STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN RE: SMALL SMILES LITIGATION

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

DECISION

Before the Court are a number of motions and cross-motions dealing with discovery in these consolidated actions. There motions are hereby decided in turn.

I. DEFENDANT NEW FORBA'S MOTIONS FOR PROTECTIVE ORDERS

The defendants, FORBA Holdings, LLC, n/k/a Church Street Health Management, LLC; FORBA NY, LLC, Small Smiles dentistry of Albany, LLC; Small Smiles Dentistry of Syracuse, LLC; and Small Smiles Dentistry of Rochester, LLC (collectively known as the "New FORBA defendants"), make the instant motion for a protective order pursuant to CPLR s. 3103 to prevent plaintiffs from obtaining certain documents, in particular, "special reports" issued in connection with the federal and New York Corporate Integrity Agreement (the "CIA") maintained by New FORBA as part of a settlement of fraud claims brought against New FORBA by the United States Government and the Attorneys General of several states. This CIA was entered into by and between New FORBA and the Office of the Inspector General for the United States Department of Health and Human Services on January 15, 2010. New FORBA also moves for a protective order pursuant to the same provision of the CPLR to "claw-back" other documents, specifically, performance evaluations of its dentists that were generated prior to January 15, 2010, that defendants claim were inadvertently produced

during the course of discovery to the plaintiffs and which defendants now claim are privileged.

For a plethora of reasons almost too great to count, defendants' motion is DENIED.

The defendants' motion is incurably procedurally flawed.

This Court, with the consent of all parties, appointed Hon. John W. Brandt as referee in this matter, to handle all disputes with regard to discovery. The parties were directed to submit all matters relating to discovery, objections to demands or responses, pleas for protective orders, motions to compel, etc., to Judge Brandt prior to turning to the Court for relief. The referee was to make recommendations and report same to the Court.

On September 24, 2012, New FORBA filed an objection to plaintiff's discovery requests 30 through 34, claiming that these requests "seek information which is outside the relevant time period in this lawsuit so as to render the demand overly broad and intrusive." These requests sought the special reports generated as a result of the CIA, which, pursuant to the CIA, include quality improvement goals, quarterly and annual reports, among other documents. At the time the defendants raised this objection, some of these special reports had already been produced to the plaintiffs without reservation or objection when the defendants handed over some 200-plus compact disks containing some 2.4 million pages of documents.[1]

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[1]At a June 28, 2012 conference with the Court, all counsel agreed that some 200-plus compact disks containing some 2.4 million pages that had been produced to the Unsecured

These objections were submitted to Judge Brandt; each side had a full and fair opportunity to brief the issues and to raise or dispute whatever objection to the production of the special reports each side felt appropriate. The brunt of the defendants' objections was that the production would be unduly burdensome, overly broad and intrusive, as well as temporally irrelevant to the plaintiffs' claims; at no time did the defendants ever raise the issue of privilege with regard to these special reports.

On October 7, 2012, Judge Brandt issued a recommendation and report, granting the plaintiffs' request to compel the production of the special reports and to fully comply with the plaintiffs' demands 30 through 34. In a well-reasoned and thorough letter decision, Judge Brandt found that the defendants' objections to the production of the special reports lacked merit: "It appears that there are, at most, eleven quarterly reports and two annual reports that are being sought. Based on the Monitor Reports I surmise that the quarterly reports required to be prepared by the defendants are not that lengthy and are already in existence." Further, Judge Brandt found that "the information being sought is quite specific and not, as claimed by the defendants, to be overbroad" and that "since the reports already exist, defendants will not be overly burdened, harassed, or otherwise unreasonably annoyed in providing such reports." This Court now affirms the recommendations of the referee orders that all subject documents be produced forthwith.

Creditors Committee in a bankruptcy proceeding involving two of New FORBA's companies would be treated as if they had been produced in this action. On July 30, 2012, counsel for the plaintiffs and New FORBA stipulated to such a production and did so with no reservation or claim of privilege for any of the documents produced. Apparently part of this production included several of the special reports over which New FORBA now seeks to claim as privileged.

With regard to the defendants' claims that the documents sought lack temporal relevance, Judge Brandt specifically stated,"It is not difficult to perceive how the information sought in such demands is relevant or material to plaintiffs' claims; conversely the only conclusion I can reach from the Monitor's reports is that the information required to be produced in such quarterly reports strikes at the heart of the plaintiffs' claims." Indeed, the documents sought to be protected, the special reports, are distinctly relevant to the plaintiffs' claims in all causes of action.

Judge Brandt also recorded the defendants' acknowledgment that "the documents in question have been previously turned over, albeit in another action in another jurisdiction, which action had a different objective than the action pending here." However, Judge Brandt went on to state, "That doesn't change the point that such reports have been provided, or otherwise published, thereby constituting a waiver of objection to the materials sought by plaintiffs."

In the days that followed Judge Brandt's ruling, the defendants did not appeal the referee's decision to the Court, or ask the Court to intervene. No motion to renew or reargue was made to the referee either. The defendants simply allowed Judge Brandt's recommendation to stand, without abiding by it, until they made the instant motion to this Court. What is notable is that the defendants did not even mention their prior motion before Judge Brandt, or his October 7, 2012 decision, when making the instant motion. For the defendants to move this Court for relief without advising the Court that the referee had already recommended that the relief be denied is disingenuous at best and appears to be an outright attempt to deceive the Court.

New FORBA's motion for a protective order fails on the merits as well

Even if the defendants' motion weren't so procedurally flawed as to require denial, the motion must be denied on the merits as well.

As this motion relates to two separate and distinct sets of documents, the Court will address each of these in turn.

The employee files and performance reviews:

With regard to the performance reviews and employee files that New FORBA now wishes to "claw back" and protect as privileged under Public Health Law s. 2805-j and Education Law s. 6527(3). Some of these employee files, including performance reviews of the defendant dentists, have already been produced by New FORBA, while still others have not yet been produced.

