

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

TIMOTHY ANGUS, as Parent and Natural Guardian of Infant JACOB ANGUS; JESSALYNN PURCELL, as Parent and Natural Guardian of Infant ISAIAH BERG; BRIAN CARTER, as Parent and Natural Guardian of Infant BRIANA CARTER; APRIL FERGUSON, as Parent and Natural Guardian of Infant JOSEPH FERGUSON; SHERAIN RIVERA, as Parent and Natural Guardian of Infant SHADAYA GILMORE; TONYA POTTER, as Parent and Natural Guardian of Infant ESIRAE HAGER; NANCY WARD, as Legal Custodian of Infant AALYIAROSE LABOMBARD-BLACK; NANCY WARD, as Legal Custodian of Infant MANUEL LABORDE JR.; JENNIFER BACON, as Parent and Natural Guardian of Infant ASHLEY PARKER; and COURTNEY CONRAD, as Parent and Natural Guardian of Infant ZAKARY WILSON,

Plaintiffs,

vs.

FORBA HOLDINGS, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSA, LLC; FORBA NY, LLC n/k/a LICSA NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF ALBANY, LLC; ALBANY ACCESS DENTISTRY, PLLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; EDWARD J. DEROSE, D.D.S.; ADOLPH R. PADULA, D.D.S.; WILLIAM A. MUELLER, D.D.S.; MICHAEL W. ROUMPH; MAZIAR IZADI, D.D.S.; LAURA KRONER, D.D.S.; JUDITH MORI, D.D.S.; LISSETTE BERNAL, D.D.S.; EDMISE FORESTAL, D.D.S.; EVAN GOLDSTEIN, D.D.S.; KEERTHI GOLLA, D.D.S.; NASSEF LANCEN, D.D.S.; WADIA HANNA, D.D.S.; and BERNICE LITTLE-MUNDLE, D.D.S.

Defendants.

Memorandum of Law
on Behalf of Plaintiffs

Index No: 2011-6084
Index No. 2011-2128
Index No. 2011-6223
Hon. John C. Cherundulo

AND OTHER COORDINATED ACTIONS

PRELIMINARY STATEMENT

Plaintiffs in the coordinated actions submit this memorandum of law to oppose the pending motion by the Wilson Elser Defendants¹ to require this Court to recuse itself from the Small Smiles cases.

POINT I

RECUSAL IS NOT REQUIRED OR APPROPRIATE IN THIS CASE

The Wilson Elser Defendants' motion to recuse lacks support in the law and record, and this Court should deny it. As discussed below, recusal is not required, appropriate, or wise.

a. This Court decides on recusal

When recusal is sought to avoid the appearance of impropriety, as is the case here, the trial judge is "the sole arbiter of recusal." *People v. Moreno*, 70 N.Y.2d 403, 405 (1987). In that role, the trial judge must use his discretion and listen to his "personal conscience" in determining whether to recuse himself in order to avoid the appearance of impropriety since only he knows fully his own thoughts and feelings. *Id.*; *In re Angie M.P.*, 291 A.D.2d 932, 933 (4th Dep't 2002); *People v. Diaz*, 130 Misc.2d 1024, 1030 (Sup. Ct. Suffolk Co. 1986) ("the question of when a Judge should disqualify himself is generally a matter of personal conscience since only the individual judge knows fully his own thoughts and feelings." (citations omitted)). The decision is entirely a subjective one.

¹ Wilson Elser represents Drs. Judith Mori, Keerthi Golla, Maziar Izadi, Evan Goldstein, Edmise Forestal, Nassef Lancen, Koury Bonds, Naveed Aman, Tarek Elsafty, Yaqoob Khan, Grace Yaghmai, Ismatu Kamara, Sonny Khanna, Shilpa Agadi, and Kim Pham (the "Wilson Elser Defendants").

“The discretion left to each individual Judge stems from the interest in the efficient administration of justice. It is untenable to require Judges to recuse themselves whenever an unsupported allegation of bias [or, as here ‘of a potential for the appearance of impropriety exists’] is made. One would be hard pressed to find a Judge that would completely satisfy all litigants and such a system would undoubtedly promote the undesirable problem of Judge shopping.

Therefore, if a Judge, surveying the circumstances, believes he is able to preside impartially over the proceedings before him, he is able to do so.” *Ortiz v. City of New York*, 136 Misc. 2d 500, 502 (Sup. Ct. New York Co. 1987). Indeed, “[a] Judge has an obligation *not* to recuse himself or herself . . . unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance.” *Spremo v. Babchik*, 155 Misc.2d 796, 799 (Sup. Ct. Queens Co. 1992)(*emphasis added*), *mod on other grounds*, 216 A.D.2d 382, *cert denied* 516 U.S. 1161 (1996).

Because the decision whether to recuse to avoid the appearance of impropriety is a subjective one that solely belongs to the trial court, an appellate court gives the decision great weight and substantial deference. In those situations, a trial judge’s recusal decision will not be overturned absent an abuse of discretion. *People v. Moreno*, *supra*.

The Wilson Elser Defendants agree that this Court is the sole arbiter of this motion. So does Judge Tormey. He said this in his September 30, 2011 letter to the parties, attached as Exhibit “A” to the Higgins Affirmation.

b. The Wilson Elser Defendants have not demonstrated the need for recusal

Motions to recuse based on speculative cries of the possibility of an “appearance of impropriety,” are routinely denied and the orders affirmed on appeal. Often these motions are based on relationships between the judge and one of the lawyers in the case. For example, in *Mugas v Mugas*, 210 A.D.2d 958 (4th Dep’t 1994), the trial judge and his wife were social acquaintances with one of the lawyers and his wife, the two couples saw each other every two to three months, and the judge was the fact finder in the case. The appellate court concluded that the trial court “properly exercised its discretion in denying defendant’s motion for recusal”. *Id.*

Likewise, in *Kelley v. Zavalidroga*, 55 A.D.3d 1391, 1391 (4th Dep’t 2008), the trial court denied a motion to recuse “based on its alleged bias resulting from the court’s former status as a partner in the law firm where defendant previously was employed as well as the court’s friendship with a partner in the law firm representing plaintiffs.” *Id.* The appellate court affirmed the decision because the trial court “did not abuse its discretion in refusing to recuse itself.”

In *Saratoga Harness Racing Inc., v. Roemer*, 290 A.D.2d 928 (3d Dep’t 2002), the court rejected a recusal motion based on the “alleged connections between the Judge and . . . a principal in the firm representing plaintiff.” *Id.* at 929. In affirming the order, the appellate court found that the trial court “acted within its discretion in denying defendant’s recusal motion.” *Id.* at 930. See also *People v. Daly*, 20 A.D.3d 542, 543, 799 N.Y.S.2d 537 (2d Dep’t. 2005) (recusal order denying motion based on allegations of the trial court’s “hatred” of defense counsel affirmed because the decision to recuse was left to the “conscience and discretion of the judge.”); *Berman v. Herbert Color Lithographers*

Corp., 222 A.D.2d 640 (2d Dep't. 1995)(recusal order denying motion based on "past friction" between judge and defense counsel affirmed).

