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 1   SUPREME COURT OF THE STATE OF NEW YORK

 2   COUNTY OF ONONDAGA:   CIVIL PART

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 4                                RJI No. 33-11-1413
                                 Index No. 2011-2128
 5

 6   KELLY VARANO, As Parent and Natural Guardian
         Of Infant JEREMY BOHN,
 7
                                 Plaintiffs,
 8
             vs.
 9
     FORBA HOLDINGS, LLC, FORBA, LLC n/k/a
10       LICSAC, LLC; DD MARKETING, INC.;
         SMALL SMILES DENTISTRY, PLLC.
11   ...
         Including:  NAVEED AMAN, DDS; KOURY
12       BONDS, DDS; YAQOOB KHAN, DDS,

13                               Defendants.
                                             Jury Trial
14
     _____x
15

16
                                 September 25, 2013
17

18                               Onondaga County Courthouse
                                 401 Montgomery Street
19                               Syracuse, New York  13202

20

21   Before:

22           HONORABLE DEBORAH KARALUNAS
             Supreme Court Justice
23
                 And a Jury
24

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             Valerie Waite, Senior Court Reporter
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Valerie Waite, Senior Court Reporter

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Valerie Waite, Senior Court Reporter

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                          *   *   *
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18
                            WITNESSES:
19

Dr. RUDY PADULA
20
24

25 Dr. WILLIAM A. MUELLER

*   *   *

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1 (September 25th, 2013, Judge Karalunas, continuation of jury

2 trial).

3

4   THE COURT: Good morning. Are we ready to

5   proceed?

6   Mr. LEYENDECKER: Yes, your Honor.

7   (Whereupon, the jury was brought back into the

8   courtroom)

9   THE COURT: Good morning. You may proceed.

10   Mr. LEYENDECKER: Thank you, your Honor.

11

12 DANIEL DeROSE, having been previously called as a witness,

13 being previously duly sworn, continued to testify as follows:

14

15 CONTINUED DIRECT EXAMINATION BY MR. LEYENDECKER:

16   Q.   Good morning, Mr. DeRose. Am I right that you, along

17 with the other top FORBA management guys, received daily

18 production reports from the clinics?

19   A.   Yes. Yes.

20   Q.   As it relates to those production reports, production

21 meant dollars, right?

22   A.   Yes.

23   Q.   You recall the letter that your investment bankers

24 gave you in 2003, the C.I.B.C.? You recall that letter?

25   A.   I don't know which specific letter you mean, though.

1   Q.   Let's have a look at it.

2   A.   Okay.

3   Q.   Let me hand you what's been marked as Exhibit 10.

4 This is already in evidence.

5   A.   Okay.

6   Q.   You received that letter, didn't you, Mr. DeRose?

7   A.   Yes.

8   Q.   And if we look over on the second page of that letter,

9 just trying to orient you, this is the letter in which your

10 investment bankers told you, in November of 2003, that they

11 thought the company could be worth $400 to $500 million?

12   A.   Just a clarification. These weren't our investment

13 bankers yet. We went and interviewed several, and this was a

14 solicitation to us to hire them.

15   Q.   Am I right that you hired that same outfit?

16   A.   We did. We eventually hired this company, yes.

17   Q.   So the company that you hired told you in November of

18 '03 that your company could be worth up to $400 million or

19 $500 million?

20   A.   They did.

21   Q.   Depending on the growth of the company?

22   A.   Is that what they said, growth? It doesn't say

23 growth. "We believe these variables will produce a valuation

24 range of 400 million to 500 million."

25   Q.   "Valuation potential of FORBA will be largely driven

 1   by the type of buyer and its view of the company's growth

 2   plans." Do you see that?

 3   A.   Yes.

 4   Q.   You didn't have 50 companies at this time, did you?

 5   A.   No, not 2003.

 6   Q.   Maybe 20, plus or minus?

 7   A.   November '03, I would be guessing. I don't know how

 8   many.

 9   Q.   Okay. Now, you and FORBA tied the value of your

10   company to that daily production, didn't you, sir?

11   A.   It was tied to EBITDA.

12   Q.   I'm going to hand you what has been marked as Exhibit

13   Number 103, and let me just verify something real quick. 103

14   is already in evidence. 103 is a February 25th, 2004, e-mail

15   that you sent to Mr. Roumph; do you see that?

16   A.   I do.

17   Q.   Actually, an e-mail that you forwarded to Mr. Roumph,

18   of an e-mail that you'd sent to Stuart White and -- is that

19   Wyatt Ritchie?

20   A.   It is.

21   Q.   And were those some of the investment bankers at

22   C.I.B.C.?

23   A.   It was.

24   Q.   The subject was daily production?

25   A.   It was.

1   Q.   So you told your investment bankers "this was

2 yesterday," meaning the production from yesterday, "not bad

3 at all, surely worth 500 million." So FORBA was tying the

4 value of its business to its ability to get daily production,

5 right?

6   A.   All businesses are valued on their EBITDA, yes.

7   Q.   Is there anything in this e-mail about EBITDA, or is

8 the subject of this e-mail daily production?

9   A.   The subject of this e-mail is production.

10   Q.   Right. Now, there's no question, Mr. DeRose, that the

11 deal was all about production, right?

12   A.   Which deal?

13   Q.   FORBA's deal, FORBA's ability to get the 400 to 500

14 million. The deal was about production, wasn't it, sir?

15   A.   The deal? FORBA wasn't all about production. You

16 mean our sale as the deal? The sale was based on our EBITDA,

17 yes.

18   Q.   Let me hand you what has been marked as Exhibit Number

19 480 and ask if you can identify this as an e-mail that you

20 sent to Mike Roumph and others?

21   A.   It says just Mike Roumph, yes.

22   Mr. LEYENDECKER: Plaintiffs would offer Exhibit

23   480, your Honor.

24   THE COURT: Any objection?

25   Mr. FIRST: No objection.

1   THE COURT: Exhibit 480 received.

2   (Whereupon, Plaintiff's Exhibit Number 480 was

3   received in evidence)

4   THE COURT: Just a moment. Just for the record,

5   if none of the other counsel objects, then I'm going to

6   assume that there is no objection, okay, if I don't hear

7   from Mr. Stevens or Mr. Hulslander?

8   Mr. HULSLANDER: That's a safe assumption.

9   Mr. STEVENS: Thank you, your Honor.

10   Q.   Mr. DeRose, this was an e-mail you forwarded to Mike

11   Roumph on June 3rd of 2004, but that you had originally sent

12   to Rich Lane that same day; do you see that, sir?

13   A.   On the one I have, it originally was from Ken Knott to

14   Rich Lane --

15   Q.   Okay.

16   A.   -- and then from Rich Lane to me and Mike Roumph.

17   Q.   Right. And then your response to this e-mail to Rich

18   Lane was "the deal is production."

19   A.   That's what it says.

20   Q.   Right? And you said: "He can have one column as far

21   as I am concerned. He needs to be doing 16 to 18 daily."

22   And what you're referencing there is the amount of dollars

23   that the clinics and the dentists have referred to and Dr.

24   Knott's portion of this e-mail, how much he needed to be

25   doing daily because the deal with your business was all about

 1 | production, right?

 2 | A.   As I stated, the deal with our business was not all

 3 | about production, no.

 4 | Q.   Did you tell Mr. Lane that the deal was about quality

 5 | care, the deal was about working hard from 8 to 5? Did you

 6 | tell him that?

 7 | A.   The e-mail was asking about columns, and I was

 8 | responding to the question he was asking me.

 9 | Q.   And the columns are related to how many columns in the

10 | chart he could schedule hygiene or operative visits and what

11 | you said is: "I don't care how many columns he wants to use

12 | for scheduling; he needs to be doing 16 to 18,000 a day,"

13 | right?

14 | A.   Yes.

15 | Q.   I want to hand you what's been marked as Plaintiff's

16 | Exhibit 76 and ask if you can recognize this as an e-mail

17 | here in the middle that you sent to Michael Lindley and Al

18 | Smith and others?

19 | A.   Okay.

20 | Q.   Regarding due diligence items?

21 | A.   Yes, it is.

22 | MR. LEYENDECKER: Plaintiffs would offer Exhibit

23 | Number 76, your Honor.

24 | THE COURT: Any objection?

25 | Mr. FIRST: No objection.

 1   THE COURT: Exhibit 76 received.

 2   (Whereupon, Plaintiff's Exhibit Number 76 was

 3   received in evidence)

 4   Q.   Okay, Mr. DeRose. This e-mail there in the middle

 5   that I was just asking you about -- thank you, Chuck -- is

 6   from you to Ryan, and that's one of the gentlemen that worked

 7   for you at DD Marketing. Kevin Riley, is he another

 8   individual who worked at DD Marketing?

 9   A.   Yes. Ryan was the C.E.O.; Kevin was his assistant.

10   Q.   And then Michael Lindley, Al Smith and Rodney Cawood,

11   were those three of the representatives of the group that was

12   in the process of purchasing Old FORBA?

13   A.   Those were the members of the group called Sanus,

14   which was to be the new management company for the new

15   company that was going to purchase us.

16   Q.   Let me stop you there and hand you Exhibit 7 and ask

17   you if you can identify Exhibit 7 as the agreement by which

18   Sanus, the entity you just described, purchased Old FORBA for

19   the $400-some-odd million we've been discussing? Is that the

20   asset purchase agreement, sir?

21   A.   I remember it being a lot bigger, but it says it is,

22   yes.

23   Mr. LEYENDECKER: Plaintiffs offer Exhibit 7,

24   your Honor.

25   Mr. FIRST: I would object as being irrelevant

1   and immaterial.

2   Mr. HULSLANDER: Same objection.

3   THE COURT: Okay. Were you going to ask him any

4   more questions about this or --

5   Mr. LEYENDECKER: I may, yes, your Honor.

6   THE COURT: Would counsels approach, please?

7   (Discussion off the record at the bench)

8   BY MR. LEYENDECKER:

9   Q.   Mr. DeRose, in an attempt to not overwhelm us with the

10   amount of paper, we've reduced Exhibit 7 down to its cover

11   page and a listing at the back that identifies the employees

12   of DD Marketing, and would you just take a quick look at

13   that?

14   A.   Okay.

15   Q.   And tell me if that, in fact, does reflect a listing

16   of the DD Marketing employees?

17   Mr. FIRST: Mr. Leyendecker, what's the base

18   stamp?

19   Mr. LEYENDECKER: I believe it's Page 243 of the

20   exhibit.

21   Plaintiffs would offer this, your Honor, as

22   Exhibit 7A.

23   THE COURT: Okay. I note there's an objection.

24   The Court overrules the objection. Exhibit 7A is

25   received.

1   (Whereupon, Plaintiff's Exhibit 7A is received

2   in evidence)

3   Q.   Do you see your name at the top of Page 243 of Exhibit

4 7A?

5   A.   I do.

6   Q.   And do you see at the bottom that Dr. Robert Andrus is

7 identified as an employee of DD Marketing?

8   A.   I do.

9   Q.   May I see that for a second? And also it identifies

10 Dr. Andrus as a central regional dental director?

11   A.   Yes.

12   Q.   Okay.

13   A.   That information is incorrect, though, because Dr.

14 Robert Andrus's date of hire was 7/6/2000, so it doesn't

15 represent his time at DD Marketing.

16   Q.   My question is: Does it identify Dr. Robert Andrus as

17 the central regional director for DD Marketing as of the time

18 the company was sold to Sanus?

19   A.   It does.

20   Q.   And does it identify Dr. Sean Barnwell and Dr. Kenneth

21 Knott as other regional directors for DD Marketing?

22   A.   It does.

23   Q.   Okay; thank you.

24   Now, let's get back to 76. Exhibit 76, that is, Mr.

25 DeRose.

 1   A.   Okay.

 2   Q.   And Exhibit 76 is an e-mail that you were sending to

 3   the Sanus people, the acquiring company, with some

 4   information that they had requested as part of their due

 5   diligence, right?

 6   A.   Yes. They had requested all kinds of information, and

 7   this was my response to one of their requests.

 8   Q.   And so let's look down here at the bottom of your

 9   response. "Here are some of the items requested," just as

10   you described. "We will not be forwarding production per

11   dentist as it is an irrelevant calculation. Never used it;

12   never will. Meaningless and dangerous. Number one trigger

13   point for fraud."

14   A.   Yes.

15   Q.   And when you say, "We will not be forwarding," you're

16   referring to FORBA, FORBA will not be forwarding production

17   for dentists, right?

18   A.   We, the people working on the due diligence, yes.

19   Q.   Well, they didn't send this due diligence to you as an

20   individual personally, did they? They sent these requests to

21   FORBA, and so FORBA's responding to them, correct?

22   A.   These requests might have been sent to DD Marketing.

23   I'm not sure if it was FORBA, DD Marketing, but it was one or

24   the other.

25   Q.   And DD Marketing was acting on behalf of FORBA, was it

 1   not, Mr. DeRose?

 2   A.   Yes, we had a contract with FORBA, yes.

 3   Q.   So is it fair to say, "we will not be forwarding,"

 4   you're talking about FORBA not forwarding?

 5   A.   Sure.

 6   Q.   When you go on to say: "Production per dentist is an

 7   irrelevant calculation. Never used it; never will," you were

 8   telling the people at Sanus that FORBA never used it and

 9   never would, right?

10   A.   I don't know if that's right. I was saying that I

11   never used it and never will use it.

12   Q.   Does it say, "I never used it and never will"?

13   A.   It does not say it.

14   Q.   Right, and in the context, we just established that

15   "We will not be forwarding this," we established "we" as in

16   FORBA?

17   A.   As I stated, it may have been FORBA, may have been DD

18   Marketing. But I think my point was, I never used it; I'm

19   not going to start using it now.