On July 25, 2012, counsel for New FORBA entered into a stipulation for the release of some 2.4 million pages of documents contained on 200-plus compact disks that had already been released in the bankruptcy proceeding. At that time, plaintiffs identified nine categories of documents that they had previously requested, but were not contained on the disks. One such category was "personnel files and performance reviews for each Dentist Defendant."

On September 3, 2012, New FORBA filed its response to plaintiffs' first supplemental notice to produce with a privilege log attached. In that response, while specifically addressing plaintiffs' demand for "personnel files and performance reviews for each Defendant Dentist," New FORBA said that it was producing the personnel files and performance reviews in its possession, custody or control and reserving the right to

supplement the production at a later time. At no time did New FORBA claim privilege with regard to those documents, nor did the defendants supplement their responses to include a claim of privilege. In fact, as the defendants were able to gather and review the demanded documents, the employee files, many apparently containing performance reviews, were readily produced to the plaintiffs.

It is abundantly clear from the record before the Court that the review and production of these employee files and performance reviews was not part of the massive 2.4 million page document production, as defendants would now have the Court believe, but as part of a much smaller document production of which defendants undertook a review at the corporate level, and then again by outside counsel, prior to turning the files over to the plaintiffs. It is clear this was not an inadvertent reproduction of documents the importance or privileged nature of which was overlooked in the magnitude of the production. These were but relatively small files, apparently no more than a dozen in total, all of which were reviewed on two separate levels. First by Linda Zoeller, Vice-President of the Legal Department at New FORBA, and then again by the various attorneys of the law firm representing the New FORBA defendants in this instant litigation.

In support of the instant motion for a protective order, Michelle Davoli submitted her affidavit wherein she stated under penalty of perjury:

> 14. As this Court is also aware, Andrew Horsfall, Esq. handled the bulk of discovery related with this matter on behalf of the New FORBA defendants up until his departure from Smith, Sovik, Kendrick and Sugnet on September 28, 2012. In the two weeks leading up to his departure, the undersigned was assigned to take over attorney Horsfall's role in this litigation, and two other attorneys were assigned to the matter as well.

15. During the two week transition, in an effort to comply with the expedited discovery order, the undersigned was directed to perform several tasks to become acquainted with this massive file and to prepare for numerous depositions scheduled to begin October 10, 2012. The undersigned relied on the direction and advice of attorney Horsfall at this time. Among those tasks, the undersigned and another attorney were directed to produce personnel files of several dentists. These files were disclosed without redaction or otherwise withholding of privileged documents. The undersigned signed a letter on October 1, 2012 and the personnel files were produced, erroneously including privileged material which were intended to be withheld from production. The undersigned was not aware the files contained any privileged materials when the production was made.

Ms. Davoli would have the Court believe that she blindly took direction from a junior associate when producing the subject files, and that he alone was responsible for their erroneous, unredacted production. However, her email communications with plaintiffs' counsel with regard to the employee files and performance reviews tell quite a different story.

On September 29, 2012, Ms. Davoli responded to an email from plaintiffs' counsel Richard Frankel, wherein he asks about the status of the production of the personnel files/performance reviews. Ms. Davoli states, "We sent out most of your requests yesterday and will be sending out the personnel files Monday." She goes on to object to the production of another unrelated document and references a discovery brief she wrote to Judge Brandt. At no time did she claim the employee files or performance reviews were privileged.

On October 3, 2012, Ms. Davoli, in another email correspondence, assured Mr. Frankel that the employee files/performance reviews had indeed been sent. Again, there was no mention of any claim of privilege.

On October 4, 2012, Ms. Davoli wrote to Mr. Frankel, "I know for a fact that we sent you everything we have with respect to performance reviews." Again, no mention of privilege.

On October 5, 2012, Attorney Heather Zimmerman, another attorney assigned to work on the New FORBA defense team, sent an email to Mr. Frankel (with a courtesy copy to Ms. Davoli):

> I'm working with Michelle on this case, and **I reviewed all the personnel files prior to their production**...Not every file contained performance reviews, either, but I think you should have some form of performance review for nine dentists. Please let me know if you are missing something. Finally, there are some dentists for whom we do not yet have a personnel file, and we will supplement our production when we receive those." *(Emphasis added)*

It is apparent that these employee files were indeed reviewed by someone other than Mr. Horsfall prior to their production to the plaintiffs, and in particular, that the performance reviews were specifically sought out and reviewed by defense counsel, with counsel noting that not all files contained such reviews, but those that existed were being produced. At no time did Ms. Davoli or Ms. Zimmerman claim privilege to those documents.

On October 9, 2012, Ms. Zimmerman again wrote to Mr. Frankel, "We will be producing files for Doctors Aman, Nam, and Pham today. **Again, we will not be withholding any performance reviews in their files.**" *(Emphasis added)*

The Appellate Division, Fourth Department, has held that "disclosure of a privileged document generally waives that privilege unless the client intended to retain the confidentiality of the printed document and took reasonable steps to prevent its disclosure. Manufacturers and Traders Trust Co v. Servtronics, Inc., 143 AD2d 392 (4th

Dept. 1987); *see also* National Helium Corp v. United States, 219 Ct Cl 612). Two other factors to be considered in assessing whether an inadvertent disclosure waives the privilege are whether there was a prompt objection to the disclosure after discovering it and whether the party claiming waiver will suffer prejudice if a protective order is granted." Baliva v. State Farm Mut. Auto. Ins. Co., 275 A.D.2d 1030 (4th Dept. 2000); *see also* Kraus v. Brandstetter, 185 A.D.2d 300, 301 (2nd Dept. 1992); John Blair Communications, Inc. v. Reliance Capital Group, L.P., 182 A.D.2d 578 (1st Dept. 1992); New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Govis, Inc., 300 A.D.2d 169 (1st Dept. 2002).

Intent must be the primary component of any waiver test. The Supreme Court has defined waiver as an "intentional relinquishment...of a known right." Manufacturers and Traders Trust Co v. Servtronics, Inc., *supra, citing* Johnson v. Zerbst, 304 US 458. Rather than requiring a court to evaluate a client's bald claim of intent, however, the client should be required to demonstrate his intent by objective evidence. Id. The burden of proving the privilege rests with the party asserting it, not with the party contesting it. Id., *citing* Weil v. Investment/Indicators, Research & Management, 647 F2d 18.

