. 920 [Lindley] at 116-26.

¹⁹³ Expert affirmation at par. 32.

¹⁹⁴ Ex. 37.

¹⁹⁵ Ex. 171 [June 20, 2007 Tran email to Andrus].

Reno; Trouble brews as we caught them referring out pedo. I have talked to the doctors . . . They are close to getting it right, they need guidance.¹⁹⁶

152. Ultimately, the New Forba Dental Advisory Board addressed the use of restraints in Forba's clinics. The Advisory Board formed in the spring of 2007 and was composed of four pediatric dentists.¹⁹⁷ A member of the Advisory Board immediately expressed concern about Forba's use of restraints.¹⁹⁸ Later that year, the Advisory Board recommended that restraints be used in the Forba clinics "only for emergency care."¹⁹⁹ That is the standard in the AAPD Guidelines.²⁰⁰ Even then, Forba did not follow its Advisory Board's recommendation for more than two years.²⁰¹

153. Ultimately, after years of cruel and improper restraints of young children, Forba admitted the obvious. It stated in its own guidelines that its dentists should not restrain children for routine treatment, but instead should refer them to qualified dentists.²⁰²

Requiring Use Of A Fraudulent Consent Form

154. The AAPD Guidelines specifically warn that the use of restraints has risks, including "the potential to produce serious consequences, such as physical or psychological harm. . ."²⁰³ Both Old Forba and New Forba knew of the warning and the risks of restraints.²⁰⁴

¹⁹⁶ Ex. 153 [June 25, 2007 Western Region Report] at 1058339.

¹⁹⁷ Ex. 920 [Lindley] at 145; ex. 130 [April 9, 2007 Forba Board Meeting] at 53246-50.

¹⁹⁸ Ex. 131 [April 16, 2007 Andrus email to Lindley].

¹⁹⁹ Ex. 132 at 613257.

²⁰⁰ Ex. 900 [Adair] at 89-90.

²⁰¹ *Id.* at 86-90.

²⁰² Ex. 330 [September 2008 Forba Guidelines] at 247004, 247009; ex. 938 [Smith] at 272-3.

²⁰³ Ex. 66 at 163205.

²⁰⁴ *Id.*; ex. 534 [July 27, 2006 Mueller email]; ex. 929 [Padula] at 133, 165-6; ex. 900 [Adair] at 128-9; ex. 134A at 11169; ex. 920 [Lindley] at 173-5.

155. But Forba required its clinics and dentists to represent, in writing, to the parents of their patients that there were “no known risks” of using restraints.²⁰⁵ The representation was on the consent form that Forba required the parent and the treating dentist to sign before a child could be restrained.²⁰⁶

156. The Individual Defendants decided the content of the form and required its use.²⁰⁷ They knew the representation of “no known risks” was false because the AAPD Guidelines, which they had and considered to be the standard, warned that there were serious risks to restraining a child.²⁰⁸ There is no question but that the risks set forth in the AAPD Guidelines are significant enough that they should be disclosed to parents when they are asked to consent to the procedure.²⁰⁹

157. After New Forba bought the company, it continued to direct its clinics and dentists to make the same written misrepresentation to the parents that there were “no known risks” of restraints.²¹⁰

158. Finally, in March 2008, New Forba began warning parents, in writing, about the serious risks of restraints, including physical and psychological trauma, but only after adverse media publicity exposed what Forba was doing.²¹¹

159. Both Old Forba and New Forba knew the representation of “no known risks” was false. Robert Andrus was a Senior Vice President and Regional Director for

²⁰⁵ Ex. 356 [March 22, 2006 Bonds Employment Agreement] at par 8.04; ex. 461 [Lancen Employment Agreement] at 8.04; ex. 404 [Izadi Employment Agreement] at 8.04; ex. 616 [Kamara Employment Agreement] at 8.04; ex. 199 [Jeremy Bohn’s Small Smiles’ dental record] at 9, 18; ex. 440 [Shadaya Gilmore’s Small Smiles Dental Record] at 8, 16; ex. 400 [September 26, 2007 consent form for Ashley Parker] at 8; ex. 562 [Shiloh Lorraine’s Small Smiles dental record] at 5; ex. 917 [Knott] at 153; ex. 919 [Lane] at 120-1, 235-6; ex. 908 [Mike DeRose] at 169-70.

²⁰⁶ *Id.*

²⁰⁷ Ex. 65 [January 16, 2004 Forba Board Meeting] at 26489, 26519; ex. 908 [Michael DeRose] at 169-70; ex. 919 [Lane] at 120-1, 235-6; ex. 927 [Mueller] at 207-8; ex. 929 [Padula] at 133, 165-6.

²⁰⁸ Ex. 66 at 163205; ex. 534; ex. 929 [Padula] at 133, 165-6.

²⁰⁹ Ex. 914 [Izadi] at 44-45; Ex. 915 [Kamara] at 53-56; Ex. 929 [Padula] at 161-166; Ex. 900 [Adair] at 123-24, 128-29; Ex. 932 [Pham] at 116-118; Ex. 916 [November 30, 2012 dep tr Khanna] at 117-118.

²¹⁰ Ex. 127 [October 9, 2007 Consent for Protective Immobilization]; ex. 938 [Smith] at 65-6; ex. 917 [Knott] at 153; ex. 400 at 8; ex. 562 at 5.

²¹¹ Ex. 133 [April 16, 2008 Hatch email] at 70336; ex. 938 [Smith] at 68-71; ex. 920 [Lindley] at 173-5.

New Forba and actively involved in training the Forba dentists.²¹² He was a key member of New Forba's senior management and one of its three most senior dentists.²¹³ Andrus was also an Old Forba Regional Director, and among the most highly compensated Old Forba officers.²¹⁴ He was actively involved in training the new dentists for Old Forba.²¹⁵ Andrus knew in 2005 of the risks set out in the 2005 AAPD Guidelines, knew the Forba consent form represented just the opposite, knew they should be disclosed, and could not explain why they were not.²¹⁶

160. Knott was New Forba's Senior Vice President and Regional Director for the New York clinics, and a key member of New Forba's management as one of its three most senior dentists.²¹⁷ He was also an Old Forba Regional Director, and among the most highly compensated Old Forba officers.²¹⁸ Prior to the earliest treatment in this case (Jeremy Bohn in May 2006), Knott knew of the risks set out in the 2005 AAPD Guidelines, knew the Forba consent form represented just the opposite, and knew the risks should have been disclosed. He also could not explain why the risks were not disclosed.²¹⁹

161. Al Smith, New Forba's President, also admitted the risks in the 2005 AAPD Guidelines should have been disclosed by Forba's dentists.²²⁰ He claimed the failure to do so was an oversight.²²¹ Clearly it was no oversight given the knowledge of Andrus and Knott.

²¹² Ex. 269 at 132964; ex. 938 [Smith] at 21-23.

²¹³ Ex. 920 [Lindley] at 72.

²¹⁴ Ex. 24 at 20033; ex. 7 at 41214.

²¹⁵ Ex. 8 at 109662; ex. 919 [Lane] at 143-4; ex. 938 [Smith at 17-8].

²¹⁶ Ex. 903 [Andrus] at 172-5, 178-81, 184-5. 188; ex. 66 at 163179, 163205.

²¹⁷ Ex. 269 at 132964; ex. 114 at 28574; ex. 920 [Lindley] at 72.

²¹⁸ Ex. 24 at 20033; ex. 7 at 41214.

²¹⁹ Ex. 917, [Knott] at 148-50; ex. 66 at 163179, 163205.

²²⁰ Ex. 938 [Smith] at 69.

