

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF ONONDAGA: CIVIL PART

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

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6 KELLY VARANO, As Parent and Natural Guardian
Of Infant JEREMY BOHN,

7

Plaintiffs,

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vs.

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10 FORBA HOLDINGS, LLC, FORBA, LLC n/k/a
LICSAC, LLC; DD MARKETING, INC.;
SMALL SMILES DENTISTRY, PLLC.

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...

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Including: NAVEED AMAN, DDS; KOURY
BONDS, DDS; YAQOOB KHAN, DDS,

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Defendants.

14

Jury Trial

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September 27, 2013

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Onondaga County Courthouse
401 Montgomery Street
Syracuse, New York 13202

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21 Before:

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HONORABLE DEBORAH KARALUNAS
Supreme Court Justice

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And a Jury

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1 (October 9, 2013, Judge Karalunas, trial continuation)

2

3 THE COURT: Okay. So there was the request by
4 the jurors for a copy of the juror charge and Mr.
5 Higgins -- I asked counsel yesterday to supply me any
6 information about whether or not I should do that, but the
7 only person I heard from was Mr. Higgins. He sent me two
8 cases last evening. And so according to 22 NYCRR Section
9 220.11, I can give the charge to the jury, but I am going
10 to give all parties an opportunity to be heard on that
11 issue. So... I'll start with plaintiff's counsel.

12 Mr. LEYENDECKER: We're in favor of giving the
13 charge to the jury. We have no objection.

14 THE COURT: Mr. First?

15 Mr. FIRST: I know under that ruling you decided
16 you have discretion to do it. I think the usual practice
17 in New York is not to do it. I think there's a fear that
18 the jury may focus on limited portions of it rather than
19 the overall, you know, charge, and that's been expressed
20 by a number of associations including the New York Bar
21 Association, but I understand your Honor has discretion
22 and I would ask that you exercise your discretion not to
23 do it.

24 Mr. McPHILLIAMY: I adopt the arguments of Mr.
25 First and would add that initially the jury wanted the

1 entire -- entirety of the charge but later on it was
2 suffice if we just sent them back those portions of the
3 charge regarding the specific cause of action, G.B.L.,
4 battery, malpractice, negligence and negligence per se.

5 THE COURT: So is it your position that I can
6 send a portion of the charge back or the entire charge
7 back?

8 Mr. McPHILLIAMY: If it will suffice that they
9 will take a portion of the charge back, then I would have
10 no objection to that, but again you can use your
11 discretion on that.

12 THE COURT: You say you won't have any objection
13 to that. That's kind of a half answer. Is that what
14 you're asking me to do or would your preference be the
15 whole charge goes back, because I want to be heard from
16 everybody on that issue.

17 Mr. FIRST: Whole charge. If it's going to go
18 back, that would be the preference.

19 Mr. McPHILLIAMY: Whole charge.

20 Mr. NOWOTNY: The dentists will join Old FORBA's
21 position.

22 Mr. LEYENDECKER: I would point out that the
23 very first request the jury made was almost immediately,
24 "Can you give us the instructions you just read?" And
25 only thereafter were they clawing and scratching, "Can I

1 have this?" I think they want the whole charge; it's
2 proper to do that, and I think the whole charge should go
3 back.

4 THE COURT: All right. The Court has provided
5 counsel with an opportunity to be heard on whether or not
6 the charge should be submitted to the jury, and Mr.
7 Leyendecker is correct that before the jury even exited
8 the room yesterday, they requested a copy of the jury
9 charge, although they didn't use that word, and less than
10 an hour later, came in with a written note requesting the
11 charge.

12 Thereafter we brought the jurors into the
13 courtroom and explained that we weren't going to give them
14 the written charge but that it could be read back and so
15 the jurors asked for a copy of -- or the charge to be read
16 back, piecemeal. They wanted to deal first with G.B.L.
17 349. As the court reporter read back the charge, one of
18 the jurors wanted to write the charge down, word by word
19 as she read that.

20 The Court is concerned that in doing that, the
21 juror who was writing down the charge may inaccurately
22 write down what the Court reporter is saying and therefore
23 the Court does find that it is appropriate to send the
24 charge back and will do so.

25 I have made a copy of the charge. I'm going to

1 have that marked as a Court exhibit and it will be
2 preserved with the file of the Clerk of the Court at the
3 close of trial.

4 Mr. FIRST: Judge, may I ask are you doing the
5 transcript of the charge?

6 THE COURT: It's the transcript, completed copy
7 that Val completed last evening, or this morning; I'm not
8 sure. I saw it this morning. Okay.

9 All right. I'm going to have the jurors brought
10 in and tell them we have the charge for them.

11 (Court's Exhibit 11 marked for identification
12 and received in evidence)

13

14 (Whereupon, the jury was brought into the
15 courtroom)

16 THE COURT: Good morning. The Court has marked
17 as Court Exhibit 11 a copy of the transcript of what I
18 said yesterday for the jury charge, and I am going to
19 submit that to you to use during your deliberations in
20 your discretion in light of your request.

21 Thank you very much.

22 JURY: Thank you.

23 (Whereupon, the jury was excused from the
24 courtroom)

25 THE COURT: Okay. Anything else to address?

1 Mr. FIRST: Can we make the motions now?

2 THE COURT: That sounds like a great idea.

3 Mr. FIRST: May it please the Court.

4 Judge, as you know, you've reserved our rights,
5 both after the plaintiffs finished their proof and also
6 after the proof was closed, to make appropriate motions to
7 dismiss and move for a directed verdict and that's what I
8 intend to do now.

9 I'm going to first move against the negligence
10 per se cause of action, which actually isn't a cause of
11 action; it's a part of the negligence claim. At this
12 juncture, though, we know the jury is out and the Court
13 has directed a finding of liability as to that provision,
14 Section 12 -- I think I wrote it down wrong, 1203, is it?

15 THE COURT: 1203.

16 Mr. FIRST: Yes, I wrote 1230. 1203 of the
17 Limited Liability Company Law. We respectfully submit
18 that should have been dismissed. We raised it in the
19 motions for summary judgment. It's a licensing statute.
20 It does not create a private right of action which the
21 Court basically did in this case, allowed it to proceed as
22 a private right of action brought by Jeremy Bohn. It
23 doesn't set a standard of care, in the context of a
24 negligence case, and we submit that in addition, it was
25 insufficient proof of its breach, and the claim action

1 should have been dismissed, and certainly there was not
2 evidence to support a finding as a matter of law that
3 there was a violation of the statute.

4 THE COURT: Can you tell me what evidence there
5 was that's in the record that did not -- that contradicted
6 that?

7 Mr. FIRST: Contradicted your finding?

8 THE COURT: Yes.

9 Mr. FIRST: Well, the evidence in the record
10 was -- well, let me start with what the statute says. The
11 statute says in order to own an L.L.C., a professional
12 L.L.C. in New York, you have to be a licensed dentist in
13 the State of New York. The proof in the record showed
14 that Dr. Padula was a licensed -- uncontested -- was a
15 licensed dentist in the State of New York. That's all the
16 statute says. There was compliance with that statute.

17 THE COURT: Did you read -- I think it's the
18 State Farm case; I don't have it with me. I don't even
19 have any of my notes with me this morning, but there was a
20 case, I think the State Farm case, that -- really where
21 the Court addressed that issue.

22 Mr. FIRST: I don't think the Court really
23 addressed it. That was an insurance case where the
24 question was whether State Farm had to pay no-fault
25 benefits, due to treatment, to a particular entity that

1 formed fraudulently. That didn't really address the issue
2 of whether it was fraudulent; they just kind of noted in
3 passing that determination. But that's not really the
4 holding of the case. The holding of the case --

5 THE COURT: Tell me what the holding of the case
6 was.

7 Mr. FIRST: The holding of the case was that
8 State Farm didn't have to pay it. But this is much
9 different --

10 THE COURT: They didn't have to pay because of
11 what --

12 Mr. FIRST: Because the company was not valid;
13 it was fraudulent.

14 THE COURT: Correct. And basically with the
15 same proof that we have here.

16 Mr. FIRST: No, much different actually, because
17 Dr. Padula, not only was he a licensed dentist, he had an
18 interest in the management company as well. As he
19 testified, he did share in whatever profits they may have
20 had from the clinic; he did share --

21 THE COURT: That was not his testimony.
22 Indirectly I suppose he did. Indirectly, anybody who gets
23 money is sharing in the profits, I guess; they are sharing
24 in the money that comes into that business.

25 Mr. FIRST: But that's what he did. He did

1 share in the profits and he did --

2 THE COURT: He was paid a salary, right?

3 Mr. FIRST: Right, and he was -- your Honor has
4 held that FORBA was actually the owner. I assume that's
5 based on control. He was part of that as well. So it --
6 I would respectfully submit that at worst that creates
7 questions of fact on the issue. That's really for the
8 jury to decide.

9 THE COURT: Okay.

10 Mr. FIRST: That's what we've said.

11 And I would just also like the record to
12 reflect, since we're standing here at this juncture after
13 the jury is already out, that the Court's decision was
14 made in the evening on the night before it went to the
15 jury on a sua sponte basis. There was no request for that
16 relief. I mean plaintiffs obviously had that claim, but
17 there was no specific request for a directed verdict;
18 whether your Honor ruled in that fashion, it really --
19 speaking personally, it came out of the blue to me that
20 your Honor ruled that way, and I think that that has to be
21 noted for the record.

22 Obviously we excepted to that ruling in the
23 Court's charge, as well as to the jury sheet, and we
24 except to that again now.

