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STATE OF NEW YORK FIFTH JUDICIAL DISTRICT

SUPREME COURT COUNTY OF ONONDAGA

\* \* \* \* \*

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

Plaintiffs,

- against -

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

Defendants.

\* \* \* \* \*

INDEX NO. 2011-2128  
RJI NO. 33-11-1413

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\* \* \* \* \*

Shantel Johnson, as Parent and Natural Guardian of Infant Kevin Butler; Veronica Robinson, as Parent and Natural Guardian of Infant Ariana Flores; Demita Garrett, as Parent and Natural Guardian of Infant I'Yana Garcia Santos; Kathryn Justice, as Parent and Natural Guardian of Infant Breyonna Howard; Elizabeth Lorraine, as Parent and Natural Guardian of Infant Shiloh Lorraine Jr.; Laporsha Shaw, as Parent and Natural Guardian of Infant Alexis Parker; Robert Ralston, as Parent and Natural Guardian of Infant Brandie Ralston; Katrice Marshall, as Parent and Natural Guardian of Infant Lesana Ross; Tiffany Henton, as Parent and Natural Guardian of Infant Corey Smith; Janet Taber, as Parent and Natural Guardian of Infant Jon Taber,

Plaintiffs,

- against -

FORBA Holdings, LLC n/k/a Church Street Health Management, LLC; FORBA NY, LLC; FORBA, LLC n/k/a LICCSAC, LLC; FORBA NY, LLC n/k/a LICCSAC NY LLC; DD Marketing, Inc.; DeRose Management, LLC; Small Smiles Dentistry of Rochester, LLC; Daniel E. DeRose; Michael A. DeRose, DDS; Edward J. DeRose, DDS; Adolph R. Padula, DDS; William A. Mueller, DDS; Michael W. Rounph; Shilpa Agadi, DDS; Koury Bonds, DDS; Ismatu Kamara, DDS, Keivan Zoufan, DDS, Kathleen Poleon, DDS; Sonny Khanna, DDS, Kim Pham, DDS; Doug Gardner, DDS; Gary Gusmerotti, DDS, Ellen Nam, DDS; and Lawana Fuquay, DDS,

Defendants.

\* \* \* \* \*

INDEX NO. 2011-7100  
RJI NO. 33-11-3717

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\* \* \* \* \*  
Timothy Angus, as Parent and Natural Guardian of Infant  
Jacob Angus; Jessalyn Purcell, as Parent and Natural  
Guardian of Infant Isaiah Berg; Brian Carter, as Parent and  
Natural Guardian of Infant Briana Carter; April Ferguson, as  
Parent and Natural Guardian of Infant Joseph Ferguson;  
Sherain Rivera, as Parent and Natural Guardian of Infant  
Shadaya Gilmore; Tonya Potter, as Parent and Natural  
Guardian of Infant Desirae Hager; Nancy Ward, as Legal  
Custodian of Infant Aalyiarose Labombard-Black; Nancy Ward,  
as Legal Custodian of Infant Manuel Laborde, Jr.; Jennifer  
Bacon, as Parent and Natural Guardian of Infant Ashley  
Parker; and Courtney Conrad, as Parent and Natural Guardian  
of Zakary Wilson,

Plaintiffs,

- against -

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

Defendants.

\* \* \* \* \*

INDEX NO. 2011-6084  
RJI NO. 33-11-3318

Motion

**HELD BEFORE:**

The Honorable John C. Cherundolo, Justice of the  
Supreme Court, in and for the Fifth Judicial  
District, State of New York, held at the Onondaga  
County Courthouse, Syracuse, New York, on  
November 17, 2011.

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**APPEARANCES :**

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Bernal  
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Reported By:

1 THE COURT: All right, I think we have Small  
2 Smiles next. My intern has a sign-up sheet, if anybody  
3 who is here on Small Smiles would sign that I'm going to  
4 take a five-minute recess then we'll get going.

5 (Court takes a recess.)

6 THE COURT: You may be seated. All right, this  
7 is the Small Smiles matters. And thus far we've got  
8 three motions, at least as I can tell. And it looks like  
9 we have Mr. Higgins and at least Mr. Witz have been the  
10 most vocal about these motions. Maybe you two want to  
11 come up at least to the counsel tables for now and --

12 MS. MARANGAS: Your Honor, if it please the  
13 court, Theresa Marangas, I'm going to argue the severance  
14 motion, do you want --

15 THE COURT: The first motion we're going to do  
16 is the recusal motion.

17 MS. MARANGAS: Thank you, Your Honor.

18 THE COURT: That's one that Mr. Witz has  
19 brought, and if anyone other than Mr. Higgins and  
20 Mr. Witz want to be heard, why don't you stand up and  
21 come on up and we can also have you heard, as well.

22 Okay, so with that let's go with the recusal  
23 motion. I do intend to keep this on the record, so if in  
24 your arguments you would mind using the lectern so that  
25 the court reporter can catch everything that's said, just

1 so that we're all on the same wavelength here. When and  
2 if a decision is made it might affect one or the other.

3 So Mr. Witz, you made the motion, I've read the  
4 papers, I fully understand your position, if you want to  
5 take the position at the lectern and tell me anymore that  
6 you want to tell me I'm more than happy to listen to it.

7 MR. WITZ: Thank you, Your Honor. Thomas M.  
8 Witz, law firm of Wilson Elser.

9 Your Honor, if this were any other ordinary  
10 run-of-the-mill case with Powers and Santola on the other  
11 side I wouldn't be standing before you asking you to  
12 recuse yourself. But this is not a standard  
13 run-of-the-mill ordinary case with Powers and Santola on  
14 the other side. This is a major litigation involving  
15 several, at this point we believe hundred plaintiffs,  
16 potential plaintiffs, with several dentists and companies  
17 here, and the media attention has been there over the  
18 years and strong. We have every reason to believe that  
19 that media attention is going to continue.

20 Given your close association with the Powers  
21 and Santola firm, I know it goes back a few years, but  
22 it's there in terms of acting as co-counsel with  
23 Mr. Higgins and some of his partners on prior cases when  
24 you were a member of the plaintiff's bar, and your  
25 formation of the New York State Trial Lawyers Association

1 along with John Powers.

2 THE COURT: So I should be recused from all New  
3 York State trial lawyer cases, all Academy trial lawyer  
4 cases?

5 MR. WITZ: No, I don't believe that.

6 THE COURT: All those dealing with Powers and  
7 Santola?

8 MR. WITZ: Not even that, Your Honor.

9 THE COURT: How about your firm?

10 MR. WITZ: Absolutely not.

11 THE COURT: Okay.

12 MR. WITZ: Absolutely not, Judge. I think --

13 THE COURT: Do you know how many cases I did  
14 for people in your firm?

15 MR. WITZ: I'm sure there are several. I'm  
16 sure there are several. And if it were like I said, were  
17 just the association, and it wasn't for the media  
18 attention we expect this case to have, I wouldn't be  
19 asking you to do this, Judge. I think we have an  
20 obligation to our clients to be sure that what is  
21 reported and what is reported is free of innuendo and  
22 free of scandal and that it's objective, and that's the  
23 best way for our clients to be sure, at least in the  
24 court of public opinion as they say, they're getting a  
25 fair shake.



1 THE COURT: At least you dropped the not  
2 qualified part that you gave to Judge Tormey, that I  
3 really didn't know anything about how to handle a case  
4 like this. So, you know, at least you dropped that in  
5 front of me, anyway.

6 MR. WITZ: Yes, I think after -- -

7 THE COURT: So it's all about the publicity and  
8 what might happen in the publicity? All right.

9 MR. WITZ: Exactly. That's it. And with that  
10 I'll pass the mic to Mr. Higgins.

11 THE COURT: All right. Mr. Higgins?

12 MR. HIGGINS: Patrick J. Higgins for the  
13 coordinated plaintiff. Judge, we oppose this motion to  
14 recuse. What I've just heard is that under any other  
15 case this would not be grounds for recusal. There is no  
16 mandatory grounds for recusal. It appears as if the  
17 Wilson Elser defendants are picking and choosing certain  
18 cases that they don't want this Court to basically appear  
19 on.

20 This Court was the IAS judge. Not the part  
21 one, the IAS judge for this case, the Varano case in  
22 Onondaga County in May and June, and Wilson Elser brought  
23 an order to show cause which this Court signed, and they  
24 didn't have any problem with this Court at that point.  
25 And obviously that was a ten plaintiff case at that time.