²²¹ Id. at 79.

E. Quality Of Care Was Irrelevant

162. No one at Old Forba or the clinics reviewed the clinical quality of care at the New York clinics.²²² No one did chart reviews as to the quality of care.²²³ No one monitored the dentists to see whether they were following the AAPD guidelines.²²⁴ The bottom line is unmistakable:

Q: No one at either the clinic level or the corporate level reviewed the quality of care that the dentists at the New York clinics were providing, did they?

A. No.²²⁵

163. The total absence of any quality of care review continued with New Forba for more than two years after the sale.²²⁶

164. The dentist compensation criteria reflect this same corrupt practice. In the dentists' performance reviews done periodically for determining their salaries, neither Old Forba nor New Forba considered the quality of care the dentists were providing.²²⁷

F. The Plaintiffs Were Abused As A Result of the Scheme

165. Jeremy Bohn was three years old when he was first treated at the Small Smiles clinic in Syracuse in May 2006.²²⁸ Shiloh Lorraine was twenty months old when he was treated at the Small Smiles clinic in Rochester in August 2007.²²⁹ And Shadaya Gilmore was six years old when she was first treated at the Small Smiles dental clinic in

²²² Ex. 929 [Padula] at 201.

²²³ *Id.* at 202.

²²⁴ *Id.* at 203.

²²⁵ *Id.* at 201.

²²⁶ Ex. 900 [Adair] at 231, 251-2; ex. 938 [Smith] at 265-6.

²²⁷ Ex. 32; ex. 909 [Dan DeRose] at 609-612; ex. 331 [March 31, 2008 Lancen Performance Review]; ex. 938 [Smith] at 274-7.

²²⁸ Ex. 199 [Jeremy Bohn's Small Smiles dental record].

²²⁹ Ex. 562 [Shiloh Lorraine's Small Smiles dental record].

Albany in October 2007.²³⁰ The New York clinics were part of the more than fifty across the country that Forba operated.²³¹

166. As set forth more fully below, the unnecessary, substandard and abusive treatment inflicted on these three plaintiffs included the dentists' use of papoose boards. A papoose board is a medical device used to restrain young children to the point of complete, or near complete, immobilization.²³² It typically consists of the following components:

- a long rigid board that extends the length of the child's body;
- Velcro straps that are used to secure the child's wrists to the board at their side;
- canvas pieces that run down the length of the board on both sides from the child's ankles to their shoulders, which canvas pieces are connected by Velcro so that the child cannot move her body; and
- a Velcro head band that is used to secure the child's head to the board.²³³

167. Some practitioners do not use the Velcro head band, but instead have an assistant physically restrain the child's head with their hands during the procedure.²³⁴ Because its use has the potential to cause children to suffer physical and psychological trauma, as identified by the AAPD Guidelines, it is almost never used in general dentistry and rarely used in pediatric dentistry.²³⁵

²³⁰ Ex. 440 [Shadaya Gilmore's Small Smiles dental record].

²³¹ Ex. 303 at 134653-55.

²³² Expert affirmation at par. 35.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at par. 37-39.

The Syracuse Clinic & Jeremy Bohn

168. Forba opened the Syracuse clinic on October 11, 2004.²³⁶ Just two months after Forba opened its first New York clinic in Syracuse, Old Forba was dissatisfied with the clinic's production. It immediately began threatening the lead dentist, Dr. Turner, with his job: "Syracuse has issues. They think 8k is acceptable."²³⁷ Dan DeRose described the Syracuse clinic as "infected."²³⁸ Within a month, Forba's Vice President for Clinic Performance, Rounph, let Turner know his job was on the line:

I'd like to have an open discussion on Monday to discuss:

Do you still feel this job is right for you?

Do you think you can meet our expectations?

Are your philosophies regarding treatment in line with ours?²³⁹

169. The Individual Defendants were fully aware of this transparent threat as the email was brought to the Old Forba board, discussed, and made a part of the board materials.²⁴⁰

170. The pressure worked for a time, but then Syracuse's production again became unacceptable to Old Forba. Michael Rounph again admonished Turner for a lack of production. He pressured Turner to force the dentists to do more treatment on the clinic patients.²⁴¹ Rounph delivered this threat: "Bob, you are going to have to suck it up the next couple of weeks and carry the load. We need to be doing 14,000 a

²³⁶ Ex. 11 [March 2, 2006 Reilly e-mail].

²³⁷ Ex. 101 at 137878.

²³⁸ *Id.*

²³⁹ *Id.* at 137855.

²⁴⁰ Ex. 68 at 59343; ex. 909 [Dan DeRose] at 429, 435.

²⁴¹ Ex. 101 at 46059.

day . . .”²⁴² On August 1, 2005, Old Forba fired Turner: “Draft a 90 day termination notice for Bob Turner, he’s out.”²⁴³

171. Forba replaced Turner with lead dentists who practiced and managed the clinic the Forba way. The first lead dentist after Dr. Turner was Janine Randazzo.²⁴⁴ She operated the clinic using the Forba model and spread the Forba message by directing dentists to improve production by doing more procedures on each patient.²⁴⁵ She repeatedly urged all the dentists “to do as much as you can on each patient” and assured Forba corporate that she was doing so.²⁴⁶

172. Because Forba previously promised Janine Randazzo the lead dentist position in one of its Virginia clinics, it needed a permanent lead dentist in Syracuse.²⁴⁷ In short order, Forba settled on Dr. Yaqoob Khan, a dentist who had been working at the Syracuse clinic since it opened in late 2004.²⁴⁸

173. Forba tracked Khan’s production and that of the other Syracuse dentists.²⁴⁹ It knew from the numbers that Khan was a team player and a big producer.²⁵⁰ Although Dr. Khan had not been through a pediatric residency and had only been out of dental school for a year,²⁵¹ Forba liked his production numbers. On October 3, 2005, Mike Roumph reported to Dan DeRose:

²⁴² *Id.*

²⁴³ *Id.* at 197855

²⁴⁴ *Id.* at 46184.

²⁴⁵ Ex. 46 [December 7, 2005 Aman Performance Review].

²⁴⁶ Ex. 97.

²⁴⁷ Ex. 107 [November 28, 2005 FORBA Board Meeting] at 58559.

²⁴⁸ Ex. 14 [Khan Answers to Interrogatories] at No. 4; ex. 13 [October 6, 2004 Osterman email].

²⁴⁹ Ex. 101 at 198131.

²⁵⁰ *Id.*

²⁵¹ Ex. 14 at No. 3; ex. 101 at 19831.

Did a production analysis on Syracuse for last 2 weeks.

Turner \$29,962
Janine \$32,841
Yaqoob \$47,301

...hats off to Yaqoob. He has become quite a producer.²⁵²

174. Three weeks later, Roumph told Khan he should expect a promotion soon: "Yaqoob, you are doing a great job for us and we recognize your hard work. You will be a lead dentist for us some day soon."²⁵³ On November 7, 2005, Forba named Khan the new lead dentist in Syracuse, effective March 13, 2006.²⁵⁴ In addition to his new title, Khan received a \$20,000 raise.²⁵⁵

175. Khan understood that, as the lead dentist, he was responsible for implementing the Forba model. Like Forba, he analyzed each dentist's production numbers and threatened those who were not generating enough money.²⁵⁶ In May 2006, Khan reported to corporate headquarters:

Yesterday I had a meeting with my doctors and discussed with them about there (sic) performance. Dr. Dimitri had made \$ 1591 in a day where Dr. Naveed [Aman] and Dr. Koury [Bonds] had made approx. \$ 3400 each and I had made \$ 4250. He is constantly underperforming and yesterday I was very firm and told him that this was not acceptable.²⁵⁷

176. Jeremy Bohn first treated at the Syracuse clinic one week before Dr. Khan's report to corporate headquarters.²⁵⁸ He was there because the general dentist who treated his older sisters (Dr. Patel) had difficulty getting him to cooperate and open

²⁵² Ex. 101 at 198131.

