STATE OF NEW YORK
SUPREME COURT - COUNTY OF ONONDAGA

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In Re: SMALL SMILES LITIGATION

RJI No. 33-11-1413
Index No. 2011-2128
Hon. Deborah H. Karalunas

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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Plaintiffs respectfully submit this memorandum of law in opposition to defendants' pending motions for summary judgment returnable on July 10, 2013.

THE PARTIES

The plaintiffs are Jeremy Bohn, Shiloh Lorraine, and Shadaya Gilmore. Each is a young child who was a patient at one of the Forba dental clinics in New York.

Defendant Old Forba[1] was formed in 2001 to open and operate Medicaid dental clinics throughout the country using the Forba clinic model.[2] Old Forba opened the New York clinics in late 2004 (Rochester, Syracuse) and mid-2005 (Albany), with Albany as the thirtieth Forba clinic.[3] The Individual Defendants[4] were the founders, owners, officers, and board members of Old Forba.[5] On September 26, 2006, the Individual Defendants sold the business to New Forba.[6,7] Each Individual Defendant received between $37 million and $100 million from the sale.[8] New Forba continued the business of opening and operating Medicaid dental clinics, using the Forba clinical model and Old Forba's dentists and regional directors to do so.[9]

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[1] Old Forba is comprised of defendants Forba, LLC, Forba NY, LLC and DD Marketing, Inc.

[2] Ex. 909 [excerpts from October 23, 2012 dep tr Dan DeRose] at 19 (the complete transcript is Defendants' Joint Exhibit SS); ex. 58 [April 27, 2006 Dan DeRose email] at 1599862 ("Company Highlights – Replicable clinic model"); ex. 927 [excerpts from November 30, 2012 dep tr William Mueller] at 71 (the complete transcript is Defendants' Joint Exhibit C); ex. 919 [excerpts from December 3, 2012 dep tr Lane] at 14-15, 24-6 (the complete transcript is Defendants' Joint Exhibit TT); ex. 920 [excerpts from November 14, 2012 dep tr Michael Lindley] at 45-6 (the complete transcript is Defendants' Joint Exhibit B).

[3] Ex. 11 [March 2, 2006 Reilly email].

[4] The Individual Defendants are Dan DeRose, Dr. Michael DeRose, Dr. Edward DeRose, Dr. Adolph Padula, Michael Roumph and Dr. William Mueller.

[5] Ex. 24 [December 23, 2005 Lane email] at 28032; ex. 7 [Asset Purchase Agreement] at 41076; ex. 909 [Dan DeRose] at 25-7; ex. 927 [Mueller] at 8.

[6] New Forba is comprised of defendants Forba Holdings, LLC and Forba NY, LLC. Those companies were owned and controlled by an investment fund from Bahrain (Ex. 920 [Lindley] at 23). The senior executives at the company were Michael Lindley and Al Smith, neither of whom were dentists (Ex. 920 [Lindley] at 13 as to Lindley; ex. 938 [November 15, 2012 dep tr Al Smith] at 13 as to Smith.

[7] Ex. 919 [Lane] at 64.

[8] Ex. 909 [Dan DeRose] at 119; ex. 6 [Old Forba Responses to Interrogatories] at Nos. 3 and 29 (as to Ed DeRose); ex. 929 [excerpts from November 29, 2012 dep tr Adolph Padula] at 51 (the complete transcript is Defendants' Joint Exhibit XX); ex. 927 [Mueller] at 55-8; ex. 908 [excerpts from November 27, 2012 dep tr Michael DeRose] at 56 (the complete transcript is Defendants' Joint Exhibit UU); ex. 6 at Nos. 3 and 29 (as to Roumph).

[9] Ex. 920 [Lindley] at 45-6, 80-1; ex. 24 at 28033; ex. 269 [October 18, 2006 Grossman email] at 132964.

The Dentist Defendants[10] were dentists at the Forba[11] clinics in Syracuse, Rochester, or Albany. Each treated one of the plaintiffs. The Clinic Defendants[12] are the Forba clinics in those cities.

STATEMENT OF THE CASE

The evidence detailed in the Higgins Affidavit shows the defendants engaged in a scheme that caused the Dentist Defendants to treat patients at the Forba dental clinics, including plaintiffs, for the purpose of increasing Forba's profits rather than for the medical needs of the patients. Plaintiffs are three very young children who were abused by the egregiously inappropriate treatment caused by this scheme, including the inappropriate use of restraints and unnecessary baby root canals, crowns, and other dental treatment.

New York law prohibits ownership and thus control of the clinical operations of a dental clinic by anyone other than New York licensed dentists (Limited Liability Company Law, Section 1203). This prohibition is "in keeping with the longstanding ban on the corporate practice of medicine" (*Universal Acupuncture Pain Services, P.C. v State Farm Mut. Auto. Ins. Co.*, 196 FSupp2d 378, 389, n.5 [SDNY 2002]). The purpose of the prohibition is to protect patients from the danger that a lay corporation that controls the clinical operations will cause the dentists to treat patients for the purpose of increasing profit rather than for the best interests of the patient (*In re Co-Operative Law Co*., 198 NY 479, 484 [1910]). The "potential for fraud" is inherent in ownership of a dental practice by a lay corporation (S*tate Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 321 [2005]).

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[10] The Dentist Defendants are Drs. Koury Bonds, Naveed Aman and Yaqoob Khan in the Bohn case, Drs. Maziar Izadi and Nassef Lancen in the Gilmore case, and Drs. Ismatu Kamara and Gary Gusmerotti in the Lorraine case. All of the Dentist Defendants except Dr. Gusmerotti are represented by the same counsel and are sometimes referred to herein as the Six Dentists.

[11] Forba, as used in this memorandum, means Old Forba and New Forba.

[12] The Clinic Defendants in these three cases are Small Smiles Dentistry of Albany, LLC (Gilmore), Small Smiles Dentistry of Syracuse, LLC (Bohn) and Small Smiles Dentistry of Rochester, LLC. (Lorraine). The Clinic Defendants are vicariously liable for the tortious conduct of the Dentist Defendants.

The evidence shows that both Old and New Forba intentionally and secretly controlled the clinical operations of the Clinic Defendants in knowing violation of this law, engaged in the very conduct the law is designed to prohibit by pressuring and threatening dentists to adhere to a profit driven clinical model, and caused the inappropriate care and abuse of the plaintiffs that the law is designed to prevent. The evidence also shows that the Individual Defendants devised and directed the scheme.

That it would be improper for Forba to influence the clinical decisions of the dentists in order to increase Forba's profits is not disputed.[13] Forba and the Individual Defendants dispute that they engaged in such conduct. But that simply presents issues of fact. The core fact issues are:

- Did Old Forba and New Forba engage in a scheme by which they caused the Dentist Defendants to treat plaintiffs for Forba's profit interests rather than for the plaintiffs' medical needs?

- Did the Individual Defendants know of or participate in the scheme?

THE SCHEME

The evidence shows plaintiffs suffered egregiously improper dental treatment.[14] The evidence also shows the conduct of the defendants caused that harm:

- Forba unlawfully owned and operated the New York clinics;[15]
- As illicit owners, Forba unlawfully controlled the dentists. Forba hired, fired and set the compensation of the dentists;[16]

- Forba operated all of the Forba clinics the same,[17] according to the Forba clinical model;[18]

[13] Ex. 909 [Dan DeRose] [Old Forba] at 60-1; ex. 920 [Lindley] [New Forba] at 68.
[14] The improper treatment of the plaintiffs is discussed at pages 49-59 below.
[15] See evidence discussed in Patrick J. Higgins Affidavit ¶¶ 80-94.
[16] Ex. 917 [excerpts from December 10, 2012 dep tr Kenneth Knott] at 45-7; ex. 919 [Lane] at 122-6; ex. 31 [December 10, 2004 Lane email]; ex. 920 [Lindley] at 57.
[17] Ex. 927 [Mueller] at 71; ex. 919 [Lane] at 24-6; ex. 37 [December 29, 2004 Dan DeRose email sent to Roumph and Andrus]; ex. 530 [April 18, 2005 Lane email to Knott with copies to Dan DeRose and Roumph]; ex. 514 [February 7, 2006 Lane email to Knott with copies to Dan DeRose and Roumph]; ex. 59 [undated Andrus memo to Dan DeRose]; ex. 903 [October 25, 2012 dep tr Robert Andrus] at 133-7.

- The Forba clinical model included adherence to the Forba treatment philosophy,[19] including when to use restraints, when to do pulpotomies, when to do crowns, and when to refer patients;[20]

- Individual Defendant William Mueller, who made $56 million from the scheme and developed and ran the training program by which all new dentists were indoctrinated into the Forba clinical model,[21] surrendered his Colorado dental license "with the same force and effect as a revocation ordered by the Board" after the Colorado Dental Board referred him to the Colorado Attorney General for disciplinary action for having trained Forba dentists to practice dentistry contrary to the standard of care;[22]

- Deviation from the Forba clinical model, including as to clinical matters, was not allowed; it was "the Forba way or the highway;"[23]

- The Forba treatment model was for the purpose of increasing Forba's profits rather than meeting the medical needs of the children;[24]

- Forba enforced adherence to the Forba treatment philosophy by pressuring, threatening and berating dentists, by firing those who did not produce to Forba's satisfaction, and by rewarding those who did;[25]

- As a part of the Forba clinical model, Forba, knowing that the use of restraints had significant risks, required the Dentist Defendants to use a fraudulent consent form that misrepresented to the parents that the use of restraints had "no known risks;"[26]

- Defendants concealed that the Clinics were unlawfully owned and controlled by a lay corporation and that the plaintiffs' treatment

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[18] Ex. 58 at 1599862; ex. 927 [Mueller] at 71; ex. 919 [Lane] at 14-15, 24-6; ex. 920 [Lindley] at 45-6.

[19] Ex. 68 [January 29, 2005 Forba board agenda] at 59429; ex. 530; ex. 390 [July 17, 2005 Dan DeRose email to Roumph and Knott]; ex. 514; ex. 59; ex. 903 [Andrus] at 133-7; ex. 44 [July 10, 2003 Andrus fax to Dan DeRose]; ex. 903 [Andrus] at 111-116; ex. 45 [October 7, 2005 Knott email]; ex. 37; ex. 909 [Dan DeRose] at 240.

[20] Ex. 927 [Mueller] at 78-9, 99-101.

[21] Ex. 927 [Mueller] at 55-8, 83-4.

[22] Ex. 50 [March 28, 2009 Colorado Dental Board Stipulation and Order] at 1, 3-4; ex. 927 [Mueller] at 146-8, 155-6; ex. 909 [Dan DeRose] at 312-17.

[23] Ex. 37; ex. 909 [Dan DeRose] at 239; ex. 68 at 59429; ex. 530; ex. 390; ex. 514; ex. 59; ex. 903 [Andrus] at 133-7; ex. 44; ex. 903 [Andrus] at 111-116; ex. 45; ex. 909 [Dan DeRose] at 240.

[24] See pages 3-7 below and Higgins Affidavit at ¶¶ 104-122.

[25] See pages 3-7 below and Higgins Affidavit at ¶¶ 104-141.