20   Q.   "Meaningless and dangerous, number one trigger point

21   for fraud," right?

22   A.   That's right.

23   Q.   You thought it was dangerous because it was the number

24   one trigger point for fraud?

25   A.   In my opinion, yes.

 1   Q.   And it is the production per dentist statistic; that

 2 is, the use of that is a number one trigger point for fraud,

 3 correct?

 4   A.   My thoughts are it was not a good management tool,

 5 yes.

 6   Q.   You thought that if a company were measuring

 7 production per dentist and then using it to try to get its

 8 dentists to increase their production, that would be a

 9 problem?

10   A.   Yes.

11   Q.   And the problem that it would create would be a clear

12 indication, the number one trigger point for fraud, if a

13 company were using that statistic, right?

14   A.   Yes --

15   Mr. FIRST: Object to the form.

16   Q.   What was your answer, sir?

17   A.   Yes, it is.

18   Mr. FIRST: Object to the form.

19   THE COURT: Overruled.

20   Q.   Let me go over here to the easel.

21   I'm writing: "Using production per dentist is the

22 number one trigger point for fraud."

23   Now, the fact of the matter, Mr. DeRose, is that Old

24 FORBA had been using production per dentist in its

25 operations, right?

1 A.   I didn't use it, no.

2 Q.   Let me hand you what's marked as Exhibit 88, and ask

3 you if you can identify this as a June 14th, 2005 e-mail from

4 Mike Roumph to you and others?

5 A.   That is.

6   Mr. LEYENDECKER: Plaintiffs offer Exhibit

7 Number 88, your Honor.

8   THE COURT: Any objection?

9   Mr. FIRST: No objection.

10   THE COURT: Exhibit 88 received.

11   (Whereupon, Plaintiff's Exhibit Number 88 was

12 received in evidence)

13 Q.   Mr. DeRose, isn't it true that Old FORBA had been

14 using the production per dentist, this number one trigger

15 point for fraud, to pressure dentists to increase their

16 production?

17 A.   As I stated, I never used production per dentist, no.

18 Q.   Okay. Let's look at this Exhibit 88, Mike Roumph

19 e-mail from June 2005. The subject of the e-mail is

20 "production for May." Do you see that, sir?

21 A.   I do, yes.

22 Q.   And Dr. Lenora Covington was one of the lead dentists

23 in the FORBA clinics?

24 A.   She was.

25 Q.   Sean Barnwell, he was -- was he the regional director

1 for that clinic?

2   A.   He oversaw clinics in the east, yes. I think -- yes,

3 probably this clinic, yes.

4   Q.   And what we see there is average daily production for

5 May was $14,500, and that's the average amount of revenue,

6 the dollars that the clinic was generating each day in the

7 month of May of 2005?

8   A.   Correct.

9   Q.   And Mr. Roumph says: "This was the lowest production

10 in the last three months. Production per patient appears to

11 be the biggest issue." So he's studying the daily production

12 and he's looking at the production per patient, which is how

13 much we'll be getting out of each young child that comes to

14 this clinic per day on average, right?

15   A.   Correction, per patient, yes.

16   Q.   He goes on to say: "I have been watching production

17 by provider and I know LaChandra is not much help."

18 LaChandra was one of the FORBA dentists, was he or she not?

19   A.   I believe it was a she, and yes, that's what he says.

20   Q.   And production by provider is the same thing as

21 production per dentist, is it not?

22   A.   It would be, yes.

23   Q.   And so he's looking at the production per dentist in

24 the context of telling the lead dentist, "Your production is

25 slipping; the clinic's production is slipping," right?

1   Mr. FIRST: Objection.

2   THE COURT: Form?

3   Mr. FIRST: It's not appropriate -- it's not an

4   appropriate reading of what the summary says.

5   THE COURT: Form?

6   Mr. FIRST: Form.

7   THE COURT: Overruled.

8   Q.   Is it fair to say, Mr. DeRose, that Mike Roumph, your

9   partner, was interacting with the lead dentist about their

10   low production numbers, and he was studying the production

11   per dentist so that he could influence those dentists to get

12   those numbers up?

13   A.   Just a couple of clarifications. One, that's not low

14   production; that's okay production. And it appears that Mike

15   was using production by provider, yes.

16   Q.   Okay. So we know that we are -- and the point of

17   this, "We have budgeted 15,000 per day for the month of June.

18   Can you hit it?"

19   A.   Right.

20   Q.   We know that FORBA pressures dentists and clinics to

21   increase production even when it's okay, right?

22   A.   No.

23   Q.   Isn't that what you just said, that the production is

24   okay, but he's using this anyway?

25   A.   We're not pressuring the dentists to increase

1   production. We're communicating with our employees. "Your

2   goal is $15,000; you're at 14,500. Can you hit your goal?"

3   Q.   "Can you hit your goal" -- he's noting -- let's move

4   on, okay?

5   A.   Okay.

6   Q.   No question your partner, FORBA owner/board member,

7   was using the very thing you say is the number one trigger

8   point for fraud, right?

9   A.   In this case, he used it, yes.

10   Q.   Let me hand you what's been marked as Exhibit Number

11 91, and ask you if you can identify this as a March 10th,

12 2006 e-mail from Mr. Roumph to you and others?

13   A.   It is.

14   Mr. LEYENDECKER: Plaintiffs offer Exhibit

15   Number 91, your Honor.

16   Mr. FIRST: I would just object. It doesn't

17   relate to Syracuse.

18   THE COURT: Any other objections?

19   Mr. HULSLANDER: Same objection.

20   THE COURT: Overruled. Exhibit 91 received.

21   (Whereupon, Plaintiff's Exhibit 91 was received

22   in evidence)

23   Q.   So we're now, Mr. DeRose, in 2006. We've seen it used

24 in 2005, and now we're looking at 2006?

25   A.   Okay.

1   Q.   This e-mail from Mr. Roumph on March 10th of '06

2 relates to the Rochester production, right?

3   A.   Correct.

4   Q.   And he sent to Kim Pham, and you remember she was the

5 lead dentist in Rochester?

6   A.   I remember Dr. Pham, yes.

7   Q.   And was she the lead dentist at Rochester, at that

8 time?

9   A.   At that time? I don't know at that time. I know at

10 one time she was.

11   Q.   Kim and Nancy -- Kim is Dr. Pham's first name?

12   A.   Kim, Kim Pham. I don't know who it is. I just know

13 her as Kim.

14   Q.   And Nancy Wilson, was she the office manager at

15 Rochester?

16   A.   She was.

17   Q.   So Mr. Roumph is looking at Rochester's production and

18 he says: "We missed production by $250 per day, but your

19 budget is now climbing to $14,800 in March." That's the

20 expectation that FORBA set for the Rochester clinic in March

21 of '06?

22   A.   That was the budget, yes.

23   Q.   That's what you expected them to produce, right?

24   A.   Yes, um-hmm.

25   Q.   "And we're currently averaging $12,400 a month so

 1   far." So he's telling them, "You are not meeting our

 2   expectations on the dollars you're generating on average per

 3   day," right, sir?

 4   A.   Yes, you're not meeting budget, you're off $250 per

 5   day.

 6   Q.   "Patient flow is excellent." So you have enough

 7   patients, right?

 8   A.   It appears so.

 9   Q.   "Biggest problem continues to be production

10   per patient." We're not squeezing enough out of these little

11   children that come through our doors every day; that's what

12   he's telling them, right?

13   A.   No, that's not what he's telling them. He's telling

14   them we're treatment-planning and the work is not getting

15   done.

16   Q.   "Rochester is the lowest in the company so far this

17   month."

18   A.   Okay.

19   Q.   "We ended last year at $200 per patient and we are

20   currently at $166, so we have gotten considerably worse."

21   A.   Okay.

22   Q.   "Kevin, let's break down production by provider and

23   see if we can give Dr. Kim some insight"?

24   A.   Okay.

25   Q.   Mr. Roumph is telling a lead dentist at the clinic in

1 Rochester in the context that "your production is off by $250

2 a day --"

3   A.   Okay.

4   Q.   We're going to use this statistic, the number one

5 trigger point for fraud, to figure out how we can get it back

6 up, right?

7   A.   He was going to use it in his evaluation with the

8 clinic, information-gathering, yes.

9   Q.   And he was going to use it, Mr. DeRose, to get back

10 those $250 a day, right? He wanted to get the 250; he wanted

11 them to get to the 14-8. He's using it to pressure them to

12 increase their production, isn't he, sir?

13   A.   No.

14   Q.   Let's look at Exhibit 477. Can you identify Exhibit

15 477 as an e-mail you sent on February 10th, 2004, to Mike

16 Roumph?

17   A.   And Kirk Kochenberger, yes.

18   Mr. LEYENDECKER: Your Honor, Plaintiffs offer

19   Exhibit 477.

20   THE COURT: Any objection?

21   Mr. FIRST: I believe this exhibit was offered

22   after the time limit.

23   Mr. LEYENDECKER: I have it on my list, your

24   Honor. Regardless, it's appropriate to impeach this

25   witness in light of his testimony that FORBA wasn't using

 1   production per dentist.

 2   Mr. FIRST: I object to that.

 3   THE COURT: Exhibit 477 received.

 4   (Whereupon, Plaintiff's Exhibit Number 477 was

 5   received in evidence)

 6   Q.   Mr. DeRose, did you send Exhibit 477?

 7   A.   It appears I did, yes.

 8   Q.   Let's just study the top to make sure we're oriented.

 9   This is February 10th, 2004, right?

10   A.   2004.

11   Q.   Yes, sir?

12   A.   Yes, sir.

13   Q.   And we've seen production per dentist being used by

14   FORBA in 2005, right?

15   A.   No, not by FORBA. By Mike.

16   Q.   So Mike Roumph, he was, you know, running his own

17   cowboy show? He wasn't working for FORBA?

18   A.   He wasn't a cowboy. He was in charge of production

19   and he wasn't at the direction of FORBA, no.

20   Q.   He was a FORBA owner and board member, and as you just

21   said, he was in charge of production, right?

22   A.   That was one of his -- that was one of his

23   responsibilities, yes.

24   Q.   And he was using it in 2005 and he was using it in

25   2006; that's what we just saw, right?

 1   A.   Um... yes.

 2   Q.   And now we're looking at it in 2004. Let's look at

 3   the bottom e-mail from Mr. Kochenberger to you and Mike

 4   Roumph. Who was Mr. Kochenberger?

 5   A.   He was a DD Marketing employee.

 6   Q.   And what was his job?

 7   A.   He had various jobs throughout the years. He was

 8   director of marketing, as I look at this; that's how I

 9   remember his job.

10   Q.   The subject of Greenville. Greenville was one of the

11   FORBA clinics?

12   A.   Greenville, South Carolina, yes.

13   Q.   It says: "I spoke to Melissa today." Was she the

14   manager of Greenville?

15   A.   May be.

16   Q.   "She has some concerns about scheduling and getting as

17   much work done as possible the day the child is in."   That

18   was FORBA's philosophy, getting as much work done as

19   possible?

20   A.   No.

21   Q.   She said, "They lost two patients today because

22   Harry" -- and you understand Harry was the lead dentist at

23   the Greenville clinic?

24   A.   I understand that.

25   Q.   "We lost two patients today because Harry has

 1   instituted a policy that only children nine and under are

 2   scheduled for ops," and that's operative work, right?

 3   A.   Correct.

 4   Q.   "Scheduled for ops in the morning and older kids in

 5   the afternoon." So do you read this to suggest that the lead

 6   dentist is trying to accommodate young children, who perhaps

 7   get tired and cranky after lunch, and get whatever work they

 8   need to get taken care of in the morning? Isn't that what

 9   she's saying there?

10   A.   No. She's not saying tired and cranky. I do not see

11   that.

12   Q.   No, but you understand young children, on balance, can

13   get tired and cranky after lunch and perhaps they might be

14   more receptive to getting -- seeing a doctor in the morning?

15   Does that make sense to you?

16   A.   I didn't experience that with my own children, no.

17   Q.   Well, I did with mine.

18   A.   Did you?

19   Q.   Melissa, and that's the "she," right?

20   A.   Uh --

21   Q.   "I spoke to Melissa today," the office manager. "She

22   ran a report on production by dentist, which reinforced for

23   us her concern," right?

24   A.   I'm reading it as you are. Yes. I did not send this

25   e-mail.

1   Q.   I understand that, but you responded to it, Mr.

2 DeRose, and so you read it at the time, didn't you, sir?

3   A.   I'm sure I read it, yes.

4   Q.   She said: "Ryan and Kathy do all they can, but the

5 other dentists might be slacking."

6   A.   Okay.

7   Q.   And so this office manager was using the production

8 per dentist statistic to see if her sense of whether these

9 doctors were slacking and hurting production -- she was using

10 it for that purpose, wasn't she, sir?

11   A.   It sounds like as if she took it upon herself to do

12 it, yes.

13   Q.   "I told her I would pass this info on to you," and

14 that's you, Mr. DeRose, right?

15   A.   It's to me and Mike, but I'm one of the "you's," I

16 guess.

17   Q.   Kirk Kochenberger had spoken to this office manager on

18 these subjects of dentists slacking and some doing all they

19 could do and others slacking, and he's reporting it on to

20 you, right?

21   A.   Okay.

22   Q.   He's reporting it on to you to "see if we can address

23 it without mentioning her name," right?

24   A.   That's what it says.

25   Q.   Okay. Let's look at the top and see what your

 1 recommendation was, because this is your response to that

 2 request: "What should we do about dentists who are slacking,

 3 as confirmed by review of the production per dentist

 4 statistic?" Right? That's what we're looking at right now?