The above law evidences a strong judicial policy trusting the wisdom of supreme court justices and discouraging motions to recuse brought for tactical reasons, i.e. forum shopping. In this case, that judicial policy favors this Court denying the Wilson Elser Defendants' motion to recuse.

The Wilson Elser Defendants rest their motion on two paragraphs in the Witz Affirmation.² They state the undersigned acted as co-counsel to this Court.³ They provide no details to this Court. But they did to Judge Tormey. Attached as Exhibit "B" to the Higgins Affirmation,⁴ is the September 27, 2011 letter on this issue from the Wilson Elser Defendants to Administrative Judge James C. Tormey, III. It clarifies that the "co-counsel" relationship alleged between this Court and the undersigned was limited to a single case – the *Chase* matter – and that this case settled on November 18, 2002 and closed on August 18, 2003. That was over eight years ago. The Wilson Elser Defendants allege no other case with the undersigned.

The Wilson Elser Defendants further state that this Court had a strong relationship including serving as co-counsel on matters with the firm of Powers & Santola, LLP. The Witz Affirmation provides no details. The Wilson Elser Defendants' September 27, 2011 letter to Administrative Judge James C. Tormey,⁵ shows that the last such case ended in 2004, almost seven years ago. The Wilson Elser Defendants did not present these facts on this motion to recuse.

² Affirmation of Thomas M. Witz, Esq. executed on October 19, 2011 in Support of the Wilson Elser Defendants' Motion for Recusal.

³ (Witz Affirmation ¶ 8.)

⁴ Affirmation of Patrick J. Higgins, Esq. executed on November 1, 2011 in Opposition to the Wilson Elser Defendants' Motion to Recuse.

⁵ Ex. B Higgins Affirmation.

The law cited above indicated that time periods of seven and eight years constitutes sufficient time for a justice to deny a recusal motion based on an earlier relationship. While not controlling, or directly on point, there are some indicia that this extended time period is probative on a motion to recuse.

For example, in cases involving justices of the appellate division and the Court of Appeals, 22 NYCRR § 16.1 provides that a justice of the appellate division or the Court of Appeals may appear before his or her colleagues two years after sitting on the bench – not seven or eight years. The two-year-period established by 22 NYCRR 16.1 has been used as an “appropriate” guide in other judicial ethics opinions. Whatever its relevance to this case, the seven or eight year period at issue is far more than the two years in 22 NYCRR § 16.1

The Wilson Elser Defendants did not address this law in their moving papers, even though plaintiffs raised it with Judge Tormey before the Wilson Elser Defendants’ motion to recuse. A copy of plaintiffs’ September 29, 2011 letter to Judge Tormey is attached as Exhibit “C” to the Higgins Affirmation.

The remaining grounds for recusal alleged are that this Court and John K. Powers formed the New York State Trial Lawyers Academy in 2004.⁶ The Academy is a CLE and educational resource for trial lawyers. It was founded not just by John Powers and this Court but also by John Duffy, Esq. in Nassau County, and Robert Lahm, Esq. in Utica, New York. And that was over seven years ago. The Wilson Elser Defendants cite no law or factual basis indicating why joint participation seven years removed in formation of a trial academy would or should cause this Court to recuse itself. These two paragraph allegations do not support recusal under the established case law cited above. The

⁶ (Witz Affirmation ¶ 9.)

cases acknowledge that many Justices are former lawyers and will know members of the bar appearing before them and there is nothing improper about them doing so, particularly when the contacts were several years earlier.

c. Forum Shopping is not a ground for Recusal

The current motion can be seen as forum shopping to get a judge different than this Court. The Wilson Elser Defendants did not object to this Court for the past six months. Plaintiffs filed the *Varano* action in Onondaga County on April 4, 2011. They moved before this Court by order to show cause executed by this Court on May 4, 2011 for admission *pro hac vice* for out-of-state attorneys representing plaintiffs. This motion was served on all parties, including the Wilson Elser Defendants.

The Wilson Elser Defendants did not object to this Court hearing and deciding the *pro hac vice* motions. In fact they presented to, and had this Court execute an order to show cause dated May 5, 2011. The Wilson Elser Defendants there sought multiple grounds of relief from this Court, including severing the action into ten separate actions. A copy of that order to show cause with attached affirmation is attached to the Higgins Affirmation as Exhibit "D."

If the Wilson Elser Defendants had real issues with this Court, they would have moved to disqualify this Court then. Instead, they invited this Court's participation in the case by requesting that he rule on papers they submitted to him. It is difficult to understand why no appearance of impropriety existed in June, but one exists now simply because this Court has been assigned as the Coordinating Justice.

Additionally, from May 16, 2011 to August 25, 2011 the Litigation Coordinating

Panel (“LCP”) stayed the three actions now coordinated. However, during this time the Wilson Elser Defendants did not object to this Court’s continued assignment to the *Varano* action. They did not advise the Court – or anyone – of any issues with this Court.

On September 1, 2011, the LCP lifted the stay and requested that Judge Tormey assign an Onondaga County coordinating justice to the coordinated Small Smiles actions. Plaintiffs’ counsel served that order with notice of entry on all counsel on September 15, 2011. The Wilson Elser Defendants did not object to Judge Cherundulo at that time. They knew that Judge Tormey would appoint a coordinating justice, and that this Court was the assigned justice in the main *Varano* action then pending in Onondaga County. It was not until after Judge Tormey appointed this Court as the coordinating justice that the Wilson Elser Defendants thought that there needed to be a change.

This desire to control what justice has been assigned, i.e. self-selecting the forum, also appears in the Wilson Elser Defendants’ response to the plaintiffs’ motion to coordinate the actions before the LCP. The Wilson Elser Defendants stated that “there are certain candidates for coordinated justice that may be better suited to handle this type of coordinated litigation than others.”⁷

After “review[ing] the judiciary of the relevant judicial districts for potentially related experience,”⁸ the Wilson Elser Defendants asked the LCP to appoint the Honorable James McCarthy as a coordinated justice for this case in the Fifth Judicial District, and the Hon. Richard Aulisi in the Fourth Judicial District for this case.⁹ This was despite acknowledging in their papers that “the designation of the coordinating justice is to be

⁷ Affirmation of Theresa L Marangas, Esq. executed on June 14, 2011 submitted in response to Plaintiffs’ Order to Show to Cause before the LCP to Coordinate all Small Smiles Actions.

⁸ (*Id.* at ¶ 12.)