25 As to the other causes of action, the G.B.L.,

1 Section 349, we would respectfully submit that there was
2 insufficient proof of any violation of the statute; there
3 was insufficient proof of a consumer-oriented conduct that
4 was materially misleading. And, in addition, there was
5 insufficient proof that there was any injury: All
6 elements that are required under that statute.

7 With respect to the battery, I would once again
8 submit that there was insufficient proof of offensive
9 bodily contact without consent. To the contrary, the
10 proof indicated that Dr. Bonds went through a process of
11 consent that I would respectfully submit establishes that
12 a battery could not have occurred. Also there was no
13 proof of any injury.

14 With respect to the negligence, I would
15 respectfully submit that there was insufficient proof of
16 lack of reasonable care and that there was insufficient
17 proof of any injury, and for all those reasons, I would
18 move to dismiss the complaint and move for a directed
19 verdict in favor of my clients.

20 THE COURT: Thank you, Mr. First.

21 Mr. FIRST: Thank you.

22 THE COURT: Do we have New FORBA? On behalf of
23 New FORBA?

24 Mr. McPHILLIAMY: Thank you. Good morning, your
25 Honor.

1 THE COURT: Good morning.

2 Mr. McPHILLIAMY: On behalf of New FORBA, at
3 this point we would like to make a motion for a directed
4 verdict, that all causes of action be dismissed as the
5 plaintiff has not submitted either adequate or sufficient
6 proof to make it a prima facie case as to any and all of
7 the remaining causes of action in this matter, and in the
8 sake of judicial economy, I adopt those arguments made by
9 counsel for old FORBA.

10 But more specifically, we seek to have the claim
11 for -- sounding of malpractice dismissed. Dr. Slack came
12 to court on October 1st, 2013. Her testimony was
13 initiated and completed on that date. Despite the fact
14 that Dr. Slack gave approximately half a dozen opinion
15 questions of departure from accepted dental practice, she
16 did not give any testimony, was not asked any questions
17 with regard to those departures being a proximate cause of
18 any type of injury or damage to Jeremy.

19 The required proof -- the required elements of
20 proof in a dental malpractice actions are, one, that the
21 deviation or departure -- that there was a deviation or
22 departure from good, accepted dental practice and, number
23 two, that there has to be evidence that such departure was
24 the proximate cause of injury or damage, and the plaintiff
25 must establish the requisite nexus between the malpractice

1 alleged committed by the defendants and the injuries,
2 unless the causal relationship is readily apparent to the
3 trier of fact. Dr. Slack at no point during her testimony
4 was asked any questions with regards to whether proximal
5 cause was a substantial factor nor did she volunteer any
6 testimony in support of a proximal cause argument.

7 Therefore, we would not only want all the cause of action
8 dismissed but especially the malpractice cause of action.

9 THE COURT: Thank you. Mr. Stevens?

10 Mr. STEVENS: Thank you, your Honor. I will be
11 brief.

12 I would like to first adopt all of the arguments
13 of Mr. First and Mr. McPhilliamy, and we make the same
14 request for a directed verdict. We believe a directed
15 verdict should be granted for the battery cause of action
16 for the same reasons stated by my colleagues; for the
17 malpractice action for the same reasons stated by my
18 colleagues; for the negligence claims for the same
19 reasons. We believe that -- we urge a directed verdict
20 for defendants Dr. Bonds, Dr. Aman and Dr. Khan on the
21 punitive damages claim on the grounds that there's been
22 insufficient proof to support a punitive damages claim as
23 to those individual dentists, as well as the doctor
24 demonstration of harm, which will be another reason.

25 For all of those causes of action we urge the

1 Court to direct a verdict in favor of the individual
2 dentists.

3 Thank you.

4 THE COURT: Thank you, Mr. Stevens. Who on
5 behalf of plaintiff's counsel is going to be heard? Mr.
6 Frankel?

7 Mr. FRANKEL: Your Honor, with respect to Mr.
8 First's initial motion regarding 1203, the Maleyia (Phon.)
9 case that your Honor mentioned, the State Farm case,
10 addresses what, under New York law, what or who
11 constitutes an owner under 1203. It's not enough, and it
12 would be the epitome of fraud to say what they're saying,
13 which is, "Well, I am a licensed owner. Although it's a
14 big charade, I've complied with the statute."

15 So the New York Court of Appeals looked beyond
16 that statute to see what is deemed to be an owner,
17 addressed that, and the evidence is undisputed in this
18 case that FORBA was the owner. Dr. Padula said FORBA sold
19 the clinics; New FORBA bought the clinics. He said all
20 the money went to FORBA. He acknowledged the owner is the
21 one who gets the profit. There wasn't anything to submit
22 to the jury, completely one-sided, no fact issue created,
23 and your Honor acted appropriately in deciding there
24 wasn't something to submit.

25 As to the malpractice argument regarding Dr.

1 Slack, I'm not entirely sure whether that's an accurate
2 representation of the testimony. What I know is that when
3 a professional testifies that procedures were unnecessary,
4 and there's testimony of what -- photographs or videos of
5 what happens when you go through that procedure, evidence
6 of what happens in a restraint, it's reasonable for the
7 jury -- there's not the need for expert testimony to
8 explain the consequences of unnecessary procedures, or
9 having a -- she testified, for example, that no local,
10 that it would cause pain. That's enough evidence for the
11 jury to use its common sense and decide what is an
12 appropriate level of damage. But saying that, if you had
13 an unnecessary pulp and crown, that that was a proximate
14 cause of injury, there's no need for that testimony. It's
15 like saying, "Well, you cut off the wrong leg. Was that a
16 proximate cause of injury?" I think every juror knows and
17 doesn't need expert testimony on that.

18 THE COURT: Thank you.

19 Mr. FIRST: If I may?

20 THE COURT: Yes, Mr. First.

21 Mr. FIRST: I just want to add one other thing.
22 I also would move to dismiss -- obviously if the Court
23 granted the motions to dismiss that I made, this would be
24 academic -- but I want to specifically move to dismiss the
25 punitive damages claim, that there is no showing in this

1 case of conduct sufficiently wanton to justify that under
2 any construction of the evidence and I would ask that your
3 Honor not let that issue go to the jury. Thank you.

4 THE COURT: All right. As I think I've stated
5 on the record before, the way this case has evolved over
6 time has made it a little more difficult to do things in
7 an orderly fashion, but I did request that counsel meet
8 with me on Sunday to review the jury charge and the
9 verdict sheet. Although there was a little opposition to
10 that, we did meet and worked -- everybody worked fervently
11 throughout Sunday night, Monday, Monday night, and we also
12 came into court on Monday afternoon to continue our jury
13 charge conference, and to speak also about the verdict
14 sheet.

15 I did give counsel an opportunity to put motions
16 on the record before the jury came back, but that was
17 declined. So we're doing these motions now, and the Court
18 anticipated the motions and has thought about the motions
19 and is going to deny the motions that are made.

20 With respect to the Court's sua sponte decision
21 regarding the 1203 violation, as I was preparing the jury
22 charge on that issue, I did determine that as a matter of
23 law the -- that issue -- there were no factual issues that
24 the jury would need to decide to determine whether or not
25 there was a violation of Section 1203, and as soon as I

1 made that decision, I notified all counsel by e-mail,
2 which was our method of communication in light of the fact
3 that most of those communications were taking place in the
4 evening and early-hour mornings. So I did give that --
5 counsel notice of that as soon as that determination was
6 made.

7 Anything else?

8 Mr. NOWOTNY: Yes, your Honor.

9 THE COURT: Yes, Mr. Nowotny.

10 Mr. NOWOTNY: Good morning, your Honor.

11 On behalf of defendants Dr. Aman, Dr. Bonds and
12 Dr. Khan, we would move for mistrial based on we believe
13 that my clients have been denied a fair trial because of
14 the cumulative factors of the Court's conduct. The basis
15 of this motion is found in the Ougourlian v. New York City
16 Health & Hospitals, 5 A.D.3d 644, a malpractice case with
17 similar issues. In this particular matter, if I can just
18 make the record --

19 THE COURT: Yes.

20 Mr. NOTWATNY: I'm going to start in kind of a
21 reverse order:

22 Closing argument: At the time of closing
23 argument, the Court allowed all counsel time limits to try
24 to get all the argument in or summations in in a timely
25 and orderly fashion. Defendants complied with the time

1 constraints --

2 THE COURT: Let me just say you didn't comply
3 with the time constraints. It was only because
4 co-defendant allotted you time. You actually went an hour
5 and I think fifteen or twenty minutes. No, you went an
6 hour and five minutes, I believe, and you were allotted
7 forty minutes.

8 Mr. NOWOTNY: We were advised we got two hours
9 for defense. Defense worked among themselves. I had two
10 years of time for the entirety of the care and treatment,
11 not just two aspects of it, plus two-and-a-half weeks of
12 evidence to get in. As to the allocation of the time, you
13 never gave direction that it was per; the defense
14 cumulatively had two hours, and we worked amongst
15 ourselves.

16 THE COURT: You did not advise the Court that
17 was how you were going to do it. You wanted time and I
18 wanted to ensure that all defense counsel had time to make
19 the arguments that you wanted.

20 Mr. NOWOTNY: And we complied with the two-hour
21 limit collectively to all defendants. I was given a
22 five-minute warning, which I noticed the Court did not
23 give to Mr. Leyendecker when he was close to his hour, and
24 he was in fact given almost ten minutes more for summation
25 with the Court acknowledging, "Well, he's about to wrap

1 up" in his argument and that was allowed.

2 Further, the Court denied my request in order to
3 cover all the ground that was put before us, with the two
4 years of care and two-and-a-half weeks of evidence, to use
5 trial testimony and publish it to the jury to expedite the
6 conversation in summation. That was denied. There were
7 no grounds given, legal or procedural, just that actually
8 the Court ironically conveyed this verdict that it would
9 be time-consuming, when it was my intent and prior
10 experience had been that it actually expedites the entire
11 conversation.