 5   A.   No, I think my response is about the lead dentist

 6 establishing a policy that only allows certain children to

 7 come into the clinic at certain times. That was my response.

 8   Q.   And FORBA was not about to let a dentist establish a

 9 policy that might actually be in the interests of young

10 children, was it?

11   A.   In the interests of young children?

12   Q.   Yeah. Don't you remember young children, tired after

13 lunch, a little fresher in the morning. That's what he

14 wanted to do?

15   A.   As I mentioned, my children were not tired after

16 lunch.

17   Q.   You didn't want him establishing policies that this

18 lead dentist thought might be good for the young children;

19 you wanted him to do it the FORBA way?

20   A.   Well, that policy appears to me to be a non-dental

21 policy, and --

22   Q.   His --

23   Mr. FIRST: Let him finish.

24   Q.   I apologize. I stepped on your toes.

25   A.   I'm done.

 1   Q.   You say "M.R." Is that Mike Roumph?

 2   A.   I would guess so, yes.

 3   Q.   "Call Harry"-- that's the lead dentist?

 4   A.   Yes.

 5   Q.   "And see if he has a policy." That's the policy we're

 6 talking about?

 7   A.   The non-dental policy, yes.

 8   Q.   Okay. "His is not to make policy; his is to work."

 9   A.   Right.

10   Q.   Don't be thinking about what's good for young

11 children; just do as we tell you; that was your message?

12   A.   No, that wasn't my message, absolutely not.

13   Q.   "With that said, craftily kick his ass" and that's

14 what FORBA did, when they knew that dentists, after reviewing

15 the production per dentist statistics, were not doing all

16 they could do on patients on a given day, right?

17   A.   Well, my comment had nothing to do with production per

18 dentist. My comment was policy, concerning non-dental

19 scheduling -- it has nothing to do with per patient, so no to

20 your question.

21   Q.   So we know -- you know that FORBA had used it in '05,

22 '06 and '04, right?

23   A.   An office manager used it in --

24   Q.   She worked for the office in Greenville? Let me ask

25 you this, Mr. DeRose: Can you offer this jury some

 1   explanation for why, if in fact FORBA didn't endorse its use,

 2   as we have seen by your FORBA partner, why, if FORBA didn't

 3   endorse its use, would an office manager feel comfortable

 4   enough passing this up the food chain all the way to DD

 5   Marketing?

 6   A.   Sure. Our software that we bought off the shelf, it's

 7   called Eaglesoft by Patterson Dental. It tracked all this

 8   information. When you put in the chart to bill, you put in

 9   the child's name, date of birth, treatment plan, all the work

10   that had to be done; the X-rays could digitally be put in the

11   file. And the provider, the dentist that did the treatment

12   on each visit, was denoted in the chart. So, in this

13   software that we bought off the counter, you can do always

14   kinds of cues, all kinds of searches. And one of the

15   searches you could do, if you wanted to, was production

16   per provider. You could do production per patient. You

17   could do how many kids are five? You could do whatever you

18   wanted. It was great software. We used a lot of that

19   information in helping us manage the clinics. I know they

20   have every board packet, every board meeting, production

21   per dentist. We did not look at it on a monthly basis; it

22   was not discussed at the board meetings. It was not

23   something that I encouraged people to use, so that's how it

24   came about.

25   Q.   Am I right that any lead dentist or yourself or Mr.

1 Roumph, anybody with access to the Eaglesoft, could pull up

2 this production per dentist at any time?

3   A.   Yes.

4   Q.   On any day that they wanted to?

5   A.   Let me clarify. I'm not an I.T. guy, so I don't know

6 if they needed -- and to be technical, I don't know exactly

7 who could and who couldn't, but it was in the software.

8 Whether you needed access or a certain code, I don't know.

9   Q.   Are you suggesting then that that software had the

10 ability to restrict access to some of its features?

11   A.   Again, I'm not a software guy. I think it -- I don't

12 know. Obviously, she could do it, so... she knew how to do

13 it.

14   Q.   So FORBA didn't restrict any access to this production

15 per dentist for its lead dentists or its office managers?

16   A.   Oh, no; we didn't hide it --

17   Q.   May I finish, sir?

18   A.   Sure.

19   Q.   Is it true that FORBA didn't restrict access to this

20 production per dentist statistic with any of its owners or

21 any of its lead dentists or office managers? They all could

22 use it if they wanted to?

23   A.   Sure. There was no reason for us to prevent them from

24 looking at it.

25   Q.   Really?

1   A.   Yes.

2   Q.   Even though you think it's the number one trigger

3 point for fraud, you think there's no reason that you

4 shouldn't restrict access to it?

5   A.   Yes. We didn't restrict access to any physician.

6   Q.   The reason you didn't restrict access to it, Mr.

7 DeRose, is because FORBA was using it religiously, right?

8   A.   Absolutely not.

9   Q.   FORBA was using it in the Syracuse clinic, weren't

10 they?

11   A.   FORBA was not using it, no.

12   Q.   Let me hand you what has been marked as Exhibit 101G.

13 101G is base 46184 of the original 101, and let me ask you if

14 you can identify this as a July 21, 2005 e-mail from Jacob

15 Kochenberger to you and others.

16   A.   It is from Jacob and I am listed as a recipient, yes.

17   Mr. LEYENDECKER: Plaintiffs offer 101G, your

18   Honor.

19   THE COURT: Any objection?

20   Mr. FIRST: No objection.

21   THE COURT: Exhibit 101G received.

22   (Whereupon, Plaintiff's Exhibit 101G was

23   received in evidence)

24   Q.   Are you ready for me, Mr. DeRose?

25   A.   Sure.

 1   Q.   All I'm doing here with Exhibit 101G is orienting you.

 2   Remember, we talked about Dr. Turner and how he met his

 3   situation yesterday afternoon?

 4   A.   Sure.

 5   Q.   This July 21, '05 e-mail, there was some question

 6   about whether he quit, resigned or had been terminated; do

 7   you remember that?

 8   A.   Yes, there was.

 9   Q.   This e-mail from July of '05 says: "Janine Randazzo

10   has been hired to work in Syracuse. She will be the new lead

11   dentist to replace Turner." And that's true, right?

12   A.   Yeah.

13   Q.   She was the lead dentist that followed the dentist

14   that wouldn't produce and got ran off?

15   A.   That part is not true, but she did replace Dr. Turner,

16   yes.

17   Q.   As the lead dentist?

18   A.   Right.

19   Q.   And then there was Dr. Khan that replaced her as lead

20   dentist in Syracuse?

21   A.   Dr. Yaqoob, yes.

22   Q.   Dr. Yaqoob Khan, I believe is how he pronounces his

23   last name. Dr. Randazzo was using that production

24   per dentist statistic, wasn't she, Mr. DeRose?

25   A.   Not that I'm aware of.

 1   Q.   Okay. Well, let's look at Exhibit 46. This is in

 2   evidence.

 3   A.   Okay.

 4   Q.   You're familiar with these -- this is one of those

 5   performance reviews?

 6   A.   Sure.

 7   Q.   You're familiar with those?

 8   A.   Right.

 9   Q.   You did them on the lead dentists?

10   A.   Yes.

11   Q.   And they have nothing to do with the quality of care,

12   the clinical quality of care, do they?

13   A.   I was not a dentist.

14   Q.   Right.

15   A.   I couldn't evaluate quality of care.

16   Q.   So at least we know when you were conducting a

17   performance review of a lead dentist, one thing we know you

18   weren't doing is you were not evaluating the clinical quality

19   of their care?

20   A.   I never evaluated quality of care, no. I could not.

21   Q.   We've seen this exhibit before the other day, and this

22   is the lead dentist's evaluation of Dr. Naveed Aman?

23   A.   Okay.

24   Q.   And you understand he's one of the defendants in this

25   case?

 1   A.   I know Dr. Aman, yes.

 2   Q.   And if you scroll down here on Exhibit 46, you see

 3   this is from December of '05?

 4   A.   Okay.

 5   Q.   And then on the second page, we'll focus on the second

 6   page. Down here at the bottom... where it says: "In

 7   conjunction with your employee, establish a written

 8   development plan. Limit the focus to one to three areas."

 9   And do you see that the plan that Dr. Aman, together with the

10   lead dentist, Dr. Randazzo, developed was to improve

11   production by doing more procedures on each patient, right?

12   A.   That's what it says, yes.

13   Q.   Now, the only way -- or a way that Dr. Randazzo would

14   know that she wanted Dr. Aman to improve his production was

15   by studying the production per dentist statistics, right?

16   A.   Oh, no. She could know a lot of ways.

17   Q.   I said "a" way?

18   A.   I thought you said the only way.

19   Q.   No, sir.

20   A.   Okay.

21   Q.   That's certainly true. She could be using production

22   per dentist, "No, you're not generating enough. You need to

23   generate more dollars by doing more procedures on each

24   patient," right?

25   A.   She could have done it, right.

1   Q.   Do you recall we've seen in the context of Dr. Turner

2 yesterday, Exhibit 101E -- may I see that, Chuck, please?

3 Remember this e-mail, Mr. DeRose?

4   A.   I do.

5   Q.   Mr. Roumph did the production per dentist in the

6 Syracuse clinic?

7   A.   He did.

8   Q.   And this was after Turner had been terminated?

9   A.   No, I think he was still there -- well, he worked

10 there; his name is on there.

11   Q.   "No need to rip Turner's ass," and if you would like

12 to see the e-mail where he was terminated, I can show you

13 that.

14   A.   I mean, he was still there. Yeah, he may have been

15 given his 90-day notice. So you confused me there for a

16 minute.

17   Q.   Mr. Roumph is using production per dentist. A few

18 months later, the lead dentist is telling an associate

19 dentist, "You need to generate more dollars by doing more

20 procedures;" you just saw that?

21   A.   Okay.

22   Q.   Now, it wasn't too much longer that you sent Dr.

23 Randazzo to open a clinic in Baltimore or the east coast;

24 does that refresh your memory?

25   A.   I think she moved to Virginia. I don't think it was

 1 | Baltimore.

 2 | Q.   Virginia. And she was sent by FORBA to serve as the

 3 | lead dentist in a Virginia clinic?

 4 | A.   She wanted to move and we accommodated her desire to

 5 | move.

 6 | Q.   And so FORBA needed a new lead dentist for Syracuse?

 7 | A.   Sure, yes.

 8 | Q.   And that lead dentist, the one that's become "quite

 9 | the producer," that's who the lead dentist became?

10 | A.   Yes.

11 | Q.   And you know that Dr. Khan, shortly after he became

12 | the lead dentist for Syracuse, began using the number one

13 | trigger point for fraud in admonishing his doctors that they

14 | weren't producing enough, right?

15 | A.   I knew that? No.

16 | Q.   You certainly did.

17 | A.   No.

18 | Q.   Okay. Let's look at Exhibit 101F. 101F is the 46257

19 | base page out of the original 101. Mr. DeRose, if you can

20 | identify this as a May 31st, 2006 e-mail from Dr. Aman to

21 | you, Mr. Roumph, and to Mr. Lane?

22 | A.   Yes.

23 | MR. LEYENDECKER: Plaintiffs offer Exhibit 101F,

24 | your Honor.

25 | THE COURT: 101F, you said?

 1   Mr. LEYENDECKER: 101F, your Honor.

 2   Mr. FIRST: No objection.

 3   THE COURT: Exhibit 101F received.

 4   (Whereupon, Plaintiff's Exhibit Number 101F was

 5   received in evidence)

 6   Q.   Let's look at the top here, Mr. DeRose. May 31, 2006.

 7 See that?

 8   A.   I do, yes.

 9   Q.   You probably don't know this, but I'll tell you,

10 Jeremy's first day of treatment at Syracuse is May 23rd,

11 2006.

12   A.   I remember that, yes.

13   Q.   So this is about a week after Jeremy first visited the

14 Syracuse clinic.

15   A.   Okay.

16   Q.   And Dr. Khan is writing Mr. Roumph about "broken

17 appointments at Syracuse." Do you see that? See the

18 subject?

19   A.   Yes.

20   Q.   And in the middle of this discussion, he says:

21 "Yesterday, I" -- that's Dr. Khan, right -- "I had a meeting

22 with my doctors and discussed with them about their

23 performance," right?

24   A.   Sure, yes.

25   Q.   Dr. Dmitri, and that's Dr. Dmitri Filostrat, he was

 1 one of the dentists at the Syracuse clinic?

 2   A.   Okay.

 3   Q.   Is that right?

 4   A.   Yeah, I briefly remember Dmitri.

 5   Q.   Dr. Dmitri had made 1,591 in a day when Dr. Naveed,

 6 and that's Dr. Aman, a dentist at the Syracuse clinic -- and

 7 Dr. Koury, that's Dr. Koury Bonds, right?

 8   A.   Yes.

 9   Q.   "Dr. Dmitri had made 1,591 in day when Dr. Naveed and

10 Dr. Koury had made approximately 3,400 each and I had made

11 4,250." Dr. Aman is using the production per dentist

12 statistic and he's communicating with you and the partners,

13 is he not?

14   A.   I don't know what statistic he was using, but he sure

15 said: "Hey, each guy did this much."

16   Q.   The 1,591 a day, the 3,400 of Dr. Naveed and Dr.

17 Koury, and the 4,250, that's the production per dentist

18 statistic, isn't it, Mr. DeRose?

19   A.   That's how much each dentist billed that day, yes.

20   Q.   And that's production per day, isn't it?

21   A.   It's how much those dentists produced, yes. Whether

22 that was pulled off the software -- I mean, it seems a little

23 odd that's it's 3,400 and 4,250. I mean, rarely were the

24 numbers that clean. I don't know how he got it. I don't

25 know if he looked at the number of patients...

