STATE OF NEW YORK
SUPREME COURT – ONONDAGA COUNTY

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In Re: SMALL SMILES LITIGATION

Index Nos: 2011-2128
2011-2128
2011-6223
Hon. John C. Cherundolo

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO ALL MOTIONS TO DISMISS

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PRELIMINARY STATEMENT

This case involves a nationwide fraudulent course of conduct conceived of and directed by the owners of the Small Smiles pediatric dental clinic chain.[1] The clinic owners hired, trained and directed dentists to carry out the scheme which placed the financial interests of the business and its owners ahead of the health and safety of the young patients who were treated at the Small Smiles clinics.[2] The fraudulent scheme was the mainstay of the company's business for close to a decade, generating hundreds of millions of dollars in revenues for the company and its owners.[3]

The scheme and the manner in which it was implemented are set forth in the Amended Complaint.[4] First, FORBA hired dentists to work at its pediatric dental clinics.[5] FORBA then conducted its own training sessions in which it taught its dentists to perform inappropriate treatment, to use restraints when they knew they were not qualified to do so, to use restraints in circumstances they knew were not proper, to misrepresent through forms prepared by FORBA that restraints had no risks when they knew they did, and to refrain from referring patients they were not qualified to treat to dentists who were.[6] FORBA then set "production expectations" based on the assumption the dentists would perform as trained, and enforced "the FORBA" way on a

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[1] Am. Compl. ¶¶ 56-80; 167-187. References in this Memorandum to "Am. Compl." are to the Amended Complaint in *Varano v. FORBA Holdings, LLC, et al.*, which is Ex. A to the Attorney Affidavit submitted by New FORBA in connection with New FORBA's Motion to Dismiss. The Amended Complaint in *Angus v. FORBA Holdings, LLC* and in *Johnson v. FORBA Holdings, LLC,* contain the same allegations as those in *Varano*, although some of the paragraph numbers are different. For efficiency purposes, Plaintiffs reference specifically only the *Varano* Amended Complaint in the body of this Memorandum. The parallel allegations in all three cases are set forth in Ex. B to the Attorney Affirmation of Patrick Higgins. Ex. B is attached to this Memorandum for ease of reference.

[2] Am. Compl. ¶¶ 60-80.

[3] Am. Compl. ¶¶ 20-22; 28-29; 32-33.

[4] Am. Compl. ¶¶ 56-80; 167-187.

[5] Am. Compl. ¶ 49.

[6] Am. Compl. ¶¶ 60-68.

daily basis through threatening and berating dentists if they did not produce the profits FORBA expected.[7] At FORBA's direction, the dentists carried out the scheme by misrepresenting and concealing the truth from the children's parents or guardians in order to induce them to consent to their children undergoing painful, improper and unnecessary dental procedures.[8]

Plaintiffs are thirty children victims of the scheme who received inappropriate and unnecessary treatment at one of the New York Small Smiles clinics.[9] They assert the same causes of action - common law fraud, battery, breach of fiduciary duty, statutory fraud under the consumer protection law, negligence, malpractice, and lack of informed consent - resulting from the same course of conduct by the Defendants.[10]

Defendants are the former and current owners and managers of the New York Clinics (hereinafter "Old FORBA" and "New FORBA"), the corporate entities under which the Small Smiles clinics in New York operated (hereinafter "the Clinics"), and the dentists (hereinafter the "Dentist Defendants") who were hired to execute the fraudulent scheme in their communications with and treatment of the Plaintiffs.[11]

Four different Defendant groups have filed pre-answer motions to dismiss under CPLR 3211(a)(7).[12] All four groups seek to dismiss the common law fraud and breach of fiduciary duty claims. Three of the groups seek to dismiss plaintiffs' battery claims.

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[7] Am. Compl. ¶¶ 60-66; 70-80.
[8] Am. Compl. ¶¶ 65-69; 168-174; 177-178.
[9] Am. Compl. ¶¶ 155-164.
[10] Am. Compl. ¶¶ 167-249.
[11] Am. Compl. ¶¶ 81-148.
[12] The four groups are Old FORBA and six individuals who conceived and directed the scheme under Old FORBA, New FORBA , fifteen dentists represented by Wilson Elser (hereinafter "Fifteen Dentists") and four dentists represented by Hancock Estabrook (hereinafter "Four Dentists"). One other dentist, Dr. Dimitri Filostrat, who is *pro se*, served a motion to dismiss in September 2011. The motion, which contained no notice or return date, merely denies some of the allegations in the Original Complaint and asked that the cases against him be dismissed. Dr. Filostrat filed a second motion on January 5, 2012. Plaintiffs submit their opposition to those motions here also.

Two groups seek to dismiss the statutory consumer protection claim. And one group moves to dismiss the negligence claim. The four motions total more than fifty pages. Because many of the arguments overlap, Plaintiffs file this single Memorandum of Law opposing motions to dismiss and opposing affirmation to dismiss to the four motions to dismiss served on December 16, 2011 and to Dr. Filostrat's motion served in September 2011 without notice of motion or return date. This memorandum of law also opposes a later motion filed by Dr. Filostrat by notice of motion dated January 5, 2012. These motions are returnable before the Court on February 9, 2012.

STANDARD FOR DECIDING MOTIONS UNDER CPLR 3211(a)(7)

"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." *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 (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." *People v. Coventry First, LLC*, 13 N.Y.3d 108, 115 (2009) quoting *Polenetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 (2001).

SUMMARY OF ARGUMENT

Defendants' primary argument is that Plaintiffs' causes of action alleging intentional misconduct should be dismissed as duplicative of the malpractice claim. Defendants seek to dismiss Plaintiffs' fraud, battery, and breach of fiduciary duty causes of action on that basis.

Those causes of action, which require proof of intentional misconduct, are not duplicative of the malpractice claim which does not. They are, instead, alternative claims. If the alleged misconduct is proved to be intentional then it will establish fraud, battery, and breach of fiduciary duty. If not, then the misconduct amounts to malpractice. CPLR 3014 expressly authorizes a party to plead alternative claims. CPLR 3014 ("Causes of action . . . may be stated alternatively . . . ."); *Cohn v. Lionel Corp.* 21 N.Y.2d 559, 563 (1968)("Undeniably, a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery."); *Watner v. P & C Food Mkts, Inc.* 138 A.D.2d 959, 960 (4th Dep't 1988)(noting "liberal policy of the CPLR to permit pleading of inconsistent and alternative claims."). Defendants' primary argument is without merit.

Defendants also contend Plaintiffs have not pled the fraud claim with sufficient particularity. That argument, as well as the rest of Defendants' contentions are, without merit and the motions to dismiss should be denied.

POINT I

PLAINTIFFS HAVE STATED A FRAUD CLAIM WITH SUFFICIENT PARTICULARITY[13]

Defendants claim the Amended Complaint fails to meet the pleading requirement of CPLR 3016(b) that "the circumstances constituting the wrong shall be stated in detail." [14] 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 (1977). "What is [c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. . . [A]lthough under CPLR 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud." *Sargiss v. Magarelli,* 12 N.Y.3d 527, 530-31 (2009).

Defendants claim, first, that the Amended Complaint fails to allege the substance of the false representations and the identity of the person who made them.[15] In paragraphs 168 through 174, Plaintiffs allege both. Plaintiffs allege that the Dentist Defendants and Small Smiles Clinics knowingly made numerous false representations including that:

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[13] This joint point opposes the sections of the following defendants' memorandums of law and affirmations: New FORBA Point I; Old FORBA Point II; Fifteen Dentists Point I; Four Dentists Point I.