12 THE COURT: Okay, listen, Mr. Nowotny, just so I
13 don't lose track, not having a pen or paper in front of
14 me, with respect to that issue, there was a request made
15 to me by plaintiff's counsel to publish to the jury
16 testimony, trial testimony, the day before closing
17 arguments. All counsel were at the bench. I'm not sure
18 if you personally were, but there was a representative of
19 your client. Whether it was Mr. Stevens or Miss Marangas
20 or you, I'm not sure, but I did have all counsel present
21 when that request was made, and I denied that request to
22 plaintiff's counsel.

23 And so it was for that reason that when you went
24 to display the testimony that I said I wasn't going to
25 allow it. I had already denied that request the day

1 before.

2 Mr. NOWOTNY: Okay. My understanding of that
3 was for the evidentiary part of the case and this was
4 during summations.

5 THE COURT: No, no, it was specifically with
6 respect to summations.

7 Mr. NOWOTNY: I actually was informed it was Mr.
8 McPhilliamy who brought up the issue, but either way I'm
9 just pointing out that the request was made, and in
10 contrast, you allowed Mr. Leyendecker to publish the
11 verdict form and complete the verdict form on the
12 overhead, when objections were made, and overruled those
13 objections, and this is going to concerns that I expressed
14 at the beginning of this motion.

15 Photographs: During the closing, Mr.
16 Leyendecker presented this jury with a photograph that the
17 evidence in this case clearly demonstrated was of this
18 child at the age of two. We made an objection. The Court
19 overruled the objection and did not allow for a curative
20 measure on that matter, suggesting that his reference that
21 this is a couple of months before attending my client's
22 facility was, as the Court put it, I believe, "there were
23 a lot of exaggerations in the summations."

24 Plaintiff's counsel did not object to any of the
25 Court's impressions of exaggerations by defense counsel

1 during their summation, so the Court made its own
2 observation of that, did not allow a curative measure to
3 correct the gross misrepresentation by counsel of that
4 photograph, and we believe that was highly prejudicial to
5 us.

6 In fact, the significance of that misleading of
7 the jury, I think, was demonstrated with the first
8 question from the jury asking if they could get the
9 readback on what the dates were for that, and the readback
10 was the child was two years old, not three years and seven
11 months or two years and five months. He was three years
12 and seven months when he first appeared.

13 THE COURT: The reason I said I would not give a
14 curative instruction on that because I anticipated that
15 the jury was smart enough to understand what the evidence
16 was on that issue, and as I said on the record before, Mr.
17 Nowotny, I think -- I believe the testimony was that the
18 child was two, and two spans twelve months. I don't think
19 it was a gross misrepresentation, and as an example of
20 statements that were made, I believe by all three defense
21 counsel, that I think were misrepresentations of the
22 evidence, I think all defense counsel said, for example,
23 that when Jeremy first appeared at Small Smiles, he was --
24 he had -- I think the words were "raging infection;" he
25 had swollen gums, and fever --

1 Mr. HUSLANDER: No, no --

2 THE COURT: I'm not 100 percent sure but there
3 were references to the condition, and to my knowledge
4 there was no evidence in the record that that in fact was
5 true. However, again, my view is -- excuse me, would
6 counsel just be quiet in the back?

7 My recollection of the testimony that that was
8 inconsistent. However, I do believe that that's what the
9 jury is instructed, both at the beginning of the case and
10 the end of the case, that closing arguments are merely
11 arguments; they're not evidence. And I think that like
12 those representations, the fact that the testimony was
13 that the child was two, that's the jury's job to sort out
14 the statements that may not have been -- were not an
15 accurate representation of the testimony.

16 Mr. NOWOTNY: Yes, your Honor; however, even
17 with the liberties of summation, counsel are not typically
18 allowed to directly mislead the jury on a point that's
19 very significant to the entire issue of this case, and Mr.
20 Leyendecker actually referred them to an office note of
21 Dr. Taylor, which happened to be a few months earlier,
22 where she's looking in the child's throat for a sore
23 throat, handing the jury the photograph of this child,
24 saying, "Here's the child. Look at these teeth, a few
25 months before," trying to correlate --

1 THE COURT: I think he said several months.

2 Mr. NOWOTNY: I said a few, but that's that.

3 Now, we also believe that there was a
4 significant disparity in the rulings by this Court on the
5 objections made throughout this trial, and the record will
6 demonstrate that. Many objections were made throughout
7 this case, and I believe that the ratio of sustaining
8 objections dramatically favored the plaintiff. I think
9 that will bear out, just a sheer counting of the
10 objections sustaining.

11 But we also have specific concerns because with
12 regard to Dr. Davis, our primary expert, while on the
13 stand, multiple objections on foundation to an expert and
14 they were almost all sustained. Whereas when Dr. Slack
15 was on the stand and started to offer opinion testimony
16 that actually was the subject of a motion in limine to
17 exclude and was denied, was allowed to testify in her
18 opinion about psychological damage that this person may
19 have in the future. We objected on foundation and that
20 testimony was allowed to come in and our objection was
21 overruled. The disparity in the objections for those as
22 related on foundation as to the experts we believe was
23 disproportionate.

24 The next item is the --

25 THE COURT: I don't recall that Dr. Slack

1 testified as to future psychological damage. But I could
2 be wrong. I do not recall that being the subject of any
3 of her testimony.

4 Mr. NOWOTNY: Okay. The next was gummy bears.
5 There was a motion in limine by plaintiff at the beginning
6 of the trial that gummy bears and associated things that
7 might impugn the parenting of this child would be
8 excluded. There was an exception by this Court to that
9 ruling that if there's any information that comes through
10 the exchange with the health care providers involved in
11 the child's care, that that can be commented on, and in
12 fact there were exchanges through this trial. Gummy bears
13 actually came out in Mrs. Varano's testimony to some of my
14 questioning and the Court did allow that.

15 The concern is that the summation point, while
16 there was some -- what the defense believes to be
17 consistent rulings on this issue throughout the trial --

18 THE COURT: There were.

19 Mr. NOWOTNY: -- the Court announced prior to
20 submissions that no reference to gummy bears -- and I'm
21 using gummy bears because it's the catch phrase that was
22 most dramatically brought to bear in this courtroom -- was
23 not to be raised. And it was never the intent of the
24 defense to -- because we didn't ask for Ms. Varano or Mr.
25 Bohn to be on the verdict form; parenting has never been

1 part of our case.

2 However, plaintiff's counsel's case has hinged
3 primarily on the concept that that picture of this
4 two-year-old's mouth with those fine-looking teeth at that
5 point was the basis of the argument no treatment should
6 have been given because there was no indication for it;
7 there was no decay. There was one cavity is all that's
8 conceded.

9 So the causation of how the ECC, how this decay
10 that was observed even by the mother in the preceding
11 year, came into play should have been allowed to be
12 discussed, and we believe we were prejudiced in not only
13 being hindered in discussing causative factors, regardless
14 of whether there's parental blame or not, we were never --
15 never had and never did suggest that it was the parents'
16 fault. We were denied the opportunity to put that in
17 front of this jury and then in summation completely denied
18 the opportunity to address it, and I had an exchange I was
19 going to present to the jury with Ms. Varano about her
20 answers to me about her conversations with Dr. Bonds that
21 gummy bears were very much a concern and a condition for
22 one of the issues that he suggested and she agreed to deal
23 with his oral hygiene, and we were denied that
24 opportunity.

25 THE COURT: It was done in the context of a

1 motion by Mr. Higgins that was submitted to all counsel
2 and the Court with respect to summation arguments and what
3 the Court should -- with a request to exclude certain
4 testimony. I believe that that motion was made in part
5 because of the utilization of the subject of gummy bears
6 in opening statements, notwithstanding the Court's motion
7 in limine on that subject.

8 Had the subject not been addressed in opening
9 statements, contrary to the Court's ruling on that subject
10 and the motion in limine which, of course, counsel had a
11 right to object to and did and take an exception to, I
12 would not have ruled the way that I did. I made it clear,
13 I believe, on the record that, while I was granting the
14 motion, the basis for granting that, because I don't think
15 it's appropriate to object during closing arguments, and
16 to avoid that issue, the Court ruled that it was not going
17 to allow the subject of gummy bears to come in.

18 However, I did open the door before closings
19 began and said that if defense counsel wanted to walk the
20 line, that they certainly were free to do that, and I did
21 note that the subject of gummy bears, I don't think came
22 up in closing arguments, but I did retract somewhat from
23 the ruling that I gave before closing arguments.

24 Mr. NOWOTNY: I think your Honor added the
25 potential of "provoking the wrath of the Court."

1 THE COURT: Well, yes. My concern was that I
2 was going to get an objection during closing arguments,
3 which I was trying to avoid, in having to admonish one of
4 the lawyers in front of the jury, and that is why I said
5 what I did.

6 Mr. Higgins, you're standing up.

7 Mr. HIGGINS: I just wanted to be heard on that
8 one issue, the gummy bear issue, if the Court -- if not,
9 I'll wait.

10 THE COURT: Why don't you wait.

11 Mr. NOWOTNY: Next area of concern was during
12 the course of the trial, it was the impression of the
13 defense counsel there were multiple interruptions by the
14 Court of defense witnesses on the stand, that you
15 instructed on a couple of occasions sort of your own
16 objections of nonresponsiveness, instructing the witnesses
17 to answer yes or no when no similar objection was being
18 made by plaintiff's counsel, and that position of the
19 Court was not applied on Dr. Slack's testimony or on any
20 plaintiff-specific witness. And we believe that was
21 disproportionate as well.