⁹ (*Id.* at ¶ 14-18.)

done at the discretion of the Administrative Justice.”¹⁰

Thus, the Wilson Elser Defendants have tried twice to have this Court removed from this case, once before the LCP, and once before Judge Tormey. This violated the law cited above indicating that motions to recuse must be brought to the justice at issue, and the LCP Rules.¹¹

Both attempts appear to constitute judge shopping. There is no other reason apparent why the Wilson Elser Defendants would make these motions to courts other than this one while submitting motions for consideration without objection to this Court. But forum shopping and tactical decisions as to which justice might be thought best for a particular litigant are not grounds for a recusal motion. As the above cases indicate, if they were, everyone would make them.

d. The “Media Attention” Argument lacks merit

The Wilson Elser Defendants argue that this Court should recuse itself, in part, because of “the amount of media attention that these matters have and will receive.” (Mem of Law at 2). The argument is unfounded for several reasons. First, there is no proof that this litigation is going to receive an unusual amount of media attention.

After an initial one or two day flurry of activity when the cases were filed in April of 2011, the news media quickly moved on in search of new stories. The Wilson Elser Defendants did not include in their moving papers any evidence of publicity at the time of filing or since then. They have not claimed that any media outlet has publicized this case since the initial filing.

¹⁰ (*Id.* at ¶ 8.)

¹¹ See 22 NYCRR §202.69(c).

Second, the standard for recusal in a “high profile case” is no different than in other cases. Indeed, in cases much more high profile than this one, trial judges have rejected motions to recuse similar to this one. See, e.g. *United States v. Mitchell*, 377 F.Supp. 1312 (D.D.C. 1974) *aff’d. sub. nom. United States v. Haldeman*, 181 U.S. App. D.C. 254, 559 F. 2d 31 (D.C. Cir. 1976). (Trial judge in Watergate case denied motion to recuse); *Cheney v. United States Dist. Court*, 541 U.S. 913, 916 (2004)(Scalia, J., mem.)(Justice Scalia denied motion to recuse in case involving Vice-President, Dick Cheney, despite many newspaper editorials throughout the United States urging him to recuse himself); *People ex rel. Spitzer v. Grasso*, 853 N.Y.S.2d 64, 65-69 (1st Dep’t 2008)(Trial court denied motion to recuse in suit by New York Attorney General to recover large overpayments from former CEO of the New York Stock Exchange).

Third, as demonstrated above, whether this litigation receives extensive media attention or not, this court’s claimed past relationship with one of the plaintiffs’ lawyers and his firm many years ago is no proof that this Court should recuse itself at this date

e. The Wilson Elser Defendants’ cases do not support recusal

The Wilson Elser Defendants support their motion to recuse with authorities that are either inapposite or undercut their motion. Two of their cases, *New Hope Missionary Baptist Church* and *SunTrust Mortgage*, are orders from a trial judge in Kings County who, using his discretion and relying on his personal conscience, concluded he should recuse himself. The cases illustrate that the decision to recuse because of an alleged possibility of the appearance of impropriety is a subjective one left to the discretion of the judge.

Judge Schack elected to recuse himself “to avoid any speculation as to the rationale for [his] decisions”, but there was no requirement that he do so. The decisions were solely his and would have been proper if he had used his discretion, decided he could be impartial, and denied the motions to recuse.

Two other cases, *Cummings* and *Murray*, involve mandatory disqualification under section 14 of the Judiciary Law, and, thus, do not apply to the current motion. The Wilson Elser Defendants concede that they are not alleging a mandatory section 14 ground for recusal.

Movants also cite the *Ferlito* case which demonstrates a court’s duty to sit. In *Ferlito*, the Court of Appeals ruled that the trial judge should *not* have recused himself and declared a mistrial during the middle of a criminal case, but should have continued to preside over the trial even though it may have been “unpleasant duty.”

Finally, the Wilson Elser Defendants refer to the *Corradino* case. In that child custody case, the Court of Appeals noted that there is no canon of judicial ethics which requires disqualification because the attorney for one of the parties was in the same law firm as the judge at the time she was designated to the Bench. The Court of Appeals also noted in *dicta* that it believed that under those facts, “the better practice” was for the trial court to have disqualified itself.

Eight years later in *Moreno*, the Court of Appeals clarified that the decision to recuse belongs solely to the trial court relying on his discretion and personal conscience and would not be disturbed on appeal except for an abuse of discretion. As demonstrated by the cases cited above, since *Moreno* the appellate courts have regularly deferred to the judgment of the trial courts in reviewing recusal motions based on the relationship—good or bad-- between the court and one of the counsel in the case.

CONCLUSION

This Court should deny the motion to recuse. It is not supported by governing case law, or the record, and it appears motivated by tactical reasons.

Dated: November 1, 2011



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**STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY**

TIMOTHY ANGUS, as Parent and Natural Guardian of Infant JACOB ANGUS; JESSALYNN PURCELL, as Parent and Natural Guardian of Infant ISAIAH BERG; BRIAN CARTER, as Parent and Natural Guardian of Infant BRIANA CARTER; APRIL FERGUSON, as Parent and Natural Guardian of Infant JOSEPH FERGUSON; SHERAIN RIVERA, as Parent and Natural Guardian of Infant SHADAYA GILMORE; TONYA POTTER, as Parent and Natural Guardian of Infant ESIRAE HAGER; NANCY WARD, as Legal Custodian of Infant AALYIAROSE LABOMBARD-BLACK; NANCY WARD, as Legal Custodian of Infant MANUEL LABORDE JR.; JENNIFER BACON, as Parent and Natural Guardian of Infant ASHLEY PARKER; and COURTNEY CONRAD, as Parent and Natural Guardian of Infant ZAKARY WILSON,

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FORBA HOLDINGS, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF ALBANY, LLC; ALBANY ACCESS DENTISTRY, PLLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; EDWARD J. DEROSE, D.D.S.; ADOLPH R. PADULA, D.D.S.; WILLIAM A. MUELLER, D.D.S.; MICHAEL W. ROUMPH; MAZIAR IZADI, D.D.S.; LAURA KRONER, D.D.S.; JUDITH MORI, D.D.S.; LISSETTE BERNAL, D.D.S.; EDMISE FORESTAL, D.D.S.; EVAN GOLDSTEIN, D.D.S.; KEERTHI GOLLA, D.D.S.; NASSEF LANCEN, D.D.S.; WADIA HANNA, D.D.S.; and BERNICE LITTLE-MUNDLE, D.D.S.,

Defendants.