[14] "[S]atisfaction of CPLR 3013, which imposes the fundamental requirement that notice of the transaction be given and the material elements of the claim be set forth, will usually satisfy CPLR 3016(b) as well. The consequence of a violation of CPLR 3016(b) is in any event a mere amendment as long as the facts that the statute calls for exist and merely need pleading . . . Should the detail be unavailable at the pleading stage, but the complaint, notwithstanding an absence of detail, satisfactorily states a claim in fraud, the complaint can be sustained and the needed detail left to abide pretrial disclosure or, if need be, the trial itself." D. Siegel, *New York Practice*, § 216 at 368 (5th Ed. 2011).

[15] Fifteen Dentists' Memo. at 8; Four Dentists' Memo. at 7-8.

they intended to provide appropriate dental care when they did not so intend[16];

the clinic was authorized under New York law to provide dentistry service when it was not[17];

the dental procedures prescribed for the plaintiffs were appropriate when they knew they were not[18];

the dentists were qualified to perform advanced behavior management techniques when they knew they were not[19];

the Plaintiffs' dental treatment required them to be put in restraints when the Dentist Defendants and Small Smiles Clinic knew that was not true[20]; 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.[21]

Old FORBA claims Plaintiffs have failed to allege what information the Dentist Defendants and Small Smiles Clinic concealed from Plaintiffs.[22] The Amended Complaint contains a detailed list of those facts,[23] including that:

they were engaged in a course of conduct that placed revenue ahead of the medical needs of the 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;

the Small Smiles Clinic was not authorized under New York law to provide dentistry services;

they were not qualified to perform advanced behavior management techniques, that each infant 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.

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[16] Am. Compl. ¶ 168-69.
[17] Am. Compl. ¶ 170.
[18] Am. Compl. ¶ 171.
[19] Am. Compl. ¶ 172.
[20] Am. Compl. ¶ 173.
[21] Am. Compl. ¶ 173.
[22] Old FORBA Memo. at 4.
[23] Am. Compl. ¶ 178.

Old FORBA also claims that the damage allegations are generic and do not include a causal connection to the misrepresentations.[24] Plaintiffs allege the link between the fraud and their damages. Plaintiffs allege that as a result of the fraudulent misrepresentations and concealments, they were induced to submit to unnecessary dental treatments and physical restraints and suffered damages as a result.[25] As to the details of the damages, all that is required to comply with CPLR 3016(b) are "facts . . . from which damages may properly be inferred." *Black v. Chittenden*, 69 N.Y.2d 665, 668 (1986). The allegation that the Plaintiffs were induced by fraud to consent to inappropriate and unnecessary dental treatment, including being physically restrained during their dental procedures, satisfies this requirement.

Defendants argue the fraud allegations in the Amended Complaint are insufficiently detailed because they do not identify the dates of the misrepresentations and the identity of the persons making them.[26] CPLR 3016(b) does not require those type of factual details, particularly before any discovery has taken place. *Kaufman v. Cohen,* 307 A.D.2d 113 (1st Dep't 2003)(Plaintiffs sufficiently alleged fraud without specifying exact date, time or precise contents of misrepresentations, nor indicating how they came to rely on defendant's statements); *Bernstein v. Kelso & Co.*, 231 A.D.2d 314, 321 (1st Dep't 1997)(Plaintiff sufficiently alleged fraud although he "had no way of knowing the precise dates, the participants in or the extent of the conversations alleged to have taken place in furtherance of the alleged scheme to defraud"); *EBC I, Inc. v. Goldman Sachs & Co.*, 7 A.D.3d 418 (1st Dep't 2004)(Plaintiff sufficiently alleged fraud in case involving kickback scheme by pleading the substance of misrepresentation and

[24] Old FORBA Memo. at 5.
[25] Am. Compl. ¶¶ 174-176; 183-184.
[26] Four Dentists' Memo. at 7; Fifteen Dentists' Memo. at 7; New FORBA Memo. at 3.

identity of person making it); *Holme v. Global Minerals and Metals Corp.*, 22 Misc.3d 1123(A)(Sup Ct., New York Co. 2009)(Pleading requirements of 3016(b) do not extend to every potential detail such as dates of alleged fraud).

Although not required, the Amended Complaint includes the details demanded by Defendants. Since the misrepresentations were made to induce the Plaintiffs to consent to dental treatment at Small Smiles, they were made on or about the date Plaintiffs received their treatment at the Small Smiles Clinic. The Amended Complaint states those dates for each Plaintiff.[27] The Amended Complaint also identifies, for each Plaintiff, the names of their treating Dentist Defendants who made the misrepresentations and concealed facts that caused the Plaintiff's parent or guardian to consent to his child's treatment.[28]

Finally, New FORBA contends the Amended Complaint fails to satisfy CPLR 3016(b) because it does not include details to support the allegations that Plaintiffs received inappropriate dental treatment, the dentists were not qualified to administer advanced behavior management techniques, and the Plaintiffs were improperly restrained.[29] Plaintiffs are not required to plead evidence and New FORBA cites no authority to support its argument. "To require a 'showing' of an evidentiary nature . . . improperly imports a summary judgment standard into the orbit of the CPLR 3211 analysis, and is beyond what is required to uphold the sufficiency of a pleading." *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 98 (1st Dep't 2003).

In sum, the Amended Complaint alleges the context of the fraud, the details of the scheme, the substance of the misrepresentations and concealed facts, the identity

[27] Am Compl. ¶ 155-164.
[28] *Id.*
[29] New FORBA Memo. at 3.

of the persons making the misrepresentations, and the approximate dates on which they were made. It provides more than "sufficient detail to inform defendants of the substance of the claims" against them. *Bernstein*, 231 A.D.2d at 320. Nothing more is required under CPLR 3016(b).

POINT II

PLAINTIFFS' FRAUD CAUSE OF ACTION IS NOT DUPLICATIVE OF THE MALPRACTICE CAUSE OF ACTION AND IS SUFFICIENT[30]

A. *Simcuski* Establishes The Validity Of Plaintiffs' Fraud Claims

Plaintiffs allege Defendants engaged in a scheme, conceived and directed by FORBA, by which the Dentist Defendants induced 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.[31] Because this is intentional misconduct resulting in improper treatment that caused Plaintiffs damage, Plaintiffs have stated a valid fraud claim. *Simcuski v. Saeli*, 44 N.Y.2d 442, 451-52 (1978). In addition and in the alternative, Plaintiffs have alleged a malpractice claim if it is determined the improper treatment was not the result of intentional misconduct.

The validity of the fraud claim is established by *Simcuski.* As in this case, the fraud claim in *Simcuski* was that the doctor induced improper treatment that caused the plaintiff harm by intentionally misrepresenting that the treatment was appropriate when the doctor knew it was not. As here, the plaintiff alleged the doctor had conflicted

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[30] This joint point opposes the sections of the following defendants' memorandums of law and affirmations: New FORBA Point II; Old FORBA Point I; Fifteen Dentists Point I (pp. 3-7); Four Dentists' Point IA.

[31] Am. Compl. ¶¶ 56-80; 167-187.

interests that caused him to commit the fraud. In *Simcuski*, the conflicted interest was the doctor's interest in covering up his prior malpractice. Here, the conflicted interest that caused the Dentist Defendants to commit the fraud was their loyalty to FORBA's profit scheme at the expense of Plaintiffs' care. The Court in *Simcuski* held the fraud claim to be valid. *Simcuski,* 44 N.Y.2d at 451-52.

Defendants do not contend Plaintiffs have failed to allege each of the elements of fraud. Instead, they argue the fraud claim should be dismissed as "duplicative" of the alternative malpractice claim because the damages for both are the same and the fraud did not occur subsequent to the malpractice.

The claims are clearly not duplicative because the fraud claim requires proof of intentional misconduct while the negligence claim does not. As the Court held in *Simcuski,* fraudulently inducing improper treatment that the doctor knows is improper is "more than . . . [an] act of alleged negligent malpractice on the part of the treating physician. . . ." *Simcuski,* 44 N.Y.2d at 451. It is an "intentional fraud." *Id.* at 451-52.