[26] See Higgins Affidavit ¶¶ 154-161.

was for the purpose of increasing Forba's profits and not plaintiffs' medical needs.[27]

In moving for summary judgment, the defendants do not contest that Forba illegally owned and operated the Clinics. Nor do they contest that Forba operated all of the clinics the same, and that it was "the Forba way or the highway." Their basic contention is that the evidence is allegedly undisputed that they did not influence the treatment provided by the dentists. The evidence that they did is overwhelming and creates a material issue of fact:

For example, as to Old Forba:

- Dan DeRose, an owner, director and the president of Old Forba instructed Mike Roumph, an owner and director of Old Forba "to teach them how to do dentistry" in order to increase production, and to pressure the dentists daily by letting them know that "we are aware of the lack of treatment"; [28]

- Richard Lane, an Old Forba senior executive, reported to Dan DeRose and Roumph his instructions to retrain a clinic to "break the old ways and get them on board with the FORBA model", including as to treatment planning;[29]

- Lane reported to Dan DeRose and Roumph his instructions that dentists "either buy in or they are gone" and to terminate dentists if they are "not matching up with our philosophy";[30]

- Dan DeRose reported to Roumph and others that referrals by the dentists at a Forba clinic had been "uncovered", that this was contrary to the Forba model, and that he was instructing that "no more ideas that are not FORBA's will be fostered and they . . . will do it our way or be terminated;"[31]

- In response to Dan DeRose's dissatisfaction with production in Syracuse, Roumph reported to Dan DeRose that he let the Syracuse lead dentist know his job depended on conforming to

[27] Kelly Varano Affidavit ¶ 4; Elizabeth Lorraine Affidavit at ¶ 4; Sherain Rivera Affidavit at ¶ 4.
[28] Ex. 390. Dan DeRose was an owner, director, and the President of Old Forba. He was in charge of all clinic activity. Roumph was an owner and director of Old Forba and was in charge of clinic performance. (Ex. 24 at 28032-3; ex. 909 [Dan DeRose] at 128; ex. 919 [Lane] at 81-3; ex. 6 at No.3).
[29] Ex. 919 [Lane] at 9-10.
[30] Ex. 530.
[31] Ex. 37.

Forba's treatment philosophies and meeting Forba's expectations;[32]

- Dr. Kenneth Knott, a regional director for both Old Forba and New Forba, reported to Dan DeRose and Roumph his plans for pressuring the dentists every day to change their treatment planning in order to increase production;[33]

- Knott reported to Roumph he had threatened four dentists that "their production was unacceptable", that the threat got the attention of three of the dentists, and his plan was to continue to pressure the fourth to resign;[34]

- Dr. Robert Andrus, another regional director for both Old Forba and New Forba, reported to Dan DeRose that he was going to influence the dentists' treatment planning in order to increase production;[35]

- Andrus reported to Dan DeRose that he was going to threaten the dentists to use restraints the Forba way or find another place to work.[36]

As reflected above, Knott and Andrus were key participants in the scheme for Old Forba, and they were key participants as New Forba continued the scheme. New Forba continued Knott and Andrus as regional directors[37] and assigned them the official company goal of increasing New Forba's revenues 27% by influencing the treatment planning of dentists who were not producing to New Forba's satisfaction.[38] Knott, who was New Forba's regional director for the New York clinics,[39] was directed to increase revenues by evaluating "diagnosis and treatment planning tendencies of clinics that fall below average per patient production."[40] As Exhibit 148

[32] Ex. 101 [December 15, 2004 Dan DeRose email sent to Roumph] at 137878 and [January 21, 2005 Roumph email to Dan DeRose] at 137855.
[33] Ex. 45; ex. 24 at 28033; ex. 269 at 132964.
[34] Ex. 665 [August 31, 2005 Knott email to Roumph]; ex. 666 [September 1, 2005 Knott email to Roumph].
[35] Ex. 44; Andrus was a Regional Director for both Old Forba and New Forba. (Ex. 24 at 28033; ex. 269 [October 18, 2006 Grossman email] at 132964).
[36] Ex. 59 at 35186; ex. 903 [Andrus] at 133-5.
[37] Ex. 24 at 28033; ex. 269 at 132964.
[38] Ex. 148 [January 29, 2007 Forba Holdings Goals and Objectives] at 18041-3.
[39] Ex. 114 [October 9, 2006 Grossman email] at 28574.
[40] Ex. 148 at 18043.

reveals, Forba's policy was to influence the dentists in their treatment to increase "per patient production" or PPP. As described by Knott: "PPP is the Golden Goose."[41]

Forba's influence over treatment planning for the purpose of increasing Forba's revenues was exerted regularly and routinely at all of the clinics, including the New York clinics.[42] As Knott admitted, Forba's purpose was to increase the number of procedures on the young children in order to increase Forba's revenues.[43]

New Forba admits the dentists should have been treating the patients as they were taught in dental school.[44] The evidence shows Forba instead trained and pressured its dentists to "flip-flop" their clinical thinking to conform to the Forba clinical model in order to increase Forba's profits. As revealed by an internal communication from New Forba's Regional Director for the New York clinics:

> [The dentists] can't get past the uncertainty of SS [stainless steel] crowns, pulpotomies, papoose, nitrous, the clinical kid related issues, and the Small Smiles treatment philosophies. They are scared.
>
> * * *
>
> As clinicians, we are formally trained to think much differently than the typical Small Smiles approach. Therefore, we must formally train to flip-flop our thinking.[45]

The Forba clinical model was dramatically different than accepted dental practice. The evidence shows Forba secretly and unlawfully "flip-flopped" its dentists to cause them to treat patients for Forba's profit interests rather than for the medical needs of the children. The inevitable result was the egregiously inappropriate care suffered by the plaintiffs.

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[41] Ex. 152 [May 30, 2007 Knott Central Regional Report] at 1546842.
[42] Ex. 917 [Knott] at 210-11.
[43] *Id.* at 214.
[44] Ex. 920 [Lindley] at 57-8.
[45] Ex. 147 [December 17, 2007 Reilly email].

PRELIMINARY STATEMENT[46]

Plaintiffs allege causes of action for fraud, battery, breach of fiduciary duty, violation of General Business Law § 349, negligence, negligence *per se*, malpractice, and informed consent. In addition, plaintiffs assert claims for concerted action and punitive damages. As discussed below, the evidence of the scheme creates a material issue of fact on all causes of action and claims, other than the malpractice claims, against all defendants. As to the malpractice claims, the Dentist Defendants failed to meet their initial burden. Moreover, plaintiffs' expert evidence creates numerous issues of material fact.

The basic arguments advanced by defendants and the reasons they should be rejected and the motions denied are as follows:

Intentional Torts (Fraud, Battery, Breach of Fiduciary Duty)

Defendants argue that even if they engaged in the scheme to and did provide care for Forba's profit interests rather than the medical needs of the plaintiffs and thereby committed the intentional torts of fraud, battery and breach of fiduciary duty, summary judgment on those claims should nonetheless be granted because they are allegedly duplicative of the medical malpractice claims against the Dentist Defendants. Justice Cherundolo rejected this same argument in denying defendants' Motions to Dismiss and it should be rejected again. Contrary to defendants' argument and for the reasons set forth by Justice Cherundolo and below, New York law does hold medical professionals accountable for intentional tortious conduct committed against their patients.

[46] Plaintiffs are not pursuing and do not oppose summary judgment on the following claims: (1) the successor liability claim (2) claims against DeRose Management, LLC (3) the General Business Law § 350 claims against all defendants (4) and the battery, General Business Law § 349, negligence *per se* and informed consent claims against Dr. Gusmerotti.

New Forba and Old Forba also argue for summary judgment as to the intentional torts on the grounds the evidence is allegedly undisputed that the Dentist Defendants had no intent to deceive. The basis for their argument is the self-serving testimony of the Dentist Defendants that they provided proper care to the plaintiffs in accordance with the standard of care and were not influenced by the Forba Defendants in their treatment. Notably, the Six Dentists do not even move for summary judgment of the intentional tort claims on this basis.

The Dentist Defendants' intent to deceive is not essential to plaintiffs' intentional tort claims against the Forba Defendants and the Clinic Defendants. Whether the Dentist Defendants acted fraudulently or negligently in allowing themselves to be influenced by the Forba Defendants' fraudulent conduct, plaintiffs allege the Forba Defendants' and the Clinic Defendants' own conduct was fraudulent. The Forba Defendants and Clinic Defendants do not address those allegations in connection with their argument based on the Dentist Defendants' intent, which precludes summary judgment on that basis.

Furthermore, the evidence detailed below shows (1) defendants engaged in a scheme that caused the Dentist Defendants to treat patients at the Forba clinics, including the plaintiffs, for the purpose of increasing Forba's profits rather than for the medical needs of the patients (2) defendants concealed from the plaintiffs' parents that the treatment of their young children was for Forba's profit interests and not for the children's medical needs (3) defendants used a fraudulent consent form that knowingly misrepresented there were "no known risks" to the use of restraints when defendants knew there were risks and (4) the treatment the plaintiffs received was egregiously below the standard of care. Clearly, this evidence contradicts the self-serving evidence of the Dentist Defendants and creates a material issue of fact as to whether they had an intent to deceive.

In the Hulslander Affirmation (but not in its Memorandum of Law), New Forba also argues for summary judgment of the intentional torts on the grounds the evidence is allegedly undisputed that New Forba (as opposed to the Dentist Defendants) did not have an intent to deceive. To the contrary, the evidence of Forba's scheme also creates a material issue of fact as to New Forba's intent to deceive.

General Business Law § 349

Defendants' argument for summary judgment as to the GBL § 349 claim is that the allegedly undisputed evidence shows the defendants' conduct was not consumer-oriented. Again, the basis for this claim is the self-serving evidence of the Dentist Defendants that they allegedly provided proper care uninfluenced by the Forba Defendants. From this, defendants argue that their conduct was private as to each individual plaintiff rather than a routine practice that could potentially affect other patients as well and thus is not consumer-oriented. Again, the evidence of the scheme contradicts this evidence. That evidence shows defendants were engaged in a scheme, as a matter of routine practice, to provide treatment based on Forba's profit interests rather than the medical needs of the patients. That scheme was directed at all of the children in all of Forba's clinics and potentially affected them all. As discussed below, that is consumer-oriented conduct. The evidence of the scheme thus creates a material issue of fact as to whether defendants' conduct was consumer-oriented.

The Individual Defendants

The Individual Defendants seek summary judgment as to all causes of action, including negligence,[47] on the basis that the evidence does not support piercing the corporate veil. Piercing the corporate veil is not required for the Individual Defendants' liability and is not the basis for

[47] Plaintiffs assert the negligence claim against the Forba Defendants and the Individual Defendants. The Forba Defendants have not moved for summary judgment on the negligence cause of action.

plaintiffs' claims against them. As discussed below, corporate officers and directors are liable for a corporation's tortious conduct if they participated in that conduct, which is plaintiffs' claim. This rule applies to all tortious conduct, including intentional and negligent conduct. Since the Individual Defendants do not address the legal basis for the claims against them, their motion must be denied.

Malpractice

Plaintiffs allege the Dentist Defendants committed malpractice. Their motions as to the malpractice cause of action should be denied because plaintiffs' expert evidence details the egregious treatment plaintiffs received from the Dentist Defendants and the specific ways in which their conduct was below the standard of care.

Informed Consent

Plaintiffs allege an informed consent cause of action against four of the Dentist Defendants for failing to disclose the risks of restraints. Their motion fails because whether a dentist is required to obtain consent before restraining a child, which risks of restraints should be disclosed, and whether a reasonably prudent person in the position of the plaintiffs' parents would have consented to the restraints if fully informed are issues of fact for the jury.

Negligence *Per Se*, Punitive Damages And Concerted Action

Plaintiffs allege the Forba Defendants were negligent *per se,* by owning and operating the Clinics in violation of the New York law that prohibits lay corporations from practicing dentistry. As discussed below, the statute is to protect patients from lay corporations controlling dentists and causing them to treat for profits rather than for the medical needs of the patients. The Forba Defendants' argument that the violation of the statute is not negligence *per se* is wrong because a statute that restricts the manner in which conduct can be performed establishes a standard of care, the violation of which is negligence *per se*.

Defendants' motion for summary judgment as to the punitive damages claim should be denied because the evidence of the scheme raises a material issue of fact as to whether their conduct was grossly negligent, reckless, intentional, or otherwise shows an indifference to or a reckless disregard of the health or safety of others.

Defendants' motion as to the concerted action claim should be denied because the evidence of the scheme creates a fact issue as to whether the defendants by their conduct implicitly agreed to engage in the scheme.

Dr. Gusmerotti

Dr. Gusmerotti's motion for summary judgment as to causes of action for fraud, breach of fiduciary duty and malpractice should be denied for the same reasons as the motions of the other defendants. His motion for summary judgment because the plaintiff allegedly admitted he is not seeking damages against Dr. Gusmerotti fails because Shiloh Lorraine's Amended Complaint, his disclosure of expert opinions, and his answers to discovery requests state that he is seeking damages against Dr. Gusmerotti and the nature of those damages.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy to be used sparingly since it deprives a party of his right to present his case to the jury (*Ugarriza v Schmeider*, 46 NY2d 471, 474 [1979]). "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of facts from the case" (*Winegrad v New York University Med. Center*, 64 NY2d 851, 853 [1985]). A "[d]efendant's failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Brown v Smith*, 85 AD3d 1648, 1649 [4th Dept 2011]). It is well-settled

that a party cannot establish its entitlement to summary judgment by pointing to gaps in its opponent's proof (*DeAngelis v Martens Farms, LLC,* 104 AD3d 1125 [4th Dept 2013]).