**PLAINTIFFS'
AFFIRMATION
OPPOSING MOTION
TO RECUSE**

**Index No: 2011-6084
Index No. 2011-2128
Index No. 2011-6223
Hon. John C. Cherundulo**

AND ALL OTHER CONSOLIDATED ACTIONS

Patrick J. Higgins, an attorney duly admitted to practice law in the State of New York, affirms that the following statements are true under penalty of perjury:

1. I am a partner at Powers & Santola, LLP attorneys for the plaintiffs in the coordinated Small Smiles actions along with co-counsel. I submit this affirmation to oppose the motion by the Wilson Elser Defendants¹ to require this Court to recuse itself from these actions, and for such other, further and different relief as this Court deems just and proper.
2. Attached as Exhibit "A" is the September 30, 2011 letter from the Hon. James C. Tormey, III the administrative justice for the Fifth Judicial District, to all counsel, denying the Wilson Elser Defendants' request to remove this Court as the coordinating justice for the Small Smiles cases, and referring any such motion to this Court.
3. Attached as Exhibit "B" is the September 27, 2011 letter from Theresa L. Marangas, Esq. representing the Wilson Elser Defendants, to Justice Tormey, requesting that this Court be removed from the Small Smiles cases.
4. Attached as Exhibit "C" is the plaintiffs' September 29, 2011 letter to Justice Tormey responding to the September 27, 2011 letter attached as Exhibit "B."
5. Attached as Exhibit "D" is a copy of the Wilson Elser Defendants' May 5, 2011 Order to Show Cause executed by this Court with supporting affirmation and exhibits.

¹ Wilson Elser represents Drs. Judith Mori, Keerthi Golla, Maziar Izadi, Evan Goldstein, Edmise Forestal, Nassef Lancen, Koury Bonds, Naveed Aman, Tarek Elsafty, Yaqoob Khan, Grace Yaghmai, Ismatu Kamara, Sonny Khanna, Shilpa Agadi, and Kim Pham (the "Wilson Elser Defendants").

6. Attached as Exhibit "E" is the June 14, 2011 affirmation executed by Theresa L. Marangas, Esq. and filed with the Litigation Coordinating Panel on behalf of the Wilson Elser Defendants.
7. Attached as Exhibit "F" is the September 1, 2011 Order from the LCP coordinating the Small Smiles actions in Onondaga County, served with notice of entry on September 15, 2011.
8. As discussed more fully in the accompanying memorandum of law, plaintiffs oppose the Wilson Elser Defendants' motion to have this Court recuse itself. The Wilson Elser Defendants in their moving papers include only two paragraphs on the basis of the motion. (Witz Affirm. Supp. Mot. ¶¶ 8-9.)
9. They claim that the undersigned was co-counsel with this Court on a case, that Powers & Santola, LLP has acted as counsel with this Court on other cases, and that this Court before ascending to the bench helped found the New York State Trial Lawyers Academy with John K. Powers, Esq.
10. As can be seen from the Wilson Elser Defendants' letter to Justice Tormey attached as Exhibit "A," the undersigned was counsel with this Court on one matter that settled in November of 2002 and was closed in August of 2003. That is the Chase matter, and that ended over eight years ago.
11. As for Powers & Santola, LLP, the Wilson Elser Defendants' submissions to Justice Tormey indicate that the last case that Powers & Santola, LLP was counsel with this Court on was in 2004. (Ex. A.) That was over seven years ago.
12. And while this Court, and John K. Powers, Esq. helped launch the New York State Trial Lawyers Academy in 2004 with attorneys John Duffy, Esq. from

Nassau County and Robert Lahm, Esq. from Utica, New York, that was also seven years ago.

13. New York law also does not prohibit the bench and bar from jointly furthering legal education in New York. Many other members of the bench and bar have given seminars, or worked on education projects in New York.
14. As discussed more fully in the accompanying memorandum of law, the cases indicate that recusal is not necessary, appropriate or required based on contact occurring seven or eight years before. The public policy recognizes that justices come from the community and are likely to know and have worked with members of the bar.
15. That is why the Court of Appeals has left the issue of recusal solely up to the justice. The justice's decision will not be disturbed absent an abuse of discretion. With this standard appellate courts appropriately defer to the justice's conscience and knowledge in deciding the motion. The cases decided under this abuse of discretion standard indicate that seven or eight years passing is more than enough time to deny a recusal motion.
16. Although not directly on point, the regulations applying to justices of the Appellate Divisions and the Judges of the Court of Appeals also show the probative nature of the seven and eight year time period. As discussed more fully in the accompanying memorandum of law, 22 NYCRR § 16.1 provides a two year period of time in which former colleagues cannot appear before the respective courts. Admittedly, this regulation does not apply to supreme court justices. However, it does provide a shorter time period than seven or eight years.

17. Plaintiffs further oppose the motion to recuse this Court because it appears motivated by tactical reasons, i.e. judge shopping. The Wilson Elser Defendants have tried to block this Court twice from assignment as the coordinating justice since the start of this case. However, they did not do so directly. This violates the law of motions to recuse, and also Litigation Coordination Panel ("LCP") regulations at 22 NYCRR §202.69(c).
18. The Wilson Elser Defendants first attempted to have Justice McCarthy appointed as the Coordinated Justice for the Small Smiles cases in Onondaga County, even though this Court had been assigned the only Onondaga County Small Smiles case (*Angus*). The LCP panel in its September 1, 2011 decision brushed aside this request. It held without discussion that Justice Tormey as the administrative justice would assign the coordinating justice. (Ex. F at 3.)
19. After Justice Tormey chose this Court as the coordinated justice on September 25, 2011, the Wilson Elser Defendants tried to remove this Court by going directly to Justice Tormey. (Ex. A.) Justice Tormey denied that request, and directed the Wilson Elser Defendants to make the motion before this Court.
20. In May of 2011, the Wilson Elser Defendants presented an order to show cause to this Court to sever without objecting to the Court. (Ex. E.) Plaintiffs on May 4, 2011 presented an order to show cause to this Court to admit attorneys *pro hac vice*. They served this motion on all parties. The Wilson Elser Defendants did not object to this Court at that time.
21. It appears that the Wilson Elser Defendants have had no conflict with this Court as long as the Court was not assigned as the coordinated justice for the Small Smiles cases. That appears why they tried to block the Court twice as a

coordinated justice but had no problem with the Court otherwise. This appears to constitute judge shopping. It is hard to understand how the Wilson Elser Defendants could have no problems with this Court as an IAS judge, but suddenly require recusal once this Court was chosen as the coordinating justice. That record is not a basis for any Court to recuse itself.

22. The Wilson Elser Defendants also mention case publicity. But they didn't show any on this motion. The undersigned knows of an initial on or two day flurry of publicity when the cases were filed. However, the media quickly moved on to other things, to satisfy the news and entertainment cycle. The Wilson Elser Defendants do not claim otherwise.
23. Wherefore, the plaintiffs in the coordinated actions respectfully request that this Court deny the motion to recuse, and for such, other, further and different relief as this Court deems just and proper.