1 Q.   Does he say approximately 3,400?

2 A.   Oh, yeah, he says approximately.

3 Q.   Wherever he got it, he's using the number one trigger

4 point for fraud, isn't he, Mr. DeRose?

5 A.   In my opinion, that was a trigger point, yes.

6 Q.   And he knew it?

7   THE COURT: What was your answer?

8 A.   In my opinion that it's a trigger point for fraud,

9 yes.

10 Q.   And you knew he was using it in Syracuse on the three

11 doctors, in connection with the very doctors that are in

12 issue in this case, right?

13 A.   I knew he was using it?

14 Q.   Yes, sir.

15 A.   I knew he reported what each doctor did that specific

16 day, yes.

17 Q.   He goes on to say -- he's not just using it for no

18 apparent reason; he's using it for the very danger you say

19 creates fraudulent activity, right? "He is consistently

20 underperforming and yesterday I was very firm and told him

21 that this was not acceptable." The "him" he's referring to

22 is Dr. Dmitri, and he's using the production per dentist

23 statistic to pressure him to produce more dollars for FORBA,

24 is he not?

25 A.   I think he's using it in this case to tell him that:

 1 "You're not doing anywhere near what everyone else is doing.

 2 Why are you doing that?"

 3   Q.   He told him: "It's not acceptable that you're only

 4 generating $1,591 a day." He's using the production

 5 per dentist statistic to tell a doctor, "It's not acceptable

 6 what you're doing," right?

 7   A.   He said he's underperforming, yes.

 8   Q.   So there really isn't any question that FORBA, its

 9 owners, its officers, its lead dentists in the Syracuse

10 clinic were always using the production per dentist

11 statistic; is that fair to say?

12   A.   Not fair to say. FORBA didn't use it; I didn't use

13 it.

14   Mr. LEYENDECKER: I'll pass the witness, your

15   Honor.

16

17 CROSS-EXAMINATION BY Mr. FIRST:

18   Q.   Good morning, Mr. DeRose.

19   A.   Good morning.

20   Q.   What is the role of a lead dentist at one of these

21 clinics?

22   A.   A lead dentist is to set the tone for the clinic.

23 They're to help encourage positive attitude, make sure that

24 every child is treated like it was their own child. They're

25 responsible for helping with staffing after the initial

1   staffing takes place. They evaluate and do performance

2   reviews on the other dentists; they're responsible to work

3   from 8 to 12 and 1 to 5; they're responsible to communicate

4   back to the management company any issues, concerns, problems

5   that they may have. They are the person in charge of the

6   clinic. They are the manager, if you will, that sets the

7   tone and sets the expectation and then works with everyone to

8   try to meet the goals.

9   Q.   Now, you indicated that the software that you used --

10   what's the name of it?

11   A.   Eaglesoft.

12   Q.   Eaglesoft is an off-the-shelf, I think is the

13   expression you used, software?

14   A.   Yes.

15   Q.   What does that mean?

16   A.   Patterson Dental is one of the largest dental supply

17   companies in the United States and they developed this

18   software, their own software, and so I don't know how many

19   dentists -- thousands and thousands of dentists purchased

20   this software and use it in their dental clinics. It's a

21   billing software; it's a record-keeping software. It can do

22   all kinds of things. It can, if you want, for example, it

23   could print out labels of all your patients, if you wanted to

24   send them a mailer, so it's very diversified and has a lot of

25   different features to it.

1   Q.   And it has various metrics, I think is the word that

2   you business guys use, has metrics you can get out of it and

3   any dentist can get out of it who uses the software?

4   A.   Yes.

5   Q.   And are these -- what's a metric, just so the jury

6   knows?

7   A.   It's a measurement that you would use to measure the

8   performance of whatever it is you're trying to measure. I

9   mean, it helps you understand and compare one to another.

10   Q.   And these metrics, are they standard metrics that a

11   dentist needs to run a dental practice?

12   A.   Most dentists, they're in a practice by themselves,

13   you know; it's very important for them to know about their

14   production and about production per patient and number of

15   procedures and those types of things.

16   Q.   Okay. So those metrics, as you call them, are

17   standard metrics that every dentist tracks in every dental

18   practice in America?

19   A.   Absolutely, yes.

20   Q.   So what you were doing as the management company is

21   tracking the same measurements that other dentists and every

22   dentist tracks?

23   Mr. LEYENDECKER: Objection, leading, your

24   Honor.

25   THE COURT: Sustained.

 1   Q.   Were these metrics any different than the metrics that

 2   were followed by dentists throughout the country?

 3   A.   They were not.

 4   Q.   Now, you indicated that you yourself did not use

 5   production per provider as a metric; is that correct?

 6   A.   That's correct.

 7   Q.   And I think you also indicated that it was not used by

 8   the board. What do you mean by that?

 9   A.   In our monthly board meetings, on our agendas, it

10   wasn't a topic that we discussed. We looked at production of

11   the clinics, but we didn't look at production per provider as

12   a board, make decisions about production per provider. And

13   it was partly because of the way our clinics were set up, in

14   that we had four dentists, and I always felt it was a little

15   unfair to look at production per provider, unfair for the

16   dentists, because a dentist might spend two hours in the

17   hygiene room checking exams and doing the treatment plan, and

18   obviously they're not billing, except for the hygiene

19   appointment at that time. And if another doctor was in an

20   operatory for two hours treating a child like Jeremy that had

21   a lot of decay, well, then, their billing would be a lot

22   different. So in my mind it's always -- you know, it was

23   that's not always a reflection that that doctor is not

24   working hard, because it depends where they were at in the

25   clinic, so it was a meaningless statistic to me.

 1   Q.   And how did you view the clinics? Were they viewed --

 2   well, I guess, were they considered a team of some kind? I

 3   mean, how did you view the clinics in terms of their

 4   structure?

 5   A.   Yeah, we did it on the team approach, where our goals

 6   were set as a clinic-wide. We never set individual provider

 7   goals. The clinics, based on their size and their location

 8   and all of our expenses, we would -- like any business, we

 9   would develop a budget. And, you know, to stay in business,

10   here's our budget, and if we're performing below our budget,

11   we need to increase somehow; we need to do better. And our

12   goal was to be above budget. So they had to work together as

13   a team. And with as many children as we would see in a day

14   and with the demand that our clinics had, it was the only way

15   for us to provide as much care as we did, is that if everyone

16   worked for a team. If someone said, "I don't do

17   three-year-olds" or "I won't do that kind of procedure,"

18   whatever it is, that was detrimental. You know, we had to

19   have an attitude where "Hey, everybody does whatever it

20   takes," and you pitch in. And if your patient didn't show up

21   because their automobile was broke, get up and go help

22   someone else. It doesn't mean you have the next 45 minutes

23   off. You can't go play on the Internet. You can't go make

24   personal phone calls in the back, in the break room. You

25   have to help the clinic as a whole to perform.

1   Q.   Now, you've been asked about some e-mails that have

2   goals for the clinic, financial goals --

3   A.   Okay.

4   Q.   -- for the clinic. How did you know or how did you

5   have any idea of what a goal -- what goal was realistic for a

6   clinic?

7   A.   It was based on our historical understanding of the

8   business and what it took to run the business and how much

9   money it took to operate the business. So we had a very

10   good -- you know, we were the first company to do this. We

11   couldn't follow someone else. There was no other company

12   that was building multiple clinics that just served the

13   underserved children, and so I couldn't go to IBM's playbook

14   and say, "Oh, here's how IBM did it." So we were creating

15   things as we went along, and we learned a lot of things. And

16   we always changed, because like anything else, we made

17   mistakes along the way. So that's how that worked.

18   Q.   Do you know how many e-mails have been produced in

19   this case that were generated by the Old FORBA?

20   A.   In this case? I think they've got 400,000 e-mails of

21   ours that were produced.

22   Q.   And you were asked some questions about this

23   production per provider. I think I counted there were six of

24   them that reflected that somebody, either at a clinic, Mike

25   Roumph, looked at that statistic; is that correct?

     1   A.   I didn't count them but if you say it's six -- it

     2   wasn't -- I mean, it didn't happen. The e-mails that was

     3   specifically discussed, I was telling the new owners -- they

     4   wanted that information, and I said, "Hey, guys, we don't

     5   track that information, and I suggest that you don't track it

     6   because it's a trigger point for fraud. Don't do it; I

     7   didn't do it. I didn't need it; you don't need it."

     8   Q.   Let me ask you about hiring dentists. I think you

     9   said yesterday that hiring dentists and certainly firing

    10   dentists is a difficult thing to do?

    11   A.   Yes.

    12   Q.   Can you describe what you meant by that?

    13   A.   Okay. Well, there's not a whole lot of dental schools

    14   in the U.S. and some have closed recently, and dentistry in

    15   general is understaffed by dentists and not a whole lot of

    16   dentists want to come out of dental school and work on

    17   underserved children. Most dentists don't want to work on

    18   children, let alone the population that has 80 percent of all

    19   the tooth decay in the United States. It's a lot of work.

    20   You're doing procedures; you're doing work; you have

    21   troubling cases, not only troubling, but to see the decay and

    22   the rot, it's not great. So, you know, we couldn't pay great

    23   pay. We thought we paid good pay. We would offer dentists

    24   $10,000 a month. We would pay for all their health

    25   insurance. We would give them paid time off. We paid for

 1 their malpractice insurance. We tried to take care of them

 2 as best as we could, but there was a limit of what we could

 3 do as far as salary went. So when we recruited dentists, you

 4 know, we had to have a special person that not only wanted to

 5 practice dentistry, but they had to want to serve the

 6 underserved. They had to want to work in a clinic where you

 7 were going to have young children, and there was going to be

 8 crying and screaming and a lot of decay, and you had to do

 9 that every day, day in and day out. So it took a special

10 person, and it took us a long time to find those type of

11 doctors. And we developed great relationships with dental

12 schools across the country, and we would go out and we would

13 interview, and we would interview a lot, but we wouldn't hire

14 everyone we interviewed. We wouldn't hire a lot because we

15 just knew some were not going to make it in our clinic. They

16 just -- they wouldn't make it.

17   So I personally tried to interview every dentist, and

18 so that required a lot of travel and a lot of time. I wanted

19 to be there so I could get a feel for what kind of person

20 they were and I didn't make all of them, but I made most of

21 them. And so that was a big challenge for us, was to keep

22 our clinics staffed with high-quality people that wanted to

23 work on the underserved population.

24   THE COURT: Okay. It's about a minute 'til 10.

25   My motions start at 10, so we'll take our break now.

1   Enjoy your break. Don't talk about the case; don't do any

2   independent research, and I'll see you guys back here at

3   11 o'clock.

4   (Whereupon, the jury was excused and a recess

5   was taken at 9:57 a.m.)

6

7   THE COURT: Ready for the jurors?

8   Mr. LEYENDECKER: Yes.

9   (Whereupon, jurors brought back into the

10   courtroom)

11   THE COURT: Okay.

12

13   CONTINUED CROSS-EXAMINATION BY MR. FIRST:

14   Q.   Good morning again, Mr. DeRose.

15   A.   Good morning.

16   Q.   Do you remember being asked repeatedly about whether

17   it was FORBA's way or the highway?

18   A.   I do, yes.

19   Q.   Now, just before the break, you described to the jury

20   what was involved in hiring dentists. Can you estimate over

21   the years that you were involved with FORBA the number of

22   dentists that you hired?

23   A.   Well over 300, I'm sure.

24   Q.   And what was the number of dentists over those years,

25   out of the 300, who were fired?

1   A.   Fired for cause?

2   Q.   Fired for cause.

3   A.   Less than ten, probably.

4   Q.   So when Mr. Leyendecker says it was FORBA's way or the

5 highway; is that true?

6   A.   Not true.

7   Q.   Now, I want to take you back a little bit and ask

8 about yourself. Where are you from?

9   A.   I was born in Pueblo, Colorado, a hundred miles south

10 of Denver.

11   Q.   Do you have a family?

12   A.   Yes, I do. My wife, 29 years. I have two children.

13   Q.   Can you tell the jury a little about your educational

14 background?

15   A.   Sure. I attended the University of Colorado on a

16 football scholarship, graduated from the University of

17 Southern Colorado with a degree in business, and then

18 attained my M.B.A. in business as well.

19   Q.   And you indicated that you went on a sports -- a

20 football scholarship to Southern Colorado?

21   A.   Originally it was Colorado University, Buffaloes.

22   Q.   And can you describe your involvement in sports over

23 the years?

24   A.   Quickly, sure. It was always a big part of my life,

25 athletics, growing up, as a youngster, high school, college,

 1 after college. I was the owner, head coach and player of a

 2 minor league football team. I was a free agent with the

 3 Denver Broncos. During the strike season, I was the

 4 defensive captain of the New York Giants, played linebacker.

 5   Q.   Did you play with any Hall of Fame players in that?

 6   A.   Yeah, I got to play with Lawrence Taylor, which was

 7 fun, interesting.

 8   Q.   I want to now go to -- about your father. I want to

 9 talk about your father, Dr. Eddie DeRose.

10   A.   Sure.

11   Q.   How old is he now?

12   A.   He'll be 79 in November. He's 78.

13   Q.   What's the state of his health?

14   A.   He's an awesome guy. He's tough. He's got

15 Parkinson's. It's progressing, but he comes to the office

16 every day. We try to go to lunch every day. He can get

17 around, comes to his grandsons' games, and he's making the

18 most of it. He's not sitting at home withering away. He's

19 doing the best that he can.