The claims are inconsistent and pled in the alternative, not duplicative. If the conduct is determined to be intentional, it is fraud. If the conduct is determined not to have been intentional, it is malpractice. New York allows a party to plead and pursue alternative causes of action. *Cohn v. Lionel Corp.*, 21 N.Y.2d at 563; CPLR 3014.

In addition, Defendants' contentions that the damages alleged are insufficient and the fraud must occur subsequent to the alternative malpractice claim are based on a misapplication of language from malpractice cover-up cases that does not apply here.

1. Plaintiffs Have Alleged Damages Caused By The Fraud Sufficient To State A Fraud Claim

The damages for the fraud and the alternative malpractice claim are in part the same only in the sense that both allege damages resulting from the improper treatment. But damages from the improper treatment flow from the fraud if the mistreatment is determined to be intentional. The fact that the same damages would support a malpractice claim if the conduct was negligent rather than intentional does not preclude a fraud claim. *Simcuski,* 44 N.Y.2d at 452; *Mitschele v. Schultz*, 36 A.D.3d 249, 254-55 (1st Dep't 2006); *Schlissel v. Subramanian*, 901 N.Y.S.2d 910, 25 Misc.3d 1219(A)(Sup. Ct., Kings Co. 2009) at 7. Thus, in *Simcuski*, the same damages caused by the fraudulent treatment would have supported a malpractice claim if the conduct were negligent rather than intentional.

Given the clear holding in *Simcuski* that a doctor commits fraud by intentionally misrepresenting that treatment is appropriate when he knows it is not and thereby causes damage, Plaintiffs have clearly stated a fraud claim by such allegations. The real issue is whether Plaintiffs may state a fraud claim based on the treatment having resulted from intentional misconduct and an alternative malpractice claim if the conduct is negligent rather than intentional. While an alternative malpractice claim was not asserted in *Simcuski,* there is nothing to suggest that the ordinary rules which allow alternative pleadings do not apply to doctors.

Furthermore, when as here, Plaintiffs validly allege egregious conduct as a basis for punitive damages that are not recoverable in an ordinary malpractice claim, the damages are different for that reason as well and a valid fraud claim is stated.[32]

[32] Am. Compl . ¶¶ 245-249.

Savattere v. Subin Assoc., P.C., 261 A.D.2d 236 (1st Dep't 1999); *Vici Vidi Vini, Inc. v. Buchanan Ingersoll, PC*, 2008 NY Slip Op. 32226(U) (Sup. Ct., New York Co. 2008) at 3-4.

Defendants argue the damages caused by the fraud must be different from the damages caused by the malpractice. *Simcuski* does not say the damages must be different. The Court said the fraud damages must be "distinguished from" the malpractice damages under the facts involved in that case. *Simcuski* was a malpractice cover-up case. *Simcuski* involved an initial act of malpractice. Later, to cover up the malpractice, the doctor prescribed fraudulent treatment. Given those facts, *Simcuski* held that, if the plaintiff proved 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." *Simcuski,* 44 N.Y.2d at 452-53. As the Court explained, the fraud in that case would be the cause of damages only if the fraud 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 but for the fraud, then the cause of the damages would be the original act of malpractice rather than the fraud and there would be no damages from the fraud. *Simcuski*, 44 N.Y.2d 453-3.

In this case, there is no malpractice prior to the fraud and thus no prior malpractice damages for the fraud damages to be distinguished from. All of the damage here was caused by the improper treatment induced by the fraud, and pursuant to *Simcuski* is recoverable as fraud damages just as it would be in any other fraud case.

Mitschele makes this distinction in upholding a fraud claim against a professional despite the fact that the damages flowing from the fraudulently induced conduct had also been alleged in support of an alternative malpractice claim.[33] 36 A.D.2d 249. As the Court stated, citing *Simcuski*, "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 (internal quote from *Simcuski*). As to the damages, the Court distinguished malpractice cover-up cases and held the fraud claim valid based on the same damages that had been alleged in support of the alternative malpractice claim. *Mitschele,* 36 A.D.2d at 255. Defendants' contention that the damages flowing from improper treatment cannot support a fraud claim and an alternative malpractice claim is wrong.

2. Defendants' Contention That The Alleged Fraud Must Be Separate From And Subsequent To The Improper Treatment Caused By The Fraud Is Wrong

Likewise, the language that the fraud must be separate from and occur subsequent to the malpractice originated in *Simcuski* -- a malpractice cover-up case -- but has no application here. In addition to holding that a professional who fraudulently induces treatment he knows is improper may be held liable in fraud, *Simcuski* also held that a professional who commits ordinary malpractice and then fails to disclose it does not commit fraud. Thus, mere concealment of an act of ordinary malpractice is not fraud. Rather, in cases in which a fraud claim is based on the doctor's cover-up of his previous act of malpractice, *Simcuski* held that the professional must engage in fraudulent conduct "separate from and subsequent to the malpractice claim" for there to

[33] The alternative malpractice claim was dismissed on statute of limitations grounds.

be fraud. *Simcuski,* 44 N.Y.2d at 452. Thus the "malpractice claim" referred to in *Simcuski* which the fraud must be separate from and subsequent to is the original act of malpractice that the professional attempts to cover-up, not a malpractice claim pled in the alternative to a fraud claim as here.

Again, Plaintiffs' claim of fraud does not involve a cover-up of a previous act of malpractice. Consequently, there is no prior act of malpractice for the fraudulent conduct to be separate from and subsequent to. There is an allegation of fraud, and an alternative allegation of malpractice.

In the final analysis, Defendants are contending that the treatment that is the basis of a fraudulent treatment claim must be separate from and subsequent to the treatment that is the basis of an alternative malpractice claim. That would mean there could never be a fraud claim and an alternative malpractice claim since the improper treatment in the alternative claims will always be the same, with the issue being whether the improper treatment was the result of intentional misconduct or not. Contrary to Defendants' contention, the law allows a party to plead and pursue alternative claims. *Cohn,* 21 N.Y.2d at 563; CPLR 3014.

B. Defendants' Authorities Are Not On Point

None of Defendants' cases involve a professional who intentionally induced treatment he knew was inappropriate. In addition, none of the cases involve proper punitive damage allegations. In short, none of Defendants' cases involve either of the circumstances that are present in this case that the courts have held do support a fraud claim.

All but two of Defendants' cases are malpractice cover-up cases that are distinguishable from this case on the basis discussed above, or the facts stated are so attenuated that the facts of the alleged fraud are not discernible.[34] In the other two cases, the courts did use language appropriate to a malpractice cover-up case (that the damages must be separate from the malpractice and the fraud must be subsequent to the malpractice) in a context in which there was no prior malpractice. But neither of the cases involved a professional who intentionally prescribed treatment he knew was inappropriate, nor did they involve a proper punitive damages allegation. The courts simply were not confronted with the circumstances that do justify a fraud claim.