The Appellate Division, Fourth Department, applied these factors in Manufacturers and Traders Trust Co v. Servtronics, Inc., *supra*. During discovery, M&T's outside counsel procured several storage boxes of documents and reviewed the large quantity of files to identify and remove those documents that contained attorney-client privileged materials. Once this was done, the bank's counsel made the remaining documents available to opposing counsel for examination. Soon after, it was discovered

that six documents containing attorney-client privileged matter was inadvertently included in the files disclosed. The bank moved for a protective order seeking return of the documents and an injunction preventing defendant from divulging the information or using it in further proceedings in the action. The defendant opposed this motion, arguing that the bank had waived its attorney-client privilege.

The appellate division found that there was no evidence that the bank intended to disclose the documents. The court reasoned that the problem occurred due to M&T's counsel inadequately screening the material before it was delivered to defendant. However, "the fact that counsel undertook a screening procedure indicates that he took some precaution to avoid disclosure of privileged material. Disclosure caused by an error of a competent screener, as counsel was in this case, does not evidence a lack of precautions." Manufacturers & Traders Trust v. Servtronics, Inc., *supra*; *see also* Delta Financial Corp v. Morrison, 12 Misc.3d 807 (Sup. Ct. Nassau County, 2006).

In the matter at bar, New FORBA argues that the production of the employee files and performance reports was inadvertent and that New FORBA did not intend to waive privilege with regard to the performance reviews, which is somewhat similar to the claims made by the plaintiff in Manufacturers & Traders Trust v. Servtronics, Inc, however, that is where the similarities between the two cases ends. In the M&T case, counsel had reviewed several storage boxes containing a large quantity of documents, and that the documents at the heart of the motion for a protective order had slipped by an otherwise competent screener.

Here, we have the review of relatively few documents, the employee files of less than a dozen defendant dentists, that are thin in nature due to the shoddy document

retention practices of the defendants, as admitted by New FORBA ("This company, Centers included, were simply 'not good at keeping records' up until around 2007-2008."). Further, the documents in question, particularly the performance reviews of the defendant dentists, were specifically reviewed and recognized for what they are - performance reviews, and were specifically referred to and discussed between counsel for the parties in multiple emails. These were handed over in discovery with no claim of privilege whatsoever, although New FORBA did dispute the discoverability of other documents during that same time period.

Finally, and perhaps this is the most telling with regard to defendants' waiver of any privilege that might have applied to these documents is the following. On October 17, 2012, plaintiffs undertook to depose defendant Dr. Naveed Aman, who is represented by Attorney Thomas Witz of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker. This was the first examination before trial of any of the defendant dentists in this matter. The production of Dr. Aman's employee file took place on or around October 9, 2012, according to an email sent by Heather Zimmerman to Richard Frankel on that same date; "We will be producing files for Doctors Aman, Nam and Pham today. Again, we will not be withholding any performance reviews in their files." During the deposition, Dr. Aman was shown what had been marked as Exhibit "6," the performance review for Dr. Aman that had been produced by New FORBA a couple of weeks before. Dr. Aman was asked about this document, and the deposition was abruptly halted by Mr. Witz, who argued that he was not willing to proceed with the deposition unless he was shown whatever documents plaintiffs' counsel intended to question the witness about ahead of time. Attorney Kevin Leyendecker, counsel for plaintiffs who had been

conducting the deposition, would not agree to this, arguing that Exhibit "6" had been produced by New FORBA to all parties during the course of discovery, that the witness had already testified that he recognized the document and was familiar with it and questioning should proceed.

Judge Brandt was called with regard to this dispute. A lengthy discussion took place with Judge Brandt, during which Misters Witz and Leyendecker were heard at length about whether Mr. Leyendecker had to turn over to Mr. Witz whatever documents he sought to question the witness about prior to the deposition, and in particular performance reviews (Exhibit "6", for example), despite the fact that the documents had been disseminated to all parties during discovery. New FORBA was represented during this deposition by Attorney Robert Cahalan of the law firm of Smith, Sovik, Kendrick & Sugnet. At no time did Mr. Cahalan speak up and raise the issue of privilege with regard to the performance reviews. In fact, no one at all raised the issue of privilege during this discussion. Judge Brandt rejected Mr. Witz's arguments and directed that the deposition proceed. Despite this ruling, Mr. Witz refused to go forward with the deposition, sent his witness home, and canceled the depositions of other clients what were to take place during the remainder of the week.

Unlike the situation in Manufacturers & Traders Trust v. Servtronics, Inc., where the plaintiff did not allow any testimony or other production of documents to occur that would further compound the error caused by the production over privileged documents, the defendant New FORBA remained silent on the issue of privilege when one of the very documents claimed to be privileged was discussed at length with the referee. Mr. Cahalan took no position whatsoever on the objection raised with Judge Brandt, and the

deposition was ordered to proceed. But for Mr. Witz's disregard for Judge Brandt's ruling, the deposition of Dr. Aman would have gone forward on this issue of his performance review.

On October 18, 2012, after motion arguments (on a motion unrelated to the instant motion) before the Court, the issue of what had occurred during the deposition on October 17, 2012 was raised. Misters Leyendecker and Witz were present, Ms. Davoli for New FORBA was present in the courtroom, as well as several other attorneys for different defendant groups. The Court heard from the parties with regard to what had occurred at the deposition and Judge Brandt's ruling, and Mr. Witz's unilateral decision to halt the deposition despite that ruling. At no time during this conversation with the Court did counsel Ms. Davoli assert any kind of privilege over the documents that were at the heart of this heated exchange. In fact, she was entirely silent on the matter, as evidenced by the record of the proceedings.

It is clear from the email communications in which the performance reviews were specifically mentioned multiple times and in which counsel for New FORBA promised to turn over without reservation, as well as the silence from New FORBA's counsel on the issue of privilege during the lengthy discussions that took place with the referee on October 17, 2012, and before the Court on October 18, 2012, that New FORBA intended for the production of those documents without any assertion of privilege. Further, it was only after the deposition of Dr. Aman was attempted, when the damaging nature of the performance reviews was realized by Mr. Witz (although, apparently not by New FORBA's counsel as can be seen by counsel's silence on the matter during the discussion with Judge Brandt and with the Court on October 18, 2012), that it became abundantly

clear that something had to be done to "claw back" these damaging documents, and New FORBA brought the instant motion.