²⁵³ Ex. 101 at 198227.

²⁵⁴ Ex. 15 [November 7, 2005 Khan Lead Dentist Agreement] at 2699.

²⁵⁵ Ex. 14 at No. 21.

²⁵⁶ Ex. 101 at 46257.

²⁵⁷ *Id.*

²⁵⁸ Ex. 199 at sheet 1.

his mouth. Dr. Patel therefore advised Jeremy's mother that she should take him to see a pediatric dentist.²⁵⁹ Obviously believing Small Smiles had such specialists practicing at its clinics, Dr. Patel referred her to the Syracuse clinic.²⁶⁰

177. At the time he first visited the Syracuse clinic, the dentists who would treat Jeremy – Dr. Bonds, Dr. Aman and Dr. Khan - had been fully indoctrinated into the Forba model. Operating under the model, those dentists needlessly and inappropriately restrained Jeremy three times, performed four unnecessary baby root canals, put on four unnecessary stainless steel crowns, and drilled and filled seven teeth without local anesthesia - all contrary to good and accepted dental practice and in violation of the standard of care.²⁶¹

178. Dr. Bonds was the first dentist to see Jeremy at the Syracuse clinic. Dr. Bonds is not a pediatric dentist and has never attempted to go to a pediatric residency program.²⁶² Dr. Bonds admits it would be misleading to hold himself out as a pediatric dentist.²⁶³ Dr. Bonds has no training in diagnosing children's behavior and the only training he received from Small Smiles was to watch the lead dentist and others and follow what they did.²⁶⁴

179. Dr. Bonds first started dental school in 1993, but got behind on his work and did not graduate until 1999.²⁶⁵ Dr. Bonds failed the national dental exam while he was in dental school and then an additional two to three more times over the next seven

²⁵⁹ Ex. 942 [excerpts from October 10, 2012 dep tr Kelly Varano] at 124-5, 129-30 (the complete version of this transcript is incorporated herein for all purposes as attached and included in defendants' Joint Exhibits at Z).

²⁶⁰ *Id.* at 130-1.

²⁶¹ Ex. 199 at sheets 1, 5, 7, 9, 10, 14, 19; expert affirmation at par. 59-62, 81-83.

²⁶² Ex. 907 [Bonds] at 12.

²⁶³ *Id.* at 13.

²⁶⁴ *Id.* at 30-1, 503.

²⁶⁵ *Id.* at 318.

years.²⁶⁶ He was working for \$11.25 per hour as an assistant at the Syracuse clinic when Old Forba offered to pay him \$120,000 per year as a dentist if he could pass the dental exams.²⁶⁷

180. Old Forba also offered to pay the \$700 fee for him to take a prep course in hopes of finally passing the dental exam and obtaining his license.²⁶⁸ In exchange for Old Forba's paying the \$700, Dr. Bonds agreed that if he passed the exam he would work for one of the Small Smiles' clinics for two years or pay Old Forba \$10,000 if he decided to work somewhere else.²⁶⁹ Dr. Bonds ultimately passed the exam and obtained his license in late March or early April 2006.²⁷⁰ Dr. Bonds had been a licensed dentist for less than two months when the Syracuse clinic assigned him to treat Jeremy on May 23, 2006.

181. On that day, Dr. Bonds first performed an initial dental evaluation on Jeremy.²⁷¹ In doing so, he did not identify a single existing condition on Jeremy's teeth.²⁷² During the hygiene portion of Jeremy's visit that day, the records indicate Dr. Bonds performed a complete oral examination, but he made no diagnosis of any condition and did not make any notes, clinical or otherwise, of any condition on Jeremy's teeth.²⁷³

182. Dr. Bonds acknowledges that the dental record is an essential part of patient care, keeping an accurate record is an essential part of a dental practice,

²⁶⁶ *Id.* at 319, 321.

²⁶⁷ *Id.* at 346.

²⁶⁸ *Id.* at 333, 337, 340, ex. 354.

²⁶⁹ *Id.* at 341, 347, ex. 354.

²⁷⁰ *Id.* at 354.

²⁷¹ Ex. 199 at Initial Dental Evaluation.

²⁷² *Id.*

²⁷³ *Id.* at sheet 1.

important facts relative to diagnosis and treatment should be in a dental record and that it was his practice to write down all important facts regarding the patient's condition.²⁷⁴

183. Dr. Bonds obtained two x-rays showing five of Jeremy's teeth. For three of those teeth, the x-rays are non-diagnostic and only show a portion of each of those three teeth.²⁷⁵ Despite these facts, Dr. Bonds prepared a treatment plan that called for restorative work on eleven (11) of Jeremy's teeth and convinced Jeremy's mother to agree to that work.²⁷⁶

184. Jeremy was put in restraints twice on May 23, 2006 and again on October 11, 2006 by Dr. Koury Bonds.²⁷⁷ Each time, Jeremy was (a) restrained for non-emergency dental treatment (b) by a dentist untrained in the use of advanced behavior management techniques who (c) obtained consent to restrain Jeremy by utilizing the fraudulent Forba consent form that stated that there were no known risks of restraining a child.²⁷⁸

185. On one of those visits, October 11, 2006, Dr. Bonds restrained Jeremy and drilled three of his teeth without using any local anesthetics. This was despite the fact that Jeremy's heart was racing at more than 200 beats per minute and the oxygen saturation of his blood was only 88%.²⁷⁹

186. Jeremy was further victimized by the Forba model on August 31, 2006, when he endured four unnecessary baby root canals and had four unnecessary stainless steel crowns put on his front teeth.²⁸⁰ Dr. Naveed Aman, the dentist who performed the

²⁷⁴ Ex. 907 [Bonds] at 122, 128, 130.

²⁷⁵ *Id.* at May 23, 2006 x-rays; expert affirmation at par. 53.

²⁷⁶ *Id.* at sheet 2.

²⁷⁷ *Id.* at sheets 1, 5, 9.

²⁷⁸ *Id.* at sheets 1, 4, 5, 8, 9; ex. 907 [Bonds] at 28-31, 504.

²⁷⁹ Ex. 199 at sheet 9.

²⁸⁰ Ex. 199 at sheet 7; expert affirmation at par. 77-78.

unnecessary treatment was under pressure to produce more revenue for Forba.²⁸¹ At the beginning of that year as part of his annual review, Dr. Aman received a written directive to increase his production by doing more procedures on each patient.²⁸²

187. Dr. Aman got the message and Jeremy Bohn got eight of those extra (and unnecessary) procedures. And to conceal that he was adding four baby root canals and three crowns to Jeremy's treatment plan, Dr. Aman falsified Jeremy's dental record.

188. Without initialing, dating or otherwise reflecting that he was changing the treatment plan three months after-the-fact, Dr. Aman added the notation "NSP?" to the portion of the May 23 treatment plan that called for fillings on three of Jeremy's front teeth.²⁸³ Jeremy's dental record, thus, appeared to show that Dr. Bonds thought that four baby root canals and crowns might be necessary.²⁸⁴ But that was not true.²⁸⁵ Nevertheless, Dr. Aman performed the additional, extensive and unnecessary treatment on Jeremy's front teeth and in doing so, increased his per patient production (PPP) numbers and Forba's revenues by close to a thousand dollars.²⁸⁶

189. Jeremy was a victim of the Forba model in a third way: to speed up treatment and maximize production, Drs. Bonds (on October 11, 2006 and October 23, 2006), Aman (on March 22, 2007) and Khan (on January 21, 2008) each drilled and filled Jeremy's teeth without anesthesia.²⁸⁷

²⁸¹ Ex. 46 at 2.