1           Then they went to the Litigation Coordination  
2 Panel, they tried to get this Court off the case by  
3 requesting Judge McCarthy and Judge Aulisi, and at that  
4 time they didn't have any problem with the publicity,  
5 they didn't have any problem with this Court's  
6 experience, they didn't have any problem with any  
7 association whatsoever, so we think this motion is  
8 basically based on a tactical decision or a thought on  
9 the part of the Wilson Elser defendants.

10           We also note that, you know, even after this,  
11 Judge Tormey was appointed by the LCP to be the  
12 coordinating justice, then they went to him to try to get  
13 you removed, as opposed to everyone knows in recusal  
14 motions you go right to the court. So they've tried to  
15 get this Court off this case twice by essentially going  
16 around and not doing what's appropriate.

17           You know, I don't think there's any real  
18 dispute that any relationship that is seven or eight  
19 years ago is not grounds for recusal, and this Court and  
20 the Court of Appeals says that it's up to this Court to  
21 make this determination. And, you know, the Trial  
22 Academy is filled with plaintiffs' attorneys, but it's  
23 also filled with defense attorneys and, you know, it's  
24 not unusual for either defense attorneys or plaintiffs'  
25 attorneys to lecture throughout the state and teach and

1 do things when they reach a certain level of skill, and  
2 this Court is obviously at that level, and I don't see  
3 anything wrong with that.

4 In terms of publicity, there may be some bad  
5 publicity, but that's because of what these people -- the  
6 allegations are what these people were doing. The 20/20  
7 case aired two years before the case even started.

8 So finally he just -- there was indication that  
9 I was co-counsel. We did try -- I did try one case in  
10 November of 2002 for the Cherundolo Bottar Law Firm, but  
11 I tried that case myself.

12 So we oppose this, we think it's based on  
13 tactical grounds, and we oppose it.

14 THE COURT: Mr. Witz, anything else?

15 MR. WITZ: No, Your Honor, other than to, you  
16 know, in terms of the order to show cause we presented to  
17 you earlier, that was for the severance motion. And  
18 Mr. Higgins' comment that we didn't object then, you  
19 know, you were the judge that was available to sign it,  
20 we had you sign it. It was for -- the LCP motions were  
21 made and what have you. So that's all I want to say  
22 about that and I'll defer to Your Honor at this point.

23 THE COURT: All right. With regard to the  
24 motion for recusal, I assume nobody else wants to be  
25 heard? I'm going to deny the motion to recuse. I've

1 looked at the Corradino law case, the Court of Appeals  
2 case, which is the lead cite by Mr. Witz. I've also  
3 looked at the judicial ethics opinions. The ironic thing  
4 is I would be able to be in front of my own firm, but in  
5 Mr. Witz' opinion not in front of the Powers and Santola  
6 firm. Two years is the waiting limit for a judge to deal  
7 with any conflicts he may have, and I am well into my,  
8 well, fifth year at this point, so I'm well beyond that.  
9 The cases you submitted are 2002 and 2003 cases. That's  
10 eight, nine years ago. I don't hardly see John Powers or  
11 Dan Santola except speaking events throughout the state,  
12 and I see hundreds of other lawyers at the same time. I  
13 have nothing to do with, financially other otherwise,  
14 with the Powers and Santola law firm, haven't for many,  
15 many years, and I see nothing wrong with my continuing  
16 here as the judge in this case, given the fact that it's  
17 now been sent to me to be the coordinating judge.

18 So I'm going to deny the motion. You can have  
19 an exception. Mr. Higgins, if you want to prepare an  
20 order on that I'd appreciate it.

21 MR. HIGGINS: We'll do so, Judge.

22 THE COURT: So that takes care of that. And  
23 with that I will continue as the judge on the case and go  
24 on to motion number two, which would be the, I believe  
25 the motion to have pro hac vice, admission of pro hac

1 vice of, as I count them, six Texas attorneys. My only  
2 question at this point is why so many, and maybe you can  
3 explain that to me, Mr. Higgins. Anybody else want to be  
4 heard on the pro hac vice? I understand that there is  
5 some agreement in place that nobody really objects. My  
6 only concern is why so many. Mr. Higgins?

7 MR. HIGGINS: And Judge, to answer that  
8 directly, we have thirty plaintiffs, and we have -- this  
9 is expected to be a very involved case, and basically we  
10 are intending to move the case as quickly as possible and  
11 use as many attorneys as we can, so we believe that this  
12 level of attorneys will allow the case to move quickly.  
13 If there are discovery issues we can basically, you know,  
14 have one group of Texas attorneys handle them, if another  
15 group can, or I along with the other attorneys can handle  
16 the depositions, and so we can make sure that the case  
17 does not linger and it goes forward.

18 You know, we also have -- there are thirty  
19 plaintiffs and their families, you know, there'll be a  
20 lot of records that have to be and have been gathered  
21 and, you know, so I think that the admission of these six  
22 attorneys would be appropriate.

23 I would also note that Judge Kramer has  
24 admitted four of those attorneys on May 3rd in the Angus  
25 action before it was consolidated and stayed, so really

1 in terms of what we're requesting, we're requesting that  
2 those four be admitted essentially again for the  
3 consolidated or coordinated actions, and that the  
4 additional two attorneys, Charles E. Dorr and James R.  
5 Moriarty be admitted, and this application is for all  
6 coordinated actions within the scope of the LCP order.

7 THE COURT: All right, thank you. Any comment,  
8 Mr. Witz, or --

9 MR. WITZ: No, Judge, we have no objection.

10 THE COURT: And I assume no one else does?  
11 That being the case, I will allow admission pro hac vice  
12 for P. Kevin Lyendecker, Esquire; Richard Frankel,  
13 Esquire; Hillary Green, Esquire; Stephen Hackerman,  
14 Esquire; Charles Dorr, Esquire; and James Moriarty,  
15 Esquire, to be admitted pro hac vice. If you want to  
16 submit the appropriate order, Mr. Higgins, I'll sign it.

17 MR. HIGGINS: I will do so, Judge.

18 THE COURT: All right, moving right along, two  
19 out of three. All right, number three, the notice of  
20 motion to sever, and I believe the day before yesterday  
21 we received an order to show cause. Who is going to talk  
22 about this from your side, Mr. Witz?

23 MR. WITZ: My partner, Theresa Marangas.

24 THE COURT: What's your name?

25 MS. MARANGAS: Theresa Marangas.

1 THE COURT: Ms. Marangas, why don't you tell me  
2 about this order to show cause that kind of got us by  
3 surprise two days ago. Maybe you can tell me about that.

4 MS. MARANGAS: There are three orders to show  
5 causes. The original one was brought in Schenectady  
6 County signed by Judge Kramer filed in the county clerk's  
7 office, and the papers went to Judge Kramer. Once the  
8 LCP order came out, the clerk in Schenectady was directed  
9 to transfer the file to this courthouse. They  
10 transferred the file. However, my understanding is that  
11 the papers may not have been retrieved from Judge Kramer  
12 for the order to show cause so those papers remained with  
13 Judge Kramer, unbeknownst to us, until this week. The  
14 Onondaga order to show cause was signed and filed with  
15 the County Clerk's Office. My understanding it's a  
16 little bit of a different procedure here, it should have  
17 been the Supreme Court Clerk's office not the County  
18 Clerk's Office, a technical oversight for which we  
19 apologize, Your Honor. The papers were express mailed to  
20 your chambers earlier this week.

21 The third order to show cause is the one in  
22 Monroe County, and that was --

23 (Court reporter interrupts.)

24 THE COURT: Yeah, you really should come up to  
25 the podium 'cause she needs to get this on the record.

1 MR. HIGGINS: Judge, while Ms. Marangas is  
2 doing that, Stephen Hackerman is going to be arguing the  
3 motion to sever, is it acceptable if he joins me at the  
4 counsel table?

5 THE COURT: Sure. All right. Go ahead,  
6 Ms. Marangas, I didn't mean to cut you off.

7 MS. MARANGAS: That's quite all right. The  
8 third order to show cause is the Monroe County one, and  
9 that was brought later on. Plaintiffs waited to actually  
10 file a suit in this case until relatively recently, and  
11 that order to show cause was done by my office on behalf  
12 of the individual defendants, dentists that we represent,  
13 which is sixteen individual dentists, to make sure that  
14 even though the LCP order directed that the three cases  
15 be brought before Your Honor, that to make sure there was  
16 consistency there was Monroe County also having a  
17 severance order to show cause pending. That order to  
18 show cause was signed, filed with the County Clerk's  
19 Office in that county.