In cases of inadvertent disclosure, there is a problem in reconciling the principle that the privilege belongs to the client and can only be waived by the client, with the doctrine that an attorney may waive the right of his client when given general power to do so. Manufacturers & Traders Trust v. Servtronics, Inc., *supra*. It has been rejected by the courts that an attorney may never waive the privilege rights of the client because, like any other agent, an attorney may possess authority to bind his client. *See* Manufacturers & Traders Trust v. Servtronics, Inc., *supra*, Republic Gear Co v. Borg-Warner Corp., 381 F2d 551 (2nd Cir. 1967); Schnell v. Schnall, 550 F.Supp 650 (SDNY 1982); Himmelfarb v. United States, 175 F2s 924 (9th Cir 1949); United States v. Aronoff, 466 FSupp 855 (SDNY 1979); 8 Wigmore, Evidence s. 2325.

Here, counsel for New FORBA has done just that. If privilege attached to any of these performance reviews, or other documents contained in the employee's files, counsel for New FORBA has waived that privilege, not just by their silence on October 17 and 18, 2012, but by their overt assurances that these specific documents were reviewed and were being produced to plaintiffs counsel.

An additional point to be made with regard to the employee files and performance reviews is that they do not even qualify for privilege under the Public Health Law ss. 2801 and 2805-j and Education Law s. 6527(3), as argued by New FORBA.

Education Law s. 6527(3) reads in pertinent part, "Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function

or participation in a medical and dental malpractice prevention program...shall be subject to disclosure under article thirty-one of the Civil Practice Law and Rules." Additionally, Public Health Law s. 2805-j sets forth in pertinent part:

1. Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental, and podiatric malpractice. Such program shall include at least the following...
   b. A...dental...staff privileges sanction procedure through which credentials, physical and mental capacity and competence in delivering health care services are periodically reviewed, and reviewed as otherwise warranted in specific instances and circumstances, as part of an evaluation of staff privileges;
   c. The periodic review and the review as otherwise warranted in specific instances and circumstances of the credentials, physical and mental capacity and competence in delivering health care services who are employed or associated with the hospital.

Public Health Care Law 2805-m(2) requires that none of the information collected and maintained pursuant to s. 2805-j shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules.

Two of the performance reviews that are the subject of this motion have been provided to the Court - one for Dr. Aman, which was generated by his supervisor Dr. Janine Randazzo on December 7, 2005, and another for Dr. Dan Gardner, which was generated by Old FORBA's president, Dan DeRose, on June 27, 2005.

The Court sees no possible way that these performance reviews may be characterized as "peer reviews" as the defendants would lead the Court to believe. In particular, the performance review of Dr. Gardner was generated by Dan DeRose, the non-dentist president of Old FORBA, who can hardly be considered a peer qualified or capable of reviewing and critiquing the clinical performance of a dentist. Secondly, it is questionable as to whether the Small Smiles clinics for which these performance reviews

were generated would fit under the definition of a hospital or dental clinic, as defined by the Public Health Law or the Education Law, as it has been alleged that the defendants were participating in the corporate practice of dentistry, an illegal enterprise under New York law.

Mr. DeRose was deposed in this action on October 23 and October 24, 2012. During his deposition he was asked a series of questions about the performance reviews that were generated by himself and others at Old FORBA.

Q: Answer my question. I'm asking you, when you did these evaluations, were you evaluating the quality of the dental care?
A: Here is what I was evaluating. As you know the answer to that, I can't evaluate dental care. I'm not a dentist. Okay. When I was evaluating was quantity of work.
Q: Not quality of care - - I'm sorry. Quality of work.
A: The second box, right?
Q: No, quality.
A: The second?
Q: Quality of work.
A: Oh, the fourth box. Quality, commitment, accuracy, neatness, thoroughness, timeliness, customer satisfaction. That has nothing to do with dentistry.

And further on, Mr. DeRose testified:

Q: So this performance review has nothing to do with the quality of care then?
A: Only as defined.
Q: Which doesn't include the dental side you just told us?
Mr. Sweeney: Objection.
A: Right, because I can't do the dental side. I'm not a dentist.

It is abundantly clear that these performance reviews had no relation whatsoever to quality assurance at the dental clinics. These performance reviews cite no specific instances or circumstances of behavior or practice; they contain just generalized statements about the individual dentist's performance and ability. What is specifically addressed in each of these is not the quality of the dentist's performance, but the

quantity of his performance.

In Dr. Aman's performance review, it is noted, "Needs to improve production by increasing efficiency and number of procedures," and that he needs to "improve production by doing more procedures on each [patient]." This certainly does not go to the quality of Dr. Aman's work, but to the quantity of work he was expected to perform, which goes to the heart of the plaintiffs' allegation that the defendants were putting profits before their patients.

In Dr. Gardner's performance review it is noted with seeming exuberance that the *"Quantity* of work has been unbelievable" *(emphasis added),* and "Has outperformed expectations in every category." As for future objectives, Mr. DeRose says Dr. Gardner needs to increase his daily production. Based on this review and his out-standing quantity of performance, Dr. Gardner was given a $12,000 per year raise.[2]

These performance reviews can hardly be characterized as quality assurance reviews generated for the purpose of avoiding malpractice. They appear to be simply quantity assurance reviews for the purpose of driving profits for the corporation. And it can hardly be argued by New FORBA that these reviews were generated as part of a quality assurance program, as New FORBA has alleged that no such program existed at the time these reports were created.[3] *See* Van Caloen v. Polinco, 214 AD2d 555 (2nd Dept.

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[2]This raise was short-lived as just two month later Dr. Gardner was arrested for committing Medicaid fraud, lost his license to practice dentistry, and was eventually sentenced to six months in prison; New FORBA repaid $450,000 to New York authorities.