20   Q.   Now, he 's a dentist?

21   A.   Yes, he is.

22   Q.   And could you tell us about his practice of dentistry

23 over the years?

24   A.   Sure. Sure. I'll be quick. His father, Bruno, my

25 grandfather, was a first-generation American, went to dental

1 school, started a dental clinic in Pueblo, 1928. A little

2 office, just him. And when my father graduated from dental

3 school, he joined my grandfather and they built their own

4 clinic in the -- outside of downtown, which was about three

5 miles away at the time. And then in 1965, Medicaid was

6 entitled by the Federal Government. Originally, the dental

7 benefit wasn't included in the entitlement. It came a couple

8 of years later. But once the dental benefit to Medicaid, my

9 Dad was one of the first guys that started seeing Medicaid

10 children. And at the time, he got a lot of grief for that.

11 He got a lot of ridicule from the other dentists, and, you

12 know, they didn't like the fee schedule; they didn't like the

13 paperwork. They thought that -- they thought that it was --

14 I don't know what they thought, but he got a lot of grief

15 about it. But he continued to do it because he loved the

16 children, and he wanted to do -- he didn't mind going against

17 the grain a little bit and doing something that wasn't the

18 most popular thing to do.

19   So he continued to do that and his practice grew in

20 notoriety for being great care and they would serve anyone.

21 If you belonged to the country club, you could bring your

22 kid. If you were on Medicaid, you could bring your kid. And

23 as I think Dr. Rudy mentioned, kids came from miles and miles

24 and miles. I know there was several families from Garden

25 City, Kansas, which was over 200-some miles away, that would

 1   come all the way to Pueblo for dental care. My brother Mike

 2   graduated from Creighton as valedictorian of his dental

 3   class, joined my father, and they continued to work on

 4   Medicaid kids.

 5   In '95, the state kept asking my father, "You know,

 6   you have to do this other places. We need help in Colorado

 7   Springs. The dentists in Colorado Springs are not serving

 8   the Medicaid kids. Will you please build a clinic in Springs

 9   and do what you're doing?" And he said yes. He was still a

10   practicing dentist, went to work every day. He went to work

11   every day until we sold and practiced dentistry every day.

12   So he opened the clinic in Springs and he would drive

13   back and forth. He would spend time at both. My brother did

14   the same; my uncle did the same. And then the state came to

15   him and said, "Hey, we'll give you $100,000 to help you start

16   a clinic in Denver, a grant." And "we need you here. Please

17   come." So he did. And Kim Salazar, the director of Medicaid

18   at the time in New Mexico, knew my father, knew the clinic,

19   knew all three clinics now, came to him and said: "Would you

20   please consider coming to New Mexico?" And he did.

21   So all this took place over five or six years and I

22   was running my own business at the time and it was taking a

23   lot out of my father. He was practicing dentistry; he was

24   doing a lot of business things that he wasn't used to doing,

25   for multiple clinics, and the toll was heavy, and we began to

 1 | talk and he asked if I would help him develop his idea and we

 2 | could serve more children.

 3 | At the time, the Surgeon General had issued a report

 4 | that dentistry with Medicaid kids was the silent epidemic --

 5 | Mr. LEYENDECKER: Your Honor, may I ask we

 6 | proceed with a question?

 7 | THE WITNESS: Too much?

 8 | THE COURT: Well, you did go afield of the

 9 | question, so try to -- try to answer. And you're bringing

10 | in stuff that's hearsay, so why don't you --

11 | Q. I asked you about your father's dental practice and

12 | the history of it, and now I think you're at a point where he

13 | had asked you to become involved in trying to --

14 | A. Right.

15 | Q. -- expand this notion of providing care to these

16 | underprivileged kids under the Medicaid program. Can you

17 | tell us about that, how that evolved and ultimately the

18 | formation of FORBA?

19 | A. Sure. I was somewhat familiar with it because of my

20 | father, my brother, my uncle, but we spent a lot of time

21 | studying exactly what the situation was, what the need was.

22 | I looked at it from a business perspective, what's the

23 | demand? And what we found was the demand was unlimited, that

24 | there was nobody serving Medicaid children. There was no

25 | company that dedicated their clinic solely to Medicaid kids,

 1 and we knew that 80 percent of all the dental disease was in

 2 20 percent of the children, the underserved, so we formed

 3 FORBA. I was entrusted as the president and C.E.O. I

 4 developed the staff. Actually, FORBA subcontracted with DD

 5 Marketing and we provided all the non-dental services.

 6   Q.   Let me ask you about that. There's questions about

 7 the FORBA model. Can you describe to the jury what that

 8 model was?

 9   A.   Okay. I know you heard about it a little bit from Dr.

10 Mueller, so I'll try not to be repetitive, but our model was

11 to locate in neighborhoods where there were no dentists, let

12 alone dentists serving Medicaid children, and spend a million

13 dollars, which is a lot of money for a dental clinic, and

14 build a beautiful, brand-new, state-of-the-art clinic.

15   At the time, Medicaid children were usually by Public

16 Health, where you seldom got an appointment. You would go in

17 and take a number and wait until your number was called for

18 an appointment. So our concept, our model was every patient

19 got an appointment. Every patient was treated as if they

20 were your own child. Every mother or father was talked to by

21 a doctor. Rarely happened with Medicaid clinicians. They

22 were consulted. They were advised and they were asked for

23 consent, if consent was needed. And our model was to be

24 highly efficient in the front office, that our charting would

25 be meticulous, that we knew in the reimbursable program that

 1 you were going to have audits and you were going to have

 2 people looking over your shoulder. So we knew that we were

 3 going to do the best we could do it.

 4   So we structured it in such a way that we were very,

 5 very efficient in the front office, and our model was to have

 6 multiple doctors. Because of the broken appointment rate and

 7 because of the demand, we had to have four doctors, our

 8 hygiene room fully staffed and plenty of assistants. Each of

 9 our doctors always had two assistants, which is very unusual

10 in dentistry. It's helpful with small children because

11 there's a lot of things going on all at once, and to have

12 another set of hands is very helpful.

13   So our model was to do what no one else wanted to do

14 and to do it great, and what's happened with our -- I'll

15 stop, I guess. I could keep talking.

16   Q.   What was the role of the management company, FORBA, in

17 that relationship?

18   A.   Sure. FORBA housed the partners as a legal ownership

19 entity. It had a contract with each clinic. Each clinic was

20 a separate corporation. They were all separate, individual

21 businesses, LLCs. They would sign a contract with FORBA to

22 provide non-dental services, the human resources, hiring,

23 firing, initial hiring, firing, human resources, helping with

24 that whole entire process, the marketing, the strategic

25 development, the financial, all of the non-dental. And then

 1 | FORBA subcontracted with DD Marketing, which was my company,

 2 | because FORBA didn't necessarily have any employees at the

 3 | time. They subcontracted with DD Marketing and we performed

 4 | the services, and those were all the services we performed.

 5 | We ended up with 40 employees in DD Marketing that

 6 | were doing one thing or the other for the dental business,

 7 | and I believe we had around 1,300 employees all together,

 8 | including the employees at the clinics.

 9 | Q.   Now, did FORBA have a dental philosophy?

10 | A.   I'm not a dentist and I think you all know that. In

11 | my opinion, we did not have a dental philosophy. We

12 | understood the C.M.S. guidelines, as Dr. Mueller explained.

13 | We understood A.A.P.D. They spent a lot of time, money and

14 | research on our population, the underserved. They had

15 | recommendations and guidelines of quality of care, kind of

16 | care. And if our philosophy -- if we had a dental

17 | philosophy, I would say it was that philosophy, and those are

18 | the articles that we gave our doctors. Those are the manuals

19 | and documents that we would refer them to. And as to dictate

20 | treatment and to dictate what to do, when and where and how,

21 | that never happened, never happened.

22 | Q.   Are you aware of any instance, any time in the

23 | existence of FORBA that a dentist was told how to treat a

24 | particular child?

25 | A.   I think if you talked to every dentist that ever

 1 worked for us, they would say to a person that I never told

 2 them what to do, what not to do, once they were in a child's

 3 mouth. Ever.

 4   Q.   Was any dentist ever told or encouraged to do

 5 unnecessary work?

 6   A.   Absolutely not. It wasn't who we were; it wasn't what

 7 we were from the beginning to the day that we sold. And more

 8 than that, you didn't need to do unnecessary work. Our kids

 9 were bombed out. They were -- there was decay, and it's sad,

10 really. I mean, there was so much decay that we couldn't do

11 it all, and -- but we were trying to make a difference. You

12 know, we would see over a half a million children a year, and

13 I often think what would have happened if we wouldn't have

14 done that?

15   And the other companies that now exist that are like

16 ours, they all came from our company in one form or another.

17 They either worked for my father, my brother, or they worked

18 at one of our clinics and they went out and grew their own

19 companies. And so our company not only had this initial

20 impact, the impact has really made a difference in the

21 Medicaid population.

22   Q.   Are you aware of a dentist ever being encouraged or

23 told to commit dental malpractice?

24   A.   Well, absolutely not. We had so much at stake. We

25 would never do it. We didn't need to do it. I mean, it

1   never even entered my mind.

2   Q.   Now, what was your job, Mr. DeRose, with FORBA?

3   A.   That's what my wife used to ask me, that question. My

4   title was C.E.O., president, so my job was a little bit of

5   everything. I was responsible for it all, at least I thought

6   I was. That's the burden I put on myself. And I was

7   responsible for the success of the company. I was

8   responsible to pay the bills, to make sure everybody got

9   their payroll check. I was responsible for the fact that we

10 weren't doing anything illegal, fraudulent, that there were

11 no activities going on in the clinics, that anyone could come

12 in and say, "Hey, you guys did this and that and this." I

13 was troubled about that constantly. I was troubled about

14 paying the bills. I was responsible for the motivation and

15 the personality of my staff, and I felt I was responsible for

16 the personality of the clinics, that we were going to be

17 positive and we were going to treat these kids that didn't

18 get great treatment in healthcare; we were going to treat

19 them different. They were going to love us and we were going

20 to love them, and I felt that burden as the C.E.O., and

21 really, as I wanted my father's legacy and his idea, the

22 great thing that he did, I wanted it to expand. I thought it

23 was good.

24   Q.   Now, as part of running FORBA, did you keep track of

25 the revenue produced by the clinics?

1   A.   Oh, yes.

2   Q.   Okay. And we touched on that before the break?

3   A.   Yes, every day.

4   Q.   And how would you know -- how would you know whether a

5   clinic is functioning well or not?

6   A.   Our experience allowed us to know what a clinic could

7   produce with a certain staffing plan and a certain number of

8   patients. It wasn't rocket science. I mean, we work hard,

9   but we're not the smartest people in the world, and so we

10 knew over time this is what a clinic that size with that many

11 doctors could do.

12   And the great thing was that the doctors, they didn't

13 have to be superdoctors. If they put in a day, if they

14 worked from 8 to 12 and 1 to 5, this is what they could do.

15 They didn't need to have roller skates on. They didn't need

16 to do work that didn't need to be done. They just needed to

17 show up, be positive, love the kids, do your dentistry. And

18 if we could do that, we would make our budget, and when we

19 made our budget, we made a profit, and that enabled us to

20 keep building clinics.

21   Q.   How were these budgets set -- I think you described

22 how they were set, but were they high budgets, low budgets...

23   A.   Compared to other dental clinics or compared to what?

24   Q.   Just compared to your own -- were they doable or --

25   A.   As I mentioned, it was very attainable, our budgets.

1   It didn't require, and I think if you talked to any of our

2   dentists, they'll tell you the same. It didn't require a

3   superhuman effort to make our budget.

4   Q.   Now, it's been suggested here that you just were doing

5   FORBA to sell it?

6   A.   No.

7   Q.   The company was ultimately sold in September,

8   September 26th of 2006?

9   A.   Yes.

10   Q.   Was the company set up for sale immediately? Can you

11 tell the history of that?

12   A.   Yeah, I told you a little bit about it. The company

13 started because my father was asked to help. And I got

14 involved because I was asked to help my father. I wasn't

15 thinking, "Yeah, I can do this and I can make a bunch and we

16 can sell it." He said, "Hey, son, will you help me expand my

17 idea?" And I said yes. And so that was my motivation. That

18 was my intent. That's why I got started. I never thought of

19 the end. You know, I didn't know we were going to be as

20 successful as we were. I didn't know that. So I didn't

21 start it to sell it.

22   Q.   How did it come about ultimately that it was sold?

23   A.   I was in my office one day in April of '06 and I got a

24 phone call. A gentleman identified himself as Greg Park. He

25 said that he and I had met in New York. He was an investment

1   banker. I said, "Greg, I don't remember you. I'm not saying

2   we didn't meet. I'm sure we did." He said, "I have someone

3   that wants to buy your business." And I said, "Well, you

4   know, my business is not for sale." I said, "I don't want to

5   go through that process." And he said, "No, this is a

6   serious company; they have experience in the Medicaid space.

7   They have been looking at your company for a long time,"

8   whatever that meant, "and they want to buy it." On that

9   phone call, I told him, I said: "Here's three conditions:

10   Here's the price, here's the terms as far as management

11   continuing with the new company, and here's a commitment I

12   want you to make to all my employees." And he said, "I'll

13   ask them." So he calls me back a week later and says,

14   "They'll do it."

15   So we met -- we had a meeting and six months later we

16   sold and my three things that I said at that very initial

17   phone call pretty much came about.

18   Q.   And, Mr. DeRose, in that process, between when there

19   was an interest in selling and when it was sold, was there

20   something called due diligence done?

21   A.   The company --

22   Q.   Before you answer that, could you just tell us what

23   due diligence is?