²⁸² *Id.*

²⁸³ Ex. 901 [Aman] at 377-78; ex. 199 at sheet 2.

²⁸⁴ *Id.*

²⁸⁵ Ex. 907 [Bonds] at 436, ex. 901 [Aman] at 378-9.

²⁸⁶ Ex. 199 at sheet 7.

²⁸⁷ Ex. 199 at sheets 9, 10, 14 and 19.

190. Local anesthetics are the safest and most effective drugs available to prevent and manage pain.²⁸⁸ They are also one of the best ways of managing a child's behavior during dental procedures.²⁸⁹

191. But since a local anesthetic takes five to fifteen minutes to work, a reasonable dentist must wait before beginning to drill.²⁹⁰ By drilling and filling Jeremy's teeth without anesthesia, Drs. Bonds, Aman and Khan acted contrary to good and accepted dental practice and in violation of the standard of care.²⁹¹ By doing so, they were able to save time that they could use to do more procedures on other patients to maximize production at the clinic.

192. Jeremy emerged from the unnecessary, substandard and abusive treatment described above with conditions varying from swelling in his face, excessive and prolonged bleeding in his mouth, screaming, crying and the appearance of being visibly shaken, an inability to talk and complaints that his wrists hurt.²⁹² In addition, following his first treatment on May 23, 2006, Jeremy was so afraid to go back to the dentist that Jeremy's mother and father had to lie to him each time thereafter about where they were going in order to get him in the car and then had to attempt to soothe him afterwards with treats following each visit because he was so upset.²⁹³

The Rochester Clinic & Shiloh Lorraine

193. Forba opened the Rochester clinic on December 13, 2004 with Dr. David Gardner as its lead dentist.²⁹⁴ At the time Forba hired him, Dr. Gardner had been disciplined by the New York dental board in the recent past, was under investigation of

²⁸⁸ Ex. 907 [Bonds] at 303-4.

²⁸⁹ *Id.* at 280, 286-7.

²⁹⁰ *Id.* at 305-06, 308.

²⁹¹ Expert affirmation at par. 85-86, 92, 97, 99-100.

²⁹² Ex. 942 [Varano] at 181, 185-187.

²⁹³ *Id.*

²⁹⁴ Ex. 11; ex. 909 [Dan DeRose] at 574-5; ex. 102 [June 27, 2005 Gardner Performance Review].

new charges, and had just been denied a license in Indiana where Forba had planned on using him.²⁹⁵ With Indiana out, Forba hired Gardner anyway and put him in charge of the Rochester clinic.²⁹⁶

194. Under Dr. Gardner's leadership, the Rochester clinic was an immediate financial success. Rochester made so much money that Forba management sent the numbers to the lead dentist in Syracuse clinic with the message that Forba looked forward to similar production numbers from Syracuse.²⁹⁷ After Dr. Gardner had been on the job for six months, Dan DeRose reviewed Gardner's financial performance.²⁹⁸ In Dan DeRose's words, it was "unbelievable", and so he gave Gardner a \$12,000 raise.²⁹⁹

195. Approximately one month later, New York authorities raided the Rochester clinic and charged Dr. Gardner with defrauding the Medicaid program and mistreating patients.³⁰⁰ Following a short investigation, Dr. Gardner pleaded guilty to a felony and Forba repaid the state \$440,000 for overcharges and substandard dental work.³⁰¹

196. Forba promoted one of its associates dentists, Dr. Kim Pham, to replace Dr. Gardner as the Rochester lead.³⁰² With Dr. Pham in charge, the Rochester clinic was not meeting Forba's financial expectations.³⁰³ Forba's statistics showed that the clinic had enough patients so Forba pressured Dr. Pham to increase production per patient.³⁰⁴ In

²⁹⁵ Ex. 106 [November 5, 2004 Dan DeRose email]; ex. 11; ex. 102; ex. 909 [Dan DeRose] at 589-92.

²⁹⁶ Ex. 909 [Dan DeRose] at 589-92; ex. 929 [Padula] at 222-5.

²⁹⁷ Ex. 505 [December 28, 2004 Dan DeRose email].

²⁹⁸ Ex. 102.

²⁹⁹ *Id.* at 1374, 1376

³⁰⁰ Ex. 22 [December 22, 2009 Forba v Forba trial tr] at 17-8; ex. 23 [February 13, 2006 Certified Copies of Gardner Felony Complaint].

³⁰¹ Ex. 929 [Padula] at 77-78, 235; ex. 506 [December 16, 2005 Rochester settlement agreement]; ex. 25 [Certified Copy of May 10, 2006 Gardner Plea Agreement].

³⁰² Ex. 603 [October 12, 2005 Dan DeRose email].

³⁰³ Ex. 91.

³⁰⁴ *Id.*

late March, Dan DeRose told Pham that the clinic's production was unacceptable and that if it did not improve in ninety days, she might be fired.³⁰⁵

197. To reinforce his message, Dan DeRose sent Forba's regional vice-president, Sean Barnwell, to Rochester armed with the financial production statistics of each dentist.³⁰⁶ After meeting with Pham and the other Rochester dentists in April 2006, Barnwell sent a report to Forba headquarters:

Yesterday, over victuals, I discussed with the doctors . . . the concept of expendability. . . . They all understood my meaning.³⁰⁷

198. Within four months, Forba's "expendability" threat became real. Dr. Pham, the Rochester lead, was gone. As Dan DeRose exclaimed, "She's out! We don't want her back."³⁰⁸

199. A few weeks later, New Forba took over the company and shuffled its regional vice-presidents.³⁰⁹ In October 2006, Ken Knott began directing the New York clinics.³¹⁰

200. As set forth above, one of Knott's duties was to substantially increase Forba's revenues. To fulfill that duty, Knott influenced the dentists to increase their production per patient and pressured them on a regular basis in all the clinics, including Rochester.³¹¹

201. Knott hired Dr. Gary Gusmerotti as the new lead dentist in Rochester in December, but he could not start until February 2007.³¹²

³⁰⁵ Ex. 32; ex. 909 [Dan DeRose] at 206-7.

³⁰⁶ Ex. 92.

³⁰⁷ Ex. 98.

³⁰⁸ Ex. 33.

³⁰⁹ Ex. 114.

³¹⁰ *Id.*

³¹¹ Ex. 148 at 18043; ex. 917 [Knott] at 201-2, 210-11.

³¹² Ex. 917 [Knott] at 252-3; ex. 565 [December 1, 2006 Gusmerotti Employment Agreement].

202. In the interim, the clinic was not meeting Forba's budget numbers. Knott reported to headquarters that in Rochester, "per patient production and # of cases over \$500 SUCKS."³¹³ But he believed Dr. Gusmerotti would fix the problem: "[W]ith some on-site leadership this should be an easy fix."³¹⁴

203. Before he took over as lead, Dr. Gusmerotti received personal training from Knott, who Dr. Gusmerotti considered his mentor and collaborator.³¹⁵ Dr. Gusmerotti understood the Forba model, including the need to place the company's financial performance ahead of the quality of dental care provided at the clinic.³¹⁶

204. Once Dr. Gusmerotti became the lead dentist, the clinic's production immediately improved: "[P]rogress with PPP . . . good spikes in daily production . . . Gus has the direction."³¹⁷ In April, Knott reported that Forba's pressure was paying off:

Dr. Gus has them hopping and out of their comfort zone; . . . PPP is up . . . [s]trong month 16% over budget . . . I've challenged Dr Gus to be at 18K/d . . .