[3]*See* Amended Complaint in the Matter of FORBA Holdings, LLC (New FORBA), v. LICSAC, et al (Old FORBA), Civil Action No.: 09-cv-02305-CMA-MJW, United States District Court for the District of Colorado, at para. 68, "Old FORBA did not establish policies, procedures, or quality control measures to promote appropriate standards of care at the Small

1995) (protective order denied because the doctor failed to allege that the documents requested were engendered and used in the course of formal proceedings by a hospital review committee); *see also* Orner v. Mount Sinai Hosp., 305 AD2d 307 (1st Dept. 2003) (court held job performance evaluations were subject to discovery because the defendant hospital did not allege that job performance evaluations were used by the hospital review committee). The New FORBA defendants cannot have it both ways - to allege in one proceeding that no quality assurance oversight of any kind was put in place during the period in question, and then attempt to claim privilege over performance reviews, stating that they were generated as part of a quality assurance program.

What's more, the defendant dentists have answered under oath that no real quality assurance program or quality of care review program was in place at the time these supposed performance reviews were generated.

In February, 2012, plaintiffs served interrogatories on the dentist defendants. Said interrogatories included the following:

> 25. Was the quality of your work at the New York Clinics reviewed by any representative of FORBA or the clinic? If so, for each such review identify all persons who conducted the review, the date of such review, the manner in which the review was conducted, and the results of the review."

Smiles facilities." [Statements made in a prior complaint are admissible as an informal judicial admission. Bogoni v. Friedlander, 197 AD2d 281 (1st Dept. 1994); Performance Comerical Importadora E Exportadora Ltda v. Sewa Intl. Fashions Pvt. Ltd., 79 AD3d 673 (1st Dept. 2010); Chock Full O'Nuts, Corp v. NRP, LLC I, 47 AD3d 189 (1st Dept. 2007). Statements in a prior complaint are admissible as an evidentiary admission. Gold v. Winget, 407 BR 232. "The law is quite clear that such pleadings constitute the admissions of a party-opponent and are admissible in the case in which they were originally filed, as well as in any subsequent litigation involving that party." United States v. McKeon, 738 F2d 26 (2nd Cir NY 1984).]

In September, 2012, twenty-five dentist defendants answered the interrogatory, and of the twenty-five, twelve said no one reviewed the quality of their work. More importantly, none of the dentists said that the quality of their work was reviewed in an annual or semi-annual performance review. Only one defendant dentist, Dr. Koury Bonds, mentioned that he underwent an annual review, and he admitted that no one reviewed the quality of his work once he became a lead dentist. These interrogatory answers only drive the point home that there was no quality assurance program in place at the time these performance reviews were generated.

Finally, the last issue to be addressed with regard to the discoverability of the employee files, and the performance reviews in particular, New FORBA takes the position that the performance reviews are privileged, and therefore not discoverable, under the Public Health Law, arguing that a plain reading of the statute does not limit the protection to actions sounding in malpractice. "The mere fact that the plaintiffs assert causes of action in addition to dental malpractice, such as fraud, negligence, battery, violations of the General Business Law sections 349 and 350 does not entitle them to these documents," citing the cases of Klinger v. Mashioff, 50 AD3d 746, and Megrelishvili v. Our Lady of Mercy Medical Center, 291 AD2d 18, to support that position.

The cases cited by the New FORBA defendants are not on point with the matter at bar. Both the Klinger and the Megrelishvili cases refer to matters where there was a cause of action for malpractice as well as another negligence-based cause of action asserted. In Klinger, the plaintiff brought claims of medical malpractice and for wrongful death; in Megrelishvili, the causes of action asserted there were malpractice

and negligence. The causes of action asserted against the defendants in each of those cases are all negligence based, whether couched in terms of common law negligence, malpractice or wrongful death.

In the case at bar, the plaintiffs have asserted causes of action sounding not only in malpractice, but also intentional tort, fraud, and violations of the General Business Law, among other things. The matter at bar is on all fours with the matter of Ryan v. State Island University Hospital, 2006 WL 3497875 (EDNY 2006).

In that case, the plaintiffs had asserted causes of action sounding in medical malpractice, as well as fraud and violations of New York's consumer protection and public health laws. In response to plaintiffs' demand for discovery, which included a demand for information from the defendant's peer review committee reports, the defendant asserted that the information sought by the plaintiffs was privileged and thus not subject to disclosure pursuant to PHL s. 2805-m and EL s. 6527(3). Ryan v. State Island University Hospital, *supra*.

After determining that the information sought was indeed relevant, the court next turned to the issue of whether it was privileged. In applying New York privilege law, the court held that, indeed, the peer review committee reports were discoverable.

> Under Education Law s. 6527(3), the New York State Legislature intended to "enhance the objectivity of the review process" and to assure that medical review committees 'may frankly and objectively analyze the quality of health services rendered." Logue v. Velez, 92 NY2d 13 (1998) (*quoting* Mem. of Assembly Rules Comm., Bill Jacket, L. 1971, ch. 990, at 6). At its heart, the statutory privilege in Education Law s. 6527(3) is designed "to promote the quality of care through self-review without fear of legal reprisal." Katherine F v. State of New York, 94 NY2d 200 (1999). Similar policy concerns were embodied in subsequent provisions of the Public Health Law, including s. 2805-m, which conferred confidentiality to findings that were made as part of the peer review committee designed to

prevent medical malpractice. Ryan v. State Island University Hospital, *supra*.

The court went on to note that these privileges are not an absolute bar to disclosure. "In actions not based on claims of medical malpractice, where the underlying policy of improving medical care was not implicated, courts have compelled disclosure of peer review committee findings." Id. "The party asserting these privileges has the burden of establishing that: 1) the information sought by plaintiff was prepared in accordance with New York Education Law s. 6527(3) and Public Health Law s. 2806-m, *see* Marte v. Brooklyn Hosp. Ctr., 9 AD3d 41 (2nd Dept. 2004), and 2) the disclosure of such information would frustrate the purposes underlying the privileges, *see* Spectrum Sys. Int'l Corp v. Chenical Bank, 78 NY2d 371 (1991).