24   A.   Due diligence is when a company is going to buy

25   another company, they investigate everything about that

1   company, because you don't want to spend a lot of money and

2   buy something that then you find out later, "Oh, gee, it's

3   not what I thought it was." So companies conduct due

4   diligence. They conducted due diligence on us for a long

5   time and they spent -- I've heard as high as eight million,

6   but I know it was millions of dollars on due diligence,

7   checking us out. They went to our clinics; they checked out

8   our bank accounts; they checked out our billing system; they

9   checked out charts; they went through everything --

10   Mr. LEYENDECKER: Your Honor --

11   A.   -- everything they could possibly go through.

12   Mr. LEYENDECKER: His testimony here is hearsay,

13   talking about what the people did or didn't do. He didn't

14   know.

15   THE COURT: It is hearsay. Objection sustained.

16   Q.   Just say what you know to your knowledge, not what

17   people told you, based on what you experienced.

18   A.   All I know is all the due diligence ran through me.

19   They sent me a list of all the information they requested.

20   They asked me for access to the clinics, and we gave them

21   everything they wanted. We turned over any document that

22   they wanted. When there was things that I thought they

23   didn't need or didn't need to know, I would tell them, as you

24   saw in the e-mail. And they spent a lot of money. At the

25   end of the day, they thought everything was great and they

 1 | bought our company.

 2 | Q.   And who were these people who were asking you for all

 3 | this information?

 4 | A.   It was the purchasing group led by Sanus, which was

 5 | three individuals.

 6 | Q.   Did they have consultants working for them as well?

 7 | A.   Oh, they hired numerous consultants. I remember the

 8 | Bain company. I remember an insurance consultant. I

 9 | remember a billing consultant. So they hired numerous

10 | consultants that helped them with their due diligence.

11 | Q.   And after the sale was consummated on September 26th,

12 | 2006, you no longer had anything to do with FORBA or the

13 | clinics, as I understand it?

14 | A.   Correct.

15 | Q.   Now, I just want to go back to this issue of

16 | production and the dentists having to produce. You saw the

17 | performance review that was up there with Dr. Rapazzo --

18 | Randazzo, I should say, Dr. Randazzo?

19 | A.   Yes, I did.

20 | Q.   Based on seeing that, was there anything wrong with

21 | her looking at what the production was of the doctor at that

22 | point in time?

23 | A.   I think as a manager you have to evaluate your

24 | employees, and you have to look at their production and how

25 | productive are they. So I don't think there's anything wrong

 1 with looking at it.

 2   Q.   In terms of as a manager, what are you looking for,

 3 for them to do what?

 4   A.   You know, we ask our employees, and sorry to be

 5 repetitive, but to show up on time. When you're at work, we

 6 want you to work. Okay? You're there to work. And when

 7 it's time to go, it's time to go. So we asked for a full

 8 effort. That's what we asked. And nothing more.

 9   Mr. FIRST: May I have a moment?

10   THE COURT: Yes.

11   Mr. FIRST: Nothing further.

12   Mr. HULSLANDER: No questions.

13   Mr. STEVENS: None.

14   Mr. LEYENDECKER: May we approach briefly, your

15   Honor?

16   THE COURT: Yes.

17   (Discussion off the record at the bench)

18   THE COURT: I'm going to have to ask the jury to

19   step out into the jury room for a minute.

20   (Whereupon, the jury was then excused from the

21   courtroom)

22   THE COURT: Okay. We've had a bench conference,

23   at which time Mr. Leyendecker said that he thought that

24   based on the witness's testimony he had opened the door to

25   questioning with respect to the lawsuit brought by New

 1   FORBA against Old FORBA after the fact. I had the court

 2   reporter read through the testimony that the witness

 3   testified, and I believe I'm quoting it: "At the end of

 4   the day, they thought everything was great and they bought

 5   our company."

 6   Based on my review of the documents, in fact,

 7   "At the end of the day," it's not clear what he means by

 8   "the end of the day." But in fact, we know that New FORBA

 9   did sue Old FORBA and raised allegations about the

10   company. So I think he has opened the door.

11   However, I only think he's opened the door

12   slightly. So, Mr. Leyendecker, I'm going to allow you to

13   question him very briefly on the fact that New FORBA sued,

14   but I'm not going to allow you to introduce the complaint.

15   I think any type of impeachment of him based on that

16   statement needs to be very brief, two or three questions.

17   Mr. LEYENDECKER: Let me just make sure I'm with

18   you, your Honor. Am I allowed to examine Mr. DeRose about

19   the allegations regarding the pressure and the other

20   things that they allege were not great?

21   THE COURT: No, I don't think so, Mr.

22   Leyendecker. I think that would be beyond impeachment,

23   because essentially what this witness has testified to and

24   left the impression with the jury was that New FORBA did

25   due diligence and everything -- and determined at the end

 1   of the day everything was great.

 2   Mr. LEYENDECKER: So how about I'll ask him,

 3   obviously, they filed a lawsuit against you?

 4   THE COURT: Correct.

 5   Mr. LEYENDECKER: And they filed a lawsuit

 6   against you because they believed you had engaged in the

 7   kind of conduct that is at issue in this case?

 8   Mr. FIRST: I'm going to object.

 9   THE COURT: I think that would be inappropriate

10   also, Mr. Leyendecker. I think that -- because the

11   questioning was about the due diligence effort that a

12   company would do in connection with purchasing another

13   company.

14   Mr. FIRST: Judge, and he also said, and I think

15   I heard it from you actually, as well as him, at the end

16   of the day they went through with the sale. I think that

17   kind of tells you when the end of the day was.

18   THE COURT: "At the end of the day, they thought

19   everything was great and they bought our company" is what

20   the transcript reads.

21   Mr. FIRST: I think that would --

22   THE COURT: But at the end of the day they

23   didn't think everything was great, according to what we

24   know, because they sued them. So the way he answered the

25   question, it's not clear what impression a jury is left

 1   with, whether they mean at the end of the day that they

 2   thought it was a great company; it was a great deal. Did

 3   they mean it the day that they completed their due

 4   diligence? I think it's ambiguous.

 5   Mr. LEYENDECKER: Part of that due diligence,

 6   your Honor, was their request for production per dentist

 7   reports, which he told them they weren't getting, wouldn't

 8   get and never would. And so I think whether there were

 9   allegations about they in fact were doing these things he

10   said they weren't is fair game in light of the connection

11   with the due diligence.

12   THE COURT: I disagree, Mr. Leyendecker. I

13   think you are entitled to raise the fact that they were

14   sued --

15   Mr. FIRST: Could I clarify with the witness

16   perhaps what he was talking about by "the end of the day"?

17   Can we reopen?

18   THE COURT: I don't think that would be

19   appropriate, Mr. First. Good try.

20   Mr. LEYENDECKER: I'll be very brief on it, your

21   Honor. I understand your ruling and I'll be very brief on

22   it.

23   THE COURT: All right.

24   (Whereupon, the jury was then brought back into

25   the courtroom)

1   THE COURT: Okay. You may proceed.

2   Mr. LEYENDECKER: Thank you, your Honor.

3

4 REDIRECT EXAMINATION BY Mr. LEYENDECKER:

5   Q.   Mr. DeRose, I would like to visit with you briefly

6 about a few of the subjects you touched on with your lawyer,

7 Mr. First, okay?

8   A.   Sure.

9   Q.   The first subject I would like to ask you about was

10 your sworn testimony to this jury that at the end of the day,

11 after all the due diligence New FORBA did, that they thought

12 everything was great, because that's what you just told them,

13 right?

14   A.   Yes, they thought it was great and they bought our

15 company after that was done.

16   Q.   And after they bought your company, isn't it true that

17 New FORBA filed a lawsuit against Old FORBA because they

18 didn't think everything was great?

19   A.   They filed the lawsuit because we were fighting over

20 some escrow money.

21   Q.   Really? That's what the lawsuit was about?

22   Mr. FIRST: I'm going to object.

23   THE COURT: And the basis of your objection is?

24   Mr. FIRST: It's beyond your Honor's ruling.

25   Mr. LEYENDECKER: He opened the door, your

 1   Honor.

 2   THE COURT: I believe he has opened the door.

 3   I'm going to overrule the objection.

 4   Q.   Okay. Let's talk about the allegations New FORBA made

 5   against Old FORBA, after they found out what Old FORBA was

 6   doing to the young children at its clinics?

 7   A.   Okay.

 8   Q.   Shall we?

 9   A.   Sure.

10   Q.   Because the allegations were not simply about an

11   escrow, were they, sir?

12   Mr. FIRST: I'm going to object to counsel

13   referring to allegations; they're simply allegations,

14   never been proven anywhere. There's never been a hearing

15   about them --

16   THE COURT: But this is proper impeachment, so

17   I'm going to overrule your objection.

18   Mr. FIRST: And it's also not a statement by

19   this witness or Old FORBA, and it's hearsay.

20   MR. LEYENDECKER: Your Honor, in light of the

21   door that's been opened, the Plaintiffs would offer

22   Exhibit Number 273.

23   Mr. FIRST: Objection.

24   THE COURT: I'm going to reserve decision on

25   whether the exhibit is received at this point, but you may

     1   question the witness about the allegations.

     2   Mr. LEYENDECKER: Thank you, your Honor.

     3   Q.   Mr. DeRose, you are aware that, as an example, New

     4   FORBA alleged that Old FORBA concealed the fact that it was

     5   pressuring dentists to increase production; you're aware of

     6   that, right?

     7   A.   I was aware that they alleged that at one time, yes.

     8   Q.   You're aware that New FORBA in its lawsuit that it

     9   filed against Old FORBA alleged that during negotiations with

    10   New FORBA, Dan DeRose -- that's you -- falsely represented

    11   that Old FORBA quote, unquote, never used data regarding

    12   production per dentist. You're aware they allege that in

    13   their lawsuit against Old FORBA, right?

    14   A.   I'm aware they allege that, yes.

    15   Q.   In a June 20th, 2006 e-mail to Old FORBA, Dan DeRose

    16   stated -- and this is an Exhibit 76 that the jury has seen,

    17   right?

    18   A.   I don't remember the number.

    19   Q.   "We will not be forwarding production per dentist as

    20   it is an irrelevant calculation. Never used it; never will."

    21   That's your e-mail?

    22   A.   Yes.

    23   Q.   And they allege you falsely alleged Old FORBA had

    24   never used it because, in fact, as we saw earlier, they had

    25   been using it?

1   A.   They did.

2   Q.   And Old FORBA had been using it, right?

3   A.   Had not, no.

4   Q.   They go on to say, "In fact, internal communications

5 and documents show that Old FORBA actively monitored

6 production per dentist and actively and repeatedly pressured

7 dentists to keep production up." That's what they alleged in

8 their lawsuit against Old FORBA?

9   A.   They allege that, yes.

10   Q.   And we've seen those e-mails, haven't we?

11   A.   Which ones?

12   Q.   For instance, Old FORBA generated spreadsheets

13 tracking dentist efficiency, and Old FORBA did have

14 spreadsheets tracking dentist efficiency, did they not?

15   A.   I'm not sure what spreadsheets you're referring to.

16   Q.   Old FORBA generated spreadsheets that tracked dentist

17 efficiency, that specifically tracked individual dentist

18 production. That was part of New FORBA's allegation against

19 Old FORBA, right?

20   A.   Is that -- I don't remember all the allegations.

21 There were a lot of allegations. I don't remember them all.

22   MR. LEYENDECKER: Your Honor, perhaps it might

23   assist Mr. DeRose if I put the allegations up on the

24   screen.

25   THE COURT: The exhibit is not in evidence, but

 1   I will allow you to show him the exhibit.

 2   Mr. LEYENDECKER: Let me see if I can come

 3   around here...

 4   Mr. FIRST: Your Honor, may I approach?

 5   THE COURT: Yes.

 6   (Discussion off the record at the bench)

 7   MR. LEYENDECKER: Thank you, your Honor. May I

 8   approach the witness?

 9   THE COURT: Yes, you may.

10   BY MR. LEYENDECKER:

11   Q.   Mr. DeRose, let's look at a few things that Old FORBA

12   sued -- excuse me, New FORBA sued --

13   A.   New. We didn't sue them.

14   Q.   New FORBA sued you.

15   A.   Me?

16   Q.   New FORBA sued Old FORBA, after they paid the money,

17   right?

18   A.   Yes.

19   Q.   And after they learned what was really going on in

20   your clinics?

21   A.   It was after they paid the money, yes.

22   Q.   Paragraph 58, "After entering into the asset purchase

23   agreement," and that's Exhibit 7 we looked at earlier --

24   A.   Yes.

25   Q.   -- "Old FORBA continued to pressure dentists to

 1 produce, specifically to ensure that the purchase price would

 2 not decrease. In fact, in July of 2006, the purchase price

 3 was reduced from 470 million to 435 million." They made that

 4 allegation, right, which had been based on Old FORBA's

 5 budgeted EBITDA for 2006.

 6   Mr. FIRST: Your Honor --

 7   THE COURT: Wait a second.

 8   Mr. FIRST: May we approach, please?

 9   (Discussion off the record at the bench)

10   THE COURT: I'm going to sustain the objection.

11

12 BY MR. LEYENDECKER:

13   Q.   Mr. DeRose, did Old FORBA in this lawsuit against New

14 FORBA, allege that contrary to the representations and

15 warranties in the A.P.A., Exhibit 7, Old FORBA's financial

16 statements did not reflect the true financial condition of

17 Old FORBA, nor did they disclose the reasonable possibility

18 of government action to recover payments for unnecessary or

19 improperly documented sources resulting from Old FORBA's

20 inappropriate push for production." Was that one of their

21 allegations against you?