22 THE COURT: Let me just state for the record,
23 and I think the record will bear this out, that the
24 defense experts repeatedly, over initial objections and
25 response statements of the Court, were giving narratives

1 and answering questions -- the question that was asked and
2 then going forward. In contrast, Dr. Slack was very
3 sparse with her words. She was answering questions and
4 not giving lengthy narratives, so while I do agree with
5 you that there were more times maybe -- I don't know -- I
6 don't recall whether I had to admonish Dr. Slack on that.
7 I don't believe I did, because she was answering questions
8 without going into lengthy narratives. And it certainly
9 is within the Court's prerogative, given the length of the
10 trial, which was -- we're in our fourth week, I think, and
11 that -- and since counsel weren't working with their
12 witnesses to try to keep them to answering the questions,
13 the Court did.

14 Mr. NOWOTNY: And I just want to be clear, my
15 point was not just limited to the interactions with the
16 experts; I believe there were instances that some of the
17 defense witnesses themselves, that the Court made its own
18 objections and instructed them to limit their answers to
19 yes or no.

20 THE COURT: Well, I think the defendants didn't
21 call any witnesses, so I'm not sure what -- you know, you
22 called your expert witnesses. I know that the plaintiffs
23 put on some of your clients on the stand, if that's what
24 you're referring to.

25 Mr. NOWOTNY: Yes. Maybe it's a terminology

1 issue, but when my client is on the stand, I consider he's
2 a defense witness; I don't care who's asking the
3 questions. And so I should perhaps have said defendants.

4 I just want to be clear that the conversation
5 that I brought up about the Court's asserting some
6 objections and instructing the yes or no responses when
7 the plaintiff's counsel was not requesting a similar
8 objection of their own to those answers wasn't just to the
9 experts but also to the defendant witnesses.

10 We also believe it was inappropriate for the
11 Court to assert itself in ruling sua sponte around 8 p.m.
12 the night before closing on the New York Limited Liability
13 Company Law 1203. It was certainly an issue of fact for
14 this jury. The evidence that came out was that there were
15 dentists who owned the Syracuse clinic. Whether Old FORBA
16 was owned by a consortium of dentists and nondentists, and
17 New FORBA, was not the sole consideration for this jury,
18 and we believe that that should have been for the jury to
19 consider. The fact is that the appropriate state agency
20 responsible for licensing health care facilities in the
21 State of New York found the paperwork and the application
22 to be satisfactory on a technical level. So this was
23 something we believe the jury should have been able to
24 hear and should have allowed on the closing the parties to
25 address those distinctions versus the impact of the

1 Court's ruling. And there was no application made for
2 that ruling by the plaintiffs prior to the Court doing so
3 sua sponte, and we believe not only did that harm our
4 corporate defendants but it also had an indirect
5 prejudicial effect on my clients, the three dentists.

6 THE COURT: With respect to that, if you can
7 address what evidence, other than the fact that they were
8 licensed, was there in the record that suggested that
9 these licensed dentists, Dr. Padula in one instance and --
10 I've forgotten the names of who else had the license --
11 ever was in the Syracuse clinic, ever directed -- ever did
12 anything with respect to the Syracuse clinic? Was there
13 any testimony on that subject?

14 Mr. NOWOTNY: Your Honor, the reality of my
15 knowledge is that under that particular statute, it is a
16 formality of the statute, meaning that procedurally you
17 must have a licensed dentist who is identified as owner.
18 There was evidence from Dr. Padula and Dr. Andrus, and
19 whether or not they're actively present or not, it's a
20 trier of fact consideration as to whether they're in
21 proper compliance or not. I don't feel that was a proper
22 ruling for the Court to make because of its interpretation
23 --

24 THE COURT: Isn't that a legal question? You're
25 asking the jury and that's really what the Court is --

1 what facts were in front of the jury to suggest that in
2 fact the individuals who held licenses and were declared
3 to be the owner were the owner? It's an application of
4 fact to the law that the jury has to decide, and there
5 wasn't any -- there were no facts that supported the
6 ownership by those individuals. There was merely a
7 license. That was it.

8 Mr. NOWOTNY: For compliance with that
9 particular regulation, statute, it is the ownership of the
10 dentist, licensed dentist, that is the threshold. As to
11 their practical involvement, I think that's a trier of
12 fact consideration, and is that a requirement that that
13 licensed dentist owner be actively involved with that
14 clinic one way or the other.

15 THE COURT: That's precisely the reason why the
16 Court granted the motion, because I don't think that was a
17 jury question. I do not believe that was a jury question.
18 But we agree to disagree, Mr. Nowotny.

19 Mr. NOWOTNY: Thank you.

20 At this point, I would just because of the
21 record -- and certainly I appreciated the exchange -- I'm
22 going to also put down, because I believe it's part and
23 parcel of the grounds for this particular issue, the prior
24 motions for mistrial and so --

25 THE COURT: I don't need you to repeat that

1 because the motions for mistrial were already made on the
2 record, so the record is preserved with respect to the
3 grounds. You don't need to repeat them.

4 Mr. NOWOTNY: I'm not going to repeat the
5 grounds, but we did bring four prior motions, and just to
6 be clear so there's no confusion, one on the open door
7 issue and allowing the New FORBA/Old FORBA complaint to
8 come in; two, was the fact that the governmental
9 investigation was let to come out through that extraction,
10 a subject of its own motion in limine. Three was the
11 seventy cases that Dr. Slack looked at suggesting there
12 was a pattern of issues. I believe four is the allowing
13 of the television program 2007 in the Maryland area be
14 brought to the attention of this jury. And/or the failure
15 to instruct and advise this jury of the Appellate Fourth
16 Department's ruling on fraud and breach of fiduciary when
17 the Court started the opening introduction of this jury,
18 "this is a case of fraud being brought by the parents of
19 Jeremy Bohn."

20 THE COURT: Okay. The Court's opening statement
21 to the jury is on the record, and that is not what I said.
22 I did deal with the other issues, and as I said, with
23 respect to those other issues coming in, they were the
24 subject of a motion in limine; the Court did grant the
25 defendant's motion in limine to keep out the other issues,

1 and it was only because one of the defendants made a
2 statement that was -- in part gratuitous, but
3 inconsistent, that I allowed the testimony about the prior
4 investigation, et cetera, to come into evidence.

5 I did have a conversation with counsel, I
6 believe Sunday, and maybe Monday, about whether or not
7 they wanted a limiting instruction, and I specifically
8 again yesterday, I believe on the record, asked defense
9 counsel about what limiting instructions they wanted me to
10 give because clearly that came in for purposes of
11 impeachment only, and defense counsel declined to have any
12 limiting instruction other than a limiting instruction on
13 the issue of the guidelines.

14 And I think with respect to Dr. Slack and the
15 other cases she reviewed, I believe that came up through
16 your testimony about -- or through the questioning of how
17 much she was paid and --

18 Mr. NOWOTNY: Oh, no, oh, no. It was brought up
19 by that gentleman right there, "You're looking at some
20 other cases, aren't you?" "70 cases." "And what did you
21 notice about those?" "There's a pattern." That came out
22 on the direct examination of their expert.

23 THE COURT: Who asked her about the \$50,000?
24 Where did that come up, that she had been paid \$50,000?

25 Mr. NOWOTNY: He asked her, "Aren't you getting

1 paid?" "I'm getting paid \$300 an hour." "How much time
2 did you spend on those cases?" We added it up and later
3 on 50,000 came out on the cross, after they brought up how
4 much time she spent on the case. It had nothing to do
5 with all these cases that she was looking at.

6 THE COURT: I'm going to have to hear from
7 counsel so...

8 Mr. NOWOTNY: Just a few more. The denial of
9 the sequencing motion to allow for the threshold decision
10 on whether malpractice and informed consent should be
11 heard before subjecting my clients to -- well,
12 three-and-a-half days of evidence that had nothing to do
13 with clinical care of Mr. Bohn. I think the way this case
14 was put on, the way the case was presented to the jury
15 clearly shows how prejudicial that was --

16 THE COURT: Mr. Nowotny, how old is this case?

17 Mr. NOWOTNY: Pretty old.

18 THE COURT: Pretty old, okay. And when was the
19 first time that defense counsel -- when was the trial date
20 set in this case?

21 Mr. NOWOTNY: Your Honor, what I heard was that
22 that request was put in a month before we --

23 THE COURT: Wait, wait. I -- ignore that
24 question for a minute; I'll get back to it. But when was
25 the trial date set in this case?

1 Mr. NOWOTNY: I would have to defer to your
2 Honor on that. I don't know.

3 THE COURT: Quite some time ago. In fact, I
4 think it was an adjourned trial date. There was an
5 earlier trial date. And with respect to when the motion
6 was made for sequencing? It was, as Miss Marangas stood
7 up and said yesterday in Court, it was submitted in
8 August, a month before the trial -- filed. However, it
9 was not considered by the Court until a week or so before
10 the trial. The record will reflect that. I don't need
11 argument on that.

12 But I think it was inappropriate and while the
13 Court did set the deadlines, I'm going to just say for the
14 record right now, at no time did the Court expect to
15 receive the papers it did in connection with this case,
16 the volume of papers that it received in the weeks before
17 this trial started. Had I known that there would be in
18 excess of 50 motions in limine, which obviously you guys
19 have been working on the case for years; I see in this
20 courtroom right now on behalf of your clients, at least
21 three lawyers...