20 All of this was brought to our attention  
21 earlier this week regarding whether the papers were  
22 properly filed, whether the papers were in chambers for  
23 Your Honor to consider.

24 We've spoken to Mr. Higgins, a letter was  
25 circulated to all parties yesterday, we've agreed to



1 stipulate that the Monroe County order to show cause, the  
2 decision on that by Your Honor would be binding on all  
3 three severance motions that are pending before you, so I  
4 consider it a moot issue as long as Your Honor is willing  
5 to entertain the motion this morning.

6 THE COURT: All right. You have no problem  
7 with that, Mr. Higgins?

8 MR. HIGGINS: I don't, Judge. I'd just like to  
9 say that the Monroe County motion to sever was brought by  
10 notice of motion, not order to show cause. Subject to  
11 that we so stipulate.

12 THE COURT: Okay.

13 MR. WITZ: Your Honor, with regard to the  
14 Monroe County motion, notice of motion, I can just add a  
15 little bit to what happened there. We did file the  
16 motion here in Onondaga under -- with the Monroe County  
17 caption, and that was sent back to us because the clerk  
18 here didn't understand why it was coming to them as  
19 opposed to Monroe, so we refiled it. And then I got a  
20 call from the clerk's office indicating that your  
21 chambers had instructed that we refile the motion, the  
22 notice of motion with the clerk, so we drafted a letter  
23 to the clerk explaining the situation, and that's why I  
24 think it came to you so late, 'cause it did get sent back  
25 with instructions to us to do something different so

1           that's what we did.

2                   THE COURT: Got it.

3                   MR. WITZ: I just wanted to add that.

4                   THE COURT: So I will entertain all motions for  
5 severance at this time, which I assume are pretty  
6 standard, the same across the board. But go ahead, I'm  
7 sure Ms. Marangas will correct me if I'm wrong in that  
8 understanding.

9                   MS. MARANGAS: No, Your Honor, you're correct,  
10 and good morning and thank you for entertaining our  
11 motions today, it's a privilege to be here. We represent  
12 sixteen individual --

13                   THE COURT: You should tell Mr. Witz to say  
14 that.

15                   MR. WITZ: For the record, Your Honor, it's a  
16 privilege to be here.

17                   THE COURT: Quite the greeting I got from him.

18                   MS. MARANGAS: Thank you, Your Honor. We  
19 represent sixteen individual dentists in the three  
20 different cases that have been brought in Upstate New  
21 York. Our individual dentists did not conceive or  
22 implement the alleged fraud scheme as owners and/or  
23 executors of FORBA, so there is not a common nucleus of  
24 facts that applies to our clients in this case, and  
25 severance at this time in the very early stage of the

1 case is imperative to prevent them being prejudiced in  
2 this action by going forward with discovery and potential  
3 trial when the action should be severed. It's  
4 appropriate based on prior case law in medical  
5 malpractice cases where cases are brought by a group of  
6 plaintiffs against an individual doctor and a hospital  
7 because they were all treated at that facility.  
8 Severance at an early stage is appropriate in this case  
9 because of the potential prejudicial effect.

10 Specifically in regard to plaintiffs' action  
11 meeting the threshold under CPLR Section 1002 for  
12 permissive joinder, these actions do not arise out of the  
13 same transaction, occurrence or series of occurrences.  
14 The treatment occurred on different dates and before  
15 different dentists. The treatment was according to each  
16 individual plaintiff's presentation at the clinic, and  
17 the dentist had different tenures at the clinic in some  
18 cases. Many of the cases they don't even overlap. The  
19 prejudicial effect, if I may speak on that for a moment,  
20 Your Honor, severance of the claims is critical when  
21 multiple and distinct claims are made and there is a  
22 resulting potential for jury confusion.

23 Now the argument could be made, rightly so, by  
24 some of the parties, severance belongs down the road.  
25 And in some circumstances that would be appropriate.

1           However, not in this circumstance and not for our  
2           individual dentists. The potential for jury confusion is  
3           clearly a significant issue. And we're not by any means  
4           waiving that issue by bringing it at this point in time.  
5           We're actually looking to avoid that.

6                         And the potential for judicial economy also  
7           applies to that same argument. There will be motions  
8           made in this case. There will be motions made by  
9           individual dentists against individual plaintiffs, and  
10          there will be discovery in this case that doesn't belong  
11          being meshed together. There can be some creative way to  
12          address discovery and save time for the parties while  
13          there is still a severance in place early on in the case.  
14          There's enough creative minds in this courtroom that I'm  
15          sure can sit down and agree to some joint discovery while  
16          still having severance in place.

17                        We're not looking to eliminate or say that  
18          judicial economy is not a factor in this case, it's  
19          always a factor, and we're here to convey that that  
20          factor, along with the potential for prejudice against  
21          our clients, warrants the severance at this early stage.

22                        Each plaintiff's claims of malpractice must be  
23          weighed on their own merits without the potential for  
24          compounding factors of multiple claims. Joinder at this  
25          stage will cause confusion. In fact, in one of the cases

1 from Monroe County the plaintiff, Brandie Ralston, was  
2 not treated by any of the five dentists that we represent  
3 in this case, yet she's brought allegations against them.

4 (Court reporter interrupts.)

5 MS. MARANGAS: I'll make the statement again,  
6 Your Honor, if I may. Specifically, Brandie Ralston has  
7 brought allegations against five defendants, individual  
8 dentists that we represent in the Monroe County case and,  
9 in fact, she never treated with any of them. Clearly  
10 joinder of those actions at this time is improper.

11 The failure to sever will require the parties  
12 to engage in complicated motion practice. It would  
13 clearly be simpler if the plaintiffs assert their  
14 specific claims against the specific dentists that they  
15 believe committed the alleged tortious acts.  
16 Anticipating potential trials in this case, there's no  
17 clear lines as to what discovery will then become  
18 admissible. There is going to be substantial motions in  
19 limine and substantial potential confusion to the jury  
20 and crossover if there is not severance at this time.  
21 The LCP order directs coordination, not joinder or  
22 consolidation. The scheduling of depositions in this  
23 case will be much more complicated if the cases remained  
24 joined.

25 For these reasons, and based on the cases cited

1 in our papers, we respectfully request that severance on  
2 behalf of the individual dentist to prevent the highly  
3 prejudicial fact at this early stage in the case is  
4 appropriate. Thank you, Your Honor.

5 THE COURT: Thank you. Mr. Higgins, or --

6 MR. HIGGINS: Yes, Stephen Hackerman is going  
7 to be arguing the opposition.

8 THE COURT: Mr. Hackerman?

9 MR. HACKERMAN: Thank you, Your Honor. I'm  
10 Steve Hackerman, law firm of Hackerman and Frankel. It's  
11 a pleasure to be here and to be in front of Your Honor.

12 THE COURT: Oh.

13 MR. HACKERMAN: You have a lovely courtroom.  
14 This is a grand place to work I would expect.

15 Let me -- fundamentally I've got two points.  
16 First, the cases are properly joined under the joinder  
17 rules; and second, the motion is really premature.

18 As to the first point, let me first say that  
19 Ms. Marangas, through the papers and this morning, has  
20 struggled to find some reason why there is prejudice or  
21 some problem in deferring, deciding the severance issue  
22 until after discovery. And what I hear is that while  
23 we've got confusion, and I know this is what they said in  
24 their papers, we've got confusion and disorder 'cause  
25 we've got plaintiffs who have sued dentists in this case,

1 the way it is in the complaint, who didn't treat them,  
2 and that is just not correct. The way the -- it's an  
3 incorrect reading of the complaint.

4 And I don't have the Monroe County complaint, I  
5 just brought one, but they're all basically done the same  
6 way. This is the Varano case, which is an exhibit to  
7 other pleading, and if you look at paragraph 155 in that  
8 Varano complaint, which we have a paragraph in the  
9 complaint for each of the ten plaintiffs, in each of the  
10 three cases, and in paragraph 155, that's Jeremy Bohn,  
11 that's the individual paragraph we've already -- Jeremy.  
12 And it says in paragraph 155 that he received treatment  
13 from obviously the Syracuse Clinic, but from dentist  
14 Bonds, Aman and Khan that was below the standard of care,  
15 and that he is asserting claims against the Syracuse  
16 Clinic and the force of defendants, but only against  
17 defendants, dentists Bonds, Aman and Khan. And in the  
18 amended complaint there are nine -- in Varano there are  
19 nine dentists, defendants, but he has specifically  
20 identified the dentists against which he is asserting  
21 claims. So the suggestion that there is some problem  
22 here that needs to be dealt with in order to avoid  
23 confusion and disorder because plaintiffs have asserted  
24 claims against dentists that didn't treat them is just  
25 incorrect because that's not happened.