Thus, in *Spinosa v. Weinstein*, 168 A.D.2d 32 (2d Dep't 1991), upon which Defendants primarily rely, the plaintiff claimed the doctor fraudulently represented that he could make her feet beautiful through a series of surgeries. 168 A.D.2d at 41. The issue as to the fraud claim was presented by a summary judgment motion, brought after extensive discovery, rather than a motion to dismiss. *Id.* at 36. The court concluded as a matter of fact there was no intent to injure, which was conceded by the plaintiff, (*Id.* at 41), and there was no evidence that the doctor's decision to perform surgery was the result of evil or reprehensible motives. *Id.* at 43. Thus the intent and motive that turn what would otherwise be ordinary malpractice into fraud, as set forth in *Simcuski* and the other cases upon which Plaintiffs rely and as alleged in this case, were not present

[34] Eight of the cases cited by the Defendants on this point are malpractice cover-up cases: *Simcuski, supra; Abraham v. Kosinski*, 305 A.D.2d 1091 (4th Dep't 2003); *Coopersmith v. Gold*, 172 A.D.2d 982 (3d Dep't 1991); *Giannetto v. Knee,* 82 A.D.3d 1043 (2d Dep't 2011); *Rochester Fund Municipals v. Amsterdam Municipal Leasing Corp.*, 296 A.D.2d 785 (3d Dep't 2002); *Harkin v. Culleton,* 156 A.D.2d 19 (1st Dep't 1990); *LaBrake v. Enzien*, 167 A.D.2d 709 (3d Dep't 1990); *Addorisio v. Schwartz*, 7 Misc.3d 1026(A) (Sup. Ct., Bronx Co. 2005). The two cases in which the facts of the alleged fraud are not discernible are *Haga v. Pyke*, 19 A.D.3d 1053 (4th Dep't 2005) and *Yates v. Genesee County Hospice Foundation, Inc.*, 299 A.D.2d 900 (4th Dep't 2002).

in *Spinosa*. Furthermore, as a result of the absence of reprehensible motive, there was no basis for a punitive damages claim in *Spinosa* and so it is distinguishable for that reason as well. *Id.* at 42-43.[35]

Finally, Defendants are contending these cases should be read as establishing a rule that there can be no fraud claim for intentionally inducing a patient to endure improper treatment the dentist knows is improper (1) if the damages flow from the improper treatment induced by the fraud or (2) the fraud did not occur separate from and subsequent to the improper treatment that is the basis for the fraud. To the extent they can be so read, they are inconsistent with *Simcuski*, which holds just the opposite. As set forth above, the courts that have addressed the issue in the actual context of claims of fraudulent professional advice have consistently upheld such claims. And to exempt professionals from fraud liability for such egregious conduct would be unjust. As stated in *Simcuski,* 44 N.Y.2d at 454:

> "[I]n 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 for escape from a medical predicament which the physician by his own negligence had initially inflicted on his patient."

It would likewise be unthinkable not to hold persons liable in fraud for knowingly and intentionally misleading infant children for the purpose of generating profits for a corporate dental chain in consequence of which the infant children were made to

[35] The other case is *Abbondandolo v. Hitzig*, 282 A.D.2d 224 (1st Dep't 2001), in which the doctor represented the treatment would give the plaintiff permanent and natural hair. Nothing in the opinion suggests the claim was that the doctor knew the treatment was improper, which would be a necessary allegation for a fraud claim, as was upheld in *Simcuski* and is alleged here, nor were punitive damages alleged.

undergo improper dental procedures and endure the physical and emotional trauma of the improper use of restraints.[36]

POINT III

THE AMENDED COMPLAINT STATES A CLAIM FOR BATTERY[37]

A. A Dentist That Performs Procedures On A Child Based On A Fraudulently Obtained Consent Is Liable For Battery

It has long been settled in New York that a health care professional who performs a procedure without his patient's consent commits a battery for which he is liable for damages. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30 (1914); *Cerilli v. Kezis*, 16 A.D.3d 363, 363-64 (2d Dep't 2005); *Messina v. Matarasso*, 284 A.D.2d 32, 34-35 (1st Dep't 2001). Consent obtained by fraud is treated the same as no consent at all. *Birnbaum v. Siegle*r, 273 A.D. 817 (2d Dep't 1948); 2 NY PJI3d 3:3 at 15 (2012) - (in discussing battery in medical cases: "Consent, express or implied in fact, does not bar recovery [for battery] if obtained by fraud or duress."). Therefore, a health care professional is liable for battery if he performs a procedure on a patient after fraudulently procuring consent. *Id.*

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[36] The Fifteen Dentists also complain that Plaintiffs have improperly injected Medicaid fraud issues into the case, point to FORBA's payment of $24 million to settle claims brought by the United States and numerous states for Medicaid fraud by the performance of unnecessary procedures at Small Smiles clinics, and suggest without authority Plaintiffs' claims are somehow foreclosed. Fifteen Dentists' Memo. at 2-3. By those claims, the governmental entities sought recoupment from FORBA of the taxpayer dollars FORBA fraudulently obtained by its inappropriate care. Plaintiffs do not assert any such claim. Plaintiffs' claims are for the damages to them for the fraudulent improper treatment they suffered at the hands of the Defendants. The Dentists also say the Medicaid fraud claims are irrelevant. The relevancy of the Medicaid fraud claims is not presented by this motion to dismiss. What is clearly relevant is Plaintiffs' claim that the Dentist Defendants were trained to and did put the profit motives of FORBA ahead of the interests of their patients, including the Plaintiffs, which caused them to intentionally induce Plaintiffs to endure improper treatment by misrepresenting that the treatment was appropriate when they knew it was not. That allegation is to be taken as true for purposes of these motions to dismiss and clearly is relevant to the claims in this case.

[37] This joint point opposes the sections of the following defendants' memorandums of law and affirmations: New FORBA Point III; Old FORBA Point III; Four Dentists' Point III.

In case after case, New York courts have recognized battery causes of action against doctors based on intentional as opposed to negligent misconduct. *See, e.g., Oates v. New York Hosp.*, 131 A.D.2d 368 (1st Dep't 1987); *Wiesenthal v. Weinberg*, 17 A.D.3d 270 (1st Dep't 2005); *Cross v. Colen*, 6 A.D.3d 306 (1st Dep't 2004). In other cases, New York courts have acknowledged the difference between claims for battery based on intentional misconduct and lack of informed consent, but found that the allegation or evidence in the particular case was not of intentional misconduct. *See Ponholzer v. Simmons*, 78 A.D.3d 1495 (4th Dep't 2010); *Spinosa v. Weinstein*, 168 A.D.2d 32 (2d Dep't 1991).

Plaintiffs' battery claims allege intentional misconduct. Plaintiffs allege they were induced to consent to unnecessary and harmful dental procedures by intentional and fraudulent misrepresentations. The allegations contained in the Amended Complaint state all the elements of a battery[38] and Defendants do not claim otherwise. Instead, they move to dismiss the battery claim because they contend that it is "duplicative" of the claims for malpractice and lack of informed consent.

B. The Battery Claim Is Not Duplicative Of The Lack Of Informed Consent And Malpractice Claims

A claim for battery, as alleged here, is pleaded as an alternative to a claim for malpractice or lack of informed consent. The battery claim requires proof of intentional misconduct; the malpractice and negligence claims do not.

Plaintiffs have alleged both claims. If the jury concludes that the Plaintiffs' consent was obtained fraudulently, then it will find for the Plaintiffs on the battery claim.

[38] Am. Compl. ¶¶188-193.

If the jury decides that the lack of consent was accidental, then it will find for the Plaintiffs on their informed consent and malpractice claims.

Claims for assault and battery and negligence based on the same acts and seeking the same damages may be alleged in the same lawsuit. *See, e.g., Flamer v. City of Yonkers*, 309 N.Y. 114, 119 (1955)(Trial judge reversed for not letting jury decide both negligence and assault claims); *Yasuna v. Big V Supermarkets, Inc.*, 282 A.D.2d 744 (2d Dep't 2001). In *Flamer*, plaintiffs sued the City of Yonkers for both assault and negligence seeking to recover wrongful death damages. The assault and negligence claims were asserted alternatively so that plaintiffs could only succeed on one of them, depending on the jury's assessment of the evidence. Plaintiffs sued to recover wrongful death damages under both claims. The trial court only instructed the jury on the assault claim and the Court of Appeals reversed. The Court ruled that the jury, and not the trial court, should have decided whether the evidence supported a claim for negligence or an intentional assault. Under *Flamer*, if the evidence will support a verdict for either an intentional tort or negligence claim arising from the same acts and seeking the same damages, the judge must submit both claims to the jury. To submit both claims, the plaintiff first must be permitted to plead them.