22 Mr. NOWOTNY: My client is actually this good
23 old Mr. Stevens and -- I'm sorry. How could I miss her?

24 Ms. MARANGAS: I'm here to help you out.

25 THE COURT: And I will remind counsel of an

1 argument or a statement that I made on the record at one
2 of our -- I believe on the record but maybe not, at one of
3 our conferences when I asked -- and there were lots of
4 lawyers in the room -- is there a single lawyer in this
5 room who has read all of the papers that have been
6 submitted to me this week to read with respect to the
7 trial that was going to begin I believe in a week or two,
8 and not a single lawyer raised their hand. Not a single
9 lawyer had read all of the papers they were asking me to
10 read in the week or week-and-a-half before this case
11 began.

12 So I want the record to be clear, too.

13 Mr. NOWOTNY: Thank you, your Honor.

14 THE COURT: Mr. Nowotny.

15 Mr. NOWOTNY: The last one, with regard to the
16 proposed jury sheet, the one that's back there for
17 consideration of this jury is almost identical to the one
18 proposed by plaintiff in this case. The one proposed by
19 the defendants was not incorporated to any meaningful
20 degree, if any.

21 That's the concluding comment.

22 THE COURT: And just with respect to that, as
23 counsel knows from our meeting on Sunday with respect to
24 the verdict sheet, I did not want to submit a ninety --
25 what was the number of pages of the verdict sheet? 94 or

1 97?

2 Mr. HIGGINS: 97, Judge.

3 THE COURT: -- a 97-page verdict sheet to the
4 jurors, so I said I wanted to work off of the shorter
5 version, and we spent hours going over that verdict sheet.
6 So yes, I wanted to start with one of them, and I picked
7 the shorter version of the sheet, but we went over
8 question by question and -- yes, I did start with the
9 plaintiff's verdict sheet.

10 Mr. NOWOTNY: Thank you, your Honor.

11 THE COURT: Thank you. Response to the
12 motion --

13 Mr. FIRST: Your Honor, if I may, I would like
14 to just state for the record that on behalf of my clients,
15 we join in the motion for the mistrial for reasons stated
16 by counsel.

17 Mr. McPHILLIAMY: We join in that as well.

18 THE COURT: All right.

19 Mr. HIGGINS: Judge, just in opposition to the
20 motion for mistrial, first --

21 THE COURT: Just a minute before I do that. We
22 do have another note from the jury, so I'm going to have
23 it marked.

24 (Court's Exhibit 12 marked for identification
25 and received in evidence)

1 THE COURT: Okay. The Court has received and
2 marked Court Exhibit 12, a note from the jury. They would
3 like a copy of both versions of A.A.P.D. guidelines on
4 protective immobilization with respective dates. I would
5 request counsel to please locate those documents in the
6 exhibits.

7 Mr. LEYENDECKER: Your Honor, those are Exhibits
8 Plaintiff's 66 and Plaintiff's 67.

9 THE COURT: Do they have the dates on them or do
10 we need to have the testimony read back?

11 Mr. LEYENDECKER: They both have the e-mail
12 date, your Honor.

13 (Discussion off the record at the bench)

14 Mr. FIRST: I said we put in a version 771,
15 Exhibit 771, which is 2004/2005.

16 THE COURT: And is that on the protective
17 immobilization?

18 Mr. FIRST: Yes, it is. In fact, it has less in
19 it --

20 (Discussion off the record at the bench)

21 Mr. LEYENDECKER: I would just note, Exhibit 771
22 is the 2004 and 2005 guidelines. Exhibit 66 is as amended
23 '05/'06. 66 is as amended '06/07. So versions could be
24 both 66 and 67 or the version before they included the
25 risk language and the version after the risk language was

1 included, so I think it would be fair to send all three
2 documents if we can.

3 THE COURT: That's what --

4 Mr. FIRST: I'm fine with that.

5 THE COURT: That's --

6 Mr. LEYENDECKER: But all three are dated and
7 it's clear -- they're paying attention to the details and
8 they can figure that out.

9 THE COURT: And do all counsel agree that I can
10 send the -- wait, Jim -- exhibits back without bringing
11 the jury in here?

12 Mr. LEYENDECKER: Plaintiffs certainly do.

13 THE COURT: So we have plaintiffs and we have
14 New FORBA, Old FORBA and dentists, you agree that we can
15 send them back without bringing the jurors in?

16 Mr. FIRST: Yes.

17 THE COURT: Okay.

18 * * *

19 THE COURT: Okay.

20 I am going to hear from you. Would you mind if
21 we just take a break because I have motions. I'm going to
22 be very brief with motions.

23 Mr. HIGGINS: Whatever is good for the Court.

24 THE COURT: How long are you going to be?

25 Mr. HIGGINS: We're here all day, so whatever is

1 good for you.

2 THE COURT: How long is it going to take?

3 Mr. HIGGINS: I can just do it after the
4 motions, Judge. Either way. Whatever is good for the
5 Court.

6 THE COURT: Why don't we wait then and, Val, why
7 don't you stay here.

8 (Recess taken)

9

10 (Court's Exhibit 13 marked for identification
11 and received in evidence)

12 THE COURT: It's my understanding the jurors
13 have gone down for a cigarette break, but in the meantime
14 have sent out a note. It's been marked as Court Exhibit
15 13. The note requests depositions of Drs. Knott and
16 Andrus and Old FORBA dentist employment contract.

17 So with respect to the second request, I believe
18 that's in evidence, and so I would ask counsel to pull
19 that out.

20 With respect to the depositions of Drs. Knott
21 and Andrus, the transcripts obviously were not in
22 evidence. Those were read in? No, no, they were here.

23 Mr. FRANKEL: Those witnesses ended up --

24 THE COURT: Were right here. So I think what
25 we'll do is bring them in here and tell them to write a

1 note with what -- or to ask specifically what portions of
2 the testimony they want read back because we can't give
3 them any transcript of that, so if there's some testimony
4 in particular they're looking for...

5 Mr. LEYENDECKER: I was just going to say on the
6 employment contract, I think in my original stack I
7 referenced Dr. Bonds, but I think there's maybe one other
8 in evidence, Dr. Aman's, Dr. Aman's -- no, Dr. Khan's. I
9 thought there were two, so I can go look for that.

10 THE COURT: Mr. Stevens, you stood up?

11 Mr. STEVENS: And when the foreman starts
12 writing down the testimony word for word, we'll decide
13 what to do at that point, your Honor.

14 THE COURT: Hopefully that's not going to
15 happen, but... anybody else have a different suggestion?
16 Mr. Stevens?

17 Mr. STEVENS: It was only a light remark, your
18 Honor.

19 THE COURT: Understand. There's really no other
20 way to deal with that except to ask them what specifically
21 they want testimony on.

22 Ms. MARANGAS: What does the note say on the
23 employment agreements?

24 THE COURT: It says "Old FORBA dentist
25 employment contract."

1 Ms. MARANGAS: Doesn't specify which dentist.

2 Mr. LEYENDECKER: Well, they have one. And they
3 just want one.

4 Mr. HULSLANDER: It's in your pile of stuff.

5 Mr. LEYENDECKER: It was referenced in closing,
6 I think Dr. Bonds, and they have that. If they only want
7 that one...

8 THE COURT: Mr. Hulslander, did you want them
9 all to go in?

10 Mr. HULSLANDER: They already have a contract
11 and the contract is the same for all the dentists except
12 for the dollar amount, so they already have one back
13 there.

14 THE COURT: Are you suggesting then when they
15 come in here, I tell them they have one and the other one
16 is identical -- what do you want me to tell them when they
17 come in?

18 Mr. HULSLANDER: They have a copy of the
19 contract --

20 Mr. STEVENS: Maybe they don't know they have
21 it.

22 Mr. HULSLANDER: -- already. It was in the pile
23 of exhibits that was given to them shortly after they went
24 back to deliberate.

25 THE COURT: Okay.

1 Mr. HULSLANDER: That's all -- they were asking
2 for a copy of the contract. Tell them they have it.
3 Which one do they have, Kevin?

4 Mr. LEYENDECKER: I think I gave Dr. Bonds. I
5 think what I gave them -- I'm sorry -- was Dr. Bonds'
6 contract that was marked as Old FORBA 1037.

7 Mr. HULSLANDER: Why don't you just point it out
8 as Old FORBA 1037?

9 THE COURT: Okay.

10 When they come back from their cigarette break,
11 we'll bring them in here.

12 * * *

13

14 (Whereupon, the jury was brought back into the
15 courtroom)

16 THE COURT: We have received another note. It's
17 been marked as Court Exhibit 13. That note requests
18 depositions of Drs. Knott and Andrus and old FORBA dentist
19 employment contract.

20 It's my understanding that you already do have a
21 copy of an Old FORBA dentist contract. It was in the
22 stack of papers that was initially given to you, and so I
23 think we addressed that one. That should be in the stack
24 that's there.

25 With respect to the depositions of Drs. Knott

1 and Andrus, they testified here in court, and we can have
2 any of their testimony read back to you. We can't provide
3 you the depositions because they weren't offered in court,
4 but if there's a particular subject matter that they
5 testified on, a portion of their testimony you want read
6 back, or if you want all of their testimony read back, we
7 can do that. So do you want to go back and let me know
8 what of that testimony you want or how do you want to
9 address that?

10 What I'm going to ask you to do is just go back
11 for a minute, go back and decide. Do you want part of the
12 testimony read back? Do you want all of the testimony
13 read back? What subject matters, if it's just a part, and
14 we'll pull that up, okay?

15 Thank you.

16 (Whereupon, the jury was then dismissed from the
17 courtroom)

18

19 THE COURT: While they're working on that, why
20 don't we start argument?

21 Mr. HIGGINS: Sure.

22 Plaintiffs oppose the request for the mistrial.
23 First as to the gummy bear issue, this has been -- this
24 was fully raised and decided well before the trial even
25 started. We first moved under 3211(a)(7) to bar any

1 reference to the parents, anything like that. That motion
2 was granted. That was on the full 2214-b record, and then
3 after that, we made a motion to exclude any reference to
4 gummy bears both -- on any grounds, including causation
5 grounds, and again this is on the 2214-b record, so
6 everybody's got full notice.