³¹⁸

205. Under the direction of Knott and Dr. Gusmerotti, the Forba model was firmly entrenched at the Rochester clinic when Elizabeth Lorraine brought her twenty-month old son Shiloh to the clinic on August 23, 2007 for his first dental visit.³¹⁹ Shiloh was not in pain and didn't have any issues with his teeth. He was simply there for a routine visit because Shiloh's pediatrician suggested he was old enough to begin seeing a dentist for regular checkups.³²⁰

³¹³ Ex. 150 at 514322.

³¹⁴ *Id.*

³¹⁵ Ex. 913 [Gusmerotti] at 71-2; ex. 640 [February 13, 2007 Central Region Report] at 485802.

³¹⁶ Ex. 572 [March 19, 2007 Gusmerotti email]; ex. 577 [April 20, 2007 Gusmerotti email].

³¹⁷ Ex. 574 [March 12, 2007 Central Region Report] at 1553302.

³¹⁸ Ex. 576 [April 2, 2007 Central Region Report] at 1391115.

³¹⁹ Ex. 562; ex. 921 [excerpts from November 27, 2012 dep tr Elizabeth Lorraine] at 55-6 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at T).

³²⁰ Ex. 921 [Elizabeth Lorraine] at 55-6.

206. While he was at the clinic, Shiloh became a victim of the Forba model. He was strapped to a papoose board for an hour unable to move his arms or legs while one of Dr. Gusmerotti's associates, Dr. Ismatu Kamara, performed four unnecessary baby root canals and placed four crowns on his front teeth.³²¹

207. When his ordeal was over, Shiloh left the clinic with blood all over his mouth and cheeks, bruises on his wrists, head and ankles, bloodshot eyes, broken blood vessels on his face and soiled underpants.³²² He screamed and cried during the ride home and for weeks woke up screaming in the middle of the night calling out for his parents.³²³

208. Dr. Gusmerotti's conduct demonstrates that he succumbed to Forba's pressure to maximize production. Although no x-rays were taken of Shiloh's teeth, Dr. Gusmerotti presented Shiloh's mother with x-rays he said demonstrated Shiloh's teeth needed baby root canals and stainless steel crowns.³²⁴ Shiloh's mother signed a treatment plan authorizing that treatment after seeing these x-rays and hearing Dr. Gusmerotti's representations about what they showed.³²⁵ All four of the baby root canals and crowns recommended by Dr. Gusmerotti were unjustified and unnecessary.³²⁶

209. Dr. Kamara was one of the dentists who received the message from Forba's management about "expendability."³²⁷ She was also one of the dentists that Dr. Gusmerotti had out of her comfort zone.³²⁸

³²¹ Ex. 562 at sheet 4; expert affirmation at par. 110-112.

³²² Ex. 921 [Elizabeth Lorraine] at 85-8.

³²³ *Id.* at 89-91.

³²⁴ Ex. 921 [Elizabeth Lorraine] at 68-9; ex. 562 at sheet 1.

³²⁵ Ex. 921 [Elizabeth Lorraine] at 68-9; ex. 562 at sheet 2.

³²⁶ Expert affirmation at par. 104-105.

³²⁷ Ex. 98.

³²⁸ Ex. 576 at 1391115.

210. She too succumbed to that same Forba pressure to maximize production when she performed the four baby root canals and crowns on Dr. Gusmerotti's treatment plan without first examining Shiloh to confirm the need for such treatment.³²⁹ In performing the root canals and crowns on Shiloh's teeth, Dr. Kamara acted contrary to good and accepted dental practice and violated the standard of care.³³⁰

211. To do the unnecessary procedures, Dr. Kamara followed yet another part of the Forba model: restraining a child if he is uncooperative. Shiloh was put in a papoose restraint for non-emergency dental treatment³³¹ by a dentist who had no training in the diagnosis, need for or use of such behavior management techniques.³³²

212. Furthermore, Dr. Kamara used the fraudulent Forba consent form to assure Shiloh's mother that there were no known risks of restraints.³³³ Dr. Kamara also told Shiloh's mother that restraints would calm Shiloh down like a baby with a swaddling blanket. She also said that it would be best if Shiloh's mother stayed in the reception area while they used it because that would help keep Shiloh calm.³³⁴ Dr. Kamara did this even though she knew that restraining a child could cause significant psychological and physical trauma³³⁵ and that Shiloh had been screaming uncontrollably just prior to the time she strapped him down onto the papoose board.³³⁶

³²⁹ Ex. 562 at sheet 4 (no limited oral exam to confirm treatment plan and rule out other conditions).

³³⁰ Expert affirmation at par. 110-112.

³³¹ Ex. 562 at sheet 4.

³³² Ex. 66 at 163204; ex. 630 [Kamara Answers to Interrogatories] at No. 24.

³³³ Ex. 562 at sheet 3.

³³⁴ Ex. 921 [Elizabeth Lorraine] at 75, 81.

³³⁵ Ex. 915 [Kamara] at 22, 53-4; ex. 66 at 163205; ex. 619 [August 31, 2005 Kamara AAPD Guideline Acknowledgement]; ex. 622 [August 18, 2006 Kamara AAPD Guideline Acknowledgement].

³³⁶ Ex. 562 at sheet 1.

213. Dr. Kamara's use of a papoose restraint on Shiloh was abusive, unnecessary and contrary to the standard of care, but it was precisely what Forba trained her to do.³³⁷

The Albany Clinic & Shadaya Gilmore

214. Forba opened the Albany clinic on May 16, 2005 with Dr. Donna Sherry as the lead dentist.³³⁸ Within a few weeks, Dan DeRose complained that the clinic was not meeting Forba's financial expectations: "Albany open 2 mos (and totally sucks) . . ." ³³⁹ On August 2, Forba fired Dr. Sherry.³⁴⁰

215. In her place, Forba promoted Dr. Judy Mori, one of its associate dentists.³⁴¹ Forba executives immediately pressured Mori to increase the clinic's production.³⁴² In response, Dr. Mori assured them that she would read the Albany dentists the riot act to increase their production.³⁴³ She further agreed to adopt a clinic policy that would lengthen the time that children would be kept in restraints to increase the number of procedures that could be done at once on a child.³⁴⁴

216. Forba intensified the pressure on Mori to increase production when she received her performance review in January 2006. Dan DeRose told her in writing: "[w]e are not meeting goals in production." He let her know that if the clinic's financial performance did not improve she could be terminated.³⁴⁵

³³⁷ Expert affirmation at par. 113-115; ex. 927 [Mueller] at 169-71.

³³⁸ Ex. 11; ex. 39 [April 26, 2005 Forba Board Meeting] at 58329.

³³⁹ Ex. 390.

³⁴⁰ Ex. 29 [July 31, 2005 Forba Board Meeting] at 57474; ex. 374 [July 11, 2006 Root email to Dan DeRose] at 152303.

³⁴¹ Ex. 29 at 57411, 57474.

³⁴² Ex. 61 [November 16, 2005 Roumph email].

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ Ex. 19 [January 2006 Performance Review for Dr. Judy Mori] at 852, 853; ex. 909 [Dan DeRose] at 206-7.