Dated: November 1, 2011
Albany, New York


Patrick J. Higgins

EXHIBIT “A”



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

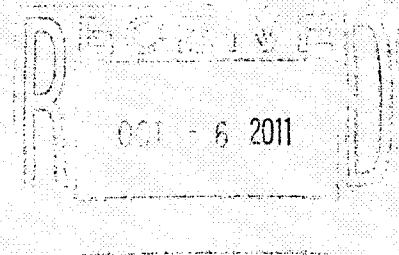
DAVID S. GIDEON, ESQ.
Principal Law Clerk

KATHERINE M. VAETH
Confidential Secretary

September 30, 2011

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

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



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

Dear Counselors:

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

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

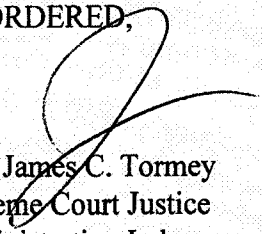
Page Two

September 29, 2011

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

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

SO ORDERED,



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

JCT:kmv

EXHIBIT “B”

WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP

677 Broadway - 9th Floor, Albany, New York 12207-2996 Tel: (518) 449-8893 Fax: (518) 465-2548

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Affiliates: Berlin • Cologne • Frankfurt • Munich • Paris*

www.wilsonelser.com

September 27, 2011

Via E-Mail and Regular Mail

Honorable James C. Tormey, III
Administrative Judge for the Fifth Judicial District
Onondaga County Courthouse
401 Montgomery Street
Syracuse, NY 13202

Re: Kelly Varano, et al. v. FORBA Holdings, LLC, et al.
Onondaga County Index Number: 2011-2128
RJI No. 33-11-1413
Our File No.: 12973.00002

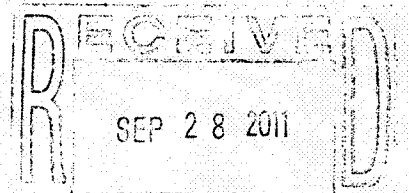
Timothy Angus, et al v. FORBA Holdings, LLC, et al.
Schenectady County Index No.: 2011-562
Our File No.: 12972.00002

Shantel Johnson, et al v. FORBA Holdings, LLC, et al
Monroe County Index No.: 2011-7100
Our File No.: 12974.00001

Dear Judge Tormey:

Kindly accept this correspondence in response to plaintiffs' letter dated September 26, 2011 and Proposed Order with respect to the appointment of the Coordinating Justice for the above-referenced matters. Wilson, Elser represents numerous individual dentists who have been named as defendants. We respectfully request that the Order not be signed and that the choice of Judge Cherundolo be reconsidered.

As the Court is no doubt aware, immediately prior to his elevation to the bench, Judge Cherundolo was an active litigation attorney whose practice focused on plaintiff's personal injury work. In connection with this work, Judge Cherundolo frequently had as his co-counsel the firm of Powers & Santola (see attached decisions and verdicts). Indeed, the alliance between Mr. Powers and Judge Cherundolo was so strong that in 2004 they coordinated to establish their own association, the New York State Academy of Trial Lawyers (see attached article).



In fact, Judge Cherundolo specifically partnered with Patrick Higgins, lead plaintiffs' counsel for the above-referenced matters, as noted in the attached e-law report of the case entitled Chase v. Neulander, et. al.

While we in no way seek to impugn Judge Cherundolo or the law firm of Powers & Santola, we respectfully suggest that it would be imprudent to allow Judge Cherundolo to preside over these matters which, although they span three counties, are all championed by a firm with whom he maintains such close connections.

At a minimum, allowing Judge Cherundolo to preside over matters in which his collaborators and close colleagues play such a prominent role is the quintessential example of an appearance of impropriety. Based upon section 100.2 of the Rules of the Chief Administrator of the Courts such appearances are to be avoided in any case, but are especially important to avoid when the cases in question are likely to catch the public eye. These matters have already been widely reported in the news media in all three counties where they were commenced and were the subject of multi-part media investigations in both Syracuse and Rochester. Indeed, attacks on FORBA and Small Smiles have received national media attention as well. Given the fact that these cases involve allegations of injury to young children, it is inevitable that these will continue to be high profile cases. Therefore, we respectfully submit that an abundance of caution is appropriate for overseeing these cases.


Section 202.69 of the Uniform Rules for the New York State Trial Courts gives the Administrative Judge for the coordinating district discretion to choose any Judge in his or her district to act as Coordinating Justice. One of the factors to be considered when selecting such a Justice is prior experience with coordinated litigation. Although there are other judges who have coordinated litigation experience in the Fifth Judicial District, particularly in the asbestos realm, Judge Cherundolo does not have this expertise.

Based upon the above, we respectfully request that the selection of Judge Cherundolo be reconsidered and a different Coordinating Justice be selected for this matter.

Thank you for your time and attention to this matter.

Respectfully submitted,

WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP

A handwritten signature in cursive script, reading "Theresa B. Marangas / ejg".

Theresa B. Marangas

TBM/ejg

EXHIBIT “C”

Powers & Santola, LLP

COUNSELLORS AT LAW

www.Powers-Santola.com

www.DelayedCancerDiagnosis.com

www.NYConstructionAccidentLaw.com

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

Albany Office
39 North Pearl Street
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Telephone: (518) 465-5995
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Syracuse, NY 13202
(315) 701-1030
(518) 426-4012

Margie A. Soehl†
Michael J. Hutter
Special Counsel

† Also admitted in Ecuador

PLEASE REPLY TO: ALBANY OFFICE

Thursday, September 29, 2011

Hon. James C. Tormey, III
Administrative Judge Fifth Judicial District
Onondaga County Courthouse
401 Montgomery Street
Syracuse, NY 13202

BY E-MAIL AND FIRST CLASS MAIL

jtormey@courts.state.ny.us

GNERI@courts.state.ny.us

Re: **SMALL SMILES - Angus v. FORBA, et al (Index No. 2011-0562)**
SMALL SMILES - Varano v. FORBA, et al (Index No. 2011-2128)
SMALL SMILES - Johnson v. FORBA, et al (Index No. 111/7100)
(All actions coordinated under LCP:0011/2011)

Dear Judge Tormey:

We respond to the September 28, 2011 letter from Teresa Marangas, Esq. on this matter regarding the dentist defendants that her firm represents. ("Wilson, Elser defendant dentists.")

The Wilson, Elser dentist defendants do not address their Order to Show Cause and motion to sever that they presented to Judge Cherundulo without objection and which invited the Court's participation in this case without objection. This is significant.

Additionally, the Wilson, Elser defendants cite Judicial Ethics Opinion 91-20. As plaintiffs indicated, this establishes that the Wilson, Elser defendants should present their *de facto* recusal motion to Judge Cherundulo, not this Court.

Finally, while plaintiffs will abide by this Court's directives, there is no apparent need for any telephone conference to further delay this case. The law and ethics opinions cited by plaintiffs and unrebutted by the Wilson, Elser defendants. They indicate that (1) there is no legal basis for disqualification, and (2) any recusal motion should be directed to Judge Cherundulo.

Very truly yours,

POWERS & SANTOLA, LLP

Patrick J. Higgins

By: Patrick J. Higgins

cc. All parties by e-mail and first class mail. (See attached service list).