If a defendant satisfies its initial burden, a court must decide whether there are factual issues to be tried. In doing so, a court accepts as true the plaintiff's pleadings, the evidence presented in opposition to the motion, and the inferences that may be drawn from them (*Velardi v Lerman*, 203 AD2d 929 [4th Dept 1994]; *O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1st Dept 1996]; *Wenger v Goodell*, 220 AD2d 937, 938 [3rd Dept 1995]; *Dykeman v Heht*, 52 AD3d 767, 769 [2d Dept 2008]). The evidence is viewed "in the light most favorable to the [plaintiff]", affording him the benefit of every positive inference (*Esposito v Wright*, 28 AD3d 1142, 1143[4th Dept 2006]). "Where there is any doubt as to the existence of factual issues . . . or where the issue is arguable," summary judgment must be denied (*Chilberg v Chilberg,* 13 AD3d 1089, 1090 [4th Dept 2004]).

POINT I

PLAINTIFFS' FRAUD CAUSE OF ACTION IS NOT DUPLICATIVE OF THE MALPRACTICE CAUSE OF ACTION[48]

Defendants argue for summary judgment on the fraud claim because it is allegedly duplicative of the malpractice cause of action. Defendants unsuccessfully argued this precise issue in their Motions To Dismiss. In response to the same arguments made here, Justice Cherundolo held after extensive briefing and argument that the fraud cause of action is not duplicative.[49] Defendants appealed that order, the appeal has been fully briefed to the Fourth Department, and oral argument has been scheduled.

[48] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: New Forba Point I, Old Forba Point I, Six Dentists Point I, and Gusmerotti Point V(a).

[49] Ex. 3 [Justice Cherundulo's Order dated September 14, 2012].

Nothing has changed since Justice Cherundolo's decision rejecting defendants' argument. To the contrary, defendants simply argue that Justice Cherundolo's decision is wrong.[50]

As Justice Cherundolo held, the fraud and medical malpractice causes of action are not duplicative but, instead, are alternative claims. If the misconduct is determined to be intentional, it is fraud. If the conduct is determined not to have been intentional, it is malpractice.[51] New York allows a party to plead and pursue alternative causes of action (*Cohn v Lionel Corp.,* 21 NY2d 559, 563 [1968]; CPLR 3014).

Defendants argue that fraud and malpractice causes of action are duplicative and the fraud cause of action must be dismissed if the damages from the fraud are the same as the damages from the malpractice cause of action. If that were the rule, then a patient victimized by a health care provider's fraud could not sue if the fraud caused improper treatment. The Court of Appeals has held to the contrary. A patient may sue for fraud for intentional misconduct that results in improper medical treatment (*Simcuski v Saeli*, 44 NY2d 442, 451-52 [1978]). The fact that the same damages would support a malpractice cause of action if the conduct is negligent rather than intentional does not preclude a fraud claim (*Id* at 452; *Mitschele v Schultz*, 36 AD3d 249, 254-55 [1st Dept 2006]).

As *Simcuski* held, to exempt defendants from fraud liability simply because their fraudulent conduct results in improper medical treatment would be "unthinkable" (*Simcuski*, 44 NY2d at 454):

> [I]n human terms, it would be unthinkable today not to hold a professional person liable for knowingly and intentionally misleading his patient in consequence of which, to the physician's foreknowledge, the patient was deprived of an opportunity for escape from a medical predicament which the physician by his own negligence had initially inflicted on his patient.

[50] New Forba Memo. at 4, FN3.
[51] Ex. 3 at 13-14.

It would likewise be unthinkable not to hold persons liable in fraud for knowingly and intentionally misleading infant children for the purpose of generating profits for a corporate dental chain in consequence of which the infant children were made to undergo improper dental procedures and endure the physical and emotional trauma of the improper use of restraints.

Certainly there are circumstances in which the damages from a fraud must be different from the damages from an act of malpractice, but they are not present in this case. For example, that would be the case when a doctor first commits malpractice and subsequently commits fraud by prescribing treatment he knows is inappropriate in order to cover-up the prior malpractice. In those circumstances, the damages from the malpractice have already occurred before the fraud is committed and consequently there would be no damages from the fraud unless damages different from those resulting from the original act of malpractice are shown. That was the case in *Simcuski*, which is the source for the language upon which defendants rely (*Simcuski*, 44 NY2d at 452-3).

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

The Dentist Defendants also argue that a fraud cause of action based on improper treatment lies only if a medical professional performs improper treatment to cover up a prior act of malpractice. *Simcuski* disposes of that contention as well. The fundamental holding of *Simcuski* is that a medical professional is liable in fraud for committing fraud in providing treatment (*Simcuski*, 44 NY2d at 451-2). While the improper treatment that gave rise to the fraud in *Simcuski* was done to cover-up a prior act of malpractice, *Simcuski* does not limit its

holding to those circumstances. The Dentist Defendants have suggested no reason for such a limitation and there is none. As *Simcuski* held, medical professionals are not and should not be exempt from liability for fraudulent conduct that causes improper treatment.

For the reasons stated in Justice Cherundolo's prior decision on this issue, defendants' argument for summary judgment on the basis that the fraud and malpractice cause of action are duplicative should be rejected.

Furthermore, the motions of the Forba Defendants and the Individual Defendants should be rejected for an additional reason. As New Forba correctly points out, a malpractice cause of action against them would fail as a matter of law because they did not have a dentist-patient relationship with any plaintiff[52] (*Cygan v Kaleida Health*, 51 AD3d 1373, 1375 [4th Dept 2008]; *Garofalo v State of New York*, 17 AD3d 1109, 1110 [4th Dept 2005]). There is, therefore, no malpractice claim against the Forba Defendants or the Individual Defendants for the fraud claim to duplicate. Thus, the duplicative argument cannot form the basis for a summary judgment on the fraud claim against the Forba Defendants or the Individual Defendants.

POINT II

SUMMARY JUDGMENT IS NOT WARRANTED ON THE FRAUD CLAIM

A. The Forba Defendants Are Not Entitled To Summary Judgment Based On Their Claim That The Dentist Defendants Allegedly Had No Intent To Deceive[53]

New Forba argues it is entitled to summary judgment on the fraud cause of action because no material issue of fact exists that the Dentist Defendants did not have an intent to deceive and therefore no fraud lies against the Dentist Defendants. It argues that fraud by the Dentist Defendants is necessary in order to show proximate cause for a fraud against New

[52] New Forba Memo. at 22. Plaintiffs did allege a malpractice claim against the Forba Defendants and the Individual Defendants but are withdrawing it because it is not available as a matter of law.

[53] This joint point opposes the following sections of the defendants' memoranda of law and affirmations: New Forba Point II and Old Forba Memo. at 2.

Forba.[54] Old Forba makes a similar argument. It argues it is entitled to summary judgment because no material fact exists that that the Dentist Defendants did not make knowing misrepresentations and, if the Dentist Defendants did not commit fraud, there can be no fraud against Old Forba.[55]

1. The Forba Defendants Have Not Met Their Burden As Movants

The Forba Defendants have not met their burden as movants to demonstrate their entitlement to judgment as a matter of law. Whether the Dentist Defendants committed fraud is not an essential fact as to whether the Forba Defendants committed fraud that harmed the plaintiffs. As set forth above, plaintiffs allege (1) that the Forba Defendants and the Clinic Defendants committed fraud by engaging in a scheme by which they unlawfully and intentionally influenced the Forba dentists to treat patients for the purpose of generating revenue for Forba rather than for the dental needs of the patients and (2) such conduct caused the improper treatment of the plaintiffs.[56] The Forba Defendants simply do not address these allegations. Whether the Dentist Defendants acted fraudulently or negligently in allowing themselves to be influenced by Forba's fraudulent conduct, Forba's and the Clinic Defendants' conduct was fraudulent and damaged plaintiffs. The Forba Defendants have not made a *prima facie* showing of entitlement to judgment as a matter of law on the plaintiffs' fraud cause of action. This Court should therefore deny summary judgment on this basis alone.

[54] New Forba Memo. at 8-9.
[55] Old Forba Memo. at 2.
[56] Plaintiffs' Amended Complaints have been marked as Defendants' Joint Exhibits: def. j. ex. W [Varano (Syracuse) Am. Compl.] at ¶¶ 36-80; 155; 167-187; def. j. ex. P [Johnson (Rochester) Am. Compl.] at ¶¶ 36-80; 167; 175-195; def j. ex. I [Angus (Albany) Am. Compl.] at ¶¶ 36-80; 167; 175-195.

2. Whether The Dentist Defendants Made Knowing Misrepresentations Or Failed To Disclose Material Facts Is A Material Issue Of Fact In Dispute

Even if the Forba Defendants had met their initial burden, the allegedly undisputed fact they claim entitles them to judgment is disputed. Indeed, the Six Dentists do not even claim entitlement to summary judgment on the grounds that the undisputed evidence shows they did not act with an intent to deceive.[57] It is inconceivable that the Six Dentists would not have raised this ground for summary judgment themselves if it were even a colorable argument. In fact, it is not.

Intent to deceive is satisfied by evidence of a knowing misrepresentation *(Jo Ann Homes At Bellmore, Inc. v Dworetz*, 25 NY2d 112, 120-1 [1969]; *Owens v Waterhouse*, 225 AD 582, 584 [4th Dept 1929]; *United Nat'l Bank v Ettinger*, 59 AD2d 584, 586 [3d Dept 1977]; NY PJI 3:20, Comment at 14). Failure to disclose material facts "is of the same legal effect and significance as affirmative misrepresentations" (*Nasaba Corp. v Harfred Realty Corp*., 287 NY 290, 295 [1942]; NY PJI 3:20, Comment at 8). Thus, the failure to disclose material facts that the defendant is obligated to disclose also satisfies the intent to deceive element (*Striker v Graham Pest Control Co. Inc.,* 179 AD2d 984, 985 [3d Dept 1992]; NY PJI 3:20, Comment at 15).

(a) The Evidence Of The Scheme Creates A Material Issue Of Fact As To The Dentist Defendants' Intent To Deceive

The evidence of the scheme, which is detailed above at pages 3-7 and in Part 5 of the Higgins Affidavit, creates a material issue of fact as to whether the Dentist Defendants knowingly made misrepresentations or concealed material facts. The evidence shows the Dentist Defendants knowingly subjected themselves to Forba's unlawful control and knowingly

[57] The only basis set forth by Drs. Bonds, Aman, Khan, Kamara, Izadi, and Lancen for summary judgment on the fraud claim is the legal argument that it is duplicative of the malpractice claim. *See* the Six Dentist Defendants' Memoranda of Law at 1-4.

participated in Forba's company policy of providing treatment for the purpose of increasing Forba's profits rather than in the best interests of the patients. The Dentist Defendants also concealed from the parents that the clinic was unlawfully controlled by Forba and that their children's treatment would be for the purpose of increasing Forba's profits rather than for the medical needs of their children.[58] The evidence thus presents a material fact issue as to whether the Dentist Defendants made a knowing misrepresentation or failed to disclose material facts and thus had an intent to deceive.

New Forba argues "the general assertion of a profit motive is not evidence of fraudulent intent."[59] That is not plaintiffs' claim. Treatment of patients for the purpose of increasing profits rather than for the medical needs of the patients and concealing that from the parents, which is plaintiffs' claim, is evidence of fraudulent intent. New Forba cannot and does not claim otherwise.