217. In March, Mori reported to corporate management that “{w}e have the patients but the doctors are just not producing.”³⁴⁶ In response, Roumph encouraged Mori to pressure the dentists to do more procedures on each patient: “Maybe we talk to the docs about doing 1 more procedure per visit. Then next month we do the same thing, 1 more procedure per visit.”³⁴⁷

218. For the next several months, Roumph kept pressuring the Albany clinic to generate more dollars per patient. In April, he admonished Mori: “Production per patient needs to improve. In the next 60-90 days you will have an entirely new dentist staff. Let’s take this opportunity to set the expectation level from the start of their employment.”³⁴⁸

219. In June, Roumph instructed Forba’s regional manager to apply daily pressure in Albany: “Columbia, Greenville, Atlanta, and Albany need extra attention. I think daily communication with the 3 lead dentists . . . is vital to keep some pressure on them.”³⁴⁹ Roumph copied Dan DeRose on his e-mails.³⁵⁰

220. A few weeks later, one of Forba’s regional managers visited the Albany clinic. In preparation for the trip, Roumph directed a Forba employee to prepare a report of each dentist’s daily average production.³⁵¹ That same day, Dan DeRose was busy denying that Forba ever used such statistics. He said they served no legitimate purpose and were the number one trigger point for fraud.³⁵²

221. Forba changed owners in September 2006, but not its message to the clinic and its dentists to produce more money for the company. Knott, a Forba regional vice-

³⁴⁶ Ex. 95.

³⁴⁷ *Id.*

³⁴⁸ Ex. 71 [April 19, 2006 Roumph email].

³⁴⁹ Ex. 96.

³⁵⁰ Ex. 71; ex. 96.

³⁵¹ Ex. 93.

³⁵² Ex. 76.

president, talked to the dentists at least weekly, pushing them to increase their production.³⁵³ And to meet Forba's financial expectations, Knott directed Dr. Mori to influence the Albany dentists to do more treatment: "[I]n order to play with the big boys you have got to get your Docs motivated to . . . complete more TX . . ."³⁵⁴

222. Forba delivered the same message to Dr. Maziar Izadi, a dentist who had been at the clinic for nearly a year when he became Albany's lead dentist in July 2007.³⁵⁵ While assuring corporate headquarters that Dr. Izadi "understands our model and I expect good things in the very near future",³⁵⁶ Knott kept pressuring Dr. Izadi to increase the clinic's production per patient. In early September, Knott reported: "MTD production way off-budget . . . I will visit this week and ppp will be a major item of discussion."³⁵⁷

223. Dr. Izadi got the message. He understood he was being paid to influence the dentists to increase production on each patient.³⁵⁸ After meeting with Dr. Izadi, Knott reported to Forba's executive staff: Izadi "is determined to get production to well above budget; I wish more of our employees had his attitude of gratitude . . . ppp is the problem and [Izadi] knows it."³⁵⁹ As of October 2007, the clinic was utilizing the Forba model to meet the company's financial expectations: "[Izadi] has the vision" and production for October was strong.³⁶⁰

224. That month, Shadaya Gilmore made her first visit to the Albany clinic.³⁶¹ It was for a routine checkup.³⁶² Shadaya didn't have any problems or concerns with her

³⁵³ Ex. 917 [Knott] at 227-9; 235.

³⁵⁴ Ex. 667.

³⁵⁵ Ex. 578 at 1250028; ex. 917 [Knott] at 270-1; ex. 404; ex. 914 [Izadi] at 29.

³⁵⁶ Ex. 670 [August 28, 2007 Central Region Report] at 1494059.

³⁵⁷ Ex. 154 at 617823.

³⁵⁸ Ex. 168 at 1119915.

³⁵⁹ *Id.*

³⁶⁰ Ex. 425 [October 29, 2007 Central Region Report] at 1291315.

³⁶¹ Ex. 440.

teeth.³⁶³ She was not in any pain and did not have any infected or abscessed teeth.³⁶⁴ Her mother had simply taken her there for a routine cleaning because she had seen Small Smiles' television commercials about treating children and her aunt said they just treated kids, so she was interested in giving it a try.³⁶⁵

225. Utilizing the Forba model, Dr. Izadi and his associate, Dr. Lancen, needlessly and inappropriately restrained Shadaya twice, performed three unnecessary baby root canals and put on three unnecessary crowns - all of which violated the standard of care and were contrary to good and accepted dental practice.³⁶⁶

226. Shadaya was put in a restraint device on October 9, 2007 and again on December 27, 2007.³⁶⁷ She described it as being in a "straight jacket."³⁶⁸ Both times, she was restrained according to the Forba model: a dentist without the necessary training in advanced behavior management techniques concealed the risks of restraints by using the fraudulent Forba consent form to perform non-emergency dental treatment on a young child.³⁶⁹ All while her mother had been convinced to stay in the reception area.³⁷⁰ Placing a restraint on Shadaya on October 9 and December 27 was abusive, medically unnecessary and violated the standard of care.³⁷¹

³⁶² Ex. 935 [excerpts from November 6, 2012 dep tr Sherrain Rivera] at 100 (the complete version of this transcript is incorporated herein for all purposes as attached and included in defendants' Joint Exhibits at M).

³⁶³ Ex. 440 at patient information and sheet 1.

³⁶⁴ *Id.* at sheet 3.

³⁶⁵ Ex. 935 [Rivera] at 95-6, 100.

³⁶⁶ Expert affirmation at par. 121-150.

³⁶⁷ Ex. 440 at sheets 3 and 6.

³⁶⁸ Ex. 912 [excerpts from November 6, 2012 dep tr Shadaya Gilmore] at 13 (the complete version of this transcript is incorporated herein for all purposes as attached and included in defendants' Joint Exhibits at L).

³⁶⁹ Ex. 444 [Lancen Answers to Interrogatories] at Nos. 14, 24; ex. 918 [excerpts from November 20, 2012 dep tr Nassef Lancen] at 25, 32-5 (the complete version of this transcript is incorporated herein for all purposes as attached and included in Defendants' Joint Exhibits at O); ex. 454 [Lancen orientation materials] at 40-1 (orientation agenda); ex. 440 at papoose consent forms.

³⁷⁰ Ex. 935 [Rivera] at 128-130, 274-5; ex. 285 [November 21, 2007 Grossman e-mail enclosing Forba company policies]; ex. 286 [October 12, 2007 Mullinix e-mail].

³⁷¹ Expert affirmation at par. 133-134, 142-146.

227. Shadaya was also victimized by Forba's constant pressure on the dentists to do more treatment and generate more revenue. On October 9, 2007, Dr. Izadi prepared Shadaya's treatment plan that included three unnecessary baby root canals and three unnecessary crowns. The same day, he handed her off to Dr. Lancen to perform some of the dental work. Dr. Lancen followed Dr. Izadi's treatment plan and while restraining Shadaya, performed an unnecessary baby root canal and placed an unnecessary crown without examining Shadaya to confirm the need for such treatment.³⁷²

228. On December 27, 2007, Dr. Izadi, strapped Shadaya to a restraint board, and performed two more unnecessary baby root canals and put two more unnecessary crowns on her teeth.³⁷³

229. Shadaya emerged from the above-described unnecessary, substandard and abusive treatments saying she could feel every bit of the pain.³⁷⁴ She was sad and crying, her face was red and blotchy, she was walking slowly and was bleeding all in her mouth, her gums were swollen and her gums had sores appear the next day.³⁷⁵ While strapped to the papoose board during the December 27th treatment, Shadaya became so scared that she peed on herself.³⁷⁶

230. The trauma Shadaya suffered at Small Smiles lasted years. In January 2009, her new dentist noted that she was unwilling to cooperate with him and wrote "PAST PEDODONTIST TRAUMA!!" in her records.³⁷⁷ Shadaya's fear of the dentist continued through September 2010. At that time, her dentist requested a consultation

³⁷² Ex. 440 at sheet 3 (no limited oral exam to confirm treatment plan and rule out other conditions); expert affirmation at par. 132-134.