22   A.   I don't remember specifically, but if that was an

23 allegation.

24   Q.   Let me show you Paragraph 59 of their complaint and

25 see if that refreshes your memory on that.

 1   A.   Okay. That's what it says, yes.

 2   Q.   Was one of their allegations against Old FORBA, Mr.

 3 DeRose that "in addition, Old FORBA did not comply with

 4 applicable laws relating to the licensure of its associated

 5 dentists and practice owners with regard to Small Smiles

 6 dentists Andrus, Knott and Kakarla"?

 7   A.   Who was the third one?

 8   Q.   Kakarla?

 9   A.   Is that an allegation? Is that what you're asking?

10   Q.   The lawsuit filed against you, Paragraph 75, I'll ask

11 you, does that refresh your memory that Old FORBA did not

12 comply with the laws as related to licensure of those

13 dentists?

14   A.   They did allege that, yes.

15   Q.   Did they allege, Mr. DeRose that "another example of

16 the practices' non-compliance" -- and that's a reference to

17 the clinics, right? "The practices' noncompliance with

18 applicable laws and standards and as a result of the breach

19 of these warranties relating to Old FORBA's practice of

20 pressuring dentists to produce in order to inflate revenues,"

21 they alleged that against you?

22   A.   They alleged it, sure.

23   Q.   All right. New FORBA alleged that "this practice

24 created a culture within the Small Smiles centers that

25 emphasized production over quality care, in clear

 1 | contravention of applicable laws and accepted standards of

 2 | care." That's part of what new FORBA sued old FORBA for?

 3 | A.   That was an allegation, yes.

 4 | Q.   Another one of their allegations in this lawsuit,

 5 | which you said they thought everything was great, was that

 6 | "Old FORBA was also responsible for providing orientation and

 7 | training to dental centers' dentists and staffs."

 8 | Mr. FIRST: Objection.

 9 | Q.   "The training was inadequate and did not ensure all

10 | dentists and staff were sufficiently familiar with the

11 | guidelines of the American Academy of Pediatric Dentistry and

12 | Medicaid billing guidelines."

13 | Mr. FIRST: Objection.

14 | THE COURT: Legal basis?

15 | Mr. FIRST: He interjected into the question the

16 | summary of the testimony.

17 | THE COURT: Overruled.

18 | Mr. FIRST: It's to the form of the question.

19 | THE COURT: I understood. Overruled. You can

20 | answer.

21 | A.   I can? Oh. That was an allegation, yes.

22 | Q.   That New FORBA alleged that "Old FORBA provided

23 | inadequate training to its dentists, failed to make sure they

24 | were familiar with the appropriate guidelines and standards

25 | of care," right?

 1   A.   Allegation, yes.

 2   Q.   Did they allege that "Old FORBA had other information

 3 indicating the potential for investigations for other legal

 4 action but did not share with New FORBA," in breach of your

 5 asset purchase agreement. Did they make that allegation?

 6   A.   That was an allegation, yes.

 7   Q.   They say, for example, in an internal e-mail,

 8 Defendant Mueller warned of, quote, certain things we do

 9 which have caused concern on the part of parents, dental

10 boards or the media, end quote. His list included: One, no

11 parents in the back, and that's a reference to FORBA's

12 practice of not allowing parents to go back with their

13 children, right?

14   A.   I'm not sure what that's a reference to.

15   Q.   Number two, patient immobilization. That's a

16 reference to the use of papoose boards; isn't it, Mr. DeRose?

17   A.   It appears, yes.

18   Q.   And three, use of stainless steel crowns. Four,

19 amount of work done at one time. These are all things we

20 talked about as part of the FORBA model, weren't they?

21   A.   We had a non-dental model, yes.

22   Q.   They go on to allege, Mr. DeRose, "These very topics

23 were ultimately the subject of a joint federal/state

24 government investigation into the Small Smiles centers, --"

25   Mr. FIRST: I'm going to object to this.

 1   Q.   " -- Old FORBA, and New FORBA, coordinated by the

 2   United States Department of Justice." That's part of what

 3   they alleged against Old FORBA in their lawsuit, right?

 4   Mr. FIRST: Object.

 5   THE COURT: Objection overruled.

 6   Q.   Right?

 7   A.   That was an allegation.

 8   Q.   Those investigations did occur, did they not, sir?

 9   A.   What investigations?

10   Q.   Investigations --

11   Mr. FIRST: Objection.

12   Q.   -- by the --

13   Mr. LEYENDECKER: He said there was an

14   allegation.

15   THE COURT: Sustained.

16   Q.   Let me move on, because I want to touch on something

17   else you said during your direct examination, and that was:

18   "Most dentists don't want to perform work on Medicaid

19   children. We wouldn't hire someone because we knew someone

20   would not make it." Do you recall making those statements?

21   A.   Yes.

22   Q.   Let me show you Exhibit 386 and ask you, Mr. DeRose,

23   if Exhibit 386 is a September 16th, 2002 e-mail from Mike

24   Roumph to you and others?

25   A.   2002 --

1   Q.   Excuse me, 2002, thank you. Do you recognize that?

2   A.   I read that; it's an e-mail. I don't recognize it,

3   but I read it, yes.

4   Q.   That's an e-mail from Mike Roumph to you, sir, is it

5   not?

6   A.   It is.

7   Mr. LEYENDECKER: Plaintiffs offer Exhibit 386.

8   THE COURT: Any objection?

9   Mr. FIRST: I object on the grounds it's

10   immaterial, unrelated.

11   Mr. HULSLANDER: Same objection.

12   THE COURT: Overruled. Exhibit 386 received.

13   (Whereupon, Plaintiff's Exhibit 386 was received

14   in evidence)

15   Q.   Let's look for a minute at Exhibit 386, Mr. DeRose.

16   A.   Okay.

17   Q.   This 2002, as you correctly pointed out, e-mail from

18   Mr. Roumph. The subject of the e-mail was Dr. Robert Brown;

19   do you see that?

20   A.   I do.

21   Q.   And he's copied Dr. Mueller; your brother, Dr. Mike

22   DeRose; Rich Lane, and Dr. Rudy Padula on this e-mail as

23   well, right?

24   A.   Correct.

25   Q.   And Dr. Robert Brown was a doctor that FORBA was

 1   interviewing and thinking of hiring for one of his clinics in

 2   South Carolina, right?

 3   A.   Okay.

 4   Q.   Am I right about that?

 5   A.   Let's see.

 6   Q.   "Dr. Robert Brown is a dentist that has his own

 7   practice in Newberry. Newberry is halfway between Columbia

 8   and Greenville," and that's South Carolina, right?

 9   A.   Right.

10   Q.   And so FORBA was thinking of hiring Dr. Brown as a

11   dentist for one of its clinics in South Carolina?

12   A.   It doesn't say we were thinking of hiring him.

13   Q.   Let's keep looking at it then. There was a question

14   of whether nobody wanted to treat Medicaid kids, okay?

15   A.   Sure.

16   Q.   "His practice is 25 percent children, of which 50

17   percent are Medicaid. He graduated in '78." You took that

18   to mean he graduated dental school in 1978?

19   A.   I would assume, yes.

20   Q.   And so you understood that Dr. Robert Brown was

21   familiar with Medicaid children and the Medicaid population

22   and was, in fact, practicing on that very population at this

23   time?

24   A.   I assumed that.

25   Q.   Sure, from this e-mail from Mr. Roumph?

1   A.   I don't know that I made any assumptions. I read the

2   e-mail. I don't even know if he's an expert; I don't know.

3   Q.   He says: "He started that" -- that being Medicaid --

4   "since the increase in fees in '99."

5   A.   Yes.

6   Q.   75 percent of dentists now take Medicaid, and Medicaid

7   fees were increased in '99. 75 percent of dentists are now

8   taking patients with those fees?

9   A.   I have no idea if that's correct.

10   Q.   When Mr. Roumph goes on to say: "When I discussed our

11   dental philosophies"-- and he means FORBA's?

12   A.   It's hard to say what he meant.

13   Q.   "When I discussed our dental philosophies, I told him

14   about behavioral management and the ultimate use of the pedo

15   wrap." That's the papoose board, correct?

16   A.   Yes.

17   Q.   "He was not in favor of it and sounded set in his

18   ways. He also is an instructor at the Medical College of

19   Georgia two Fridays per month, which he would not want to

20   give up. He is going to have rotator cuff surgery around

21   Thanksgiving and wouldn't be able to start until after the

22   first of the year."

23   Now, the fact of the matter is, FORBA didn't want this

24   experienced dentist to Medicaid kids to be treating the

25   Medicaid population, because he was not in line with FORBA's

 1 philosophy about when and how to use the papoose board,

 2 right?

 3   A.   No, not right. I'm not even sure we were considering

 4 hiring him.

 5   Q.   You wouldn't consider hiring a dentist who was

 6 familiar with the population, who had been practicing for

 7 almost -- '78 to 2002, for -- what is that, 25 years?

 8   A.   I would love to hire a dentist like that, absolutely.

 9   Q.   Even if he only practiced a couple of days a week,

10 you'd would love to have a guy that knew the population, that

11 loved kids, wouldn't you?

12   A.   Probably a couple days a week, it wouldn't work the

13 way we were staffed. We wanted full-time dentists.

14   Q.   Do you think it would be good for young children,

15 young Medicaid children, to have an experienced dentist

16 providing them care? Would that have been a good thing for

17 them?

18   A.   To have a good dentist, yes.

19   Q.   Experienced with a population that you said nobody

20 wants to treat?

21   A.   That's what the facts say.

22   Q.   Not according to Dr. Robert Brown. "He is sending

23 resume probably tomorrow. D.D." -- that's you, right?

24   A.   That's me.

25   Q.   "I told him you would be calling him. Let me know if

 1 you would prefer to have me give the cat's on the roof

 2 story." Do you see that?

 3   A.   I do.

 4   Q.   What that's a reference to, Mr. DeRose, is do you want

 5 to let him down easy or do you want me to let him down easy

 6 that we don't want him?

 7   A.   Is that a question?

 8   Q.   Yes, sir. That's what Mr. Roumph meant by that?

 9   A.   I don't know what he's talking about, cat's on the

10 roof. I don't know what that is.

11   Q.   Let's look at Exhibit Number 97, which was previously

12 admitted into evidence.

13   A.   I don't think I have it.

14   Q.   Exhibit Number 97 is an e-mail chain involving Janine

15 Randazzo, Mike Roumph, you and others, related to Syracuse

16 production.

17   A.   Okay.

18   Q.   We've heard any number of times that your testimony

19 is, "The only pressure we were applying is to show up and

20 work hard," right?

21   A.   Yes.

22   Q.   And I want to focus in on that concept as it relates

23 to this e-mail.

24   A.   Okay.

25   Q.   You see down here at the bottom, the Mike Roumph

 1   February 10th, 2006, e-mail to Dr. Randazzo and Nadine

 2   VandeWalker. Was that one of the Syracuse office workers?

 3   A.   Yes.

 4   Q.   It has to do with Syracuse production update?

 5   A.   That's the title, yes.

 6   Q.   "Good production in January. Beat our daily

 7   expectation by $700 per day," right?

 8   A.   Yes.

 9   Q.   So these guys are working hard, aren't they?

10   A.   Yes.

11   Q.   No indication they're drinking coffee and making phone

12   calls and surfing the Internet. They're meeting expectations

13   and having good production in January?

14   A.   Right.

15   Q.   Let's look what happens ten days later after the good

16   production in January, up there at the top. Dr. Randazzo

17   says, "I keep urging the docs to do as much as you can on

18   each patient." That's pressure to do more work, isn't it,

19   Mr. DeRose?

20   A.   No.

21   Q.   "I keep urging the docs to do as much as you can on

22   each patient." If it was show up and work hard, why was

23   pressure being applied if they were showing up and working

24   hard --

25   A.   That's from Janine, I mean...

1   Q.   Your lead dentist?

2   A.   Do you want me to comment on what she meant?

3   Q.   I'm asking you to answer my question, which is: If

4 all the FORBA model ever involved was show up at 8, work hard

5 until lunch, have a sandwich, work hard until 5, if that's

6 all the pressure they got applied, why is she pressuring them

7 to do as much as they can when we know they're already

8 working hard?

9   A.   She wanted them to continue to work hard.

10   Q.   Let's look at Exhibit 46.

11   A.   Okay.

12   Q.   You may have that -- actually, I think that's already

13 up on your stand.

14   A.   I gave all that away. I think it's -- I don't know

15 where I put it.

16   Q.   Well, we can put it up on the screen. It's in

17 evidence. 46 is Dr. Randazzo's performance review of Dr.

18 Aman. Do you remember that one?

19   A.   We have looked at this.

20   Q.   Do you remember looking at this earlier this morning?

21   A.   Okay. Yes, I do.

22   Q.   Okay. Let's go over to Page 2, because you're

23 familiar with the performance evaluations, aren't you?

24   A.   I was. I'm vaguely familiar now.

25   Q.   I want to zoom in here on this section called -- right

 1   here, "Quality of --" this last section right there, Chuck.

 2   Thank you very much. "Attendance." That's the one I want to

 3   focus you in on. This is the performance review in December

 4   of '05 when Dr. Randazzo and Dr. Aman put together a plan

 5   where he was going to improve the clinic's production by

 6   doing more procedures on each patient. That's what this is.

 7   Do you recall that?

 8   A.   I recall that it's his performance review, yes.

 9   Q.   Attendance significantly exceeded FORBA's rating

10   scale, as it relates to attendance, punctuality,

11   dependability, reliability and time management. See that?

12   A.   Yes.

13   Q.   "Summarize overall performance, including strengths."

14   And his strengths are he's hard working; he's reliable; he's

15   eager to learn?