1                   Now I don't have the -- I can't remember the  
2                   name of the plaintiff that was mentioned.

3                   VOICE: Brandie Ralston.

4                   MR. HACKERMAN: I don't have that one in front  
5                   of me because I didn't bring that complaint, but I'm  
6                   going to be surprised if it asserts claims against  
7                   dentists that didn't treat Brandie, because that's not  
8                   the way we drafted these complaints.

9                   With regard to the issue, the prematurity  
10                  issue, there really can't be any real issue here with  
11                  regard to whether these cases were properly joined. And  
12                  I say that because, number one, most of the defendants  
13                  didn't bring a motion to sever in the first place. And  
14                  secondly, the dentists who did in their reply papers and  
15                  their reply affirmation say that they are okay with joint  
16                  -- with consolidation of these cases for discovery. And  
17                  that's at paragraph four, I think, of Mr. Witz'  
18                  affirmation. Defendants also do not oppose consolidation  
19                  of these matters for discovery purposes. So if the cases  
20                  are appropriate for consolidation, which is fundamentally  
21                  what a joint joinder is in the way that we have filed the  
22                  case, that can only be because the cases satisfy the  
23                  joinder requirements, and there is just no objection to  
24                  these cases being treated on a consolidated basis, at  
25                  least through discovery. And if we're going to do that,



1 and I would submit to Your Honor there is plenty of good  
2 reason to do that, and I'll talk about that in a minute,  
3 but if it's going to be -- first of all, what's the point  
4 of severing these out and then consolidating them back.  
5 It doesn't seem to make any sense to me. And if the  
6 cases are properly consolidated for discovery, which they  
7 obviously are, since there is no objection to that then  
8 there is plenty of time to decide whether -- how the  
9 cases are going to be tried, whether they're going to be  
10 more than one case tried together, or whether they're  
11 going to be severed, to what extent they would be severed  
12 for trial purposes. And that is a decision that  
13 obviously is much better made after discovery, after the  
14 motion practice has focused the issues and developed the  
15 issues in a way that whether -- we'd like to think we can  
16 see it all right now. But I've been around this business  
17 a long time and it, unfortunately it sometimes changes,  
18 and exactly where we're going to be after we get done  
19 with discovery, what the evidence is going to show, what  
20 the motion practice is going to develop by that time, is  
21 clearly going to inform the Court as to how the cases  
22 should be tried, and at that time that's the proper time  
23 to be deciding a motion for severance as it relates to  
24 the trial.

25 And that's the sensible teaching of the Allen

1 case, which we cited in our memorandum, which is a Fourth  
2 Department 2004 case. It involved, I think, ninety-five  
3 plaintiffs, a toxic discharge from a plant allegedly  
4 causing injury to all ninety-five plaintiffs. And the  
5 Court did just what I just described, which was  
6 fundamentally conclude that the discovery, the  
7 development of the case, which shed great light on how  
8 the cases should be tried, and the motion to sever was  
9 premature and so dismissed it without prejudice to bring  
10 it back.

11 I'll say from our point of view, I really  
12 shouldn't speak from the Court's point of view and what  
13 you'd like to see before you decide a motion to sever for  
14 trial purposes, I'll say from our point of view it's hard  
15 for us to suggest how the cases ought to be tried until  
16 we see how the evidence and the law develops. And so  
17 we're reluctant even at this time to say that all the  
18 cases ought to be tried together, or ten of them ought to  
19 be tried together, or three of them, or whatever. We  
20 just don't feel like we're in a position to be making  
21 that suggestion from our side, and the development of the  
22 case will help immensely in that regard.

23 Now with regard briefly to just the question of  
24 whether the cases are properly joined, and I'll be -- in  
25 the first place I'll be brief on that because as I say,

1           there doesn't seem to me to be any objection to treating  
2           these cases on a consolidated basis through discovery,  
3           and that would only be the case if they should, if  
4           they're properly joined in the first place. On this  
5           issue we're kind of like ships passing in the night.  
6           There's a lot of argument by those who have brought the  
7           motion, but they don't address what our claims are. At  
8           no point do they make reference to the twenty-five  
9           paragraphs that start, I think, in paragraph 155 of our  
10          complaint in the Varano case. I'm sorry, paragraph -- I  
11          think it's paragraphs 56 through 80, which set forth the  
12          allegations that's central and fundamental to everyone of  
13          these plaintiffs' claims, and that is that the defendants  
14          engaged in an illegal profit scheme that damaged, the  
15          result of which was damage to each one of the plaintiffs.  
16          All of the thirty plaintiffs damaged by the same course  
17          of conduct. Damaged by the same illegal profit scheme.

18                        We've got twenty-five paragraphs, as I say,  
19          describing why we believe that, and it's in detail, and  
20          at no point do the defendants who brought this motion  
21          suggest why that's not -- the fact it does not satisfy  
22          the same occurrent status, the same series of occurrent  
23          status of common issues. Obviously the common issues  
24          revolve around the course of conduct, the illegal scheme.  
25          Did the defendants engage in an illegal scheme that

1           damaged each of the plaintiffs. That's the fundamental  
2           question. There would be all kinds of fact questions  
3           underlying that question, but that will be the ultimate  
4           question, obviously the common question.

5                     The common legal question would be, for  
6           example, if FORBA directed an illegal profit scheme that  
7           damaged each of these plaintiffs, are they legally  
8           responsible. That would be the legal question, and there  
9           would be a lot of, I'm sure, various reasons why the  
10          defendants might suggest that the answer to that is no.  
11          Obviously we say it's yes, but that's the common legal  
12          question that runs through all of these cases, and so the  
13          common questions of fact in law are going to be there,  
14          they predominate. So we think the cases are properly  
15          joined in the first place, they satisfy the rules. We've  
16          cited the cases in our -- in our brief.

17                    I will say, just briefly, as to the cases that  
18          the defendants have brought the motion have cited, many  
19          of those cases weren't properly joined in the first  
20          place. They didn't satisfy the joinder rules. None of  
21          those cases had any significant common issues that were  
22          identified by the Court, and certainly none of them were  
23          based, as this is, on a claim that the injury to each of  
24          the plaintiffs that were joined was caused by the same  
25          course of conduct, same illegal profit scheme as we have

1 here. There is no such claim in any of those cases.

2 And I would add on that score, Your Honor, that  
3 in none of those cases did the parties agree that the  
4 case was proper for consolidation, at least through the  
5 discovery stage. And as I say, the reason is there  
6 weren't any common questions in those cases, at least of  
7 any significance, and clearly that's not the case here.

8 It is our -- a fundamental claim that in our  
9 case that these defendants participated in this scheme,  
10 and that that scheme caused injury to every one of the  
11 plaintiffs in this case. So we think the motion should  
12 be denied.

13 THE COURT: All right, thank you.  
14 Ms. Marangas, anything else?

15 MS. MARANGAS: Yes, Your Honor.

16 THE COURT: Why don't you come on up.

17 MS. MARANGAS: The scheme that is referred to  
18 relates to Medicare fraud scheme, and that scheme  
19 involved FORBA, and not individual defendants. The  
20 individual defendants will, again, be highly prejudiced  
21 by this broad brush that's being applied to all the cases  
22 staying together at this time. The individual dentists  
23 are entitled to have the claims that plaintiff is seeking  
24 brought against them individually, and to know the  
25 allegations and then to refute those allegations on an

1 individual basis.

2 They plead malpractice in these cases. The  
3 malpractice actions are separate and distinct for each  
4 individual plaintiff. Based on that alone the cases  
5 should be severed. The fraud scheme relates to the  
6 owners of the clinics and the executives of the clinics  
7 who profited off of that.

8 The discovery in this case can go forward, as I  
9 said, with some coordination, as the LCP order directs,  
10 and as the parties can come to an agreement on, but there  
11 is no reason at this time not to sever the claims for the  
12 individual dentists to prevent that highly prejudicial  
13 effect of plaintiffs' broad based allegations just being  
14 asserted against all of my client's. Thank you, Your  
15 Honor.

16 THE COURT: All right, thank you.  
17 Mr. Hackerman, anything else?

18 MR. HACKERMAN: No, Your Honor.

19 THE COURT: All right. I've had a chance to  
20 review the papers submitted with regard to the motions  
21 and order to show cause to severance, asking for  
22 severance in this matter. Does anyone else want to be  
23 heard before I make a ruling on this?