(b) The Fraudulent Restraints Consent Form Creates A Material Issue Of Fact As To Intent To Deceive

In addition, as part of Forba's scheme, four of the Dentist Defendants knowingly misrepresented the risks of restraining children for dental procedures. Drs. Kamara, Lancen, Izadi and Bonds strapped the young plaintiffs to a board while they carried out unnecessary dental treatment to enhance Forba's bottom line. Dr. Bonds restrained Jeremy Bohn three different times; Dr. Izadi and Lancen each restrained Shadaya Gilmore; and Dr. Kamara restrained Shiloh Lorraine.[60]

[58] Elizabeth Lorraine Affidavit ¶ 4; Shevian Rivera Affidavit ¶ 4; Kelly Varano Affidavit ¶ 4.
[59] New Forba Memo. at 12.
[60] Ex. 199 [Jeremy Bohn's Small Smiles' dental record] at sheets 1, 5, 9; ex. 440 [Shadaya Gilmore's Small Smiles Dental Record] at sheets 3, 6; ex. 562 [Shiloh Lorraine's Small Smiles dental record] at sheet 4.

The AAPD Guidelines on Behavior Guidance of the Pediatric Dental Patient[61] warned Forba and these dentists that the use of restraints has serious risks, including "physical or psychological harm."[62] Forba and its senior executives had the Guidelines and distributed them to all of the company's dentists.[63] Forba nonetheless required its dentists to use a restraints consent form that represented the opposite: that the use of restraints has "no known risks."[64]

As instructed by Forba, the four Dentist Defendants used the company form. Each time one of the Forba dentists restrained a child, he or she had the parent sign a consent form saying "I understand there are no known risks to the stabilization procedure." The mothers of the plaintiffs received and signed the forms, as did Drs. Bonds, Izadi, Lancen and Kamara.[65]

The evidence shows these dentists followed Forba's instructions and represented there were no known risks even though they knew there were. Dr. Lancen testified he has known since he began working at the clinic that the use of restraints has the potential to produce serious consequences such as physical and psychological harm.[66] Dr. Izadi testified that the risks of restraining a child are set out in the AAPD Guidelines and he knew of those risks since at least September 2006.[67] Dr. Kamara testified that in 2005 she knew about the risks of restraints, including emotional and psychological trauma and that she did not believe the form to be accurate because it did not reveal the risks, but she nevertheless told parents there were no

[61] The American Academy of Pediatric Dentistry is the leading organization of pediatric dentists. It publishes and updates, on a regular basis, clinical guidelines pertaining to the dental treatment of children. One of those guidelines is entitled "Behavior Guidance of the Pediatric Dental Patient." These particular guidelines are referred to as the "AAPD Guidelines" hereinafter. See ex. 66.

[62] Ex. 66 [August 30, 2005 Lane email] at 163205.

[63] *Id*. at 163179.

[64] Ex. 356 [March 22, 2006 Bonds Employment Agreement] at ¶ 8.04; ex. 461 [Lancen Employment Agreement] at 8.04; ex. 404 [Izadi Employment Agreement] at 8.04; ex. 616 [Kamara Employment Agreement] at 8.04; ex. 199 at sheets 4 and 8; ex. 440 at sheet 6 and October 9, 2007 restraints consent form; ex. 562 at sheet 3; ex. 917 [Knott] at 153; ex. 919 [Lane] at 120-121, 235-6; ex. 908 [Mike DeRose] at 169-70.

[65] Ex. 199 at sheets 4 and 8; ex. 440 at sheet 6 and October 9, 2007 restraints consent form; ex. 562 at sheet 3.

[66] Ex. 918 [excerpts from November 20, 2012 dep tr Nassef Lancen] at 130-1 (the complete transcript is Defendants' Joint Exhibit O).

[67] Ex. 914 [excerpts from November 19, 2012 dep tr Maziar Izadi] at 44-6 (the complete transcript is Defendants' Joint Exhibit N).

known risks.[68] Dr. Bonds knew there were risks to restraining a child, but told Jeremy's mom in writing there were not because that is what the Forba form said.[69]

In their affirmations submitted in support of their summary judgment motions, Drs. Kamara, Lancen, Izadi, and Bonds all acknowledge that restraining a child can cause psychological and physical trauma, but now claim the risk is remote. At best, that simply creates a material issue of fact. Furthermore, the evidence flatly contradicts those assertions. In the spring of 2008, Forba changed the consent form to tell parents the truth by disclosing the risks set forth in the AAPD Guidelines.[70] The change came only after the media shined light on the fraudulent form that New Forba (and Old Forba) had used in the past, including to procure consent to restrain the three plaintiffs.[71] These Dentist Defendants have, thus, been telling parents since the spring of 2008 that restraining their child "has the potential to produce serious consequences such as physical and psychological harm" based on the same AAPD Guidelines that they received and read in 2006 and 2007. Their self-serving affidavits that they believed the risks were too remote to warrant disclosure is contradicted by their own actions in having disclosed those risks themselves for the last five years. The evidence creates a material issue of fact as to the four Dentist Defendants' intent to deceive.[72]

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[68] Ex. 915 [excerpts from December 6, 2012 dep tr Ismatu Kamara] at 51-4 (the complete transcript is Defendants' Joint Exhibit U).

[69] Ex. 907 [excerpts from November 19, 2012 dep tr Koury Bonds] at 391-2 (the complete transcript is Defendants' Joint Exhibit DD).

[70] Ex. 903 [Andrus] at 178-81; ex. 133 [April 16, 2008 Hatch email] at 70336; ex. 938 [Smith] at 68-71; ex. 920 [Lindley] at 173-5.

[71] Ex. 938 [Smith] at 69.

[72] In the Hulslander Affidavit at ¶ 54, New Forba says Old Forba owner and director William Mueller put the no known risks language in the consent form because he found no support for the risks identified in the AAPD Guidelines from his review of the literature. In fact, he testified only that he found no support for the risk of death from restraints. (Ex. 927 [Mueller] at 214). He said nothing about researching the risks of physical and psychological harm identified in the Guidelines. Mueller is an Individual Defendant in this case, made $56 million from Forba's fraudulent scheme, and surrendered his Colorado dental license "with the same force and effect as a revocation ordered by the Board" after the Colorado Dental Board referred him to the Colorado Attorney General for disciplinary action for having trained Forba dentists to practice dentistry contrary to the standard of care. (Ex. 50 at 1, 3-4; ex. 927 [Mueller] at 55-8, 146-8, 155-6; ex. 909 [Dan DeRose] at 312-17).

B. Whether New Forba Acted With An Intent To Deceive Is A Material Issue Of Fact[73]

Plaintiffs do not believe New Forba is moving for summary judgment on the grounds that it (as opposed to the Dentist Defendants) did not have an intent to deceive. New Forba does not address this issue in its memorandum of law. But, if New Forba has raised this issue in the Hulslander Affirmation, New Forba is in error. Whether Forba had an intent to deceive is a material issue of fact.

1. New Forba's Affirmative Steps To Conceal Its Knowingly Unlawful Ownership And Control Of The Clinics Is Clear Evidence Of Its Intent To Deceive And Create A Material Issue of Fact

As set forth above at page 2, New York law prohibits ownership and thus control of the clinical operations of a dental clinic by lay corporations. This prevents lay corporations from causing dentists to treat patients for the corporation's profit interest rather than for the best interests of the patient (Limited Liability Company Law, Section 1203; *In re Co-Operative Law Co*., 198 NY 479, 484 [1910]). The evidence shows that New Forba knew it was unlawful for it to own and control the clinics' clinical activities,[74] and that New Forba took affirmative steps to conceal that it owned and controlled the clinics.[75]

Forba gained illicit control of the clinical operations of the clinics by making it appear the clinics were owned by New York licensed dentists as the law requires. In fact those "owners" were Forba officers who were hand-picked by Forba and who Forba could fire as "owners" at any time.[76] Forba's hand-picked "owners" made no investment to obtain their "ownership"

[73] This joint point opposes New Forba's affirmation at ¶¶ 28-70. This issue is not addressed in New Forba's Memorandum of Law.
[74] Ex. 920 [Lindley] at 330.
[75] Higgins Affidavit at ¶¶ 90-94.
[76] Ex. 920 [Lindley] at 323-4; ex. 269 at 132964; ex. 917 [Knott] at 69-70.

interest[77] and received none of the profit from the clinics. All profit went to Forba.[78] And Forba, not the hand-picked "owners", operated the clinics,[79] including hiring, firing and setting the compensation of the dentists.[80] This evidence shows that Forba was the true owner of the clinics in knowing violation of the law (S*tate Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 321 [2005]).

This knowingly unlawful conduct was the means by which Forba secretly gained control of the clinical affairs of the clinics to do the very thing the law seeks to prevent: exercise that control to cause treatment for Forba's interests rather than for the best interests of the children. To affirmatively take steps to hide its ownership and control of the clinics -- as the evidence shows Forba did -- is a "willful and material failure to abide by state and local law" and is fraudulent (*Mallela*, 4 NY3d at 321). This is clear evidence of intent to deceive and creates a material issue of fact for the jury to decide.

2. The Evidence Of The Scheme Is Clear Evidence Of New Forba's Intent To Deceive And Creates A Material Issue Of Fact

Furthermore, the evidence of the scheme shows that New Forba in fact (1) exercised its illicit ownership and control to require the clinics to treat the children for the purpose of increasing New Forba's profits rather than providing proper care and (2) concealed from the parents Forba's illicit control of the clinics and that their children would be treated for Forba's profit interests rather than their medical needs. The evidence thus presents a disputed fact issue as to whether New Forba made a knowing misrepresentation or failed to disclose material facts and thus had an intent to deceive.

[77] Ex. 920 [Lindley] at 320-5; ex. 118 [January 1, 2007 Syracuse Clinic Purchase Agreement]; ex. 307 [January 1, 2007 Rochester Clinic Purchase Agreement]; ex. 308 [January 1, 2007 Albany Clinic Purchase Agreement].
[78] Ex. 920 [Lindley] at 313-4, 327-8; ex. 903 [Andrus] at 59-60; ex. 917 [Knott] at 57-8.
[79] Ex. 927 [Mueller] at 71; ex. 919 [Lane] at 14-5, 24; ex. 920 [Lindley] at 45-6.
[80] Ex. 917 [Knott] at 45-7; ex. 919 [Lane] at 122-6; ex. 31; ex. 920 [Lindley] at 57.

3. New Forba's Fraudulent Restraints Consent Form Is Clear Evidence Of New Forba's Intent To Deceive

Finally, New Forba argues specifically that the misrepresentation in its consent form that there are no known risks of restraining children was not made with intent to deceive.[81] But the evidence shows that New Forba, knowing that the use of restraints had significant risks, required the Dentist Defendants to use a fraudulent consent form that misrepresented to the parents that the use of restraints had "no known risks."

As set forth above, the 2005 AAPD Guidelines warned that the use of restraints had serious risks.[82] Yet New Forba required its dentists to use a consent form that represented just the opposite; that there were "no known risks."[83] The testimony of Dr. Andrus, Dr. Knott, and Al Smith shows this was a knowing misrepresentation. All were key members of New Forba's senior management, and Andrus and Knott were New Forba's most senior dentists.[84]

Dr. Andrus was a New Forba Senior Vice President and Regional Director.[85] Andrus testified that in 2005 he received the 2005 AAPD Guidelines that warned of the serious risks of restraints[86]; that those risks should have been disclosed to parents[87]; that New Forba did change the consent form to disclose those risks but not until the spring of 2008;[88] and he had no explanation for why, until the spring of 2008, he and Forba were telling parents there were no known risks when he knew the AAPD had reported significant risks as early as 2005.[89]

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[81] New Forba Memo. at 10-11.
[82] Ex. 66 at 163205.
[83] Ex. 356 at ¶ 8.04; ex. 461 at 8.04; ex. 404 at 8.04; ex. 616 at 8.04; ex. 199 at sheets 4 and 8; ex. 440 at sheet 6 and October 9, 2007 restraints consent form; ex. 562 at sheet 3; ex. 917 [Knott] at 153.
[84] Ex. 920 [Lindley] at 72.
[85] Ex. 269 at 132964. Andrus was also a Regional Director for Old Forba, with the highest compensation in the company other than the owners. (Ex. 24 at 28033; ex. 7 at 41214).
[86] Ex. 903 [Andrus] at 172-5, 188; ex. 66 at 163179, 163205.
[87] Ex. 903 [Andrus] at 178; 184-5.
[88] *Id.* at 178-81.
[89] *Id.* at 178.