While the court in Ryan found that the defendant had arguably demonstrated that the subject documents were prepared in accordance with the Public Health Law, the court went on to find that the defendant had failed to meet its burden to demonstrate that disclosure of the information sought would frustrate the policies behind the privilege it was asserting. Ryan v. State Island University Hospital, *supra*.

> Even though plaintiff has asserted a cause of action for medical malpractice, the crux of her complaint asserts deceptive acts, false advertising and fraudulent business practices by the defendants. Thus, plaintiff does not seek information regarding "medical malpractice" or "physician misconduct" to demonstrate that such malpractice or misconduct actually occurred. Rather, plaintiff seeks information regarding the success rates of its Body Radiosurgery treatment (which would go to prove the plaintiff's fraud-based causes of action). Thus to allow disclosure here will not hamper [the defendant's] ability to candidly review its procedures and physicians in order to "make adequate medical services available to the public." Ryan v. State Island University Hospital, *supra*.

Further, the court in Ryan found that to foreclose discovery would subvert the important policies underlying General Business Law ss. 349 and 350. Id., *citing* LaValle v State of New York, 185 Misc2d 699 (NY Sup Ct 2000) (the public interest in preventing disclosure should be weighed against the societal interests in redressing private wrongs and arriving at a just result in private litigation) (*quoting* Cirale v. 80 Pine St. Corp., 35 NY2d 113 (1974).

In the case at bar, the plaintiffs have asserted causes of action not only in malpractice, but fraud and violations of the General Business Law. While it is negligible that the performance reviews in question here were generated in accordance with the Public Health Law, to prevent disclosure of these documents would certainly not frustrate the purposes for which the privileges were enacted. To allow the defendants to use the privilege to hide the very documents that cut to the heart of the plaintiffs' fraud-based claims would be to frustrate the policies underlying the General Business Law. These documents unabashedly show that the defendants were interested in putting production and profits ahead of the quality of care that they had advertised they would provide to their infant clients.

For all of the above reasons, the New FORBA defendants' motion to "claw back" documents already produced and for a protective order over same is DENIED.

The special reports generated pursuant to the Corporate Integrity Agreement.

New FORBA moves for a protective order with regard to documents maintained by New FORBA as required by the Corporate Integrity Agreement ("the CIA") entered into by New FORBA and the Office of the Inspector General for the United States

Department of Health and Human Services on January 15, 2010. The CIA was entered into as part of a settlement of fraud claims brought against New FORBA by the United States Government and the Attorneys General of several states. The purpose of the CIA is to ensure that New FORBA complies with "statutes, regulations and written directives of the Medicare, Medicaid and all other Federal health care programs." An independent company, Strategic Health Solutions, was hired to perform annual site visits to ensure New FORBA was complying with the requirements of the CIA.

Under the CIA, Strategic Health Solutions and each Small Smiles clinic generated the following: Independent Quality of Care Monitoring Reports for each New York clinic; Report/Recommendations for each site; Responses prepared by each clinic to the Report/Recommendations, among other documents. New FORBA argues that each of these documents was generated to ensure that New FORBA complied with the CIA as part of the dental malpractice prevention program. New FORBA takes the position that the documents are privileged under Public Health Law s. 2805, and that regardless of privilege, the documents are temporally irrelevant.

As discussed above, the parties moved on discoverability of these very same documents, the special reports, before Judge Brandt. The defendants had a full and fair opportunity to raise whatever objections to the production of these documents at that time. The issue of privilege with regard to the documents as a whole was never raised, although it appears as though defendants did argue that there may have been confidential and privileged HIPPA information in the reports. On October 7, 2012, Judge Brandt issued a recommendation to the Court rejecting the defendants' arguments and directing New FORBA to turn over the special reports pursuant to plaintiffs' discovery

demands 30 through 34. The referee stated further, "As far as defendants' HIPPA arguments are concerned, this is a non-issue. It appears to me the reports generated will not reveal any privileged information about any particular patient, but should that be the case, relevant HIPPA protected portions of such report can be properly redacted prior to turning over the reports."

The issue of privilege was indeed among the defendants' arguments before Judge Brandt, just not the privilege New FORBA tries to assert now for the first time.

New FORBA had many opportunities to raise the issue of privilege: At the June 28, 2012 conference with the Court when it was agreed that the 200-plus compact disks containing 2.4 million pages of documents which had already been produced in the bankruptcy action and on which some of these special reports were produced would be turned over in this action; in the July 25, 2012 stipulation, entered into by New FORBA on July 30, 2012, with regard to the production of the compact disks; in defendants' September 3, 2012 responses to the plaintiffs' first supplemental notice to produce and accompanying privilege log, wherein no assertion of privilege was made; during any of the email correspondence that took place between the parties between September 5, 2012 and October 9, 2012; or in any of the motion papers or arguments made to Judge Brandt when he considered the discovery motion on these very same special reports. The issue of privilege under the Public Health Law was never raised.

New FORBA has simply waived any privilege these documents might have had by the words and deeds of New FORBA and its counsel: these documents, among others, were produced in the bankruptcy proceeding to the Unsecured Creditors Committee, without any claim of privilege or reservation of rights; the defendants then agreed that

the disks that New FORBA had produced in the bankruptcy proceeding would be treated as if they had been produced in this action, without any claim of privilege or reservation of rights; when plaintiffs sent a supplemental demand to produce that specifically enumerated the special reports demanded in plaintiffs' discovery demands 30 through 34, New FORBA did not raise the issue of privilege, but argued against their production on other grounds to Judge Brandt; and New FORBA waived its privilege by failing to assert the privilege in a privilege log, neither for the motion before Judge Brandt or in the instant motion.[4] Further still, after Judge Brandt issued his October 7, 2012 recommendation directing defendants to produce the documents, New FORBA didn't bring a motion to renew and/or reargue to Judge Brandt, and didn't even mention the referee's recommendation in this motion.