The practice of prosecuting battery and negligence claims alternatively is common enough that the New York Pattern Jury Instructions on battery include the following admonition: "Since the same act may constitute battery or negligence depending upon whether it was intentional, it will often be necessary to submit both issues to the jury, although there cannot be a recovery for both." 2 NY PJI3d 3:3 at 10

(2012). Under CPLR 3014, Plaintiffs are entitled to plead and pursue alternatives claims for battery and malpractice.

Battery and ordinary malpractice claims are different for a second reason: one allows for punitive damages and the other does not. *Freeman v. The Port Authority of New York and New Jersey*, 243 A.D.2d 409, 410 (1st Dep't 1997); *Persaud v. New York Presbyterian Hospital,* 18 Misc.3d 767, 771 (Sup. Ct., New York Co. 2007); *Karlsons v. Guerinot*, 57 A.D.2d 73, 83 (4th Dep't 1977). Thus, even if a party must allege separate and distinct damages to prosecute a battery and an ordinary malpractice claim alternatively, Plaintiffs have done so by seeking punitive damages. *See Savattere v. Subin Assocs., P.C.*, 261 A.D.2d 236, 237 (1st Dep't 1999).

The three cases that Defendants cite in which a battery claim was dismissed as "duplicative" are inapposite. In one case, the plaintiff alleged that the doctor's failure to obtain informed consent was negligent; in another, he could not prove otherwise. *See Ponholzer*, 78 A.D.3d at 1496 (Plaintiffs alleged that doctor negligently exceeded scope of plaintiff's consent); *Romatowski v. Hitzig*, 227 A.D.2d 870, 872 (3rd Dep't 1996) (Battery claim dismissed on summary judgment because of lack of evidence of intent by doctor). In the third case, *Haga v. Pyke*, 19 A.D.3d 1053 (4th Dep't 2005), the court refused to grant leave to the plaintiff to amend her complaint to add a battery claim because she did not allege damages arising from those claims that were distinct from those resulting from the alleged malpractice. Like the other two cases cited by Defendants, *Haga* did not involve an allegation that the doctor intentionally misrepresented facts to induce the plaintiff to consent to treatment. Absent such allegation (on a motion to dismiss) or proof (on a summary judgment), the courts will

presume that a doctor is acting in good faith and treat a claim for exceeding the scope of consent as one for unintentional failure to obtain informed consent, regardless of how it is labeled. *See, e.g. Dries v. Gregor*, 72 A.D.2d 231, 235-36 (4th Dep't 1980).[39]

In this case, Plaintiffs allege in detail that their consent was procured by fraud and that the Defendant Dentists intentionally and as part of a scheme put the financial interests of their employer ahead of the welfare of their infant patients, including the Plaintiffs.[40] The corporate defendants scripted the consent process, including the fraudulent consent forms used to persuade parents to consent to having their children restrained.[41] These allegations of intentional wrongdoing by the Dentist Defendants along with the request for punitive damages distinguish this case from those cited by the Defendants, and support a battery cause of action as a separate, distinct, and alternative claim from the claims of malpractice and lack of informed consent.

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[39] *Dries* considered the appropriate jury instructions in a pre-Public Health Law §2805-d(1) informed consent case in which the plaintiff only alleged malpractice. Today, there are separate New York Pattern Jury Instructions for Malpractice-Informed Consent (PJI 2:150A), and Battery (PJI 3:3) and the former are based on Public Health Law §2805-d(1). The comment to the Malpractice-Informed Consent instructions reaffirms the continued viability of a battery claim against a health care professional. Citing to PJI 3.3 as the applicable instruction in a medical battery case, the comment says "[o]perating without any consent is battery, as is providing treatment or performing procedure (sic) beyond the scope of the patient's consent." 1B NY PJI3d 150A at 93 (2012). Neither *Dries* nor any other case has overruled a century of New York law and foreclosed a patient from pleading a claim for battery when a doctor intentionally performs a procedure knowing it has not been authorized.

[40] Am. Compl. ¶¶168-169; 174; 177-178; 184.

[41] Am. Compl. ¶¶66-69.

POINT IV

PLAINTIFFS HAVE STATED A BREACH OF FIDUCIARY DUTY CLAIM[42]

Breach of fiduciary duty arises from a violation of a relationship of trust and confidence. A breach of fiduciary duty claim has three elements: the existence of a fiduciary duty, a breach of that duty by the defendant and damages directly caused by the defendant's breach. *McGuire v. Huntress*, 83 A.D.3d 1418 (4th Dep't 2011). Plaintiffs have alleged each element of a fiduciary duty claim.

A. The Dentist Defendants And The Small Smiles Clinics Had Fiduciary Duties

A fiduciary relationship between two persons arises "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.* 5 N.Y.3d at 19. Plaintiffs allege they went to the Small Smiles Clinics seeking professional dental advice from the Clinics and the Dentist Defendants. As a result, those Defendants owed fiduciary duties to the Plaintiffs.

As the Court of Appeals stated in *Aufrichtig v. Lowell*, 85 N.Y.2d 540, 546 (1995), 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." *Id.*

"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

[42] This joint point opposes the sections of the following defendants' memorandums of law and affirmations: New FORBA Point IV; Old FORBA Point IV; Fifteen Dentists Point II; Four Dentists Point II.

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. (Sup. Court, Queens Co. 2009).

A physician's fiduciary obligations include the duty to disclose to the patient all material facts related to treatment, *Ross v. Community General Hospital*, 150 A.D.2d 838, 841 (3d Dep't 1989)("Because of the fiduciary relationship between physician and patient, . . . intentional concealment of material facts itself may be sufficient to create an estoppel"), to speak the truth about a patient's medical condition, *Aufrichtig*, 85 N.Y.2d at 546, and to maintain the patient's confidences *Tighe v. Ginsberg*, 146 A.D.2d 268, 270-71 (4th Dep't 1989). *See also United States v. Ntshona*, 156 F.3d 318 (2d Cir. 1998)(Because of fiduciary relationship with her patients, doctor convicted of Medicare fraud received longer sentence). Dentists, as well as doctors, owe fiduciary duties to their patients. *See Tillery v. Lynn*, 607 F.Supp. 399, 401(S.D.N.Y. 1985).

B. Plaintiffs' Claim For Breach Of Fiduciary Duty Is Not Redundant

A fiduciary may breach his duties by engaging in intentional fraudulent misconduct or through less egregious conduct. In this case, Plaintiffs allege 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. The nature of the breach has pronounced legal consequences. For example, when the breach of fiduciary duty is the result of intentional, willful or wanton wrongdoing, punitive damages are available. *Don Buchwald & Assocs., Inc. v. Rich*, 281 A.D.2d 329, 330 (1st Dep't 2001). Likewise,

when a damages claim for breach of fiduciary duty is based on fraud, the statute of limitations is six years, *Kaufman,* 307 A.D.2d at 119 (1st Dep't 2003), but only three years if it is not. *Kaszirer v. Kaszirer*, 286 A.D.2d 598, 598-99 (1st Dep't 2001).