EXHIBIT “D”

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Kelly Varano, as parent and natural guardian of infant Jeremy Bohn; Shannon Froio, as parent and natural Guardian of infant Shawn Darling; Brenda Fortino; as parent and natural guardian of infant Julie Fortino; Marie Martin, as parent and natural guardian of infant Kenneth Kenyon; Jenny Lynn Cowher, as parent and natural guardian of infant William Martin; Hollan Crippen, as parent and natural guardian of infant Devan Mathews; Jessica Recore, as parent and natural guardian of infant Samantha McLoughlin; Laurie and Dominick Rizzo, as legal custodians of infant Jacob McMahon; Jason Montanye, as parent and natural guardian of infant Kadem Montanye; and Frances Shellings, as parent and natural guardian of infant Rayne Shellings,

Plaintiffs,

-against-

FORBA Holdings, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a/ LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY, LLC; DD Marketing, Inc. DeRose Management, LLC; Small Smiles Denistry of Syracuse, LLC; Daniel E. DeRose; Michael A. DeRose, D.D.S.; Edward J. DeRose, D.D.S.; Adolph R. Padula, D.D.S.; William A. Mueller, D.D.S.; Michael W. Roumph; Naveed Aman, D.D.S.; Koury Bonds, D.D.S.; Tarek Elsafty, D.D.S.; Dimitri Filostrat, D.D.S.; Yaqoob Khan, D.D.S.; Delia Morales, D.D.S.; Janine Randazzo, D.D.S.; Loc Vin Vuu, D.D.S.; and Grace Yaghmai, D.D.S.,

Defendants.

**ORDER TO SHOW
CAUSE**

Index No. 2011-2128

Upon the annexed Affirmation of Thomas M. Witz, Esq., dated May 4, 2011, and all Exhibits attached thereto, and upon all prior papers and proceedings in this matter, it is hereby

ORDERED, that PLAINTIFFS are directed to show cause at a term of this Court to be held at the Courthouse thereof, New York State Supreme Court, County of Onondaga, located at 401 Montgomery Street, Syracuse, New York 13202, on the 30th day of ~~May~~ ^{June}, 2011, at 10:00 a.m., why this Court should not issue an Order (1) severing this action into ten (10) separate actions pursuant to CPLR § 603; (2) directing plaintiffs to proceed separately with their respective claims by commencing separate actions, respectively and serving separate complaints; (3) extending each defendants' time to serve an Answer to plaintiffs' Complaint until 20 days after service of the separate Complaints or, should this Court issue an Order denying the requested relief, 20 days after service with Notice of Entry of such Order; (4) staying disclosure in this action pending determination of this motion; and (5) granting such other and further relief that this Court deems just and proper;

It is further **ORDERED**, that each DEFENDANTS' time to serve an Answer to the within COMPLAINT shall be extended until such time as this Court issues an Order with regard to this motion, and shall thereafter serve Answers to the within Complaint in accordance with such Order; and

It is further **ORDERED**, that personal service of a copy of this Order, along with the papers upon which it was granted, on the law firm Powers & Santola, LLP at 39 North Pearl Street, Albany, NY, counsel for plaintiffs, on or before May 19th, 2011, shall be deemed good and sufficient service. (X)

Signed this 5th day of May, 2011 by

J.S.C.

(X) Responding papers, if any shall be filed & served no later than June 16, 2011.
Reply papers, if any, shall be served no later than June 23, 2011.

EXHIBIT “E”

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SCHENECTADY

Timothy Angus, as parent and natural guardian of infant Jacob Angus; Jessalynn Purcell, as parent and natural guardian of infant Isaiah Berg; Brian Carter, as parent and natural guardian of infant Briana Carter; April Ferguson, as parent and natural guardian of infant Joseph Ferguson; Sherain Rivera, as parent and natural guardian of infant Shadaya Gilmore; Tonya Potter, as parent and natural guardian of infant Desirae Hager; Nancy Ward, as legal custodian of infant Aalyiarose Labombard-Black; Nancy Ward, as legal custodian of infant Manuel Laborde Jr.; Jennifer Bacon, as parent and natural guardian of infant Ashley Parker; and Courtney Conrad, as parent and natural guardian of Zakary Wilson,

Plaintiffs,

-against-

FORBA Holdings, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a/ LICSAC, LLC; FORBA NY, LLC n/k/a LICSAC NY, LLC; DD Marketing, Inc. DeRose Management, LLC; Small Smiles Dentistry of Albany, LLC; Albany Access Dentistry, PLLC; Daniel E. DeRose; Michael A. DeRose, D.D.S.; Edward J. DeRose, D.D.S.; Adolph R. Padula, D.D.S.; William A. Mueller, D.D.S.; Michael W. Roumph; Maziar Izadi, D.D.S.; Laura Kroner, D.D.S.; Judith Mori, D.D.S.; Lissette Bernal, D.D.S.; Edmise Forestal, D.D.S.; Evan Goldstein, D.D.S.; Keerthi Golla, D.D.S.; Nassef Lancen, D.D.S.; Wadia Hanna, D.D.S.; and Bernice Little-Mundle, D.D.S.,

Defendants.

AFFIRMATION

**ORAL ARGUMENT
REQUESTED**

Index No. 2011-562

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

Kelly Varano, as parent and natural guardian of infant Jeremy Bohn; Shannon Froio, as parent and natural Guardian of infant Shawn Darling; Brenda Fortino; as parent and natural guardian of infant Julie Fortino; Marie Martin, as parent and natural guardian of infant Kenneth Kenyon; Jenny Lynn Cowher, as parent and natural guardian of infant William Martin; Hollan Crippen, as parent and natural guardian of infant Devan Mathews; Jessica Recore, as parent and natural guardian of infant Samantha McLoughlin; Laurie and Dominick Rizzo, as legal custodians of infant Jacob McMahon; Jason Montanye, as parent and natural guardian of infant Kadem Montanye; and Frances Shellings, as parent and natural guardian of infant Rayne Shellings,

Plaintiffs,

-against-

FORBA Holdings, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a/ LICSAC, LLC; FORBA NY, LLC n/k/a LICSAC NY, LLC; DD Marketing, Inc. DeRose Management, LLC; Small Smiles Dentistry of Syracuse, LLC; Daniel E. DeRose; Michael A. DeRose, D.D.S.; Edward J. DeRose, D.D.S.; Adolph R. Padula, D.D.S.; William A. Mueller, D.D.S.; Michael W. Roumph; Naveed Aman, D.D.S.; Koury Bonds, D.D.S.; Tarek Elsafty, D.D.S.; Dimitri Filostrat, D.D.S.; Yaqoob Khan, D.D.S.; Delia Morales, D.D.S.; Janine Randazzo, D.D.S.; Loc Vin Vuu, D.D.S.; and Grace Yaghmai, D.D.S.,

Defendants.