Dr. Knott was New Forba's Senior Vice President and Regional Director for Forba's New York Clinics.[90] His testimony was the same as that of Dr. Andrus. He knew prior to the earliest treatment in this case (Jeremy Bohn in May 2006) that the AAPD Guidelines warned of serious risks with the use of restraints and that with such knowledge New Forba represented on its consent form that there were no known risks.[91] He, too could not explain why New Forba represented to patients at their clinics that restraints were risk-free in the face of the explicit warning of risks in the Guidelines: "I really don't have an answer for that."[92]

Al Smith, New Forba's President, also conceded that the risks should have been disclosed. As he put it, New Forba's no risks representation "wasn't correct."[93] As set forth above and as Smith further testified, New Forba ultimately changed the consent form to tell the truth by disclosing the substantial risks, but only after media attention brought the fraudulent form to light.[94] Clearly, New Forba believes the risks in the AAPD Guidelines should have been disclosed.

While Smith claimed the misrepresentation was an "oversight"[95], the evidence shows the two most senior dentists in New Forba knew that restraints were not risk free and knew that the form represented just the opposite. The evidence shows this was no oversight, but instead a knowing false misrepresentation.

New Forba argues the AAPD Guidelines are not binding.[96] Binding or not, the evidence shows New Forba believed the serious risks identified in the Guidelines should have been

[90] Ex. 269 at 132964; ex. 114 at 28574. Knott was also a Regional Director for Old Forba, with the third highest compensation in the company other than the owners. (Ex. 24 at 28033; ex. 7 at 41214).
[91] Ex. 917 [Knott] at 149; ex. 66 at 163179, 163205.
[92] Ex. 917 [Knott] at 148-50..
[93] Ex. 938 [Smith] at 69.
[94] *Id*.
[95] *Id*. at 79.
[96] New Forba Memo. at 11.

disclosed and knowingly represented the opposite. The evidence creates a genuine issue of material fact as to New Forba's intent to deceive.

POINT III

DEFENDANTS DO NOT HAVE A LEGAL OR FACTUAL BASIS FOR SUMMARY JUDGMENT ON THE BATTERY CLAIM[97]

Plaintiffs contend their parents were deceived through misrepresentations and concealment of material facts into consenting to let the dentists restrain their children and perform invasive dental procedures on them. Because their consent was procured by fraud, the invasive dental procedures and physical restraints that plaintiffs endured were unlawful as a battery.

A. The Battery Claim Is Not Duplicative

Defendants argue that because the parents consented to their children's dental treatment, plaintiffs' claim is for informed consent or malpractice and not battery. Justice Cherundolo heard and rejected the identical argument last year.[98] Although their appeal of that order is pending before the Fourth Department, defendants ask this Court to reconsider and reverse it. There are no grounds to do so.

The law has not changed. "It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she caries out a procedure or treatment to which the patient has provided 'no consent at all'" (*Vanbroklen v Erie County Medical Center*, 96 AD3d 1394 [4th Dept 2012]). And as Justice Cherundolo ruled, consent procured through fraud is no consent at all (See *Birnbaum v Siegler*, 273 AD 817 [2d Dept 1948] [in assault claim against health care provider, fact issue presented as to whether consent was procured by fraud]).

[97] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: New Forba Points I and II, Old Forba Point II, and the Six Dentists' Point II. Shiloh Lorraine is not suing Dr. Gusmerotti for battery.

[98] Ex. 3 at 19-22.

Thus, a battery claim where the patient has consented to treatment is different than an informed consent or malpractice claim. The former requires proof of fraud in procurement of the consent; the latter two do not. For the reasons stated in Justice Cherundolo's order, defendants' motions for summary judgment claiming the battery claim is duplicative should be denied.

B. Whether The Dentist Defendants Made Knowing Misrepresentations Or Failed To Disclose Material Facts Is An Issue Of Material Fact Precluding Summary Judgment On The Battery Claim

The Forba Defendants also argue for summary judgment on the grounds that the Dentist Defendants allegedly did not knowingly make false representations to obtain consent and, therefore, did not commit a battery. The claim fails for two reasons.

First, the Forba Defendants have not met their burden as movants on this motion. Plaintiffs allege that the Dentist Defendants fraudulently obtained consent for treatment by concealing from the parents that (1) the clinics were being illegally owned, controlled and operated by a corporation and (2) the dentists' treatment decisions placed Forba's financial interests ahead of the dental needs of their patients. The Forba Defendants simply did not address these allegations. A motion for summary judgment should be denied as to any claim or allegation in the pleadings or bills of particulars that is not specifically refuted by the movant (*Humphrey v Gardner,* 81AD3d 1257 [4th Dept 2011]). Thus, the Forba Defendants' motions for a summary judgment on the battery claim must be denied.

Second, the record demonstrates that the Dentist Defendants did fraudulently procure consent, both for the dental procedures as a whole and, specifically, to restrain the plaintiffs while they performed invasive dental procedures. The same evidence that creates a material issue of fact on the fraud cause of action also creates a disputed fact issue as to whether the parent's consent to treatment was obtained by fraud. See pp. 18-21 above. Because whether the

Dentist Defendants concealed material facts from the parents to obtain their consent for treatment is a material issue of fact, the motions for summary judgment must fail.

In addition, the evidence that Drs. Kamara, Izadi, Lancen and Bonds made knowing misrepresentations regarding the risks of restraints, discussed above at pages 19-21 creates a fact issue as to whether those Dentist Defendants fraudulently obtained consent to restrain the plaintiffs. On that basis alone, the Forba Defendants' motion for summary judgment on battery must be denied.

C. Whether New Forba Acted With An Intent To Deceive Is A Material Issue Of Fact

As set forth above, plaintiffs do not believe New Forba is contending that its own lack of an intent to deceive entitles it to summary judgment on the battery claim. But if the issue is raised in the Hulslander Affidavit, the evidence and arguments set forth above at pp. 22-26 show that New Forba's intent to deceive is a disputed fact that must be decided by the jury. Accordingly, New Forba's motion for summary judgment on the battery claim on that ground should be denied.

POINT IV

SUMMARY JUDGMENT IS NOT WARRANTED ON PLAINTIFFS' BREACH OF FIDUCIARY DUTY CAUSE OF ACTION [99]

Plaintiffs contend that the Defendant Dentists had a fiduciary duty to disclose all material facts and place the interests of the plaintiffs ahead of their personal interests. Plaintiffs further contend that the Forba Defendants and the Individual Defendants interfered with that relationship, inducing the Defendant Dentists to breach their fiduciary duties to their patients.

[99] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: Old Forba, Point III, New Forba Points I and II, the Six Dentists' Point III and Dr. Gusmerotti's Point VII.

A. The Legal Arguments Have Been Decided And Are On Appeal

Defendants request summary judgment on the breach of fiduciary duty claim based on one or more of three legal arguments: (1) the Defendant Dentists do not have a fiduciary duty to their patients (2) the breach of fiduciary claim is duplicative of the malpractice cause of action and (3) the allegations are not specific enough to meet the pleading requirements of CPLR § 3016(b). These are the same legal arguments that defendants made, lost and are now making on appeal. They are not based on new facts or law. There is no reason for this Court to reconsider them.

Justice Cherundolo ruled that there is a fiduciary relationship between medical professionals and patients.[100] It includes a duty to disclose to the patient all material facts related to treatment and to speak the truth about a patient's medical condition (*Ross v Cmty Gen. Hosp*., 150 AD2d 838, 841 [3d Dept 1989]; *Aufrichtig v Lowell*, 85 NY2d 540, 546 [1995]; *Otto v Melman*, 25 Misc 3d 1235(A)[Sup Ct., Queens County 2009]). [101] Dentists, as well as doctors, owe a fiduciary duty to their patients (*See Tillery v Lynn*, 607 FSupp 399, 401 [SDNY 1985]).[102] As Justice Cherundolo further ruled, the breach of fiduciary claim is not duplicative of a malpractice cause of action because the former requires proof of intentional misconduct while the malpractice cause of action does not.[103] Finally, he ruled that the Amended Complaint describes in detail the alleged misconduct including, that the Dentist Defendants were conflicted by their loyalty to Forba's profit interests which they concealed from the plaintiffs and that their conflicted interests caused them to intentionally perform unnecessary procedures, unnecessarily

[100] Ex. 3 at 23.
[101] *Id.* at 24.
[102] *Id.*
[103] *Id.* at 25.

use restraints, and conceal the risks of those restraints from the parents of the plaintiffs. [104] Justice Cherundolo was correct. For these reasons, defendants' motion for summary judgment on the fiduciary duty claim based on previously rejected legal arguments should be denied.

B. Whether The Dentist Defendants And New Forba Had An Intent To Deceive Is Immaterial And Disputed

New Forba also claims the undisputed facts show the Dentist Defendants did not have an intent to deceive. According to New Forba, the lack of such intent entitles it to summary judgment on the breach of fiduciary duty claim.

A breach of fiduciary duty claim has three elements: the existence of a fiduciary duty, a breach of that duty and damages directly caused by the breach (*McGuire v Huntress*, 83 AD3d 1418 [4th Dept 2011]). Intent to deceive is not an element of a breach of fiduciary duty claim and, therefore, not a material fact that, if undisputed, could support summary judgment.

But if it were a material fact, it is a disputed fact. The evidence, summarized above on pp. 18-23 and included in Part 5 of the Higgins Affidavit, demonstrates that the Dentist Defendants, through their knowing misrepresentations and concealment of material facts, had an intent to deceive. To the extent New Forba is also contending that it did not have an intent to deceive, the evidence summarized above on pages 22-26 and in Part 5 of the Higgins Affidavit shows that to be a disputed material issue of fact as well.

POINT V

THE MOTIONS FOR SUMMARY JUDGMENT AS TO THE GBL § 349 CLAIM SHOULD BE DENIED[105]

GBL § 349 is a consumer protection statute (*Karlin v IVF America, Inc.,* 93 NY2d 282, 288 [1999]). The elements are an act or practice that (1) is consumer-oriented (2) is materially

[104] *Id.* at 26-27.

[105] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: New Forba Point III, Old Forba Point IV, Six Dentists Point IV, and Gusmerotti Point VIII.

deceptive or misleading and (3) causes injury to plaintiff (*Id*. at 293; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A*., 85 NY2d 20, 25-26 [1995]). The Courts apply § 349 broadly. It applies to "any service" in the conduct of "any business" and prohibits "all deceptive practices" (*Karlin,* 93 NY2d at 290, 287), including deceptive practices used in the provision of medical services (*Id.).*

A. Whether Defendants' Deceptive Conduct Was Consumer-Oriented Is A Material Issue Of Fact

Defendants argue they are entitled to summary judgment because the undisputed evidence allegedly shows their conduct was not consumer-oriented. To the contrary, material issues of fact exist on this aspect of the case.

1. The Scheme Was Consumer-Oriented

Deceptive acts or practices are consumer-oriented if they are not unique to the plaintiff but instead are done as a matter of routine and therefore "they potentially affect similarly situated consumers" (*Oswego,* 85 NY2d at 26-27; see also *Flandera v AFA America, Inc.,* 78 AD3d 1639, 1641 [4th Dept 2010] [conduct was consumer-oriented because it was directed at the general public]; *Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886, 888 [3d Dept 2008] [conduct was consumer-oriented because it was a routine practice that affected many similarly situated consumers]). The allegedly undisputed fact upon which defendants base their argument that their conduct was not consumer-oriented is that each dentist allegedly made individual treatment decisions in good faith. Defendants argue on this basis that the claims are nothing more than traditional malpractice claims and therefore their conduct was private as to each plaintiff.

This is a disputed issue of material fact. The evidence of the scheme set forth above shows deceptive conduct that was both far beyond a traditional malpractice claim and was done

on a routine basis aimed at all patients. The evidence shows that the treatment was based on Forba's profit interests rather than the individual medical needs of the children and that such conduct occurred as a matter of routine practice at all of Forba's clinics and potentially affected all of the children at all of the clinics. As held in *Simcuski*, fraudulently inducing improper treatment "is more than . . . [an] act of alleged negligent malpractice on the part of the treating physician; the complaint alleges a traditional fraud. …" (*Simcuski*, 44 NY2d at 451-2). And when done on a routine basis aimed at all of the clinics' patients, it is consumer-oriented. As a result, whether the defendants' deceptive conduct was consumer-oriented is a material issue of fact and summary judgment of the § 349 cause of action should be denied.