³⁷³ Ex. 440 at sheet 6; expert affirmation at par.140-146.

³⁷⁴ Ex. 935 [Rivera] at 118-9.

³⁷⁵ *Id.* at 113,-4, 137-8, 145-8.

³⁷⁶ Ex. 440 at sheet 6; ex. 935 [Rivera] at 131-3.

³⁷⁷ Ex. 20 [Dr. Schwartz dental records] at 27.

from a pediatric dentist because of her “hx [history] of emotional trauma from dental therapy.”³⁷⁸

231. The abuses at the Albany clinic did not go unnoticed by the New York regulatory authorities. In April 2008, the State of New York terminated Small Smiles of Albany from the Medicaid program for performing unnecessary procedures.³⁷⁹ In a later investigation, the State reviewed 77 cases in which Drs. Izadi, Lancen or Mori did a baby root canal or placed a stainless steel crown on a child. The State found that more than 59% of the procedures were unnecessary.³⁸⁰ It suspended Drs. Izadi and Mori from practicing dentistry on young children until they completed extensive additional training in pediatric dentistry.³⁸¹

232. This record tenders proof in evidentiary form demonstrating that the plaintiffs have a strong, and compelling case against the defendants, and that a jury needs to hear and decide these facts. The record also demonstrates that the defendants have not met their burden on the motions, and that in any event the plaintiffs have tendered proof in evidentiary form demonstrating genuine issues of material fact. These preclude summary judgment.

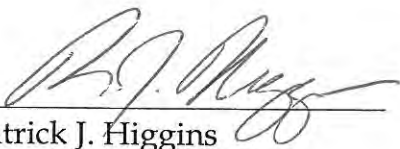
233. Wherefore, as counsel for the coordinated plaintiffs, I respectfully request that the pending motions for summary judgment be denied, and for such, other, further and different relief as this Court deems just and proper.

³⁷⁸ *Id.* at 29.

³⁷⁹ Ex. 338 [April 24, 2008 OIG Notice of Termination]; ex. 938 [Smith] at 302-3.

³⁸⁰ Ex. 342 [February 2, 2009 OIG Notice of Action]; ex. 938 [Smith] at 308-12.

³⁸¹ Ex. 419 [October 18, 2011 order of suspension for Izadi]; ex. 21 [September 13, 2011 order of suspension for Mori].


Patrick J. Higgins

Sworn to before me this 17th day of June, 2013.


Notary Public

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

Index of Exhibits
Attached to Plaintiffs' Joint Affidavit in Opposition to Summary Judgment Motions

Ex	Date	Description
1		Summons and Certificates of Merit for Bohn, Gilmore and Lorraine actions
2	4/15/13	Chart of Plaintiffs and defendants sued in coordinated actions
3	9/14/12	Decision and Order Denying Motions to Dismiss
4	4/4/13	In re: Small Smiles Hearing Transcript of April 4, 2013
5	1/15/13	Bohn Expert Disclosures
6	9/1/12	Old Forba's Answers to Interrogatories
7	6/14/06	Asset Purchase Agreement
8	4/1/04	CIBC FORBA Confidential Offering Memorandum
9	4/14/04	Certified Copy of Syracuse filings with NY Secretary of State
10	11/25/03	CIBC 11/25/03 FORBA Proposal
11	3/2/06	Reilly Email transmitting FORBA Clinics and Opening Dates xls w attachment
12	10/2/05	FORBA 10/2/05 board Meeting Agenda w Attach 2D (cash positions and disbursements)
13	10/6/04	Osterman email
14	9/4/12	Yaqoob Khan Answers to Interrogatories
15	11/7/05	Khan Lead Dentist Agreement
16	1/15/13	Gilmore Expert Disclosures
17	10/11/12	Affidavits of Richard Frankel and Pat Higgins in Response to New Forba's Motion to Renew/Reargue
18	7/28/06	First Amendment to APA
19	1/1/06	Performance Review for Dr. Judy Mori
20		Dr. Ken Schwartz Dental Records for Shadaya Gilmore
21	9/23/11	Dr. Mori Suspension Order
22	12/22/09	Forba v Forba Trial Transcript at 17-18
23	2/13/06	Certified Copies of Gardner Felony Complaint
24	12/23/05	Lane email transmitting Old FORBA contact info
25	5/10/06	Gardner Plea Agreement
26	4/14/04	Certified Copy of Rochester filings with NY Secretary of State
27	10/28/04	Certified Copy of Albany filings with NY Secretary of State
28	5/13/13	Order Denying Motion to Renew/Reargue
29	7/31/05	FORBA Board Meeting Agenda w attach 10, 12A, 12B, 12C, 12D and 13F
31	12/10/04	Lane email re: Rochester Staffing Plan
32	3/20/06	Pham 3/2/06 Semi-Annual Performance Review
33	8/31/06	Bower and DeRose emails re: Dr. Kim
37	12/29/04	DeRose email re: Atlanta Clinic
39	4/26/05	FORBA Board Meeting Agenda w attach 2E
43	9/9/04	Mueller email re: Opening weeks recdns for new clinics
44	7/10/03	Andrus fax to DeRose re: Observations from Denver
45	10/7/05	Knott email re: Standard Clinic Questions

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Ex	Date	Description
46	12/7/05	Aman Semi-Annual Performance Evaluation
50	3/28/09	Colorado Dental Board Stipulation and Order
58	4/27/06	DeRose email transmitting Final Management Presentation
59		Andrus letter to DeRose re: start up clinics
61	11/16/05	Mori and Roumph email re: October Analysis
65	1/16/04	FORBA Board Meeting Agenda w attachments
66	8/30/05	Lane email transmitting AAPD Guidelines for Behavior Mgt.
68	1/29/05	FORBA Board Meeting Agenda w attach 7V
71	4/19/06	Roumph email re: Albany production
76	6/20/06	DeRose email re: due diligence items
84	9/16/05	Lane email re: Rochester Bonus Summary
88	6/14/05	Roumph email re: Production for May
90	1/20/06	K. West email re: Production in Cinni w provider production reports
91	3/10/06	Roumph email re: Rochester production update
92	4/13/06	J. West email re: Rochester YTD analysis w attach
93	6/20/06	Roumph email re: Barnwell trip to NY
94	6/23/06	Roumph email re: production emails
95	3/22/06	Mori and Roumph email
96	6/1/06	Roumph email re: June Production
97	2/10/06	Randazzo email to Roumph re: Syracuse production update
98	4/18/06	Barnwell email to Roumph re: Rochester visit
99	3/2/06	Roumph email re: Daily production
101	12/15/04	Composite exhibit re: Syracuse Clinic
102	6/27/05	Dr. Dan Gardner semi-annual performance review
103	2/5/04	DeRose email to White and Ritchie
106	11/5/04	DeRose email re: appointment of Gardner as lead in Rochester
107	11/28/05	FORBA Board Meeting Agenda w attach 2F (dentist pipeline summary)
113	6/26/06	Small Smiles Dentist New Hire Training Agenda 6/26-6/30/06
114	10/9/06	Grossman email re: Clinic Regions and Regional Leadership
115	2/28/08	Brad Gardner email re: Payroll Detail by Employee
118	1/1/07	Purchase Agreement re: Syracuse Clinic
120	9/26/06	Buy-Sell Agreement re: Syracuse Clinic
127	10/9/07	Kevin Butler consent form for Protective Immobilization
130	4/9/07	FORBA Board Meeting materials re: Advisory Board
131	4/16/07	Lindley email re: Advisory Board Memo
132	12/28/07	Lindley email re: Small Smiles Dec 07