Additionally, the privileges that the defendants now attempt to assert do not apply here. The special reports being sought by the plaintiffs were generated pursuant to the CIA. The CIA was not a voluntary program into which the defendants entered - it was part of an agreement into which the defendants entered to settle claims of Medicaid fraud being investigated by the Office of the Inspector General and the Attorneys General of several states, including the State of New York. New FORBA did not adopt this review process as part of its dental malpractice review program, it was thrust upon New FORBA as a result of the settlement agreement.

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[4]It is well settled law that the failure to serve a privilege log is fatal to any privilege claim. *See* Anonymous v. High School for Environmental Studies, 32 AD3d 353 (1st Dept. 2006); *see also* Gama Aviation, Inc v Sandton Capital Partner, LP, 2012 WL 4491100; 2012 NY Slip Op 6566 (1st Dept. 2012) (party waived privilege by failing to assert it in a privilege log).

The goal of the CIA, as set forth in its Preamble, is "to promote compliance with the statutes, regulations, and written directives of Medicare, Medicaid, and all other Federal health care programs." This says nothing about establishing a quality assurance program or peer review program pursuant to New York law, in particular the Public Health Law or the Education Law.

Here, the defendants have the burden of establishing that the privileges of the Public Health Law or the Education Law are applicable. *See* Little v. Highland Hosp. Of Rochester, 280 AD2d 908 (4th Dept. 2001); Laisch v. Millard Fillmore Hosp., 262 AD2d 1017 (4th Dept. 1999). New FORBA has simply failed to meet that burden. Nowhere has it been alleged that the special reports are a professional review action. The conclusory statements contained in the affidavit of Chris Moore, New FORBA's vice president and compliance attorney, are not enough to establish that these special reports were generated as part of a dental malpractice program.

In the matter of Kivlehan v. Waltner, 36 AD3d 597 (2nd Dept. 2007), plaintiff sought to obtain documents maintained by a hospital's department of infection control with regard to the defendant doctor's condition. The appellate court, in reversing the decision of the trial court, held that the affidavit from the hospital's credentials co-ordinator, who asserted that the defendant's file contained only information that was collected for quality assurance purposes and to comply with relevant provisions of the Public Health Law concerning the credentialing of physicians, was insufficient to demonstrate that documents maintained by the hospital's department of infection control were actually generated at the behest of the hospital's quality assurance department. Kivlehan v. Waltner, *supra*. "In order to assert the privilege, a hospital is

required, at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure." Id., *citing* Bush v. Dolan, 149 AD2d 799 (3rd Dept. 1989).

"What is the *sine qua non* for Education Law Privilege? When a particular document is *solely* generated via a quality assurance review function to improve and maintain the quality of patient care and, if not prepared in that context, the Education Law privilege will not lie." Creekmore v. PSCH, Inc., 2008 WL 627574 (Sup. Ct., New York County, 2008) *(emphasis added)*. The documents have to be generated at the request of the health care facility's quality assurance committee to be shielded from disclosure. Id.

Here, the defendants cannot and have not asserted that the special reports were generated solely pursuant to its dental malpractice review program or quality assurance review function, as they were clearly generated as a result of a settlement with the United States Government and pursuant to a settlement agreement - the CIA, instituted as a condition of that settlement. Further, the bald, conclusory statement of Chris Moore, that "The documents are also considered peer review material and as such not subject to disclosure," is insufficient to meet the burden to assert the privilege. *See* Coniber v. United Memorial Medical Center, 81 AD3d 1329 (4th Dept. 2011) (the conclusory statement in the affidavit submitted by defendant director of quality assurance that all the documents in question were prepared pursuant to defendant's quality assurance review function is insufficient to demonstrate that the subject document was actually generated at the behest of the defendant's quality assurance department).

Finally, Chris Moore's brief, conclusory description of the special reports as "peer review material" and "not subject to disclosure," with nothing more showing as to how the documents relates to the defendants' quality assurance function, strongly suggests that these documents could be material and necessary to the litigation of the action. *See* Creekmore v. PSCH, Inc., *supra;* and Simmons v. Northern Manhattan Nursing Home, Inc., 52 AD3d 351 (1st Dept. 2008).

For the reasons set forth above, New FORBA's motion for a protective order with regard to the special reports generated pursuant to the CIA and demanded in the plaintiffs' Combined Discovery Demands 30 through 34 is DENIED.

In conclusion, New FORBA's motion for a protective order pursuant to CPLR § 3103 is DENIED in its entirety, and defendants are directed to produce said the subject documents to no later than 5:00 p.m., Wednesday, October 31, 2012, or their answer shall be stricken.

II. CROSS-MOTIONS BY CO-DEFENDANTS FOR PROTECTIVE ORDER AND RELIEF FROM THE COURT'S SCHEDULING ORDER

Defendants Aman, Bonds, Elsafty, Khan, Izadi, Mori , Forestal, Goldstine, Golla, Lancen, Karma, Pham, and Agadi, move this Court for a protective order pursuant to CPLR §3103, precluding the plaintiff from conducting depositions of the Wilson Elser defendants until such time as the October 4, 2012 objections to plaintiff's uniform discovery responses are resolved, and until Wilson Elser defendants have been given a reasonable amount of time of eight (8) weeks to review and analyze the 2.4 million documents that were disclosed by co-defendant New FORBA, and directing plaintiffs to

immediately return all privileged and confidential documents of any nature whatsoever that are in their possession and that they be precluded from using such documents for any and all purposes throughout this course of this litigation, including but not limited to trial, depositions, discovery and/or in connection with motion practice and/or such other and further relief.

Referee, Judge John Brandt, has now reviewed the objections to plaintiffs' uniform discovery responses, and has made a decision, which has now been ordered by this Court. That order has now been distributed to the attorneys for the parties in this case, and as a result, that branch of the defendants' motion must be denied as moot.

Defendants further seek - in effect - a stay of eight (8) weeks to review and analyze the documents that were disclosed by co-defendant, New FORBA. This branch of the defendants' motion must be denied. The defendants have previously made an application for a stay to this Court upon the same grounds and reasons. Subsequently, when this Court denied the application, an application was made to Judge John V. Centra, as a sitting Appellate Division Justice. Judge Centra, likewise, denied the motion for stay, and the matter was then brought to the Fourth Department *en banc*. To date, no one has told this Court that the Appellate Division had enacted a stay.