Thus, an intentional fraud-based breach of fiduciary claim, as alleged here, is separate and distinct from a claim for negligence or malpractice that is based on unintentional mistakes. The claims are not redundant and there is no basis to preclude a victim of intentional misconduct by a fiduciary from asserting a breach of fiduciary claim. *See* C. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice,* 34 HOFSTRA L. REV. 689, 733 (2006). (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). Indeed, the Fourth Department recently affirmed an order which permitted a patient to pursue simultaneously breach of fiduciary duty and malpractice claims against her doctor. *Padilla v. Verczky-Porter*, 66 A.D.3d 1481 (4th Dep't 2009)(Patient alleged that her doctor committed professional malpractice and breached her fiduciary duty by engaging in a sexual relationship with the patient).[43]

Defendants cite two fiduciary duty cases to support their argument that the breach of fiduciary claim is "duplicative" of the malpractice and informed consent claims and should be dismissed. The first case, *Padilla*, as described above, undermines the Defendants' argument by allowing a patient to prosecute parallel claims for intentional

[43] The plaintiff also sued the doctor's employers for malpractice, negligent hiring and supervision and breach of fiduciary duty. The negligence and malpractice claims against the employer were dismissed on summary judgment because the plaintiff failed to prove that the employer knew of the sexual relationship or that it was foreseeable. Since the negligence and malpractice claims depended on the same alleged (and unproven) unintentional misconduct as the breach of fiduciary duty claim, the Fourth Department ruled that "the same reasoning applies to that cause of action as well, requiring its dismissal." In doing so, the court came to the unremarkable conclusion that the lack of proof on the negligence claim was also fatal to the breach of fiduciary duty claim against the employer.

breach of fiduciary duty and malpractice against a doctor. In the other case, *Karlin v. IVF America, Inc.*, 239 A.D.2d 560 (2d Dep't 1997), the Second Department summarily dismissed a claim for breach of "fiduciary medical obligations" by labeling it a "reformulation" of the plaintiff's informed consent claim. The opinion does not recite the facts of the case so it is impossible to know the nature of the alleged breach of "fiduciary medical obligations claim". But it is reasonable to infer that the claim must have been based on an unintentional failure to disclose medical information or the Court would not have characterized it as a "reformulation" of an informed consent claim—one that is unquestionably negligence-based.

C. Plaintiffs Have Pled The Misconduct Of The Dentist Defendants With Particularity

The Four Dentists also argue the breach of fiduciary duty claim is deficient because it does not allege misconduct by them other than they were employed at one of the Clinics.[44] The Amended Complaint describes, in detail, their egregious misconduct. Plaintiffs allege 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;[45] and their conflicted interests caused them to (1) intentionally perform dental procedures on the Plaintiffs they knew were unnecessary and falsely represent the procedures were necessary in order to induce Plaintiffs to consent to the treatment[46] (2) intentionally place Plaintiffs in restraints knowing the use of restraints was improper, that they were

[44] Four Dentists' Memo. at 12-13.
[45] Am. Compl. ¶¶ 56-80; 168-169; 178.
[46] Am. Compl. ¶¶ 63; 171; 174; 178; 184.

not qualified to use them and that they should have referred the Plaintiffs to dentists who were[47] and (3) intentionally falsely represent that the use of restraints was proper and had no known risks when they knew their use was improper and had serious risks.[48] These allegations allege Defendants' breach of fiduciary duty with sufficient particularity to satisfy CPLR 3016(b).

POINT V

PLAINTIFFS HAVE STATED CLAIMS UNDER GBL §§ 349 AND 350[49]

A. *Karlin* and *Oswego* Establish The Validity of Plaintiffs' GBL § 349 Claim

The Dentist Defendants argue Plaintiffs fail to state a claim under General Business Law § 349.[50] Neither the New FORBA Defendants nor the Old FORBA Defendants join in their challenge. The validity of Plaintiffs' § 349 claim is established by *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282 (1999) and *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20 (1995).

GBL §349 is a consumer protection statute. *Karlin,* 93 N.Y.2d *at 288.* The elements are an act or practice that (1) is consumer-oriented (2) is materially deceptive or misleading and (3) causes injury to Plaintiff. *Id.* at 293; *Oswego,* 85 N.Y.2d at 25-26. Deceptive acts or practices are consumer-oriented if they are not aimed solely at plaintiff but instead defendant dealt with plaintiff in the same manner as other customers because then "they potentially affect similarly situated consumers." *Oswego,* 85 N.Y.2d at 26-27. An affirmative misrepresentation is not required; a material omission is

[47] Am. Compl. ¶¶64-65; 172-173; 178.
[48] Am. Compl. ¶¶173-174; 178; 184.
[49] This joint point opposes the following sections of the Defendants' memorandums of law and affirmations: Fifteen Dentists' Point III; Four Dentists' Point IV, page 16 (mislabeled as Point VI).
[50] Fifteen Dentists' Memo. at 9-13; Four Dentists' Memo. at 14-16.

sufficient when the business alone possesses material information relevant to the consumer and fails to provide it. *Id* at 26.

The Courts apply §349 broadly. It applies to "any service" in the conduct of "any business" and prohibits "all deceptive practices." *Karlin,* 93 N.Y.2d at 290, 287. 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.' (N.Y. Dept of Law, Mem to Governor, 1963 N.Y. Legis Ann, at 105)." *Id.* at 291.

One specific target of §349 is deceptive practices used in the provision of medical services, an area in which the statute has historically been used. *Id.* at 291-92. Given this legislative intent, historical use, and broad statutory language, the Court in *Karlin* held §349 does apply to the provision of medical services.

As set forth above, Plaintiffs allege Defendants engaged in a scheme, conceived and directed by FORBA, by which the Dentists 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.[51] By this conduct engaged in 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. The allegations state a claim under §349. *Karlin*, *supra*; *Oswego supra.*

[51] The detailed allegations as to the scheme are described above at page 1 and are set forth in Am. Compl. ¶¶56-80 and ¶¶ 167-187. The allegations of injury to the Plaintiffs are in Am. Compl. ¶¶149 -164. The allegations that this conduct violates §349 are in Am. Compl. ¶¶201-213.

B. The Dentist Defendants' Contentions Are Without Merit

1. Defendants' Deceptive Conduct Was Consumer-Oriented

The Dentist Defendants' primary argument is that Plaintiffs have not alleged consumer-oriented conduct but only private interactions between Plaintiffs and their dentists. The argument ignores the allegations in the Amended Complaint. Plaintiffs allege 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.[52] The deceptive conduct was not unique to Plaintiffs, nor was it private in nature or a single shot transaction. As held in *Oswego*, deceptive acts done as a matter of routine are consumer-oriented because "they potentially affect similarly situated consumers." *Oswego*, 85 N.Y.2d at 26-27.

The Dentist Defendants suggest that because Plaintiffs make allegations as to their individual interaction with the dentists that treated them – that the dentist concealed matters from them, made misrepresentations to them, and intentionally improperly treated them – the conduct is private and individual to each Plaintiff rather than consumer-oriented. But allegations of that nature are present in every §349 claim for compensatory damages. In order to show injury, a plaintiff always has to prove the individual circumstances that establish he was a victim of the routine practice.

Thus, in *Oswego* the allegation was that a bank routinely concealed from persons opening 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-

[52] Am. Compl. ¶204. To the extent the Dentist Defendants are contending the §349 claim is not pled with sufficient particularity, there is no such requirement for §349. *Joannou v. Blue Ridge Ins. Co.*, 289 A.D.2d 531 (2d Dep't 2001); 2 PJI3d 3:20 at 219 (2012). In any event, Plaintiffs have alleged specific details as to the deceptive conduct. (See footnote 51 above.) The detailed allegations as to the deceptive conduct, including the fact that the dentists were trained to engage in such conduct, also establish that the fraudulent treatment of Plaintiffs was part of the routine practice at the Clinics. The allegations more than satisfy any specificity requirement.

would be paid and that an alternative account without that limit was available for non-profit organizations. To recover damages, the plaintiff had to show the individual circumstances of his own account opening. *Id.* at 27. But that did not make the §349 claim improper as involving a unique transaction or one that was private in nature, nor does it do so in this case. As *Oswego* holds, deceptive conduct is not private in nature but instead is consumer-oriented when, as here, it is a routine practice and thus has the potential to impact other consumers.

2. Plaintiffs' §349 Claims Allege Conduct Beyond Ordinary Malpractice

The Fifteen Dentists also argue that the §349 claims should be dismissed because Plaintiffs have not alleged conduct that is beyond the purview of the general medical malpractice and negligence claims.[53] To the contrary, the allegations are of intentional fraudulent conduct far beyond general malpractice or negligence. As held in *Simcuski*, a doctor fraudulently inducing improper treatment "is more than . . . [an] act of alleged negligent malpractice on the part of the treating physician; the complaint alleges an intentional fraud. . . ." *Simcuski,* 44 N.Y.2d at 451-52. Intentional fraudulent treatment committed on patients as a routine practice as Plaintiffs allege is even further beyond the purview of an act of general malpractice. *See also Karlin,* 93 N.Y.2d at 292-93 (GBL §349 claim is different from malpractice claim for lack of informed consent and the two may be maintained together).

