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PLEASE REPLY TO: ALBANY OFFICE

August 24, 2012

TO ALL COUNSEL *via* LEXIS NEXIS

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

Dear Counsel:

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

Thank you.

Very truly yours,

POWERS & SANTOLA, LLP

By: Patrick J. Higgins

PJH:kd
Enclosure

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

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

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

IN RE: SMALL SMILES LITIGATION

DECISION

INTRODUCTION

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENTS

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

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

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

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

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

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

DISCUSSION

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

I. Plaintiffs' Fraud Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Plaintiffs' Claim For Battery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Plaintiffs Claim for Breach Of Fiduciary Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. General Business Law § 349

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. General Business Law § 350

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

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

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

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

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

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

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

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

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

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

V. Plaintiffs' Negligence Claim Against The Dentist Defendants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

DATED: August 23, 2012.

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