7 Their expert responses didn't say anything about
8 gummy bears being the causative element or anything like
9 that. We got no responses saying that this was a
10 legitimate issue in the case that needed to be in the case
11 for defendants. The Court heard argument. We had full
12 motion papers and the Court granted the motion.

13 The only reference -- there's nothing in the
14 medical records about gummy bears, nothing. Nothing in
15 the Small Smiles chart; nothing in Dr. Taylor's chart;
16 nothing in Dr. Patel's chart. There's only one reference
17 and that was Kelly Varano said she was -- she asked Dr.
18 Bonds whether -- "could this have been gummy bears?" and
19 he said, "Yeah, it could have been," and that's it.

20 So we were very alert to the fact that they were
21 going to use this whole gummy bear thing to blame Jeremy,
22 blame the parents and make the case about something that
23 it's not.

24 So on the opening at Pages 263, 264, 267 and
25 268, the defendants did exactly what we thought that they

1 might do, they started talking about -- for instance, 268,
2 "His father said his teeth were rotting. I could see some
3 rot there." Quote, unquote, "So he knew?" "His father
4 knew." And then they talked about Kelly Varano saying
5 that she brushed his teeth every day and flossed them and,
6 you know, common sense that that can't be true.

7 So basically they were trying to get this in
8 even though there was motions in limine that had been
9 granted out of that. We did make that motion during the
10 openings; that was sustained. We had to make objections
11 during the trial that were properly sustained, and then
12 with our court exhibit on our motion in limine on the
13 closings, which, you know, we basically said that,
14 "Listen, this is where we've been; this is where we're
15 going," and the Court even at that point said, "Listen, if
16 you want to skirt that line, go ahead," and they never
17 did.

18 So there's no proof of causation. In other
19 words, it's not an issue that has any relevance in the
20 case. All of the rulings were proper and they heard --
21 during the trial they heard all about gummy bears. I
22 mean, they heard as much as -- a lot got in, even with the
23 motions in limine, so with all due respect to the
24 defendants, I think that the motions were proper and the
25 Court properly ruled on that to keep the issues in the

1 case which were relevant to where the case is.

2 In terms of the objections, the defendants
3 appear to be saying that by definition all witness
4 testimony is the same with the same foundation so that if
5 there's not 100 percent parity between the objections that
6 that means that something is wrong. Well, that's just not
7 simply the way things are. Every witness is different.
8 Every witness is a different foundation and a lot of that
9 is based upon what the counsel questioning wants to do.

10 In other words, if you have a badly prepared
11 witness, and I'm not saying that in this case, you could
12 have 100 objections. If you have a well-prepared witness
13 who knows what the foundation is, counsel knows that, you
14 could have zero objections. So I think the P.J.I. charge
15 speaks to that, and a lot of these witnesses, they didn't
16 try to lay a foundation. They just went right in and
17 said, "Tell me this; tell me that." The objections were
18 proper. It doesn't mean anything, you know, if there's
19 more objections sustained on one side. That's just not
20 credible argument.

21 As to the verdict sheet, Mr. Leyendecker was the
22 only one who put the verdict sheet up. None of the
23 defendants used the verdict sheet or -- we had the Elmo
24 right here. Everyone has been using it throughout the
25 entire trial. No one else put the verdict sheet up, and

1 if they did, you know, that wouldn't have been an issue,
2 but they never did.

3 With respect to the trial testimony on the
4 screen, just by way of background, the plaintiffs had
5 originally sought to have the deposition testimony on
6 impeachment put up. The Court denied that request. On
7 the Sunday before during our charge conference at the
8 Crown Plaza, the issue of whether we could put trial
9 transcripts up was raised. Mr. Nowotny was not there, but
10 his counsel was, and as I recall, the Court said at that
11 point in time, in reference to us putting it up, that
12 we're not doing it.

13 So it was for all counsel. We were not going to
14 put up trial transcripts during the closing. So again, I
15 don't think that's any basis for any mistrial.

16 And, you know, in terms of the sua sponte motion
17 or the Court's ruling, I think that's what the Court is
18 here for, is to basically let the jury decide what they
19 need to decide and if there's been no proof whatsoever
20 offered on an issue and all of the proof is basically
21 undisputed -- I think the Court asked two or three times
22 what specific proof was submitted that would create an
23 issue of fact or something for the jury, and there was
24 none. They submitted absolutely no proof on this.

25 And if anything, it's the plaintiff's failure --

1 we should have been moving for a directed verdict on that
2 as soon as they rested their case. So we have been a
3 little busy and certainly the plaintiff's failure is not
4 anything reflecting on the fact that the Court is sitting
5 up here and seeing the evidence come in.

6 So I think that's what the Court's job is and I
7 don't think that, you know, the fact that the
8 defendants -- if they had something to put in, they could
9 have put it in and that's what we have trials for. What
10 did we hear? We heard absolutely nothing. Not a single
11 proof, not a single fact witness by the defendant doing
12 anything to controvert this.

13 I'm just asking my -- those are the parts that I
14 was in on, so I would ask if my esteemed colleagues could
15 finish the argument for the plaintiff.

16 THE COURT: And before you begin...

17 Mr. FRANKEL: Sure.

18 (Court's Exhibit 14 marked for identification
19 and received in evidence)

20 THE COURT: We have a note from the jurors
21 marked as Exhibit 14. It reads "We withdraw our request
22 for the testimonies of Drs. Andrus and Knott."

23 Okay.

24 Mr. FRANKEL: Two follow-up points, your Honor.

25 The last point, on the 1203, it's a matter of

1 law. If they're right, that all you need to do to comply
2 with the statute is be a licensed dentist, the facts are
3 undisputed that Dr. Padula was a licensed dentist in New
4 York, as were Knott and Andrus, then they didn't violate
5 1203. If we're right and the State Farm case says what we
6 say it does and what your Honor I think has concluded it
7 does, then they did violate 1203.

8 There's no fact for the jury to decide. The
9 facts are undisputed. It's the application of facts to
10 the law that matters. Ultimately, maybe the Fourth
11 Department will decide that, but it's a legal matter; it's
12 not a factual matter.

13 One other point that Mr. Nowotny raised that I
14 want to address is the testimony of Dr. Slack regarding
15 patterns and practices. Her opinions on that subject were
16 disclosed in expert disclosure in January. The identity
17 of the cases she reviewed were put in our disclosure. The
18 objections made at the time were principally that they
19 were caught by surprise and they would have to deal with
20 unidentified plaintiffs -- or unidentified patients and
21 they didn't have the records, all of which was untrue.

22 In terms of the relevance of the testimony, your
23 Honor had decided -- not only did we disclose that in
24 January when they filed a motion for summary judgment, one
25 of the bases for opposing the motion with respect to 349

1 and with respect to punitive damages was testimony or --
2 affidavit testimony from Dr. Slack that she had reviewed
3 these cases and here were the patterns and practices that
4 she had detected, and it went unrebutted and your Honor
5 found in your order denying the motion for summary
6 judgment that that was some evidence to support the
7 consumer-oriented component of 349. And it also helped
8 establish the scheme that supports a basis for punitive
9 damages.

10 It turns out, unbeknownst to us, because they
11 didn't disclose that in their stuff, that Drs. Cisneros
12 and Davis had reviewed a bunch of cases, too. Whether
13 they detected any patterns, I don't know, but they were in
14 a position to rebut that if they choose to because they
15 had done the same thing. They choose not to. There's not
16 only no basis for a mistrial on that, it would be error
17 not to have admitted the evidence.

18 And I just think it's a non-issue. It's clearly
19 relevant evidence to key issues in the case and entirely
20 proper to admit it.

21 THE COURT: Thank you.

22 Mr. LEYENDECKER: Your Honor, may I be heard on
23 one brief issue?

24 THE COURT: Certainly.

25 Mr. LEYENDECKER: It really relates to this

1 whether you sustained more objections for the defendants
2 than you did for the plaintiffs, and the underlying
3 suggestion there is pretty incredible to me and I think
4 that the record is going to be very clear that if we're
5 going to have a score card as to the number of objections
6 that were made, the tally on one side is going to be far
7 greater than the tally on the other side, and so it
8 shouldn't come as any surprise that if the side of the
9 case that has the far greater number of objections
10 asserted has more that were sustained... that's just what
11 you would expect.

12 And I find the suggestion offensive, and I want
13 the record to be clear, as it will be, on who assert the
14 number and the amount and the frequency, including
15 objections such as "he's piling on," and the last time I
16 checked, there's no such thing as a "piling on" objection,
17 certainly not to the form.

18 Thank you.

19 THE COURT: Thank you.

20 Okay. Defendants want to respond?

21 Mr. FIRST: No.

22 Mr. McPHILLIAMY: Actually, your Honor, just on
23 one point and that's the gummy bears. The testimony that
24 was adduced during this trial was in no way to blame
25 Jeremy's parents or Jeremy for eating gummy bears or

1 child-rearing habits. The testimony that was adduced
2 during trial was just to provide once more the etiology as
3 to how Jeremy could have presented to Small Smiles, before
4 Small Smiles, to Dr. Taylor's office and Dr. Patel's
5 office and ultimately Small Smiles with decay on his
6 teeth. The testimony was not to blame his parents for
7 feeding him gummy bears or even Jeremy for ingesting gummy
8 bears, just to provide etiology for the source of decay
9 that he presented to Small Smiles with.