[53] Fifteen Dentists' Memo. at 10-12.

3. §349 Covers All Deceptive Practices

Finally, the Fifteen Dentists appear to argue that Plaintiffs must allege deceptive advertising to allege a violation of §349, citing *Karlin*.[54] Plaintiffs do allege deceptive advertising,[55] but advertising is not the only form of deceptive conduct under §349. *Karlin* holds that §349 prohibits "all deceptive practices." *Karlin,* 93 N.Y.2d at 287. Thus, for example, the §349 claim in *Oswego* did not involve advertising; it was based entirely on concealment of material information. *Oswego,* 85 N.Y.2d at 23-24.

To the extent the Dentist Defendants suggest §349 should be interpreted to specially permit deceptive practices in the provision of medical services unless advertising is involved, they cite no authority or reason and *Karlin* holds to the contrary. As *Karlin* held, §349 applies to medical services and prohibits "*all* deceptive practices." *Karlin,* 93 N.Y.2d at 287 (*emphasis added*). It would be unconscionable to exempt doctors who engage in a fraudulent course of conduct by which they routinely induce improper treatment by deceptive conduct simply because they do not do so by advertising. That is the very type of conduct §349 was intended to, should, and does prohibit.

C. *Goshen, Karlin* and *Oswego* Establish The Validity of Plaintiffs' GBL §350 Claim

GBL §350 prohibits "'[f]alse advertising in the conduct of *any* business, trade or commerce or in the furnishing of *any* service in this state.'" *Karlin*, 93 N.Y.2d at 290 (internal quote from §350; emphasis by the Court). As a part of the consumer protection law, §350 is given the same broad application as §349 and applies to medical services. *Karlin,* 93 N.Y.2d at 287. "The standard for recovery under General Business

[54] Fifteen Dentists' Memo. at 10-11.
[55] The deceptive advertising allegations are discussed below in connection with the GBL §350 claim.

services. *Karlin,* 93 N.Y.2d at 287. "The standard for recovery under General Business Law §350, while specific to false advertising, is otherwise identical to section 349." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 324 n.1 (2002). The elements are advertising that is deceptive or misleading in a material way, is consumer-oriented, and causes injury. *Karlin,* 93 N.Y.2d at 293.

Plaintiffs allege (1) the Clinics were not authorized by law to provide dental care and 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 improper treatment knowing it to be improper[56] and (2) the Clinics and FORBA targeted Medicaid children with advertising and promotional materials that falsely represented the Clinics were legally authorized to provide dental care and would provide appropriate dental care when they knew that to be false (3) which lured Plaintiffs to the Clinics and caused them injury in the form of improper treatment.[57] These allegations state a claim under § 350. *Goshen,* 98 N.Y.2d at 326 (defendants' knowledge that the service they provided was defective rendered promotional representations deceptive under § 350).

The Fifteen Dentists repeat the same arguments they make as to § 349. They argue the §350 allegations are (1) conclusory (2) the same as the malpractice claim and (3) do not allege that the conduct was consumer-oriented.[58] These contentions are without merit for the same reasons set forth above as to § 349. In addition the allegation that the promotional materials were aimed at Medicaid children in general

[56] Am. Compl. ¶¶37-55 (Clinics not authorized to practice dentistry); ¶¶56-80 and ¶¶ 167-187 (fraudulent course of conduct); ¶¶201-204 (deceptive acts and practices).
[57] Am. Compl. ¶¶206-212.
[58] Fifteen Dentists' Memo. at 12-13.

alleges conduct that could potentially affect other consumers and is thus sufficient to allege that the conduct is consumer-oriented. *Oswego*, 85 N.Y.2d at 26.

The Four Dentists also argue that the § 350 allegations implicate only FORBA and the Individual Defendants, and do not allege that the Dentist Defendants participated in drafting or perpetuating the advertisements.[59] There is no requirement that a defendant must draft a deceptive advertisement to violate § 350, and Defendants cite no authority. Plaintiffs allege the Dentist Defendants were knowing and active participants in the scheme that violated § 350, and perpetuated the deceptive advertising by intentionally providing the improper treatment that rendered the advertising deceptive.[60] 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 (2d Dep't 2008); *Kuo Feng Corp. v. Ma*, 248 A.D.2d 168 (1st Dep't 1998); 2 PJI3d 3:20 at 186 (2012) ("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").

The Four Dentists also argue 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.[61] Plaintiffs have specifically identified the deceptive materials by describing their content: those which falsely represented the Clinics were authorized to practice dentistry and children would receive appropriate care.[62] The identity of each particular advertisement or promotional

[59] Four Dentists' Memo. at 17.
[60] Am. Compl. ¶¶56-80; 167-187; 201-213; 234-236.
[61] Four Dentists' Memo. at 17-18.
[62] Am. Compl. ¶207.

material is peculiarly within the knowledge of the Defendants and of necessity must await discovery. Plaintiffs have also alleged how the materials were misleading: 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. These are concrete facts alleging a marketing scheme aimed at Medicaid children generally.

Finally, the Four Dentists say there is no allegation that Plaintiffs were aware of the advertisements.[63] Plaintiffs' allegation that they were deceived, mislead and lured to the clinic by advertisements or promotional materials necessarily carries with it an allegation of awareness of such materials.[64] Plaintiffs have stated a §350 claim.

POINT VI

PLAINTIFFS HAVE ALLEGED A NEGLIGENCE CLAIM AGAINST THE DENTIST DEFENDANTS[65]

The Four Dentists argue the negligence claim fails to state a claim against them.[66] No other Defendant joins in this contention.

The Four Dentists argue the negligence claim against them is insufficient because it does not allege conduct by them in connection with the rendition of professional services. To the contrary, the claim is based on their improper conduct in treating Plaintiffs. Plaintiffs allege (1) the law prohibits the practice of dentistry by a

[63] Four Dentists' Memo. at 17.
[64] Am. Compl. ¶209.
[65] This point opposes Point V of the Four Dentists' memorandum of law and affirmation.
[66] Four Dentists' Memo. at 18-20.

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 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.[67]

Thus, Plaintiffs allege the Clinics were formed and operated in violation of the New York law that prohibits the corporate practice of dentistry.[68] This prohibition is imposed by §§1203 and 1207 of the Limited Liability Company Law, 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.[69] This prohibition is "in keeping with the longstanding ban on the corporate practice of medicine." *Universal Acupuncture Pain Services, P.C. v. State Farm Mut. Auto Ins. Co.*, 196 F.Supp.2d 378, 389, n.5 (S.D.N.Y. 2002). The law prohibits lay ownership of professional companies because of "the accompanying potential for fraud." *State Farm Mutual Automobile Ins. Co. v. Mallela*, 4 N.Y.3d 313, 321 (2005).

The prohibition is to prevent precisely the conduct that occurred in this case. The Court of Appeals explained the reason in the context of holding the prohibition

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[67] The negligence claim against the Dentists is set forth in Am. Compl. ¶¶226-227. The factual basis for this claim is set forth in ¶¶36-55 (which contain the factual basis for the allegation that Defendants practiced in violation of the statute), and in ¶¶56-80 and ¶¶ 167-187 (which contain the factual basis for the allegation that the Dentist had conflicted interests that caused them to put the profit interests of FORBA ahead of the interests of Plaintiffs with the consequence that they rendered inappropriate care to Plaintiffs).

[68] Am. Compl. ¶¶36-55.