24 MR. HULSLANDER: I wrote a letter --

25 THE COURT: Mr. Hulslander, if you're going to

1 talk why don't you come up to the podium, say whatever  
2 you'd like.

3 MR. HULSLANDER: I wrote a letter to the Court,  
4 Judge, and I stated my position. And actually, you know,  
5 frankly I agree with both parties here. It's premature  
6 to rule on this motion. I have no -- we've already got  
7 an order coordinating discovery, you're in charge of  
8 that, and it's way too early at this point to decide  
9 severance. Every time Ms. Marangas said well, you should  
10 decide it now, she talked about well, how it's going to  
11 be prejudicial in front of a jury. And frankly I agree  
12 that at some point we'll be making a motion for  
13 severance, and I agree that the case law supports  
14 severance, and I think ultimately the case should be  
15 severed. And it's about prejudice, not so much judicial  
16 economy, but I think that it's inappropriate at this  
17 stage to decide this motion, and if you do decide it I  
18 ask that you decide it without prejudice so that it can  
19 be renewed at the conclusion of discovery when it's the  
20 right time to bring it. Thank you.

21 THE COURT: Thank you. Anybody else?

22 MR. FIRST: Judge, Dennis First. I just want  
23 to state on behalf of my client I agree with what  
24 Mr. Hulslander said, that at this point the issue of  
25 severance is premature. It's not -- it's not

1           appropriately before the Court because the issues really  
2           haven't been developed to the point where the Court can  
3           decide on a rationale basis. I just want to state that  
4           for the record, that's our position.

5                   THE COURT: Anybody else?

6                   MR. HELMER: Yes, Your Honor.

7                   THE COURT: Mr. Helmer?

8                   MR. HELMER: I represent two of the individual  
9           defendants, Doctor Hanna and Kroner, and I agree with  
10          Mr. Hulslander and Mr. First's position. There may be --  
11          very well may be an appropriate time for this motion, but  
12          not now, and I would just like to reserve our rights to  
13          bring that motion at another time if necessary and  
14          appropriate, and not be prejudiced by the early bringing  
15          of the motion now. Thank you.

16                   THE COURT: Thank you. Anyone else? All  
17          right. Having heard the arguments and having reviewed  
18          the papers submitted to the Court, this Court is in  
19          agreement with the fact it's too early to decide ultimate  
20          issues of severance in this case. This case was sent to  
21          this Court by the Litigation Coordination Panel by order  
22          dated September 1, 2011. In front of the Litigation  
23          Coordination Panel this very issue was brought up, and as  
24          determined by them they made the determination that there  
25          are and/or could be common questions and issues of fact



1 and law which would require this Court to have all of the  
2 items coordinated together, and discovery proceed  
3 together. That order and decision distinctly talked  
4 about the fact that there was a disagreement at that  
5 time, and a request for severance at that time, and they  
6 requested it not be coordinated because of many of the  
7 issues that Ms. Marangas has set forth here, and that  
8 court decided that all cases should be coordinated.

9 I don't believe that at this time the cases  
10 should be severed. I think there are questions that are  
11 presented that really are not resolved, whether there are  
12 any issues which are not common issues of law and fact to  
13 be presented, and I think that is something that has to  
14 be deferred to a later time, and will be deferred to a  
15 later time during the course of discovery and thereafter.

16 This case has been referred to me for purposes  
17 of coordination, and at this point not trial, so we will  
18 pursue the coordination of the discovery in this case  
19 pursuant to the order of the Litigation Coordination  
20 Panel, and I will use that as a guide to go forward from  
21 here with regard to their decision and order and my role  
22 as the assigned coordinating justice in this case.

23 So the motion of the defendants as presented by  
24 Ms. Marangas here is denied, subject to renewal at a  
25 later time, at which point any and all other defendants

1 will have the right to make such motions and have such  
2 motions decided at a time after discovery is complete.

3 And Mr. Higgins, I'll ask you to prepare the  
4 appropriate order. I've asked you to do the other two,  
5 you might as well do three of them.

6 MR. HIGGINS: That's fine, we'll do so.

7 THE COURT: All right. Having dealt with the  
8 three motions and the orders to show cause, I think the  
9 next step here is to discuss, if we can, where we go from  
10 here.

11 One of the issues that I want to make sure now  
12 is that any stays that are or have been in effect are now  
13 lifted. And I will so order that and ask Mr. Higgins to  
14 include that in the order that we just discussed.

15 And having gone from that let's now go to the  
16 conference that we have proposed to have, and I guess my  
17 first question that I have, obviously we have a large  
18 number of attorneys here, Mr. Higgins, how many total  
19 plaintiffs' attorneys are there with regard to all of  
20 these cases?

21 MR. HIGGINS: There are six.

22 THE COURT: Okay. And I'm assuming that --

23 MR. HIGGINS: Seven.

24 THE COURT: Seven? Okay, is that a -- who's  
25 going to be the lead spokesperson for the plaintiffs?

1 MR. HIGGINS: Judge, I will be, and I'll be  
2 working with my Texas counsel.

3 THE COURT: With regard to all of the  
4 defendants, has there been any discussion about who would  
5 be lead spokesperson for the defendants, at least for  
6 purposes of these discussions?

7 MR. WITZ: There really hasn't, Your Honor. We  
8 did have a conference amongst defense counsel last week,  
9 and then again with the plaintiffs. At that time  
10 Mr. First had taken the lead.

11 MR. FIRST: I'd be happy to play that role  
12 certainly today. We hadn't talked about that --

13 THE COURT: Why don't you come on up,  
14 Mr. First, and join Mr. Witz at counsel table. And I  
15 guess what I'm going to ask the defendants to do,  
16 obviously not today, although maybe it's a good time with  
17 everybody here today, but maybe if you can, the two of  
18 you, Mr. Witz and Mr. First, and Ms. Marangas, I don't  
19 know whether you'd be part of this or not, but maybe you  
20 can pick maybe three other attorneys from the defense  
21 group to act as coordinating defense counsel in this  
22 matter so that when there are meetings that we need to  
23 deal with discovery and other issues that rather than  
24 having a lot of people we can have maybe six on each  
25 side, or maybe even less if we can pare it down to less,

1 to talk for the group as a whole, with the understanding  
2 that that coordinating panel would at least -- committee  
3 would at least communicate and get all of the input from  
4 all of the other counsel with regard to those items of  
5 discovery that we need to discuss. So if you maybe after  
6 today's meeting can sit down and if we can limit the  
7 numbers to five or six on each side so that if there are  
8 issues that we need to have counsel meet and confer about  
9 you can do that with the five or six of you together  
10 across from the table and coordinate the discovery issues  
11 that way without me being involved in each and every one  
12 of them, to the extent we can agree on those things that  
13 would be great, to the extent that we cannot I'm here  
14 willing to step in.

15 I think there's been some suggestion that we  
16 might want to meet at least monthly for purposes of that,  
17 I'm agreeable to do that. If we have five or six people  
18 on each side who want to come to those meetings so that  
19 we can make sure we're streamlined, we can do that.

20 But I think the first thing we need to do is  
21 form a committee on each side so that that committee can  
22 speak for the group, maybe have one or two spokespeople  
23 from that committee who will be speaking for the group as  
24 we go forward on some of the discovery issues, which may  
25 or may not be a lot of issues as we get forward into

1           them, but going that way.

2                       I'm looking at Mr. Higgins' letter of November  
3           15th, and while I do not intend to go fully point by  
4           point, one issue that we probably should talk about is  
5           the style of the case. Right now we have three separate  
6           huge captions. Any ideas on how to make that a little  
7           simpler so we don't have to deal with all that?

8                       MR. HIGGINS: May I, Judge?

9                       THE COURT: Go ahead, Mr. Higgins.

10                      MR. HIGGINS: Patrick J. Higgins for the  
11           coordinated plaintiffs. We have suggested that a single  
12           caption entitled In re Small Smiles Litigation, with the  
13           three index numbers that have been assigned by the  
14           Onondaga County clerk's office, would be a suitable  
15           caption. If there are later joined actions then we can  
16           just, you know, put a single line on a second page. This  
17           way we wouldn't have, you know, fifteen pages per  
18           caption. And I think we have suggested that and, you  
19           know, that's consistent with how these types of cases are  
20           handled in other jurisdictions.

21                      THE COURT: Any objection to that?

22                      MR. FIRST: I think there is no objection, and  
23           certainly in principle to having a designation In re is  
24           one way to do it. Et al. is another way to do it and  
25           have the, you know, the three actual actions, just adopt

1 maybe the first case. Either way is okay. I don't think  
2 there's any objection in principle to doing that.