AFFIRMATION

**ORAL ARGUMENT
REQUESTED**

Index No. 2011-2128

Theresa B. Marangas an attorney duly licensed to practice law in the State of New York hereby affirms the following to be true under penalty of perjury:

1. I am a Partner with the law firm of WILSON, ELSEY, MOSKOWITZ, EDELMAN & DICKER LLP, attorneys for defendants Maziar Izadi, D.D.S., Judith Mori,

D.D.S., Edmise Forestal, D.D.S., Evan Goldstein, D.D.S., Keerthi Golla, D.D.S., Nassef Lancen, D.D.S., Naveed Aman, D.D.S., Koury Bonds, D.D.S. Tarek Elsafty, D.D.S. Yaqoob Khan, D.D.S and Grace Yaghamai, D.D.S. (hereinafter “responding defendants”) and as such I am fully familiar with the facts and circumstances stated herein.

2. This Affirmation is respectfully submitted in response to plaintiffs’ Order to Show Cause pursuant to 22 NYCRR § 202.69 for Consolidation which is returnable June 24, 2011 before the Honorable Helen E. Freedman and the remainder of the Litigation Coordinating Panel.

3. The responding defendants respectfully request that the Panel permit oral argument on this matter on the return date or at a subsequent date that is convenient to the Panel.

4. The responding defendants do not oppose coordination of these matters.

5. However, responding defendants respectfully submit that the purposes of 22 NYCRR 202.69 can best be advanced by coordination before two justices instead of one.

6. While it is true that of the three counties where actions are pending or planned Onondaga is in the middle, it is by no means equidistant from Monroe and Schenectady Counties. The respective County Seats of Monroe and Onondaga Counties (Rochester and Syracuse) are less than 90 miles apart via the New York State Thruway, whereas Schenectady is nearly 130 miles from Syracuse and the clinic that is the target of the Schenectady County actions is nearly 150 miles from Syracuse.

7. Thus responding defendants submit that the actions pending in Schenectady should be coordinated in Schenectady and the actions pending in Onondaga County and those soon to be filed in Monroe County be coordinated in either Monroe or Onondaga Counties.

8. Pursuant to 22 NYCRR § 202.69 (c)¹ responding defendants are aware that the designation of the coordinating justice is to be done at the discretion of the Administrative Judge. However, in the actions now pending and soon to be filed there are 30 known plaintiffs. In addition, Counsel for these plaintiffs has advised these responding defendants of more than 130 further potential plaintiffs who will be filing suit in the near future for a total of over 160 potential actions against 44 defendants. See Exhibit A

9. It is therefore in the interests of all the parties to note that there are certain candidates for coordinating justice that may be better suited to handle this type of coordinated litigation than others.

10. Under 22 NYCRR § 202.69 (c) an important factor in choosing the coordinating justice is that justice's previous experience with coordinated litigation.

11. We have reviewed the published Decisions and Orders of this Panel and determined that only one Order for coordinated litigation has been reported in Upstate New York. That litigation was Ordered to be coordinated in Erie County, which is not a district that is implicated in this matter.

12. As such, these responding defendants have reviewed the judiciary of the relevant judicial districts for potentially related experience.

13. Plaintiffs have requested that coordination take place in Onondaga County, which is in the Fifth Judicial District.

¹ 22 NYCRR 202.69 (c)(1) states " Designation. The Administrative Judge charged with supervision of the local jurisdiction within which coordinated proceedings are to take place shall select the Coordinating Justice or Justices, in consultation with the appropriate Deputy Chief Administrative Judge. In deciding whom to designate, the Administrative Judge shall consider, among other things, the existing caseload of each prospective appointee and the overall needs of the court in which that justice serves; the familiarity of that justice with the litigation at issue; the justice's managerial ability; and the previous experience of the justice with the field of law involved and with coordinated litigation. The Administrative Judge may designate a justice from another local jurisdiction as a Coordinating Justice with the approval of the Administrative Judge thereof." (emphasis added)

14. The Honorable James McCarthy, who sits in that district, has significant experience with coordinated litigation in that area as he has been involved with the Fifth Judicial District Asbestos Litigation for a number of years.

15. As this Court is no doubt aware, the asbestos docket is massive and requires the consideration of complex liability and causation issues.

16. As such, Judge McCarthy is undoubtedly well qualified to cope not only with the actions already commenced or shortly to be commenced in Onondaga and Monroe counties, but also with the numerous additional cases plaintiffs have advised will be asserted in the near future. See Exhibit A.

17. With respect to Schenectady County, the Honorable Richard Aulisi has similar experience to that of Judge McCarthy having ably coordinated the asbestos litigation in the Fourth Judicial District for a number of years.

18. As such the responding defendants respectfully assert that Judge Aulisi would also be fully capable of handling these matters.

19. Finally, although responding defendants do not oppose coordination, they are not waiving or abandoning their arguments with respect to the severance motions filed in Onondaga and Schenectady Counties which were appended as Exhibits H and I to plaintiffs' Order to Show Cause before this Panel.

20. To the contrary, responding defendants continue to assert that severance is necessary and proper and based upon the precedents established in the Third and Fourth Departments fully expect their motions for severance to be granted.

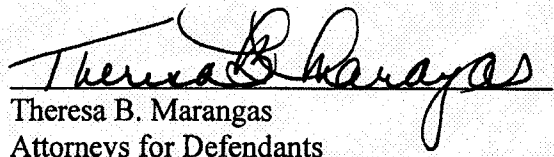
WHEREFORE responding defendants request that this Panel issue an order granting the motion for coordination with two coordinating justices, one to coordinate the matters

commenced in Schenectady and one to coordinate those commenced in Monroe and Onondaga Counties together with such other and further relief as this Panel deems justified.

Dated: June 14, 2011
Albany, New York

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 
Theresa B. Marangas
Attorneys for Defendants
Maziar Izadi, D.D.S., Judith Mori, D.D.S.,
Edmise Forestal, D.D.S., Evan Goldstein,
D.D.S., Keerthi Golla, D.D.S., Nassef
Lancen, D.D.S., Naveed Aman, D.D.S.,
Koury Bonds, D.D.S. Tarek Elsafty, D.D.S.
Yaqoob Khan, D.D.S and Grace Yaghmai,
D.D.S.
677 Broadway
Albany, New York 12207
(518) 449-8893

Of Counsel:
Richard T. Mermelstein
Thomas M. Witz
Elizabeth J. Grogan

EXHIBIT “F”

560001/11
SUB # 6

**STATE OF NEW YORK
LITIGATION COORDINATING PANEL**

X

TIMOTHY ANGUS, AS PARENT AND NATURAL
GUARDIAN OF INFANT JACOB ANGUS; JESSALYNN
PURCELL, AS PARENT AND NATURAL GUARDIAN
OF INFANT ISAIAH BERG; BRIAN CARTER, AS
PARENT AND NATURAL GUARDIAN OF INFANT
BRIANA CARTER; APRIL FERGUSON, AS PARENT
AND NATURAL GUARDIAN OF INFANT JOSEPH
FERGUSON; SHERAIN RIVERA, AS PARENT AND
NATURAL GUARDIAN OF INFANT SHADAYA
GILMORE; TONYA POTTER, AS PARENT AND
NATURAL GUARDIAN OF INFANT DESIRAE
HAGER; NANCY WARD, AS LEGAL CUSTODIAN
OF INFANT AALYIAROSE LABOMBARD-BLACK;
NANCY WARD, AS LEGAL CUSTODIAN OF INFANT
MANUEL LABORDE JR., JENNIFER BACON, AS PARENT
AND NATURAL GUARDIAN OF INFANT ASHLEY PARKER;
AND COURTNEY CONRAD, AS PARENT AND NATURAL
GUARDIAN OF INFANT ZAKARY WILSON