Indeed, Old Forba concedes that if the evidence raises a fact issue as to the scheme, then the consumer-oriented element is established. Thus, Old Forba acknowledges that the consumer-oriented element would be established if the plaintiff shows "that material misrepresentations were made to induce treatment and that the representations that were made were not unique to his treatment."[106]

That is what the evidence of the scheme shows. The deceptive conduct was not aimed solely at any individual plaintiff. Instead, the evidence shows the defendants engaged in a course of conduct common to all of Forba's clinics by which they concealed from all of the clinics' patients and their parents, including the plaintiffs in these cases, that (1) Forba illicitly owned and operated the clinics in violation of New York law for Forba's financial gain rather than for providing proper care to the clinics' patients and (2) that treatment was determined based on Forba's profit interests rather than the medical needs of the children.

In addition, the evidence shows that, when a child was restrained, Forba required all of the clinics to always use a restraints consent form that knowingly misrepresented that there were

[106] Old Forba Memo. at 17.

no known risks to restraints. The evidence shows deceptive conduct that was done as a matter of routine practice as to all of the children at Forba clinics and that potentially affected all of the children at the Forba clinics. This evidence creates a fact issue as to whether the deceptive conduct was consumer-oriented (*Oswego*, 85 NY2d at 26-7; *Flandera*, 78 AD3d at 1641; *Elacqua*, 52 AD3d at 888).

2. There Is No Special Rule For Medical Services Providers

Defendants also suggest that, because the deceptive concealments and misrepresentations occurred during an individual one-on-one encounter between the Dentist Defendants and a plaintiff, the conduct is private rather than consumer-oriented. *Oswego* holds to the contrary. In *Oswego*, a bank routinely concealed material facts from persons opening accounts. The deceptive concealment occurred in the individual one on one encounter with each person opening an account, and the plaintiff had to show the individual circumstances of her own account opening in order to prove her § 349 claim *(Oswego,* 85 NY2d at 27). But that did not make the § 349 claim improper as involving a unique transaction or one that was private in nature, nor does it do so in this case. As *Oswego* holds, deceptive conduct is not private in nature but instead is consumer-oriented when, as here, it is a routine practice. Thus, it has the potential to impact other consumers, regardless of whether it is implemented through individual one on one encounters.

Citing *Karlin*, defendants argue there is a different rule when the one-on one-encounter is with a medical services provider. Their contention is that even if they were engaged in a fraudulent course of conduct aimed at all of their patients and by which they routinely induced improper treatment by deceptive conduct to increase Forba's profits, they are still not liable under § 349 because the scheme was implemented through one-on-one encounters with their

patients. Neither *Karlin* nor any other authority suggests or supports such an unconscionable result. To the contrary, *Karlin* specifically holds that a medical services provider's treatment of an individual patient is subject to a § 349 claim so long as the plaintiff demonstrates an impact on consumers at large (*Karlin*, 93 NY at 294). There is no special rule for medical service providers. The record cited above creates a material issue of fact as to the consumer-oriented element, and the summary judgment motion is therefore properly denied.

B. Advertising And Marketing Is Not Essential To A § 349 Claim

Defendants argue that they are entitled to summary judgment because plaintiffs allegedly were not lured to the clinics by advertising or marketing materials. Defendants have not satisfied their initial burden as to this argument. Deception by advertising or marketing is not essential to a § 349 claim, and as discussed above, the evidence shows deceptive conduct both by concealment and by affirmative misrepresentations.

Contrary to defendants' argument, advertising and marketing is not the only form of deceptive conduct § 349 prohibits. To the contrary, § 349 prohibits "all deceptive practices, including false advertising" (*Karlin,* 93 NY2d at 287). Thus, for example, the § 349 claim in *Oswego* did not involve advertising or marketing; it was based entirely on concealment of material information in one on one encounters with customers who were opening bank accounts (*Oswego,* 85 N.Y.2d at 23-24). Likewise the § 349 claims in *Flandera* and *Elacqua* did not involve advertising or marketing. The absence of advertising or marketing does not support summary judgment on the § 349 claim.

POINT VI

THE INDIVIDUAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD BE DENIED[107]

The Individual Defendants were the founders, owners, officers and directors of Old Forba. All were Old Forba directors and owners.[108] Plaintiffs allege the same claims against the Individual Defendants as against Old Forba because they conceived of, directed, participated in, had the motive for and were the beneficiaries of the tortious scheme that injured the plaintiffs.[109]

The Individual Defendants argue for summary judgment on the grounds that the undisputed evidence does not support piercing the corporate veil. The motion should be denied. Piercing the corporate veil is not essential to plaintiffs' claims against the Individual Defendants and, therefore, the Individual Defendants have not satisfied their initial burden.

A. Piercing The Corporate Veil Is Not Required To Establish The Individual Defendants' Liability

Contrary to the Individual Defendants argument, it is not necessary to pierce the corporate veil to find the Individual Defendants liable for the misconduct alleged against them. "In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (*Polonetsky v Better Homes Depot, Inc.,* 97 NY2d 46, 55 [2001]). This rule was reaffirmed in *Pludeman v Northern Leasing Systems, Inc.,* 10 NY3d 486, 491 [2008]. (See also *People v Frink America, Inc.,* 2 AD3d 1379, 1381 [4th Dept 2003]; *Clark v Pine Hill Homes,* 112 Ad2d

[107] This joint point opposes Point V in Old Forba's Memorandum of Law and its affirmation.

[108] Ex. 909 [Dan DeRose] at 26-7; ex. 24 at 28032. All but Roumph were founders and officers of Old Forba.(Ex. 909 [Dan DeRose] at 26-7; ex. 24 at 28032). All were owners of Old Forba and together they owned 97.5%.

[109] Def. j. ex. W [Varano (Syracuse) Am. Compl.] at ¶¶ 89, 91, 93, 96, 100, 102, 185-6, 190-2, 198-9, 210, 217, 225-6, 231, 234-6, 245-9; def. j. ex. P [Johnson (Rochester) Am. Compl.] at ¶¶ 89, 91, 93, 96, 100, 102, 193-4, 198-200, 206-7, 218, 225, 233-4, 239, 242-4, 253-7; def j. ex. I [Angus (Albany) Am. Compl.] at ¶¶ 89, 91, 93, 96, 100, 102, 193-4, 198-200, 206-7, 218, 225, 233-4, 239, 242-4, 253-7.

755 [4th Dept 1985]; *People v Apple Health and Sports Clubs, Ltd.,* 206 Ad2d 266, 267 [1st Dept 1994]; NY PJI 3:20, Comment at 12]).

The same rule applies to all torts, including negligence. As stated in *Clark* with regard to a negligence claim, "the general rule is that an officer of a corporation who participates in the commission of a tort by the corporation is personally liable therefore" (*Clark*, 112 AD2d at 755). And in *Espinosa v Rand*, 24 AD3d 102 [1st Dept 2005], the court held that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." (See also *Haire v Bonelli*, 57 AD3d 1354, 1357 [3d Dept 2008] [officers liable in negligence for reducing mall security to maximize profits]; *Sisino v Island Motocross of New York, Inc*., 41 AD3d 462, 464-5 [2d Dept 2007] [corporate officers liable for negligent corporate policy that increased risks to plaintiffs]; *McPhillips v Ellis*, 278 AD2d 682 [3d Dept. 2000] [corporate officers liable for negligently failing to obtain adequate insurance]).

Whether there is evidence sufficient to pierce the corporate veil is thus irrelevant to plaintiffs' allegations. Plaintiffs allege the Individual Defendants are liable for the tortious conduct in this case because they participated in it, which itself establishes a basis for personal liability. The Individual Defendants have not addressed those allegations and therefore have not met their burden as movants on this motion.

B. Whether The Individual Defendants Participated In The Tortious Conduct That Damaged The Plaintiffs Is A Material Issue Of Fact

Plaintiffs do not believe the Individual Defendants are contending that they are entitled to summary judgment because they claim that they did not participate in the tortious scheme that harmed the plaintiffs. But if they are, they are in error. That is a material issue of fact.

The Individual Defendants did much more than know of or participate in the scheme. As detailed below, they concocted it, put it in place, directed it, and had the motive for and were the beneficiaries of it. Dan DeRose received more than $100 million in illicit profit from the scheme. William Mueller, Adolph Padula, Mike DeRose, and Ed DeRose each received more than $56 million. Mike Roumph received more than $37 million.

1. The Individual Defendants Conceived Of And Directed The Scheme

The Individual Defendants are six of the seven owners of Old Forba who collectively owned 97.5% of the company.[110] As set forth above, all were Old Forba directors and all but Roumph were founders and officers of Old Forba.[111]

Old Forba was a family business.[112] Dan DeRose and Mike DeRose are Ed DeRose's sons, and Adolph Padula is his brother-in-law.[113] It was a tightly knit group, and the Individual Defendants decided all issues.[114] The decisions were unanimous.[115] The Individual Defendants decided that the clinics would be opened and operated according to the Forba clinic model.[116] That was their business.[117] Forba's business plan, put in place and implemented by the

[110] Ex. 6 at No. 3.
[111] Ex. 909 [Dan DeRose] at 26-7; ex. 24 at 28032.
[112] Ex. 909 [Dan DeRose] at 41; ex. 919 [Lane] at 80.
[113] Ex. 909 [Dan DeRose] at 26-7.
[114] Ex. 919 [Lane] at 79-80.
[115] Ex. 929 [Padula] at 143.
[116] Ex. 919 [Lane] at 80-81; ex. 927 [Mueller] at 71.
[117] Ex. 927 [Mueller] at 71.

Individual Defendants, was to replicate the Forba clinical model.[118] As set forth above, the Forba model was fraudulent.

Thus, the Individual Defendants decided that Padula would be held out to be the "owner" of the New York clinics.[119] But the Individual Defendants also decided and obviously knew and intended that all of the profits of the clinics would go to Old Forba.[120] That was a part of the Forba model.[121] The Individual Defendants knew that Old Forba could not own the clinics, so they took steps to conceal that it did. They made Old Forba the owner even though they knew it could not be so they could control the operations of the clinics in order to increase the profits, and so that the profits would ultimately go to them. That was their illicit plan, and as set forth above, that in fact did occur.

The Individual Defendants also decided that Old Forba would do the very thing the law was designed to prevent: influence the dentists to treat patients as Old Forba desired. That too was a fundamental part of the Forba clinic model. Thus, as a part of the "Company Strategy," the Forba clinical model included "specific dental procedures and how they should be performed."[122]

And the Individual Defendants actively participated in influencing the clinical decisions of the Forba dentists. They decided to train the Forba dentists as to when to do specific dental procedures, including when to use restraints, when to do pulpotomies ("baby root canals"), when to do crowns, and when to refer patients.[123]

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[118] Ex. 58 at 1599862.
[119] Ex. 9 [certified copy of Syracuse filing with Secretary of State]; ex. 26 [certified copy of Rochester filing with Secretary of State]; ex. 27 [certified copy of Albany filing with Secretary of State]; ex. 929 [Padula] at 131.
[120] Ex. 929 [Padula] at 131.
[121] Ex. 909 [Dan DeRose] at 61-2.
[122] Ex. 511 [September 12, 2003 Dan DeRose email] at 17817; ex. 510 [November 20, 2003 Mueller letter] at 13661; ex. 68 at 59429.
[123] Ex. 927 [Mueller] at 78-9 and 99-101.

The Individual Defendants also knew of and approved the practice of threatening under-producing dentists to accede to the Forba treatment philosophy to increase production.[124] In January 2005, Roumph sent an email to both Dan DeRose and the Syracuse lead dentist in which Roumph let the lead dentist know his job was on the line, questioning whether "this job is right for you", whether "you can meet our expectations", and whether "your philosophies regarding treatment [are] in line with ours?"[125] The clear message was to get on board with the Forba treatment philosophies or find another job. The Individual Defendants were fully aware of this transparent threat as the email was brought to the Forba board, discussed, and made a part of the board materials.[126] Dan DeRose and Roumph were not secretly threatening dentists on their own. They did so because it was a part of the Forba model put in place by the Individual Defendants.