3 THE COURT: All right, let's caption or style  
4 the case In re Small Smiles Litigation. That will  
5 include all claims that have been brought to date, and as  
6 additional claims come about, if there are any such  
7 additional claims, we'll deal with those on a case by  
8 case basis and either include them in the caption or not  
9 as the case may be so that, we'll deal with that.

10 The next item on Mr. Higgins' list was  
11 electronic service through LexisNexis. That may very  
12 well work among counsel, and if the lead groups of each  
13 decide to do that, with everybody on board, I don't care.  
14 Obviously that would be something that you can talk about  
15 amongst yourselves. Regretfully the Court is not set up,  
16 nor can it be set up, at least right now, to do that.  
17 While we have e-mail accessibility, regrettably we need  
18 to go through the appropriate channels of filing, and  
19 then filing in the clerk's office, and they'll get it  
20 delivered to us, and without that there is no way, at  
21 least as of right now, that our courts can agree to  
22 electronic filing. So we're not going to be able to do  
23 that as far as the court is concerned.

24 Now if there's agreement among counsel, and  
25 only if there's agreement among counsel, I think should

1       that go with counsel, and I'll leave that up to you  
2       gentlemen to discuss. If you want to try to do that  
3       right now we can do it now. If you want to defer that  
4       and talk about it, I think for the purposes of right now  
5       we ought to leave everything, that everything should be  
6       filed and served as usual, unless there is agreement  
7       otherwise. And my only concern is with the Court there  
8       can be no such agreement. We have to have documents  
9       filed with affidavits of service, and if you guys agree  
10      you can do it through electronic service. Mr. Higgins,  
11      you've got something to say?

12               MR. HIGGINS: Yes, please, Judge, and thank  
13      you. So what I would propose then, and I certainly  
14      understand that the Court has the things available to it,  
15      but what I would propose then is that if we can do the  
16      LexisNexis service system among counsel, which would  
17      allow us at least to rather than let's say serve a paper,  
18      we could electronically file, serve back and forth, and  
19      then we can file in the traditional sense with the Court.  
20      So from the Court's perspective everything would be the  
21      same as it always was, from the parties' perspective we  
22      would be essentially uploading and serving through e-mail  
23      and things of that nature, so that would probably save a  
24      lot of time and money, so I would ask if there's any  
25      objection to that.

1 MR. HULSLANDER: Yeah, there is an objection.

2 THE COURT: Hold on. One at a time.

3 Mr. Hulslander, why don't you come on up.

4 MR. HULSLANDER: Well --

5 THE COURT: Don't talk until you get up here,  
6 make sure we get you on the record.

7 MR. HULSLANDER: I don't really know much about  
8 LexisNexis, but from what I'm hearing, you know, I'm  
9 against it, and the reason I'm against it is I don't want  
10 to pay to file, I'm going to have to print everything  
11 anyway, the Court is -- obviously they're going to have  
12 to print it for the Court. At least at this point I  
13 could be convinced otherwise, but at this point I'm  
14 against it, I don't think it's a good idea, I think we  
15 ought to do it the old-fashioned way until they can  
16 convince me otherwise.

17 THE COURT: Mr. Helmer, you look like you want  
18 to say something.

19 MR. HELMER: I may be anticipating Mr. First,  
20 but I'm linked to the party, I was only formally retained  
21 last week by Doctors Kroner and Hanna, and I mentioned  
22 during the recent conference call amongst all counsel  
23 that I was concerned about fees because I have two  
24 uninsured defendants. I can get back to the parties  
25 here, and I understand the Court's concerns, I figured we



1 wouldn't be able to use this system for the Court, but if  
2 I have a couple weeks I can talk to my folks, but I am  
3 working with limited resources here, and if there is  
4 filings fees, I'm going to learn more about this, I told  
5 Mr. Frankel I would, this could be a bad thing. And, of  
6 course, we can probably work out informal ways to serve  
7 each other electronically, but at this time it's a  
8 problem, and I will address it soon.

9 THE COURT: All right, thanks. Mr. First?

10 MR. FIRST: Yes. I guess it comes down to is  
11 there an opt out on this. I mean does there have to be  
12 unanimity, or can defendants or -- it looks like the  
13 defendants, opt out and just do it the old fashioned way  
14 and others can opt in and do it by the Lexis method. I  
15 think that's what has to be decided, because there  
16 clearly is some opposition to doing that.

17 THE COURT: I think what we need to do here is  
18 to have those of you that want to do it through  
19 LexisNexis agree to it, and those of you that do not will  
20 do it the good old-fashioned paper way. So the one thing  
21 I do need to be clear on and however you agree it should  
22 be in writing, signed by the parties, so that we don't  
23 have any problems later on. And everything that's filed  
24 with the Court must be in writing and must be filed in  
25 the appropriate fashion.

1 MR. HULSLANDER: I'm not saying that I'm --  
2 that it's a forgone conclusion, but I've talked to  
3 Patrick and we may be able to work this out.

4 THE COURT: You guys talk about it, you figure  
5 it out, okay? So that takes care of that.

6 I guess the next thing I want to talk about is  
7 the current status of the pleadings and the status of  
8 where we're at. And I understand that the Summons and  
9 Complaints have all been served. Mr. Higgins, why don't  
10 you give me a status update of where we are, as far as  
11 whether there are any answers that have been served yet,  
12 and/or any -- I don't believe we've got any motions to  
13 dismiss yet, I think everything's kind of been stayed.  
14 So why don't you give me an update where we're at.

15 MR. HIGGINS: Yes, Judge. These actions  
16 started in April of 2011 with the Angus case first in  
17 Schenectady followed by the Varano case the same day,  
18 April 14th. And then Judge Kramer in Schenectady before  
19 the coordination stayed the answering time for any  
20 defendant to answer until the motions were -- to sever  
21 were decided. This Court executed a similar order, an  
22 identical order and those stays have now been lifted.  
23 The LCP order in June, in June basically stayed the  
24 entire case until the LCP order was done. That was  
25 entered on September 1st.

1           So what we have is a mixed bag basically. We  
2           have a few defendants have answered, okay, and they are  
3           -- that's out there. The remaining defendants have not  
4           answered. And that is presumably because of the stays  
5           that were in effect from Judge Kramer and this Court. So  
6           where we are now is we also filed an amended complaint on  
7           October 18th in the three actions, and that complaint was  
8           only to add a corporate practice of medicine factual  
9           statement, no new parties were added, no new causes of  
10          action were added. So basically the time to answer that  
11          has essentially been stayed also according to this  
12          Court's order.

13           So where we have it now is I think what we're  
14          looking to do with the defendants is to try to get a  
15          uniform time to answer. There are no motions to dismiss  
16          outstanding. We did get -- on June 27th we got a single  
17          piece of paper from a pro se defendant who had answered,  
18          which appears to be an amended answer but it also says,  
19          you know, motion's dismissed but nothing's been filed.  
20          So, you know, basically as far as we can tell there's no  
21          motions to dismiss have been made, so at this point there  
22          is no stay in effect.

23           THE COURT: Mr. First, why don't you give me  
24          your read of what we need to do from here.

25           MR. FIRST: Judge, I'm one of the ones who has

1 not answered. I suspect there are going to be quiet a  
2 few motions to dismiss made, to dismiss one or more of  
3 the causes of action.

4 THE COURT: I suspect from what I heard from  
5 Ms. Marangas there might be.

6 MR. FIRST: So I guess we need to establish a  
7 time frame for that. I think the real issue of dispute,  
8 I think that the parties, between the defendants and the  
9 plaintiffs, they've kind of agreed on a time frame, but  
10 there's a dispute over whether the CPLR stay of  
11 discovery, which applies automatically when there is a  
12 motion to dismiss, would apply. We have suggested giving  
13 the parties until January 13, 2010 (sic.) to answer, or  
14 move to dismiss, and apply the CPLR stay.

15 The reason why the CPLR stay is in there  
16 because presumably when motions to dismiss are decided  
17 the issues will be narrowed, maybe, or if they're not  
18 narrowed you know they're not narrowed. So it makes  
19 sense to apply the stay, and that's why it's in. I don't  
20 think, and I don't want to speak, of course, for Pat or  
21 the plaintiffs' group, but I don't think they really  
22 oppose that as a deadline, but they have expressed some  
23 opposition to the stay. So I think that's roughly where  
24 it's at.