16   A.   Right.

17   Q.   If the pressure was only about show up at 8 and work

18   hard until 5, why would this lead dentist -- Chuck, scroll

19   down -- if that's all the pressure was about, why would a

20   lead dentist who is hard-working, reliable, is dependable, is

21   punctual, eager to learn, why would she be pressuring him to

22   increase the clinic's revenues by doing more procedures on

23   each patient, if that's not, in fact, what FORBA really

24   wanted?

25   A.   Well, I think Janine might have just been trying to

 1 | continue to motivate him.

 2 | Q.   We heard a lot about altruistic motives on your part,

 3 | right?

 4 | A.   That wouldn't be my definition, no.

 5 | Q.   Okay.   Let me ask you, did FORBA spend $107,000 to buy

 6 | a box office at Bronco Stadium so you could watch football

 7 | games?

 8 | A.   Not a box office, a suite.   We did have a suite at the

 9 | Bronco games, yes.

10 | Q.   Let me show you Exhibit 16.

11 | Mr. FIRST: I'm going to object to this --

12 | THE COURT: Exhibit 16.

13 | Q.   Let me make sure, Mr. DeRose, the $107,000 that the

14 | FORBA board decided to use to buy a suite at the Bronco

15 | Stadium --

16 | Mr. FIRST: Objection.

17 | Q.   And the FORBA board did decide that, didn't they, sir?

18 | Mr. FIRST: Objection.

19 | THE COURT: The basis of your objection?

20 | Mr. FIRST: It's irrelevant and immaterial to

21 | anything asked.

22 | THE COURT: I think it's already in evidence

23 | here, his statement -- the question was already asked and

24 | he answered it, but I don't know what this new question

25 | is, so he's basically --

Valerie Waite, Senior Court Reporter

 1   Q.   The question is: Did the board, the FORBA board,

 2   approve spending $107,000 to buy a suite so the owners, the

 3   FORBA board owners, could watch football at Mile-High

 4   Stadium?

 5   Mr. FIRST: Objection.

 6   THE COURT: I'm going to sustain the objection.

 7   Q.   Was the $107,000 that was used to buy these tickets

 8   Medicaid money --

 9   Mr. FIRST: Objection.

10   Q.   -- taxpayer dollars?

11   Mr. FIRST: Objection.

12   THE COURT: Overruled.

13   A.   I have no idea where the money came from. If it came

14   from our operations, then it came from the clinics, yes.

15   Q.   You talked a lot about this, how you can set your

16   budget; do you recall that testimony?

17   A.   Yes.

18   Q.   And you said based on "our experience." And that's

19   FORBA's experience. You set your budget based on what FORBA

20   had done with these clinics and the way it operated them.

21   That's how they were set, right?

22   A.   Yeah, based on my father's experience and his 30 years

23   of doing it, yes.

24   Q.   You didn't go out and look, for example, to see what

25   the typical dentist did with Medicaid patients and how much

 1 treatment they were giving. You used your own experience and

 2 your own level; that's how you set the budgets, right?

 3   A.   I could not find another multi-clinic Medicaid

 4 operation.

 5   Q.   Because you understand the corporate practice of

 6 dentistry is illegal across the United States, right?

 7   Mr. FIRST: Objection.

 8   THE COURT: Overruled. It's cross.

 9   A.   The corporate practice of dentistry is illegal in some

10 states.

11   Q.   In most, including New York?

12   A.   Including New York.

13   Q.   Is Dr. Turner the doctor you terminated for cause, the

14 first lead dentist in Syracuse? Did you terminate him for

15 cause or for some other reason?

16   A.   I'm not sure.

17   Q.   You said one of the things you were responsible for

18 was to make sure that there was no fraudulent activity going

19 on; did I hear that right?

20   A.   I felt that responsibility, yes.

21   Q.   Then why in 2002 when you saw that office manager

22 using production per dentist, which you believed to be the

23 number one trigger for fraud, why didn't you take some action

24 right then and there so that nobody would ever use that

25 again?

 1   A.   Well, it wasn't used, as you know, frequently. It was

 2 never used by me, so maybe I did take action. I'm not sure.

 3 I'm not sure she used it again.

 4   Mr. LEYENDECKER: That's all I have, your Honor.

 5   Pass the witness.

 6   THE COURT: Redirect -- or recross?

 7 RECROSS-EXAMINATION BY Mr. FIRST:

 8   Q.   You were asked about a complaint?

 9   A.   Yes.

10   Q.   Were those allegations ever heard by a court?

11   A.   No.

12   Q.   Were those allegations ever proven to anybody?

13   A.   Absolutely not.

14   Q.   And do you -- did you at the time and do you

15 specifically today deny those allegations?

16   A.   Yes, I do.

17   Q.   And was that case ultimately -- that lawsuit

18 ultimately discontinued?

19   A.   It was.

20   Mr. FIRST: That's all I have.

21   Mr. LEYENDECKER: Very quick, your Honor.

22   THE COURT: Wait a second. Mr. Hulslander, Mr.

23   Stevens?

24   Mr. LEYENDECKER: I apologize. I assumed since

25   they didn't take the turn earlier --

 1   THE COURT: I think that's a pretty good

 2   assumption, but I'll ask them anyway.

 3

 4   REDIRECT EXAMINATION BY Mr. LEYENDECKER:

 5   Q.   Mr. DeRose, on this lawsuit, new FORBA versus Old

 6   FORBA, was one of the things they allege --

 7   Mr. FIRST: I'm going to object to this. It's

 8   outside the cross or redirect, whatever you want to call

 9   it.

10   MR. LEYENDECKER: He just asked him about the

11   lawsuit.

12   (Discussion off the record at the bench)

13   Mr. LEYENDECKER: I have no questions, your

14   Honor. Thank you.

15   THE COURT: You may step down.

16   THE WITNESS: Okay; thank you.

17   (Whereupon, the witness was then excused)

18   THE COURT: We usually break at 12:30 for lunch,

19   but we're done with a witness, so I think we'll take our

20   lunch from 12:15 to 1:15 today instead. It's a good time

21   to break. Have a good lunch. Don't talk about the case;

22   don't do any independent research, and we'll see you at

23   1:15.

24   (Whereupon, the jury was then excused from the

25   courtroom)

 1   THE COURT: I understand that Mr. First wants to

 2   make a motion.

 3   Mr. FIRST: Yes, your Honor. I'm going to move

 4   for a mistrial at this time, based upon the reading of

 5   those allegations from the New FORBA complaint. As your

 6   Honor knows, before the case started, the trial started,

 7   your Honor had ruled that that complaint was not

 8   admissible in this case; it's just a series of

 9   allegations, and it should not be admitted because of

10   the -- number one, it was a series of allegations; number

11   two, it could poison this trial and this jury because it

12   is only allegations, and it's allegations made by New

13   FORBA against my client. They're not even statements by

14   my client; they're just allegations.

15   When this first came up, you know, I said to the

16   Court that the door had not been opened because Mr. DeRose

17   essentially said that they did a due diligence, and at the

18   end of the day, they went ahead with the closing, the

19   purchase of the business. That's all he said. That did

20   not open up any doors and I raised that to your Honor at

21   the time. And nonetheless, your Honor ruled that the

22   allegations could be used for impeachment purposes.

23   Now, I objected also to the complaint being used

24   in that fashion and also using the allegations for

25   impeachment purposes, particularly statements made by a

1   party other than the witness, and under those -- the Court

2   overruled the objections and allowed that to continue, and

3   now I find myself in a position where all this prejudicial

4   stuff has come in to this jury and has poisoned the

5   evidence, because the evidence -- because all allegations

6   are now before the jury, including investigations by

7   government entities. I would submit that there is no way

8   to get this back into the bag and that we have been

9   severely prejudiced by these allegations coming in.

10   They're not proof of anything, and they're not even

11   appropriate for impeaching Mr. DeRose. And I think under

12   the circumstances I have no choice, even though I'm

13   reluctant to do it, I have no choice but to move for a

14   mistrial because we have been unfairly prejudiced in this

15   case by that occurring.

16   Mr. HULSLANDER: I join. I join in the motion,

17   Judge. The witness in the first instance didn't open any

18   door to allow this complaint to be used --

19   THE COURT: You mean you disagree with the

20   Court's finding that he did open the door?

21   Mr. HULSLANDER: Oh, yeah, I disagree with the

22   Court's finding that he opened the door. He did not open

23   the door, in my view, and it's solely my view; I know it's

24   not the Court's view, but all he said was they did due

25   diligence, and at the end of the day, which obviously

 1   meant when they bought the company, they believed that

 2   everything was in good order. He did not -- what's more

 3   important is what he didn't say. What he didn't say is

 4   that they didn't find out later on, or there was something

 5   later on that arose or that there was some dispute later

 6   on. He didn't do that. All he said was at the time --

 7   and everyone knows they do due diligence in order to

 8   establish whether or not this is a deal they want to

 9   pursue and finalize. All he said was they did due

10   diligence and found everything in order, which is exactly

11   what was done, so there was nothing to -- they didn't make

12   any motion to preclude us or -- preclude Dennis from

13   offering that kind of evidence because it's a fact.

14   Now, with respect to your -- your limiting

15   question was "all you can do is ask if there was a

16   lawsuit." He went one step further, which included

17   allegations of the lawsuit and the basis of the lawsuit,

18   and the witness had no choice but to disagree with him,

19   which then in your Honor 's opinion opened the door

20   further, so it does nothing to bring this lawsuit into

21   this case. You've already ruled specifically that it's

22   not to be brought in.

23   As a result of bringing it in, you've allowed

24   him to ask questions about the government investigations,

25   which you, too, have already concluded is not relevant and

 1   should not be brought into this case. I mean that -- that

 2   by its very nature, whether they're allegations or not

 3   allegations, whether they denied it, it's poisoned the

 4   jury. It's poisoned the jury because they know -- they

 5   know things that have no relevance whatsoever to the case,

 6   and there's absolutely no way for us or Dennis to defend

 7   that, none. And now they know all this stuff about

 8   investigations and federal and state court investigations.

 9   That's prejudicial, and you allowed them to ask that

10   specific question, and as a result of that, there's no

11   way -- there's no way we can overcome it.

12   THE COURT: Mr. Hulslander --

13   Mr. HULSLANDER: So I join in his motion.

14   THE COURT: Mr. Hulslander, as I often tell my

15   kids and my grandkids, when somebody does something wrong

16   and they get punished for it, it's not the fault of the

17   punisher, and in this instance, I did rule that the

18   material was not relevant and not coming in. However, the

19   witness did open the door, and as a result, this material

20   came in. So, Mr. Leyendecker --

21   Mr. STEVENS: I think I'm next, your Honor.

22   THE COURT: Yes, Mr. Stevens.

23   Mr. STEVENS: Your Honor, first, I would like to

24   agree with and adopt the arguments of Mr. First and Mr.

25   Hulslander, but what this means to the individual dentists

1 is something greater and different. It's exactly what the

2 court has just stated, about telling your children and

3 grandchildren that the punisher of wrongdoing shouldn't be

4 criticized. The fact is that the dentists in this case,

5 who are not the persons involved in that lawsuit, have

6 been prejudiced in an irreparable way by having the jury

7 be told that there have been government investigations

8 into the precise areas where there will be claims to the

9 jury about these dentists having practiced in the case of

10 Jeremy Bohn --

11   THE COURT: I don't think they were told --

12   Mr. STEVENS: -- stainless steel crowns,

13 immobilizations and not allowing parents into the back.

14 This was read by Mr. Leyendecker, knowing full well that's

15 exactly what his case is about and knowing full well that

16 the jury would be unable to hear the fact that the

17 government thought that there was enough substance there

18 to investigate the company, and therefore the individual

19 dentists in this case should be tarred and feathered with

20 that sort of prejudice. This is why we sought a severance

21 in the first place; this is why we sought a sequencing

22 motion. We wanted the dentists to be tried on the

23 dentistry as it applies to this child, Jeremy Bohn, and

24 not as it applies to the way a company may or may not have

25 acted on a nationwide basis, so I would respectfully

1 submit that.

2   Mr. LEYENDECKER: Your Honor, I'm getting a lot

3   of credit for orchestrating something that I didn't

4   orchestrate. The plaintiffs opposes this relief that's

5   being sought. For the reasons the Court reflected, Mr.

6   DeRose did open the door, and as everyone in this

7   courtroom knows, and your Honor knows, I spent several

8   minutes trying to make sure I understood the breadth of

9   what this Court thought would be appropriate, and the very

10   first question I asked him, they sued you, they filed a

11   lawsuit against you? And all he had to say was they did,

12   and at that point in time, the Court's instructions were

13   to me to move on down the road and that's what I was

14   intending to do. But it wasn't enough for Mr. DeRose to

15   simply say, "yes, they did." At that point, he injected

16   words to the effect that it was all about some escrow, and

17   at that point he opened the door further to have a

18   discussion and be impeached that that lawsuit was all

19   about the escrow. And for the reasons your Honor

20   described in the rulings, it was appropriate to allow that

21   examination, so the plaintiffs oppose the relief being

22   sought.

23   THE COURT: All right. The Court is going to

24   deny the motion for a mistrial.

25   However, I will give a limiting instruction to

1   the jury about the use of that -- those allegations. I do

2   think that Mr. First did a good job on his recross of Mr.

3   DeRose to point out to the jury that, in fact, these were

4   merely allegations and so -- but I will give a limiting

5   instruction. Anything else?

6   Mr. STEVENS: Your Honor, in terms of the

7   alleged -- the governmental investigation, these separate

8   items, I would urge as strong as possible in the

9   instruction.

10   THE COURT: All right. Thank you.

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