In addition, the Individual Defendants created the fraudulent restraints consent form that represents there are "no known risks" to the use of restraints. They decided the "no known risks" language would be in the form.[127] They required all of the clinics to use the form with the "no known risks" language.[128] And they did so knowing that the AAPD Guidelines, which they considered to be authoritative,[129] warned that the use of restraints involves serious risks, including physical or psychological harm.[130]

[124] Ex. 68 at 59429.
[125] *Id.*
[126] Ex. 68; ex. 927 [Mueller] at 232-5.
[127] Ex. 65 [January 16, 2004 Forba Board Meeting Agenda] at 26489, 26519; ex. 919 [Lane] at 235-6; ex. 927 [Mueller] at 207-8; ex. 929 [Padula] at 133.
[128] Ex. 919 [Lane] at 117-121; ex. 908 [Michael DeRose] at 169-70.
[129] Ex. 534 [July 27, 2006 Mueller email]; ex. 929 [Padula] at 133.
[130] Ex. 66 at 163179, 163205; ex. 929 [Padula] at 165-6.

The Individual Defendants also knew the AAPD Guidelines warn that dentists should not use restraints without extensive additional training beyond dental school.[131] But they nonetheless decided to hire dentists who did not have such training.[132]

In short, the law prohibits Forba from owning and influencing the clinical operations of the clinics. As directors and owners, the Individual Defendants put in place, implemented, and concealed a scheme they knew to be unlawful, and by which they caused Forba dentists to treat patients for Forba's profit interests rather than the medical needs of the children. They are liable for their conduct.

2. The Additional Roles Of The Individual Defendants

In addition to planning and directing the scheme, the Individual Defendants each played a discrete role in its implementation.

Adolph Padula held himself out as the "owner" of the clinics to conceal the fact that Old Forba was the true owner.[133] In addition, Padula was one of the trainers in the new dentist training program through which the dentists were indoctrinated into the Forba clinical model.[134]

William Mueller was Old Forba's Medical Director.[135] He developed Forba's new dentist training program.[136] He, Ed DeRose, and Mike DeRose trained the new dentists.[137] In March 2006 the Colorado Dental Board (1) concluded that Old Forba trained dentists to practice dentistry in violation of the standard of care and that dentists trained in the program were in fact influenced to and did provide treatment below the standard of care, and (2) referred a complaint

[131] Ex. 66 at 163179, 163204.
[132] Ex. 929 [Padula] at 142.
[133] Ex. 929 [Padula] at 131; ex. 9; ex. 26; ex. 27.
[134] Ex. 919 [Lane] at 143-4; ex. 43 [September 9, 2004 Mueller email]; ex. 927 [Mueller] at 97-8.
[135] Ex. 909 [Dan DeRose] at 132-3.
[136] Ex. 927 [Mueller] at 84.
[137] *Id.* at 81; ex. 919 [Lane] at 143-4.

against Mueller to the Colorado Attorney General to prosecute a disciplinary action.[138] Mueller nonetheless continued to conduct Forba's new dentist training until the sale to New Forba.[139] In March 2009, the action was resolved by Mueller's relinquishment and permanent surrendered of his Colorado dental license with "the same force and effect as a revocation ordered by the Board."[140]

Dan DeRose was Old Forba's President and Chief Executive Officer.[141] He and Roumph were in charge of the day to day operations of the clinics, with DeRose in charge of "all clinic activity" and Roumph in charge of "clinic performance."[142] The evidence set forth at pages 5-6 above and in the Higgins Affidavit shows they participated in pressuring and threatening the dentists to conform to the Forba clinical model, to change their treatment planning to increase production, and to produce to Old Forba's satisfaction.[143]

Furthermore, both Dan DeRose and Roumph knew that tracking production by dentist to pressure them to increase production is powerful evidence of fraudulent conduct.[144] Yet Old Forba did so on a routine basis.[145] Roumph and Dan DeRose were directly involved in that conduct.[146]

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[138] Ex. 50 at 1, 3-4; ex. 927 [Mueller] at 146-8, 155-6; ex. 909 [Dan DeRose] at 312-17.
[139] Ex. 919 [Lane] at 143.
[140] Ex. 50 at 4; ex. 927 [Mueller] at 156.
[141] Ex. 24 at 28032-3.
[142] *Id*. at 28033; ex. 909 [Dan DeRose] at 128.
[143] Higgins Affidavit ¶¶ 104-113, 126, 130-1, 139-40, 150.
[144] Ex. 76 [June 20, 2006 Dan DeRose email sent to Roumph].
[145] Ex. 917 [Knott] at 227-8.
[146] Ex. 88 [June 14, 2005 Roumph email sent to Dan DeRose]; ex. 91 [March 10, 2006 Roumph email sent to Dan DeRose]; ex. 101 [emails involving Dan DeRose and Roumph] at 198131, 46257; ex. 398 [June 13, 2006 Knott email to Roumph and Dan DeRose]; ex. 479 [July 5, 2006 Roumph email to Dan DeRose] at 112875; ex. 649 [July 21, 2006 Dentist Efficiency Report sent to Dan DeRose and Roumph]; ex. 90 [January 20, 2006 West email to Roumph]; ex. 92 [April 13, 2006 West email to Roumph]; ex. 93 [June 20, 2006 Roumph email]; ex. 399 [June 29, 2006, Knott email sent to Roumph].

3. The Individual Defendants Had The Motive For And Were The Beneficiaries Of The Scheme

The first Forba clinic opened in October 2001.[147] Barely two years later the Individual Defendants hired investment bankers to sell the business.[148] To do so Old Forba had to demonstrate that the Forba clinical model was successful and could be replicated.[149] If they did, the Individual Defendants knew the scheme could potentially make each of them a huge amount of money. The investment bankers informed them in November 2003 that the value of the business was at least $400 million.[150]

In the meantime, under the scheme put in place and implemented by the Individual Defendants, all profits from all clinics went to Old Forba and the Old Forba founders (the 3 DeRoses, Padula and Mueller). Each received hundreds of thousands of Medicaid dollars every month in distributions from Old Forba.[151] By 2004, each received $200,000 per month.[152] By 2005, the amount was $250,000 each per month.[153] In 2006, each received $300,000 per month.[154]

In September 2006, the Individual Defendants sold the illicit business for $435 million.[155] The money was distributed to the Individual Defendants:

- $100 million to Dan DeRose
- $65 million to Ed DeRose
- $56 million to Padula
- $56 million to Mueller
- $56 million to Michael DeRose
- $37 million to Roumph[156]

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[147] Ex. 919 [Lane] at 10.
[148] Ex. 10 [November 25, 2003 CIBC Forba Proposal]; ex. 909 [Dan DeRose] at 74.
[149] Ex. 909 [Dan DeRose] at 63-5; ex. 58 at 1599862.
[150] Ex. 10 at 174580; ex. 909 [Dan DeRose] at 75; ex. 927 [Mueller] at 32-35.
[151] Ex. 909 [Dan DeRose] at 94.
[152] Ex. 929 [Padula] at 44.
[153] Ex. 927 [Mueller] at 47-8; ex. 12 [October 2, 2005 Forba Board Meeting Agenda] at 57682; ex. 909 [Dan DeRose] at 90-91.
[154] *Id.*
[155] Ex. 18 [July 28, 2006 First Amendment to Asset Purchase Agreement] at 214218; ex. 919 [Lane] at 64.

The Individual Defendants had the motive for and were the beneficiaries of the scheme.

This record creates a material issue of fact as to whether the Individual Defendants participated in the scheme.

POINT VII

THE FORBA DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AS TO THE NEGLIGENCE PER SE CLAIM SHOULD BE DENIED[157]

Plaintiffs allege the Forba Defendants committed negligence *per se* by owning and operating the Clinics in violation of the New York law that prohibits lay corporations from practicing dentistry[158] (Limited Liability Company Law, Section 1203). As set forth above, this prohibition is to protect patients from the danger that a lay corporation in control of dentists will cause the dentists to treat patients for the purpose of the corporation's profits rather than for the medical needs of the patients (*In re Co-Operative Law Co*., 198 NY 479, 484 [1910]). The evidence of the scheme shows that the Forba Defendants secretly and unlawfully gained control of the dentists and caused them to do precisely what the law is designed to prevent, which resulted in the improper care of the plaintiffs.

The Forba Defendants argue they are nonetheless entitled to summary judgment as to the negligence *per se* claim because (1) the violation of Section 1203 does not give rise to a private cause of action and is not negligence *per se* as a matter of law, and (2) the evidence is allegedly undisputed that the violation did not cause harm to the plaintiffs.

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[156] Ex. 909 [Dan DeRose] at 119; ex. 6 at Nos. 3 and 29 (as to Ed DeRose); ex. 929 [Padula] at 51; ex. 927 [Mueller] at 55-8; ex. 908 [Michael DeRose] at 56; ex. 6 at Nos. 3 and 29 (as to Roumph).

[157] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: New Forba Point IV and Old Forba Point VII. Plaintiffs are not alleging negligence *per se* against the Six Dentists or Dr. Gusmerotti.

[158] Def. j. ex. W [Varano (Syracuse) Am. Compl.] at ¶¶ 36-55, 226; def. j. ex. P [Johnson (Rochester) Am. Compl.] at ¶¶ 36-55, 234; def j. ex. I [Angus (Albany) Am. Compl.] at ¶¶ 36-55, 234.

A. Operation Of The Clinics In Violation Of Section 1203 Is Negligence *Per Se*

Defendants' contention that there is no private cause of action for a violation of Section 1203 is beside the point. Plaintiffs are not asserting a cause of action under Section 1203 but rather a common law negligence cause of action. "When a statute, in the interest of the general public, defines the degree of care to be used under specified circumstances, it does not create a new liability but defines a duty enforceable in a common-law negligence action" (NY PJI—Civil Division 2 B Intro.1 Statutory Standard of Care Introduction). Plaintiffs assert a cause of action for negligence because operation of a dental clinic by a lay corporation creates an unreasonable risk of inappropriate care for the patients. The conduct is not only negligent but negligent *per se* because the statute prohibits that very conduct. A statute that restricts the manner in which conduct can be performed establishes a standard of care, the violation of which is negligence *per se* (*Martin v Herzog*, 228 NY 164, 171 (1920); *McConnell v Nabozny*, 110 AD2d 1060 [4th Dept 1985]; *Coogan v Torrisi*, 47 AD3d 669 (2d Dep't 2008); *Dalal v City of New York*, 262 AD2d 596 [2d Dep't 1999]). As stated in *McConnell*, "It is established law that a defendant's unexcused violation of a statute constitutes negligence *per se* and that it is for the jury to determine whether the violation was the proximate cause of the accident" (*McConnell, 110 AD2d at 1060).*

The reason for this rule was set forth in *Martin*: "[T]o omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall far short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state" (*Martin*, 228 NY at 168). The defendants disregarded the safeguards prescribed by law for the safety of the plaintiffs and their conduct is negligent *per se*.

Defendants rely on cases holding that the violation of a general licensing statute is not negligence *per se*. But this case is about much more than failure to obtain a license. This statute prohibits lay corporations from owning and controlling dental clinics. They can never obtain authority to do so.

The licensing statute cases make this very distinction. Violation of a licensing statute that relates to the manner in which conduct may be performed is negligence *per se* (*Dalal v City of New York*, 262 AD2d 596 [2d Dept 1999] [violation of restriction on driver's license prohibiting driving without glasses is negligence *per se*]; *Coogan v Torrisi*, 47 AD3d 669 [2d Dept 2008] [violation of restriction on driver's license prohibiting driving without adult supervision is negligence *per se*]). Thus, the statute in *Dalal* prohibited the driver from driving without glasses; she could not obtain the authority to do so. The same was true in *Coogan*; the driver was prohibited from driving without adult supervision and could not obtain the authority to do so. As in *Dalal* and *Coogan*, the statute in this case restricts the manner in which these Clinics can be owned and operated; Forba cannot obtain authority to own and control them. Forba's violation of that restriction is negligence *per se*.