25 THE COURT: Well, let me just say this,

1 Mr. Higgins, before you have anything else to say. I am  
2 a judge that doesn't like stays. And my experience is  
3 that there really isn't a lot of benefit to staying  
4 discovery or other issues while motions are pending,  
5 except in certain cases, which I will address by a  
6 one-by-one case. So I am not about to stay anything for  
7 motions to dismiss or motions for summary judgment  
8 generally, okay.

9 I'm a little bit concerned about the first  
10 series of motions here, because there may be some named  
11 defendants who may have an absolute right to get out, and  
12 maybe it would be a waste of time to go through some  
13 discovery. So I think what I intend to do is to set  
14 February 9th as a return date for any motions to dismiss.  
15 Working back from that, we should have at least ten days  
16 to get the final reply papers in, so that maybe we can  
17 work our way back into December from that to get a date  
18 when answers and/or motions to dismiss would be actually  
19 made. And what I'm thinking about is maybe sometime like  
20 December 16th, which would be a Friday, to have any and  
21 all answers and/or motions to dismiss, or other motions  
22 made, and that responses to those motions, given that  
23 we've got the holidays between that, be had by  
24 January 7th, and that any reply papers be put in by  
25 January 21st. That way we would be in the good position

1 to -- I'm sorry, wait a minute. Yeah, motion papers by  
2 December 16th, reply papers by -- I'm sorry, answering or  
3 responding papers by January 13th, which is a Friday, I  
4 had the wrong year, and then any reply papers by  
5 January 27th, which is a Friday, and then our motions  
6 will be heard on February 9th.

7 Okay, so for purposes then of answers and  
8 motions, let's get everything in by December 16th on  
9 those issues, okay? Anybody got any problem with that  
10 schedule? Looks like nobody has a problem. Okay, we'll  
11 go with that schedule.

12 Now, in between that there will be some  
13 discussions that I do want to have certainty that exist.  
14 And Mr. Higgins had indicated that there was a  
15 confidentiality order that's been circulated, or is being  
16 circulated, and there are issues that deal with a master  
17 discovery set of plaintiffs, and I think we already  
18 talked about that, maybe the coordinating committees can  
19 get together and discuss so that we can talk about it in  
20 January. The idea is going forward with discovery. What  
21 I'd like to do is to have you, first of all, choose your  
22 committees, meet and confer with each other by  
23 January 13th so that maybe during the week of  
24 January 23rd we can either have a telephone conference or  
25 an in-person conference with those persons on the

1 committees to see where we are as far as an agreed  
2 discovery schedule and time line. That doesn't mean  
3 we'll be getting actually into a whole lot of discovery  
4 between now and the motions to dismiss dates, at least we  
5 can set it up, everybody can either agree or not agree  
6 with it, we can figure out what to do it by the end of  
7 January, so you can report to me by January, I think it  
8 was the 23rd, the last date in January.

9 MR. WITZ: 27th.

10 THE COURT: 27th.

11 MR. WITZ: 27th.

12 THE COURT: So maybe you can get me a report in  
13 writing by then so that we can, on February 9th when we  
14 do have the arguments we can have everybody reconvene  
15 here, at least the lead committees on each side, and  
16 those of you that want to come in addition to that we can  
17 reconvene here, look at the proposed discovery schedule  
18 and determine where we need to go from there.

19 Mr. Higgins, you want to comment on that?

20 MR. HIGGINS: Yes, thank you, Judge. Just very  
21 briefly. We have been trying to do a lot of work  
22 basically before coming to the Court, just understanding  
23 that that's our joint task. As far as I know we do have  
24 -- we have made the change to the stipulated  
25 confidentiality order, and as far as I know, and I

1 appreciate anyone would tell me if I'm wrong, I believe  
2 we do have an agreement on the confidentiality order, and  
3 assuming that's correct I would like to at least submit  
4 that on notice for the Court since we have -- we had a  
5 conference call, we requested -- we had a large  
6 discussion about it and there was a request for one  
7 change to be made, we made that change, and so I think we  
8 have made some progress on that issue.

9 THE COURT: Great.

10 MR. HIGGINS: And so I would just like to  
11 submit that on notice if I could.

12 THE COURT: Why don't you submit it to me on  
13 notice with everybody else, if anybody has objections to  
14 that let me know within ten days from the time you get  
15 it. Otherwise I'll sign it and we'll be ready to go.

16 MR. HIGGINS: The other thing is we, as we sit  
17 here now there is no stay. The motions to dismiss have  
18 not been made, so obviously from the plaintiffs'  
19 standpoint we want to try to move the case as quickly as  
20 we can and efficiently all the while obviously  
21 recognizing the rights of the defendants to, you know,  
22 represent their clients. We've served Arons  
23 authorizations, we've served all of the record  
24 authorizations for all the treating dentists, all  
25 treating physicians for these children within ten days.



1 We're prepared to go forward with depositions five days a  
2 week on the double track, whenever this Court's ready, so  
3 we can -- we're ready to do that.

4 And in terms of the stay if somebody -- there  
5 is true there is a stay under 3214, whatever, 3211, we  
6 would like to basically do as much work as we can on the  
7 case while these motions are pending, so we would like to  
8 see if we can serve, continue serving our discovery, you  
9 know, putting our case forward and see if we could get  
10 some type of an agreement from the defendants beforehand,  
11 before January 27th as to what they want from us so that  
12 we can start giving it to them. In other words, there is  
13 an agreement as to joint discovery on damages, so we'd  
14 like to start getting that out now. I don't think we  
15 have to wait till February. And, you know, if we're  
16 wrong and the case goes away, that's our nickel, it's not  
17 anybody else's nickel.

18 The other thing is that with respect to New  
19 FORBA, it has transmitted to the Department of Justice,  
20 we understand, approximately two-and-a-half million pages  
21 of searchable data that is ready to be searched. It's on  
22 120 disks, and we have served our discovery response and  
23 specifically asked for that. It's gonna take us time to  
24 go through that and set up a search engine through that,  
25 so we would like, at this time, to see if we could get

1       those disks and at least start the process of working  
2       through and give us something to do in the next, you  
3       know, two or three months so we don't slow down the case.  
4       I don't think they would be an objection to relevance. I  
5       can't speak for Mr. Hulslander, and I certainly wouldn't  
6       presume to do so. But I would like at least to see if we  
7       could get that issue before the Court and maybe in the  
8       next fifteen or twenty days, and then at least as to that  
9       issue that would allow us to, you know, kind of ramp up  
10      and get going so that come February we've been able to  
11      move the case forward. And that's, you know, I'm just  
12      asking that we be allowed to keep moving our case forward  
13      with our discovery, that a joint -- that a joint damages  
14      at least be given to us so we can agree on that, keep  
15      moving our case and get ready to start double tracking  
16      depositions as soon as possible.

17                   MR. HORSFALL: Andrew Horsfall. Good morning,  
18      Your Honor. I had a conversation last week with  
19      Mr. Hackerman about this discovery. It was produced in a  
20      prior action down in Nashville, and my understanding is  
21      having reviewed the notice to produce discovery requests  
22      from the plaintiffs in October, we put the ball in the  
23      court of our clients to determine whether or not they're  
24      willing to consent to turn over all of that electronic  
25      data in response to the discovery requests which were

1 served in October. We don't see a problem, Kevin and I,  
2 in moving discovery forward. We want this thing to  
3 continue moving. We advised our clients of that, we're  
4 just waiting for an answer from them if they will consent  
5 to releasing that data in response to the October  
6 demands. So for now we're just waiting to hear back from  
7 them, so.

8 THE COURT: Well, what's your time schedule to  
9 hear back?

10 MR. HORSFALL: I would say a week to ten days.

11 THE COURT: All right. He's expecting to hear  
12 back within ten days, Mr. Higgins. If that is an  
13 agreement that they'll do that, let me know. If there is  
14 no agreement on that then let me know as well and we'll  
15 have a conference call immediately at that time and we'll  
16 figure out what to do about that.

17 Mr. Higgins, the other issues about getting the  
18 defendants whatever they would want from the plaintiffs,  
19 is there some sort of a discovery tool that can be used  
20 to, I would say in the Bill of Particulars but that may  
21 not be the one to do, is there some kind of a document or  
22 some kind of a standard request or some kind of a thing  
23 that can be made that might deal with each case here that  
24 might be able to be responded to that would satisfy his  
25 request?

1 MR. FIRST: We had a conference call with the  
2 plaintiffs and the defendants among themselves and we  
3 addressed this issue to some extent. I think there was  
4 consensus, and I'm reluctant to speak for the group  
5 because I'm not authorized to, but I think there was some  
6 consensus that on the issue of damages, injury and the  
7 like we could come up with some kind of uniform demand in  
8 terms of a Bill of Particulars and any discovery type  
9 documents that might be relevant to those issues.