Plaintiffs

- against -

FORBA HOLDINGS, LLC N/K/A CHURCH STREET HEALTH
MANAGEMENT, LLC; FORBA N.Y., LLC; FORBA, LLC, N/K/A
LICSAC, LLC; FORBA NY, LLC N/K/A LICSAC NY, LLC; DD
MARKETING INC.; DEROSE MANAGEMENT, LLC; SMALL
SMILES DENTISTRY OF ALBANY, LLC, ALBANY ACCESS
DENTISTRY, PLLC; DANIEL E. DEROSE; MICHAEL A. DEROSE,
D.D.S., EDWARD J. DEROSE, D.D.S.; ADOLPH R. PADULA, D.D.S.;
WILLIAM A. MUELLER, D.D.S.; MICHAEL W. ROUMPH; MAZIAR
IZADI, D.D.S.; LAURA KRONER, D.D.S.; JUDITH MORI, D.D.S.
LISSETTE BERNAL ;D.D.S.; EDMISE FORESTAL, D.D.S.;
EVAN GOLDSTEIN, D.D.S.; KEERTHI GOLLA, D.D.S.; NASSEF
LANCEN, D.D.S.; WADIA HANNA, D.D.S.; AND BERNICE LITTLE-
MUNDLE, D.D.S

-----X

AND OTHER MATTERS LISTED ON THE ATTACHED APPENDIX

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

FILED

SEP - 1 2011

COUNTY CLERK'S OFFICE
NEW YORK

DECISION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

coordination.

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

Dated: August 25, 2011

Justices of the Panel:

Hon. Helen E. Freedman

Presiding Justice, First Department

Hon. Joseph J. Maltese

Associate Justice, Second Department

Hon. E. Michael Kavanagh

Associate Justice, Third Department

Hon. Matthew Rosenbaum

Associate Justice, Fourth Department

For the Panel:

A handwritten signature in cursive script that reads "Helen E. Freedman".

Hon. Helen E.
Freedman Presiding
Justice

APPENDIX

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

**STATE OF NEW YORK
LITIGATION COORDINATION PANEL**

TIMOTHY ANGUS, as Parent and Natural Guardian of Infant JACOB ANGUS; JESSALYNN PURCELL, as Parent and Natural Guardian of Infant ISIAH BERG; BRIAN CARTER, as Parent and Natural Guardian of Infant BRIANA CARTER; APRIL FERGUSON, as Parent and Natural Guardian of Infant JOSEPH FERGUSON; SHERAIN RIVERA, as Parent and Natural Guardian of Infant SHADAYA GILMORE; TONYA POTTER, as Parent and Natural Guardian of Infant ESIRAE HAGER; NANCY WARD, as Legal Custodian of Infant AALYIAROSE LABOMBARD-BLACK; NANCY WARD, as Legal Custodian of Infant MANUEL LABORDE JR.; JENNIFER BACON, as Parent and Natural Guardian of Infant ASHLEY PARKER; and COURTNEY CONRAD, as Parent and Natural Guardian of Infant ZAKARY WILSON,

Plaintiffs,

vs.

FORBA HOLDINGS, LLC n/k/a Church Street Health Management, LLC; FORBA N.Y., LLC; FORBA, LLC n/k/a LICSAAC, LLC; FORBA NY, LLC n/k/a LICSAAC NY, LLC; DD MARKETING, INC.; DEROSE MANAGEMENT, LLC; SMALL SMILES DENTISTRY OF ALBANY, LLC; ALBANY ACCESS DENTISTRY, PLLC; DANIEL E. DEROSE; MICHAEL A. DEROSE, D.D.S.; EDWARD J. DEROSE, D.D.S.; ADOLPH R. PADULA, D.D.S.; WILLIAM A. MUELLER, D.D.S.; MICHAEL W. ROUMPH; MAZIAR IZADI, D.D.S.; LAURA KRONER, D.D.S.; JUDITH MORI, D.D.S.; LISSETTE BERNAL, D.D.S.; EDMISE FORESTAL, D.D.S.; EVAN GOLDSTEIN, D.D.S.; KEERTHI GOLLA, D.D.S.; NASSEF LANCEN, D.D.S.; WADIA HANNA, D.D.S.; and BERNICE LITTLE-MUNDLE, D.D.S.,

Defendants.

NOTICE OF ENTRY

Panel Case No.: 0011/2011

Index No: 2011-562

Assigned Justice:

Hon. Barry D. Kramer

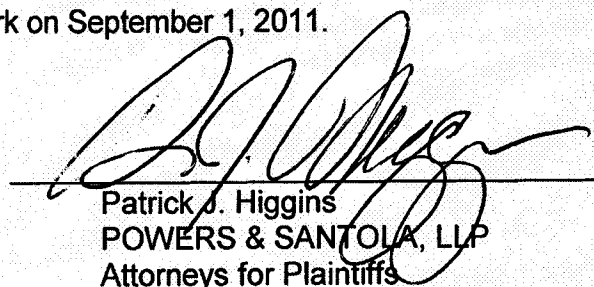
Filed: Schenectady Supreme Court

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the

Hon. Helen E. Freedman, Presiding Justice, dated August 25, 2011 which was entered

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

DATED: September 15, 2011



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

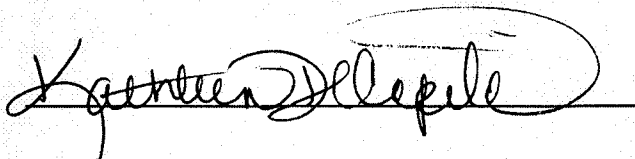
To:

Thomas B. Cronmiller, Esq. Hiscock & Barclay, LLP 2000 HSBC Plaza 100 Chestnut Street Rochester, NY 14604	John L. Murad, Jr., Esq. Hancock Estabrook, LLP 1500 AXA Tower 1 100 Madison Street Syracuse, NY 13202
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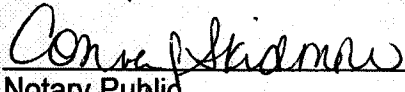
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

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

Thomas B. Cronmiller, Esq. Hiscock & Barclay, LLP 2000 HSBC Plaza 100 Chestnut Street Rochester, NY 14604	John L. Murad, Jr., Esq. Hancock Estabrook, LLP 1500 AXA Tower 1 100 Madison Street Syracuse, NY 13202
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Dr. Bernice Little-Mundle P.O. Box 10204 Silver Spring, MD 20904	



Sworn to before me on September 15, 2011.



Notary Public
State of New York

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