10 THE COURT: I think we addressed that issue
11 during the course of the trial.

12 Mr. CAHALAN: Can I be heard on one point? I
13 was listening from behind the screen. With respect to
14 that same issue that was just mentioned by Mr.
15 McPhilliamy, on whether -- there was opposition submitted
16 on a motion in limine that was made I think very recently,
17 just before closings, and we did submit opposition, I
18 believe, without checking my notes, within maybe 36 hours
19 of when it was provided. We uploaded it and provided it
20 to the Court, and in that opposition we did indicate that
21 the issue of the gummy bears had been something that had
22 been addressed during the trial and we reserved our right
23 to discuss it on the bases that -- on the bases that Mr.
24 McPhilliamy mentioned.

25 THE COURT: Okay. I don't think -- Mr. Cahalan,

1 I'm not sure I know what you're referring to because there
2 was so much that was submitted to the Court. Are you
3 talking about the issue of the gummy bears because I think
4 the motion with respect to the -- the plaintiff's motion
5 in limine, if you will, with respect to closings, that
6 wasn't -- that was just made the evening before closings,
7 wasn't it? Were you talking about opposition to that?

8 Mr. HUSLANDER: We responded to that in writing.

9 THE COURT: Right. But that didn't come 36
10 hours before --

11 Mr. CAHALAN: I'm not exactly sure.

12 THE COURT: I understand. You did submit. And
13 as I told counsel all along, whatever was submitted to me
14 by e-mail in the -- during the days, the last couple of
15 days, as I told counsel to their face, I wasn't going to
16 tell you you couldn't submit anything, and I believe I've
17 read everything, but I can't be 100 percent sure because
18 there just aren't enough hours in the day, but I do know
19 that I did receive opposition papers from you, Mr.
20 Cahalan. But I guess I was just -- not sure I knew which
21 ones you were talking about because --

22 Mr. CAHALAN: I could be wrong on the exact
23 timing. I know it was very shortly before closing that we
24 submitted something --

25 THE COURT: Right. And I got that.

1 Mr. CAHALAN: Thank you.

2 THE COURT: Anybody else? Okay.

3 The Court is going to deny the motion for a
4 mistrial.

5 Anything else?

6 THE DEPUTY: Court is in recess.

7 (Recess taken while jury continued
8 deliberations.

9 * * *

10

11 THE COURT: Okay. We have a verdict. We'll
12 have the jury brought back in.

13

14 (Whereupon, the jury was then brought into the
15 courtroom)

16 THE COURT: Okay. We have a verdict. I'd ask
17 the foreperson to please stand. We'll have the verdict
18 sheet given to you and you'll be asked some questions by
19 the court clerk.

20 THE CLERK: In the action of Kelly Varano as
21 parent and natural guardian of Jeremy Bohn, plaintiffs,
22 vs. FORBA Holdings LLC, now known as Church Street Health
23 Management LLC, FORBA New York, LLC, FORBA LLC, now known
24 as Lisac, LLC, FORBA New York, now known as Lisac, New
25 York, LLC, DD Marketing Incorporation, Small Smiles

1 Dentistry of Syracuse LLC, Daniel E. DeRose, Michael A.
2 DeRose, Edward J. DeRose, D.D.S., Adolph R. Padula,
3 D.D.S., William A. Mueller, D.D.S., Michael W. Rounph,
4 Naveed Aman, D.D.S., Koury Bonds, D.D.S., Yaqoob Khan,
5 D.D.S., have you answered the questions submitted to you
6 by the Court?

7 THE FOREPERSON: We have.

8 THE CLERK: Question Number 1: Did any of the
9 following defendants violate New York General Business Law
10 Section 349? Koury Bonds, D.D.S.?

11 THE FOREPERSON: No.

12 THE CLERK: Naveed Aman, D.D.S.?

13 THE FOREPERSON: No.

14 THE CLERK: Yaqoob Khan, D.D.S.?

15 THE FOREPERSON: No.

16 THE CLERK: Syracuse clinic?

17 THE FOREPERSON: No.

18 THE CLERK: Old FORBA?

19 THE FOREPERSON: No.

20 THE CLERK: New FORBA?

21 THE FOREPERSON: No.

22 THE CLERK: Going to Question Number 4, did any
23 of the following defendants commit a battery? Answer
24 separately as to each defendant. If the answer is not
25 unanimous, the dissenting juror must sign where indicated.

1 Koury Bonds, D.D.S.?

2 THE FOREPERSON: No.

3 THE CLERK: Old FORBA?

4 THE FOREPERSON: No.

5 THE CLERK: New FORBA?

6 THE FOREPERSON: No.

7 THE CLERK: Were your answers unanimous for all
8 of those?

9 THE FOREPERSON: Yes.

10 THE CLERK: Thank you. Going to Question Number
11 7: Was Old FORBA's violation of New York State Limited
12 Liability Company Law Section 1203 a proximate cause of
13 injury to Jeremy Bohn as of the date of May 23rd, 2006?

14 THE FOREPERSON: No.

15 THE CLERK: August 31st, 2006?

16 THE FOREPERSON: No.

17 THE CLERK: Did at least five of your number
18 agree on that?

19 THE FOREPERSON: Yes.

20 THE CLERK: Thank you. Question 9 was deleted
21 at that point.

22 As to the last question, was that answer
23 unanimous, Question Number 4?

24 THE FOREPERSON: Question Number 7?

25 THE CLERK: I'm sorry, seven.

1 THE FOREPERSON: It was unanimous for both.

2 THE CLERK: As to Question Number 1, the first
3 question on the verdict sheet, was that answer unanimous?

4 THE FOREPERSON: It was.

5 THE CLERK: Thank you. Going on to Question
6 Number 10: Was New FORBA's violation of New York State
7 Limited Liability Company Law Section 1203 a proximate
8 cause of injury to Jeremy Bohn as to the date of October
9 11th, 2006?

10 THE FOREPERSON: No.

11 THE CLERK: October 23rd, 2006?

12 THE FOREPERSON: No.

13 THE CLERK: March 22nd, 2007?

14 THE FOREPERSON: No.

15 THE CLERK: January 21st, 2008?

16 THE FOREPERSON: No.

17 THE CLERK: Was that answer unanimous?

18 THE FOREPERSON: Yes.

19 THE CLERK: Question 11: Were any of the
20 following defendants negligent?

21 Syracuse clinic?

22 THE FOREPERSON: No.

23 THE CLERK: Old FORBA?

24 THE FOREPERSON: No.

25 THE CLERK: New FORBA?

1 THE FOREPERSON: No.

2 THE CLERK: Was that answer unanimous?

3 THE FOREPERSON: Yes.

4 THE CLERK: Going to Question Number 14: Did
5 any of the following defendants commit malpractice?
6 Koury Bonds, D.D.S.?

7 THE FOREPERSON: No.

8 THE CLERK: Naveed Aman, D.D.S.?

9 THE FOREPERSON: No.

10 THE CLERK: Yaqoob Khan, D.D.S.?

11 THE FOREPERSON: No.

12 THE CLERK: Was that answer unanimous?

13 THE FOREPERSON: Yes.

14 THE CLERK: Question Number 16. In connection
15 with the treatment of Jeremy Bonds, received on the dates
16 below --

17 Mr. HULSLANDER: No...

18 THE CLERK: I'll start again. Question Number
19 16, in connection with the treatment Jeremy Bohn received
20 on the dates below, state the amount if any you award
21 Jeremy Bohn to compensate him --

22 (Discussion off the record)

23 That completes your verdict. Thank you.

24 THE FOREPERSON: Yes.

25 THE COURT: Counsel want to poll the jurors?

1 Mr. HIGGINS: Yes, Judge, I request that the
2 jurors be polled.

3 THE CLERK: I'm going to ask each juror if that
4 was their answer on each question.

5 THE COURT: Would you all just stand?

6 THE CLERK: Question Number 1 was did any of the
7 following defendants violate New York General Business Law
8 Section 349? The answers to Koury Bonds, D.D.S., Naveed
9 Aman, D.D.S., Yaqoob Khan, D.D.S., Syracuse clinic, Old
10 FORBA and New FORBA were recorded as a no on the verdict
11 sheet.

12 Juror Number One, was that your answer?

13 JUROR NUMBER ONE: Yes.

14 THE CLERK: Juror Number Two, was that your
15 answer?

16 JUROR NUMBER TWO: Yes.

17 THE CLERK: Juror Number Three, was that your
18 answer?

19 JUROR NUMBER THREE: Yes.

20 THE CLERK: Juror Number Four?

21 JUROR NUMBER FOUR: Yes.

22 THE CLERK: Juror Number Five?

23 JUROR NUMBER FIVE: Yes.

24 THE CLERK: Juror Number Six?

25 JUROR NUMBER SIX: Yes.

1 THE CLERK: And Question Number 4, that question
2 read: Did any of the following defendants commit a
3 battery, and you're to answer separately, and it was to
4 Koury Bonds, D.D.S., Old FORBA, and New FORBA, your
5 foreperson reported that as no.

6 Juror Number One, was that your verdict?

7 JUROR NUMBER ONE: Yes.

8 THE CLERK: Juror number Two, was that your
9 verdict?

10 JUROR NUMBER TWO: Yes.

11 THE CLERK: Juror Number Three, was that your
12 verdict?

13 JUROR NUMBER THREE: Yes.

14 THE CLERK: Juror Number Four?

15 JUROR NUMBER FOUR: Yes.

16 THE CLERK: Juror Number Five?

17 JUROR NUMBER FIVE: Yes.

18 THE CLERK: Juror Number Six?

19 JUROR NUMBER SIX: Yes.

20 THE CLERK: Question 7, was Old FORBA's
21 violation of New York State Limited Liability Company Law
22 Section 1203 a proximate cause of injury to Jeremy Bohn?
23 The date was May 23rd, 2006.