10 On the other hand, because of the nature of the  
11 defendants, I mean ones -- there's New FORBA, Old FORBA  
12 and individual defendants, I think it would be very  
13 difficult to come up with a uniform set of demands that  
14 relate to liability. So in response to your question,  
15 Your Honor, I think we can come up with something on  
16 injury and damages, but not readily on the individual  
17 liabilities, potential liabilities.

18 THE COURT: All right. So if we are going to  
19 have answers and motions by December 16th, why don't we  
20 also have such demands, discovery demands as might be  
21 wanting to be served by the defendants, and we can  
22 either, you know, again, I'm going to leave it up to  
23 those of you that might be leading the committee, either  
24 agree on certain discovery tools or a group of people  
25 and/or do it individually if we don't have unanimity of

1 agreement. But let's, whatever we do let's get it done,  
2 or at least get the documents served by December 16th  
3 upon the plaintiffs.

4 MR. FIRST: The joint documents by December?

5 THE COURT: If there's agreement. And you've  
6 got a whole bunch of people here today, maybe you can  
7 talk to those who may be interested in joining into a  
8 joint document that can be used for each case, those that  
9 opt out. As Mr. Horsfall may indicate they might want to  
10 opt out, they can do their own. But whether you do or  
11 not do your own by December 16th, let's get something  
12 served on December 16th so that they can go about the  
13 process of getting you what you need. In the meantime  
14 maybe you can continue discussions between now and then  
15 of what you need so they can get you authorizations or  
16 Arons authorizations or whatever, they can get them to  
17 you so that you'll have all of that and you can be  
18 amassing that information between now and February.

19 MR. WITZ: Is that going to deter further  
20 demands down the road, Judge?

21 THE COURT: No. Get the initial demands out  
22 and initial demands started so you can at least get an  
23 idea on each case what the claims are from the liability  
24 standpoint and from the damage standpoint.

25 MR. HIGGINS: And Judge, just -- may I ask that

1 with respect to -- may I ask that if there's not going to  
2 be at least a joint agreement on damages, because I think  
3 every -- there has to be uniformity on damages 'cause  
4 you've got individual children with certain damages, so I  
5 would like to be able to serve an individual discovery  
6 tool on damages on consent of the defendants, so I will  
7 work with them, you know, before that to see if we can do  
8 that. I understand about liability. If we're unable to  
9 work something out at least on damages, can we at least  
10 request a conference on that before the 16th?

11 THE COURT: Sure. We can do something by  
12 telephone?

13 MR. HIGGINS: Yes, by telephone.

14 THE COURT: I mean I'm not going to have thirty  
15 people on a telephone call. Two from the plaintiffs'  
16 side and two from the defense side, and we can talk about  
17 those issues.

18 MR. HIGGINS: The other thing is we have served  
19 discovery to the defendants, and that is that time is  
20 running, so we would ask if, you know, if we could get  
21 responses to that discovery by December 16th, the same  
22 date, 'cause that was served back in October, so I think  
23 that those answers are either due or shortly due.

24 THE COURT: Well, I have no idea what was  
25 served or not.

1 MR. FIRST: I would object -- I'm sorry, Your  
2 Honor, I cut you off.

3 THE COURT: Go ahead, Mr. First.

4 MR. FIRST: I would object to that. You know,  
5 it's rather extensive discovery, the case has been  
6 stayed. We're looking to, as Your Honor had set forth,  
7 to set a discovery schedule for January 23rd, and I think  
8 that that's when that should be addressed, when those  
9 discovery responses are due. I think we have a full  
10 plate certainly before that.

11 THE COURT: Well, the one thing I do want to  
12 deal with are the, whatever disks there are from New  
13 FORBA, let's get those. If they're produceable we'll get  
14 them produced, if they're not let's talk about it in ten  
15 days, and at least that will jump start whatever we need  
16 to jump start here.

17 As far as anything else, Mr. Higgins, I don't  
18 even know what you're talking about because I haven't  
19 seen the discovery request yet, but if we're going to  
20 have answers and motions due by the 16th, I think it's a  
21 little premature to get any other whole discovery done.  
22 I think that that's something that you might want to meet  
23 and confer with lead counsel for the defense here and  
24 figure out as part of the discovery schedule how that's  
25 going to work.

1 MR. HIGGINS: Okay.

2 THE COURT: I'm more than willing to get  
3 involved in that. I think that to have them do anything  
4 by December 16th is premature 'cause, you know, we'll  
5 just have their answers and motions to dismiss, 3211  
6 motions by then, so I certainly would recommend that that  
7 conversation be ongoing about discovery so that we can  
8 identify the issues and deal with the issues as we go,  
9 and hopefully we can do that with a limited number of  
10 people as opposed to the whole crew.

11 So we have some preliminary time schedules that  
12 we have set up here. What other issues do we need to  
13 talk about? I think it might be premature as far as  
14 trying to pick representative cases, but that's certainly  
15 something we can put on the plate at some point.

16 Anything else, Mr. Higgins, you want to talk  
17 about here?

18 MR. HIGGINS: Yes, just briefly, Judge. Some  
19 of the defendants, a small number, have served discovery  
20 to us, and I just want to clarify that that time for us  
21 to start answering that would be December 16th, so in  
22 other words we might be able to get a joint -- something  
23 joint. We don't want to answer something then find out  
24 we can do it jointly. It's a lot less time consuming for  
25 us.



1 THE COURT: Let's see if we get agreement on  
2 any previous discovery that's been served. Let's see if  
3 we can get agreement to package that up as part of the  
4 whole here or if not at least we'll know not by the 16th  
5 of December.

6 MR. HIGGINS: Thank you, Judge.

7 THE COURT: Anything else, Mr. Higgins, that we  
8 need to deal with today?

9 MR. HIGGINS: No.

10 THE COURT: Mr. Witz or Mr. First or  
11 Ms. Marangas or anyone else?

12 MR. WITZ: No, sir.

13 MR. FIRST: No, Your Honor.

14 MS. MARANGAS: No, Your Honor.

15 MR. FIRST: Thank you.

16 THE COURT: All right, Mr. Higgins, as long as  
17 you're doing the orders you want to attach a copy of this  
18 transcript and put an order together, at least for the  
19 preliminary order here, and we will have a report on the  
20 discovery process by January 27th, did we say?

21 MR. HIGGINS: Yes, Judge.

22 THE COURT: 27th, and then we will have our  
23 next conference on February 9th, at the same time, or  
24 just after we argue the motions to dismiss. And  
25 everybody's familiar with that schedule.

1 MR. HIGGINS: Judge, just so I'm clear, the  
2 motions will be heard on oral argument on that date?

3 THE COURT: I'll be here for oral argument for  
4 whoever wants to argue them orally. If you don't that's  
5 okay too. I think you might have thought by now I'm a  
6 guy who likes to make decisions quickly from the bench.  
7 I like to do my homework and get it done before I come  
8 into court. So that's why we're having the schedule set  
9 up. I no doubt will have it ready, whatever I need to  
10 have ready by the 9th, and we'll listen to oral  
11 arguments. I'm not saying that oral arguments are not  
12 worth it. Quite frankly many times I've changed my  
13 decisions because of oral arguments. But I will  
14 certainly listen to the oral arguments and make those  
15 judgments accordingly. So it's up to you whether you  
16 want to argue or not.

17 MR. WITZ: A time February 9th?

18 THE COURT: That's a motion date, why don't we  
19 set it for eleven o'clock just like we did today. We'll  
20 get those from downstate to be available to be here, and  
21 give you time to get here as well, so eleven o'clock on  
22 that date.

23 And gentlemen, go forward, work together, get  
24 this thing packaged up so you know what you're going to  
25 be looking for and how you're going to look for it. I

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will look forward to hearing back from you. If there's any issues or anything else we need to talk about let us know.

MR. WITZ: Thank you.

MS. MARANGAS: Thank you.

THE COURT: Let's see if we can get through it.

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C E R T I F I C A T E

I, **JUDY TRACY**, RMR, Official Senior Court Reporter and Notary Public in and for Fifth Judicial District, State of New York, **DO HEREBY CERTIFY** that the foregoing is certified to be a true, complete, and accurate transcript of my stenographic notes taken in the matter of In re Simple Smiles, recorded on the 17th day of November, 2011, before Honorable John C. Cherundolo, acting in and for the County of Onondaga, State of New York.

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JUDY TRACY, RMR

Dated: November 18, 2011