This Court now denies defendants' request in its entirety. This is a matter where the very documents that are now being used as a lever by defense counsel to ask for a eight-week delay, have been at issue for over a year. The documents have been in the hands of the defendants' insurance carriers, were openly and freely released in bankruptcy court by order of that court, and have been disseminated to members of the Unsecured Creditors Committee and others who may have had an interest in said

documents. It defies logic to this Court that the defense attorneys did not have access to these documents over a year ago when these documents were the subject of multiple court appearances and hearings concerning the status of the discovery. In fact, counsel for the New FORBA defendants took several months in purportedly putting together some sort of a privileged log, which was never submitted to the Court, and has never been seen to date. No doubt, New FORBA's attorneys were evaluating and reviewing the documents at that time, and it would appear from all of the information provided to this Court, that if co-defendants wanted to get the documents, they could have gotten them.

That notwithstanding, this case has been stalled in the discovery stage for over a year. Defendants continue to seek stays, and continue to do what appears to be anything possible to obstruct discovery in this matter. Such actions, at times, have been frivolous, dilatory, willful and contumacious. Clear examples include the most recent stoppage of a defendant deposition without cause or reason in willful and contumacious disregard of the deposition rules of New York State. The Court has rendered a decision orally from the bench with regard to that obstructive technique, but to allow defense now, another eight weeks to review the documents that they have had or could have had for over a year, is nonsensical to this Court. This is particularly so, since a request for stay has already been rules upon by the Justice Centra of the Appellate Division.

Likewise, defendants' motion to direct plaintiffs to return all privileged and confidential documents of any nature whatsoever that are in their possession and that they be precluded from using such documents for any purposes throughout the course of the litigation must be denied. For the reasons set forth in this decision, such documents that have been produced are not privileged documents, and have already been made

public in at least two to three different forums. This Court has ordered that Judge Brandt, the Referee, be present at depositions as he feels appropriate, in order to continue to marshal the discovery issues in this case through the deposition stage. Judge Brandt is hereby authorized and designated as Referee and empowered to supervise all disclosure pursuant to CPLR §3104. Judge Brandt is issued and empowered to supervise all discovery, have such hearings, make such rulings, and otherwise issue such directives, and make such determinations as, in his judgment, shall be necessary in the furtherance of orderly discovery. Judge Brandt shall have all of the powers of this Court, as may be granted under §3104 of the CPLR, including the determination of discovery issues and other issues to come before him, and enforce same by order.

As a result, defendants' motion to return such documents are, for the same reasons held otherwise in this decision, and those set forth herein, DENIED.

Defendants Zoufan, Fuquay, Vin Vuu, Randazzo, and Bernall likewise move this Court for an order prohibiting the use of any performance reviews authored by or concerning defendants and requiring plaintiffs to return those documents to New FORBA forthwith, or alternatively for an order directing plaintiffs to specifically identify and disclose to defendants all performance reviews that they intend to use during discovery or trial of these actions for defendants' review, and for consideration by the Court or its appointed Referee, Honorable John Brandt. For the same reasons stated above, the defendants' motion must be denied in its entirety.

The Court has already dealt with the issue of performance reviews, as above, and the Court finds that such performance reviews were both discoverable, considered and reviewed by defense counsel before producing them to plaintiffs' attorneys. The Court

further finds that such documents are quantitative performance reviews, as opposed to the types of reviews considered to be privileged. For those and other reasons set forth above, this Court denies the defendants' motion. Noteworthy, is that nowhere does the defendant produce a privilege log, or any of the documents sought to be returned upon which they are resting a claim of privilege.

This Court also denies defendants' motion to specifically identify and disclose to defendants all performance reviews that they intend to use during discovery or trial of these actions. The documents have been produced in the ordinary course of discovery by the defendants in this matter. Once the documents are disclosed, they can be used in any manner or form desirable by the inquiring attorney, and to do otherwise would be to flaunt or violate the deposition rules of the State of New York.

As a result, defendants' motion is DENIED in its entirety.

III. THE COURT'S ORDER TO SHOW CAUSE AND PLAINTIFF'S ORDER TO SHOW CAUSE SEEKING TO SANCTION THE NEW FORBA DEFENDANTS AND HOLD THEM IN CONTEMPT OF COURT

On Monday, October 22, 2012, this Court issued an Order to the New FORBA defendants to immediately turn over the subject documents that Judge Brandt had already determined should be turned over. The Court ordered that they be produced by 3:00 p.m. on October 22, 2012.

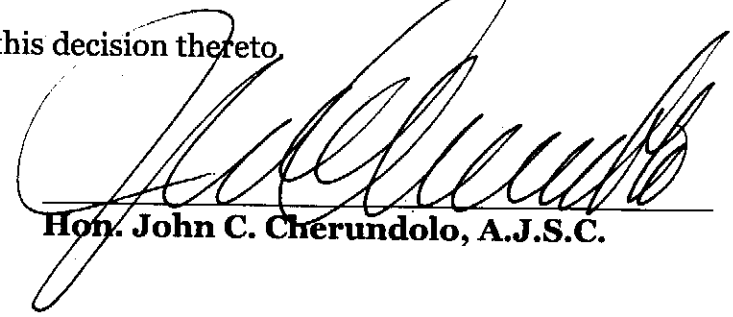
Previous to that, the defendants had made a motion for protective order, which, at least as presented by the defendants, covered the same documents. As a result, this

Court finds as moot the Orders to Show Cause for sanctions and, at this time, makes the determination that no sanctions are or should be assessed.

However, this Court does abide by the decision as set forth above, ordering the production of the documents at the earliest possible convenience, and in no event, no later than 5:00 p.m. on Wednesday, October 31, 2012. If the aforesaid documents are not produced by that time, the answers of the New FORBA defendants will be considered stricken, as a matter of law.

Counsel for the plaintiffs shall prepare the appropriate Order, consistent with the terms of this decision and submit it to the Court on notice, at the earliest possible convenience, and attaching a copy of this decision thereto.

DATED: October 29, 2012.



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