24 Juror Number One, was that your answer?

25 JUROR NUMBER ONE: Yes.

1 THE CLERK: Juror Number Two?
2 JUROR NUMBER TWO: Yes.
3 THE CLERK: Juror Number Three?
4 JUROR NUMBER THREE: Yes.
5 THE CLERK: Juror Number Four?
6 JUROR NUMBER FOUR: Yes.
7 THE CLERK: Juror Number Five?
8 JUROR NUMBER FIVE: Yes.
9 THE CLERK: Juror Number Six?
10 JUROR NUMBER SIX: Yes.
11 THE CLERK: The second date was August 31st,
12 recorded as no by the foreperson.
13 Juror Number One, was that your answer?
14 JUROR NUMBER ONE: Yes.
15 THE CLERK: Juror Number Two?
16 JUROR NUMBER TWO: Yes.
17 THE CLERK: Juror Number Three?
18 JUROR NUMBER THREE: Yes.
19 THE CLERK: Juror Number Four?
20 JUROR NUMBER FOUR: Yes.
21 THE CLERK: Juror Number Five?
22 JUROR NUMBER FIVE: Yes.
23 THE CLERK: Juror Number Six?
24 JUROR NUMBER SIX: Yes.
25 THE CLERK: Question Number 10: Was New FORBA's

1 violation of New York State Limited Liability Company Law
2 Section 1203 a proximate cause of injury to Jeremy Bohn?
3 The date was October 11th, 2006, reported no by the
4 foreperson.

5 Juror Number One, was that your answer?

6 JUROR NUMBER ONE: Yes.

7 THE CLERK: Juror Number Two?

8 JUROR NUMBER TWO: Yes.

9 THE CLERK: Juror Number Three?

10 JUROR NUMBER THREE: Yes.

11 THE CLERK: Juror Number Four?

12 JUROR NUMBER FOUR: Yes.

13 THE CLERK: Juror Number Five?

14 JUROR NUMBER FIVE: Yes.

15 THE CLERK: Juror Number Six?

16 JUROR NUMBER SIX: Yes.

17 THE CLERK: Date of October 23rd, 2006, was
18 reported by the foreperson as no.

19 Juror number one, was that your answer?

20 JUROR NUMBER ONE: Yes.

21 THE CLERK: Juror Number Two?

22 JUROR NUMBER TWO: Yes.

23 THE CLERK: Juror Number Three?

24 JUROR NUMBER THREE: Yes.

25 THE CLERK: Juror Number Four?

1 JUROR NUMBER FOUR: Yes.
2 THE CLERK: Juror Number Five?
3 JUROR NUMBER FIVE: Yes.
4 THE CLERK: Juror Number Six?
5 JUROR NUMBER SIX: Yes.
6 THE CLERK: The next date was March 22nd, 2007,
7 reported as no by the foreperson.
8 Juror Number One, was that your answer?
9 JUROR NUMBER ONE: Yes.
10 THE CLERK: Juror number Two?
11 JUROR NUMBER TWO: Yes.
12 THE CLERK: Juror Number Three?
13 JUROR NUMBER THREE: Yes.
14 THE CLERK: Juror Number Four?
15 JUROR NUMBER FOUR: Yes.
16 THE CLERK: Juror Number Five?
17 JUROR NUMBER FIVE: Yes.
18 THE CLERK: Juror Number Six?
19 JUROR NUMBER SIX: Yes.
20 THE CLERK: Next date, January 21st, 2008,
21 reported no by the foreperson.
22 Juror number one, was that your answer?
23 JUROR NUMBER ONE: Yes.
24 THE CLERK: Juror number Two?
25 JUROR NUMBER TWO: Yes.

1 THE CLERK: Juror Number Three?
2 JUROR NUMBER THREE: Yes.
3 THE CLERK: Juror Number Four?
4 JUROR NUMBER FOUR: Yes.
5 THE CLERK: Juror Number Five?
6 JUROR NUMBER FIVE: Yes.
7 THE CLERK: Juror Number Six?
8 JUROR NUMBER SIX: Yes.
9 THE CLERK: Question 11, were any of the
10 following defendants negligent? Reported no as far as
11 Syracuse clinic by the foreperson.
12 Was that your answer, Juror Number One?
13 JUROR NUMBER ONE: Yes.
14 THE CLERK: Juror Number Two?
15 JUROR NUMBER TWO: Yes.
16 THE CLERK: Juror Number Three?
17 JUROR NUMBER THREE: Yes.
18 THE CLERK: Juror Number Four?
19 JUROR NUMBER FOUR: Yes.
20 THE CLERK: Juror Number Five?
21 JUROR NUMBER FIVE: Yes.
22 THE CLERK: Juror Number Six?
23 JUROR NUMBER SIX: Yes.
24 THE CLERK: As to Old FORBA, it was reported no
25 by the foreperson.

1 Juror Number One, was that your answer?
2 JUROR NUMBER ONE: Yes.
3 THE CLERK: Juror Number Two?
4 JUROR NUMBER TWO: Yes.
5 THE CLERK: Juror Number Three?
6 JUROR NUMBER THREE: Yes.
7 THE CLERK: Juror Number Four?
8 JUROR NUMBER FOUR: Yes.
9 THE CLERK: Juror Number Five?
10 JUROR NUMBER FIVE: Yes.
11 THE CLERK: Juror Number Six?
12 JUROR NUMBER SIX: Yes.
13 THE CLERK: New FORBA, no by the foreperson.
14 Juror Number One?
15 JUROR NUMBER ONE: Yes.
16 THE CLERK: Juror Number Two?
17 JUROR NUMBER TWO: Yes.
18 THE CLERK: Juror Number Three?
19 JUROR NUMBER THREE: Yes.
20 THE CLERK: Juror Number Four?
21 JUROR NUMBER FOUR: Yes.
22 THE CLERK: Juror Number Five?
23 JUROR NUMBER FIVE: Yes.
24 THE CLERK: Juror Number Six?
25 JUROR NUMBER SIX: Yes.

1 THE CLERK: Number 14, did any of the following
2 defendants commit malpractice, as far as Koury Bonds
3 D.D.S., no by the foreperson.

4 Was that your verdict, Juror Number One?

5 JUROR NUMBER ONE: Yes.

6 THE CLERK: Juror Number Two?

7 JUROR NUMBER TWO: Yes.

8 THE CLERK: Juror Number Three?

9 JUROR NUMBER THREE: Yes.

10 THE CLERK: Juror Number Four?

11 JUROR NUMBER FOUR: Yes.

12 THE CLERK: Juror Number Five?

13 JUROR NUMBER FIVE: Yes.

14 THE CLERK: Juror Number Six?

15 JUROR NUMBER SIX: Yes.

16 THE CLERK: Reported no by the foreperson as to
17 Naveed Aman, D.D.S.

18 Juror Number One, was that your answer?

19 JUROR NUMBER ONE: Yes.

20 THE CLERK: Juror Number Two?

21 JUROR NUMBER TWO: Yes.

22 THE CLERK: Juror Number Three?

23 JUROR NUMBER THREE: Yes.

24 THE CLERK: Juror Number Four?

25 JUROR NUMBER FOUR: Yes.

1 THE CLERK: Juror Number Five?
2 JUROR NUMBER FIVE: Yes.
3 THE CLERK: Juror Number Six?
4 JUROR NUMBER SIX: Yes.
5 THE CLERK: As to Yaqoob Khan, D.D.S., reported
6 no by the foreperson.
7 Juror Number One, was that your answer?
8 JUROR NUMBER ONE: Yes.
9 THE CLERK: Juror Number Two?
10 JUROR NUMBER TWO: Yes.
11 THE CLERK: Juror Number Three?
12 JUROR NUMBER THREE: Yes.
13 THE CLERK: Juror Number Four?
14 JUROR NUMBER FOUR: Yes.
15 THE CLERK: Juror Number Five?
16 JUROR NUMBER FIVE: Yes.
17 THE CLERK: Juror Number Six?
18 JUROR NUMBER SIX: Yes.
19 THE CLERK: I believe that completes the verdict
20 sheet.
21 THE COURT: All right. I want to thank you
22 again for your service during this lengthy trial. I'm
23 going to ask you to step back into the jury room and I'll
24 be in there in just a minute to personally thank you.
25

1 (Whereupon, the jury was excused from the
2 courtroom)

3 THE COURT: Okay. Is there anything the parties
4 want to put on the record at this time?

5 Mr. HIGGINS: Yes, Judge. Under 4406, it gives
6 us, I believe, 15 days to make post-trial motions. We
7 would just like to get some additional time on that.

8 THE COURT: Certainly. How much time would you
9 like, Mr. Higgins?

10 Mr. HIGGINS: 45 days?

11 THE COURT: Any objection?

12 Mr. FIRST: No objection.

13 Mr. McPHILLIAMY: No objection.

14 Mr. STEVENS: No objection.

15 THE COURT: Anything else to put on the record?

16 Mr. HIGGINS: No, Judge.

17 THE COURT: Thank you. Again, I want to thank
18 all counsel for your cooperation during the course of this
19 trial.

20 Ms. MARANGAS: Thank you, your Honor.

21 THE DEPUTY: Court is adjourned.

22 (Conclusion of proceedings)

23 * * *

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CERTIFICATE

I, VALERIE WAITE, an Official Court Reporter
in and for the State of New York, Fifth Judicial District,
do hereby certify that I recorded stenographically the
foregoing proceedings, at the time and place noted in the
heading hereof, and that it is a true and correct
transcript of the proceedings therein to the best of my
ability.

Valerie Waite,
Senior Court Reporter

Dated: October 10, 2013

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