[69] The Clinics are limited liability companies and so the LLCL applies to them. Am. Compl. ¶109. The Four Dentist Defendants refer to New York Business Corporation Law §§1503 and 1505, but that law applies to professional corporations. The provisions of the LLCL and the BCL at issue are similar and there are no material differences for purposes of this issue.

applicable to lawyers as well as dentists ("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 to act for it"). *In re Co-Operative Law Co.*, 198 N.Y. 479, 484 (1910). As the Court observed, the relationship of a professional and his patient or client involves the highest trust and confidence, which cannot exist between a professional employed by a company and a patient because the professional would be conflicted: "he would be subject to the directions of the corporation, and not to the directions of the client." *Id.* "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 and counselor at law." *Id.* There would be "no guide except the sordid purpose to earn money for stockholders" and "evil results... might follow." *Id.*

Plaintiffs allege Defendants violated the statute because the Clinics were not owned by New York licensed dentists and the Dentist Defendants as its employees nonetheless rendered dental services. FORBA designated various dentists to register as the "owner" to make it appear the clinic was authorized to practice dentistry, but all were handpicked and let go at FORBA's whim and none provided capital, assumed the risk of loss, or received any profit from the clinics.[70] FORBA received all of the profits from and was the true owner of the clinics.[71] Under the statute, the owner is the entity that satisfies the normal criteria of an owner. Operation of a professional company with a throw-down "nominal" owner when a prohibited entity gets the profit and operates the company, as alleged here, violates the law. *Mallela, supra*, 4 N.Y.3d at 320-21; *In the*

[70] Am. Compl. ¶¶38-43.
[71] FORBA established, operated, controlled and managed the clinics, and all the clinics' profits went to FORBA. Am. Compl. ¶¶44-55.

Matter of Andrew Carothers, M.D., P.C. v. Ins. Companies Represented By Bruno, Gerbino, & Soriano, et al., 26 Misc.3d 448 (N.Y. City Civ. Ct., Richmond Co. 2009); *Universal Acupuncture Pain Services, P.C.*, 196 F.Supp.2d 378. As the Court of Appeals held, such conduct is a "willful and material failure to abide by state and local law." *Mallela, supra* at 321.[72]

Violation of a statute that restricts the manner in which conduct can be performed establishes a standard of care the violation of which is negligence per se. *Coogan v. Torrisi*, 47 A.D.3d 669 (2d Dep't 2008) (driving a car in violation of a learner's permit restriction relates directly to the operation of the vehicle and sets up a standard of care the unexcused violation of which is negligence *per se*); *Dalal v. City of New York*, 262 A.D.2d 596 (2d Dep't 1999). As recognized in *Dance v. Town of Southampton,* 95 A.D.2d 442 (2d Dep't 1983), cited by the Four Dentists, a statute designed to protect a particular class of persons against a particular harm may create a standard of care the violation of which is negligence per se. *See also* 1A PJI3d 2:25 at 284 (2012) stating, "[t]he generally accepted view is that a violation of a statutory duty constitutes negligence for the reason that the non-observance of what the legislature has prescribed as a suitable precaution is, as a matter of law, failure to observe that care which an ordinarily prudent person would observe."

The statute here relates directly to the operation of the Clinics, prohibiting the practice of dentistry at the clinics with FORBA as the owner for the very purpose of

[72] These cases involved professional corporations as opposed to a professional limited liability company, but the restrictions prohibiting the practice of dentistry by a company unless owned by New York licensed dentists are substantially the same for both. The prohibition as to limited liability companies is LLCL §§1203 and 1207, and the parallel provisions with the same prohibitions as to professional corporations are BCL §§1503 and 1507. The requirement that the owner be the true owner rather than a nominal throw-down owner is thus the same for both. *Multiquest, PLLC v. Allstate Ins. Co.,* 17 Misc.3d 37 (App. Term, 2d Dep't 2007).

preventing the conflicted interests that caused the harm to the Plaintiffs in this case. The statute was designed to protect a particular class of persons (the Clinics' patients) against a particular class of harm (inappropriate dental treatment resulting from the elevation of FORBA's profit interests above the interests of the patients). Plaintiffs are in the protected class and suffered the harm the statute was intended to prevent.

Contrary to The Four Dentists' contention, Plaintiffs' negligence claim as to them is based on their conduct in treating patients. The Dentists knew or should have known that practicing dentistry as employees of a company in violation of the corporate practice prohibition would result in the precise conflicted interests that in fact caused them to put the profit interests of FORBA ahead of their patients and caused their inappropriate treatment of the Plaintiffs. Their conduct is fraudulent if done intentionally, but negligent or negligent *per se* if not.

POINT VII

PLAINTIFFS ALLEGE FACTS AGAINST THE DEFENDANT DENTISTS THAT SUPPORT PUNITIVE DAMAGES[73]

The Four Dentists move to dismiss the punitive damages allegation against them. Although punitive damages are not available for ordinary negligence, the Four Dentists' conduct at issue was much more egregious. The Four Dentists were trained to and put the financial interests of FORBA ahead of the medical needs of their patients, including the Plaintiffs.[74] As a result, they misrepresented that dental treatment was appropriate when they knew it was not to induce the parents and guardians of young

[73] This point opposes Point VI of the Four Dentists' memorandum of law and affirmation.
[74] Am. Compl. ¶¶60-70; 155-164; 169; 171; 178.

children to consent to have their children treated at Small Smiles.[75] The misconduct by the Four Dentists was not isolated to these Plaintiffs, but was a regular practice of these dentists and of their employer, FORBA.[76] In sum, the Four 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 the Plaintiffs. These allegations satisfy the requirements for punitive damages.[77] *McDougald v. Garber,* 73 N.Y.2d 246, 254 (1989); *Graham v. Columbia-Presbyterian Med. Ctr.*, 185 A.D.2d 753, 754 (1st Dep't 1992)

POINT VIII

THE CLAIMS AGAINST DR. FILOSTRAT CANNOT BE DISMISSED BASED ON HIS FACTUAL DENIALS

After serving his answer, Dr. Filostrat filed a two-page motion to dismiss. The motion fails to identify any legal flaw with one or more of the causes of action or cite to any legal authority. Rather, it merely denies a few of the factual allegations in the initial Complaint. Dr. Filostrat's denials are not grounds for a motion to dismiss since the allegations of a complaint are accepted as true when deciding such a motion. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.2d 582, 591 (2005). The allegations, if true, state the seven causes of action alleged against Dr. Filostrat and he never suggests otherwise. Accordingly, Dr. Filostrat's motion to dismiss must be denied.

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[75] Am. Compl. ¶¶168, 171.
[76] Am. Compl. ¶¶202-209.
[77] The Four Dentists also move to dismiss two theories of liability - concert of action and successor liability - that have not been asserted against them. Plaintiffs assert seven causes of action directly against the Four Dentists. But the concert of action theory of liability is asserted only against Old FORBA, New FORBA and the Individual Defendants and the successor liability theory only against New FORBA. Thus, there is nothing to dismiss regarding those two theories of recovery.

CONCLUSION

This is not a garden-variety medical malpractice case disguised as a fraud case. It involves conduct that FORBA admits put the profits of the company ahead of the safety and welfare of the patients at Small Smiles Dental Clinics[78] and generated hundreds of millions of dollars for the Individual Defendants who conceived of and directed the scheme.[79]

Plaintiffs are entitled to allege and seek to prove that they were harmed by intentional misconduct that amounts to fraud, battery, breach of fiduciary duty, and violates the consumer protection statute. The allegations contained in the Amended Complaint support such claims. The fact that the conduct at issue involves dental treatment or that the Plaintiffs have alleged an alternative cause of action for malpractice does not deprive the Plaintiffs of their right to pursue their intentional tort claims. To do so would turn the alternative pleading rule in CPLR 3014 on its head and, at the same time exempt health care professionals from liability for intentional misconduct. For the reasons stated herein, the motions to dismiss should be denied.

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[78] Am. Compl. ¶¶71-78.
[79] Am. Compl. ¶¶23-29.

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