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Ex	Date	Description
133	4/16/08	Hatch email to clinics w new chart audit templates, enclosing new Consent for Protective Stabilization form
134A	12/5/08	Submission to HHS OIG
147	12/17/07	Reilly email
148	1/29/07	FORBA Holdings 2007 Goals and Objectives
150	1/31/07	Knott email transmitting Weekly Report
152	5/30/07	Knott email transmitting 5/25/07 Central Region Weekly Report
153	6/25/07	Andrus email transmitting Western Regional Report 6/23/07
154	9/10/07	Knott email transmitting 9/7/07 Central Region Weekly Report
164	5/25/07	Andrus email re: Daily Production and Greely, CO budget number
166	3/16/07	Andrus email re: Instructions to DeBuck
168	9/14/07	Knott email transmitting 9/14/07 Central Region Weekly Report
169	3/10/07	Andrus email distributing Western Region Weekly Report 3/10/07
170	1/19/07	Miscellaneous Andrus Emails 1/19/07-11/01/07
171	6/20/07	Tran email re: Reno Clinic
172	9/10/07	Andrus email transmitting 9/8/07 Western Region Weekly Report
199	5/23/06	Copy of Jeremy Bohn SS Records
269	10/18/06	Gross email re: New FORBA Org Charts
273	1/22/10	New FORBA Amended Complaint
279	11/5/07	McGrath email to Lindley w transcript of Channel 7 story
281	9/12/07	Aldred Williams Email
283	1/24/09	SS website
285	11/21/07	Grossman email enclosing Forba company policies
286	10/12/07	Mullinix email
296	3/6/07	Andrus 3/6/07 Email to Lindley
303	7/30/08	Moody email to Lindley re: ownership of Clinics w chart
307	1/1/07	Purchase Agreement Rochester
308	1/1/07	Purchase Agreement Albany
327	5/3/07	Barnwell email re: Williams' Langley Action Plan
330	3/4/09	K&S letter and FORBA Supplemental Submission to HHS OIG
331	3/31/08	Lancen Performance Review
338	4/24/08	NY OMIG Notice of Termination
342	2/2/09	NY OMIG Notice of Proposed Agency Action
346	9/26/06	Nash employment agreement
356	3/22/06	Bonds Syracuse Clinic employment agreement
374	7/11/06	Root email to D. DeRose re: dentist turnover
381	4/20/06	various April 2006 emails re: production

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Ex	Date	Description
390	7/17/05	D. DeRose email to Roumph, Lane, Knott re: Boise production
397	2/15/06	Bower email to D. DeRose, others re: Dr. Charisse Ciase
398	6/13/06	Knott email to Roumph, D. DeRose, Bower, others
399	6/29/06	Knott email to Holka
400	9/26/07	Copy of Ashley Parker's Small Smiles records
404	7/5/06	Izadi Employment Agreement
419	10/3/12	Izadi Consent Decree
425	10/29/07	Knott Central Region Weekly Report
440	10/9/07	Copy of Shadaya Gilmore's Small Smiles records
444	11/19/12	Lancen amended interrogatory responses
454		Miscellaneous Lancen documents - new hire packet
461	6/15/08	Lancen Employment Agreement
475	4/20/06	Roumph email to Barnwell, D. DeRose
479	7/5/06	Roumph email to D. DeRose, Kochenberger re: daily production
480	6/3/04	D. DeRose email to Roumph
488	9/26/06	Buy Sell agreement between Albany clinic and Padula and Nash re: Albany clinic
489	9/26/06	Buy Sell agreement between Albany clinic and Padula and Nash re: Rochester clinic
505	12/28/04	D. DeRose email to Turner, others re: Rochester production
506	12/16/05	Settlement Agreement re: Rochester Clinic
510	11/20/03	Mueller letter to CO Dental Board
511	9/12/03	D. DeRose email w: FORBA Overview
514	2/7/06	Lane email re: Albq re-training
515	7/17/06	Knott email
530	4/18/05	Lane email to Knott re: transition to Western Regional DD
531	11/15/05	Lane email distributing Common Concerns memo
532	4/20/06	Lane/Reilly email re: Answers to Questions
534	7/27/06	Mueller email to Roumph
562	8/23/07	Copy of Shiloh Lorraine's Small Smiles records
565	12/1/06	Gusmerotti's Lead Dentist Employment Agreement
572	3/19/07	Gusmerotti email to Knott
574	3/12/07	Knott Central Regional Report
576	4/2/07	Knott Central Regional Report
577	4/20/07	Gusmerotti and Knott email exchanges
578	7/23/07	Knott Central Region Report
603	10/12/05	DeRose email to Padula et al
616	8/5/05	Kamara Employment Agreement
619	8/31/05	Kamara AAPD Guideline Receipt Acknowledgment
622	8/18/06	Kamara Guideline Receipt Acknowledgment
630	9/4/12	Kamara Interrogatory responses
640	2/13/07	Central Regional Rpt
649	7/21/06	Dentist Efficiency Report

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Ex	Date	Description
664	6/6/06	Roumph email re: Albuquerque production
665	8/31/05	Knot Email to Roumph re: Western Reg. Production
666	9/1/05	Knott email to Roumph re: Western Region Production
667	3/9/07	Knott email to Mori
670	8/28/07	Central Regional Report
682	10/10/06	Grossman to Mori email re: bonus structure
683	12/21/06	Road to Super Bowl Attachments
684	3/1/07	March Madness Contest Email
685	5/21/07	Quest for Cup Contest
687	7/14/06	Knott Email
900	12/6/12	Excerpts from Steve Adair Deposition transcript
901	10/17/12	Excerpts from Naveed Aman Deposition transcript
903	10/25/12	Robert Andrus Deposition transcript
907	11/19/12	Excerpts from Koury Bonds Deposition transcript
908	11/27/12	Excerpts from Michael DeRose Deposition transcript
909	10/23/12	Excerpts from Dan DeRose Deposition transcript
912	10/6/12	Excerpts from Shadaya Gilmore Deposition transcript
913	12/7/12	Excerpts from Gary Gusmerotti Deposition transcript
914	11/19/12	Excerpts from Maziar Izadi Deposition transcript
915	12/6/12	Excerpts from Ismatu Kamara Deposition transcript
916	11/30/12	Sonny Khanna Deposition transcript
917	12/10/12	Ken Knott Deposition transcript
918	11/20/12	Excerpts from Nassef Lancen Deposition transcript
919	12/3/12	Excerpts from Rich Lane Deposition transcript
920	11/14/12	Excerpts from Michael Lindley Deposition transcript
921	11/27/12	Excerpts from Elizabeth Lorraine Deposition transcript
927	11/30/12	Excerpts from William Mueller Deposition transcript
929	11/29/12	Excerpts from Adolph Padula Deposition transcript
932	11/6/12	Kim Pham Deposition transcript
935	11/30/12	Excerpts from Sherain Rivera Deposition Transcript
938	11/15/12	Al Smith Deposition transcript
942	10/10/12	Excerpts from Kelly Varano Deposition transcript
	6/15/13	Redacted Expert Affirmation (original filed separately)
	6/8/13	Affidavit of Elizabeth Lorraine
	6/7/13	Affidavit of Sherrain Rivera
	6/8/13	Affidavit of Kelly Varano