B. Whether Defendants' Unlawful Conduct Caused Harm To The Plaintiffs Is A Material Issue Of Fact

Defendants also contend the evidence is undisputed that their unlawful conduct that amounts to negligence *per se* was not the proximate cause of plaintiffs' injuries. To the contrary, that is a material issue of fact. The evidence of the scheme shows defendants' illicit operation of the Clinics caused the dentists to treat the plaintiffs for the purpose of Forba's profits rather than the medical needs of the patients, which resulted in plaintiffs' improper care. The statute was designed to protect a particular class of persons (the patients at the Clinics) against a particular class of harm (inappropriate dental treatment resulting from treatment for Forba's profit interests

rather than the medical interests of the patients). Plaintiffs are in the protected class and suffered the harm the statute was intended to prevent. As stated in *McConnell*, not only is it established law that the violation of a statute constitutes negligence *per se*, but also "it is for the jury to determine whether the violation was the proximate cause of the accident" (*McConnell,* 110 AD2d at 1060).

POINT VIII

PLAINTIFFS' EXPERT AFFIRMATION AND THE RECORD SHOW MATERIAL ISSUES OF FACT AS TO THE DENTIST DEFENDANTS' MALPRACTICE THAT PRECLUDE SUMMARY JUDGMENT

The Dentist Defendants have not met their burden as movants on the malpractice cause of action. They rely heavily on their self-serving affidavits. But a defense affirmation or affidavit on a summary judgment motion in a dental malpractice action must be detailed, specific and factual in nature. It cannot assert in simple conclusory form that a defendant dentist acted within accepted standards of dental care, as this will not meet the defendant's burden on the summary judgment motion (*Wulbrecht v Jehle*, 89 A.D.3d 1470, 1471 [4th Dept 2011]).

A defendant expert affirmation or affidavit that does not address each of the specific factual claims of negligence raised in the plaintiffs' complaint and bill of particulars as a matter of law cannot support a motion for summary judgment (*Humphey v Gardner*, 81 A.D.3d 1257 [4th Dept 2011]). The defendant expert affidavit must also address the facts contained in the medical records (*see Gagnon v St. Joseph's Hosp*., 90 A.D.3d 1605 [4th Dept 2011]).

If the defendants' moving affirmations or affidavits lack these required elements, the defendant has not met its burden on the motion, and courts deny summary judgment, irrespective of the sufficiency of the plaintiff's opposing papers (*Humphreys* at 1257; *Wulbrecht*, at 1471).

The Dentist Defendants' affidavits do not meet this standard. First, they have tendered affidavits that contradict their deposition testimony. A trial court properly discounts a party's

affidavit supporting summary judgment where that affidavit contradicts the party's prior sworn deposition testimony (*Salerno v North Colonie Cent. School Dist*, 52 A.D.3d 1145 [3rd Dept 2008]; *see also Liberty Mut. Ins. Co. v General Acc. Ins. Co.* 277 A.D.2d 981 [4th Dept 2000]). These affidavits are inherently suspect because they contradict prior sworn deposition testimony (*Papoters v 40-01 Northern Blvd. Corp.*, 11 A.D.3d 368 [1st Dept 2004]).

The contradictions are plain to see. Dr. Bonds at deposition did not remember anything about the treatment of Jeremy Bohn, discussions he had with Jeremy Bohn, or with any dentists about Jeremy Bohn. Nothing would refresh his recollection.[159] But on this motion, he has submitted an affidavit based on his "general recollections" of Jeremy Bohn's treatment. [160] Dr. Bonds didn't recall anything when deposed on this treatment, general or otherwise. That he now attempts to have this case dismissed based on such recall says much.

The other Dentist Defendants (excepting Dr. Khan) have tendered party affidavits with the same fatal defect. Each said at deposition that they didn't remember the plaintiffs,[161] but on this motion submit self-serving affidavits based on "general recollection" or "personal knowledge."[162] This Court should discount these affidavits and find under the established case law that they are insufficient to support the defendants' motions to the extent based on personal recollections.

Further review of the Dentist Defendants' affidavits show that they seek dismissal of the malpractice causes of action solely on the record of their custom and practice which they

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[159] Ex. 907 [Bonds] at 119-121, 144-145.
[160] Bonds aff ¶ 7.
[161] Ex. 918 [Lancen] at 24; ex. 915 [Kamara] at 69-70, 107-08,120, 227, 270; ex. 901 [excerpts from Octoer 17, 2012 dep tr Naveed Aman] at 214, 260 (the complete transcript is Defendants' Joint Exhibit CC); ex. 913 [excerpts from December 7, 2012 dep tr Gary Gusmerotti] at 10-11 (the complete transcript is Defendants' Joint Exhibit V); ex. 914 [Izadi] at 5-6, 22, 47-48.
[162] Kamara aff ¶ 6; Izadi aff ¶ 7, Lancen aff ¶ 7; Aman aff ¶ 8; Gusmerotti aff ¶ 7 [personal knowledge].

allegedly used on the plaintiffs at bar.[163] Those affidavits, however, do not tender the necessary facts and foundation of such alleged custom and practice to satisfy the minimum threshold for such affidavits to be considered competent, and shift the burden on the motion to plaintiffs.

A case on point is *Prezespo v Garvey*, (34 Misc.3d 1240(A), [Sup Ct Erie County 2012]) in which the court analyzed the controlling law on this issue. It found that a dentist had not established custom and practice as to his tooth extractions on a summary judgment motion. Among other things, the dentist had not offered testimony of the number of extractions, or the frequency with which such procedures including procurement of consent was repeated within his practice (*id.)*.

The court in *Prezespo* cited *Rivera v Anilesh* (8 NY3d 627, 635-636 [2007]). In *Rivera*, the Court of Appeals allowed the use of habit evidence in a medical malpractice action but only under strict conditions. The affiant had to demonstrate a mundane and repetitive practice of a routine matter by a trained dental professional in complete control of the circumstances, and that the dental or medical procedures at issue did not "vary from patient to patient depending on the particular medical circumstances or physical condition of the patient" (*Rivera,* NY3d at at 635-36).

The affidavits of the Dentist Defendants do not address these necessary minimum requirements. They talk only in conclusory, vague generalities. Therefore, under the established case law set forth above, the Defendant Dentists have not met their burden on this motion (see *Campbell v Kelly*, 2012 NY Slip Op 32525(U) [Sup Ct New York County 2012]). The Dentist Defendants' affidavits are properly disregarded by this Court.

In opposition to the motions for summary judgment on the malpractice claims, plaintiffs have submitted the affidavit of a well-qualified pediatric dentist from New York with more than

[163] *See e.g*. Bonds aff ¶¶ 7, 17, 30; Kamara aff ¶¶ 6, 11; Izadi aff ¶¶ 18,22; Aman aff ¶¶ 12, 13.

thirty years experience that describes in detail the reckless conduct of each of the Dentist Defendants and how each deviated from accepted dental practices in their diagnosis and treatment of the plaintiffs. In dental malpractice cases, genuine issues of material fact preclude summary judgment. These include whether a dentist mishandled anesthesia during a dental procedure (see *Rivera v Anilesh,* 8 NY3d 627 [2007] or whether a dentist complied with the standard of care when treating a dental patient or performing a root canal (see *Page v Marusich,* 30 AD3d 871 [3d Dept 2006]; *Prigorac v Park*, 20 AD3d 363 [1st Dept 2005]). As to the claims for malpractice against the Dental Defendants, there is a classic "credibility battle between the parties' experts and issues of credibility are properly left to a jury for its resolution" (*DeAngelis v Martens Farms, LLC*, 104 AD3d 1125, 1126 [4th Dept 2013); *Baity v General Electric Co.*, 86 AD3d 948, 952 [4th Dept 2008]; *Barbuto v Winthrop University Hospital*, 305 AD2d 623, 624 [2d Dept 2003]).

A. Malpractice by Jeremy Bohn's Dentists

Jeremy Bohn first came to the Syracuse clinic with his mother, Kelly Varano, on May 24, 2006.[164] He was three years old.[165] Although he had experienced some swelling and pain in his mouth earlier in the week, by the time he went to the clinic it was gone.[166]

Jeremy was treated like any new patient arriving for a first visit: he was brought to the hygiene area for teeth cleaning and check-up.[167] Although he was only three and extraordinarily frightened and upset (which the clinic personnel described as "out of control"), the staff took Jeremy away from his mother and told her she could not be with her young child while he was

[164] Ex. 199 at patient information sheet.
[165] *Id*.
[166] Ex. 942 [excerpts from October 10, 2012 dep tr Kelly Varano] at 101-02 (the complete transcript is Defendants' Joint Exhibit Z); ex. 907 [Bonds] at 128-30; ex. 199 at initial dental evaluation, patient information sheet and sheet 1.
[167] Ex. 907 [Bonds] at 378-79.

receiving dental care.[168] Less than ten minutes later, Dr. Bonds came out and told Ms. Varano that Jeremy needed to be restrained so he could be treated.[169] Dr. Bonds gave Ms. Varano a consent form that said there were no known risks of the restraints and confirmed that orally with Ms. Varano.[170] Based on Dr. Bonds' representations and his apparent expertise, Ms. Varano signed the form consenting to the restraint procedure.[171] She would not have consented had she known the truth.[172]

Dr. Bonds strapped Jeremy in a restraint device while he cleaned his teeth and examined him.[173] Dr. Bonds performed a complete oral examination of Jeremy during the hygiene portion of his visit.[174] Dr. Bonds acknowledges that keeping an accurate record is an essential part of a dental practice, that the dental record is an essential part of patient care, that facts important to diagnosis should be documented in the record and that it was his practice to write down all important facts regarding a patient's condition.[175] Although Dr. Bonds performed and initial dental evaluation and a complete oral examination, he did not identify any existing conditions on Jeremy's teeth, did not diagnose Jeremy with any condition and did not make any notes, clinical or otherwise, of any condition on any of Jeremy's teeth.[176] Dr. Bonds took x-rays of five of Jeremy's teeth, but the films were such poor quality that they only provided diagnostic information on two teeth.[177] Nevertheless, Dr. Bonds told Ms. Varano that her three year old needed treatment on *eleven* teeth to restore his mouth to a good level of health.[178] What followed

[168] Ex. 199 at sheet 1; ex. 942 [Varano] at 141-42.
[169] Ex. 942 [Varano] at 143, 144, 146.
[170] Ex. 942 [Varano] at 148; ex. 199 at sheet 4.
[171] Ex. 942 [Varano] at 152-53, 372.
[172] Varano Affidavit ¶ 4.
[173] Ex. 907 [Bonds] at 382, 384.
[174] Ex. 199 at sheet 1.
[175] Ex. 907 [Bonds] at 114-115, 122, 128, 130
[176] Ex. 199 at initial dental evaluation and sheet 1.
[177] Expert Affirmation ¶ 53; ex. 199 at sheet 1, x-rays dated May 23, 2006.
[178] Ex. 907 [Bonds] at 429, 432; ex. 199 at sheet 2; ex. 942 [Varano] at 159.

over the next eighteen months was a series of visits to the clinic during which Dentist Defendants Drs. Bonds, Aman and Khan, carried out (or expanded on) Dr. Bonds' treatment plan and abused Jeremy in the process.

On May 23, Dr. Bonds took Jeremy out of the restraint device in the hygiene room, moved him to a different room, and then restrained him again for twenty minutes.[179] While restraining Jeremy, Dr. Bonds pulled two of his teeth without any radiographic or other clinical evidence to justify the treatment.[180] And although Dr. Bonds admits that a reasonably prudent dentist should continuously monitor the vital signs of a child in a restraint for the safety of the patient, Jeremy's record shows that no one monitored his.[181]

Jeremy returned to the clinic on August 31 for follow-up treatment.[182] The new dentist, Dr. Aman, ordered x-rays of Jeremy's front teeth. Although the x-rays showed those teeth did not need any treatment, Dr. Aman performed four baby root canals and placed four crowns on Jeremy that day.[183] To conceal his intent and to perform more procedures on Jeremy, Dr. Aman falsified Jeremy's dental record. Without initialing, dating or otherwise reflecting that he was changing the treatment plan three months after-the fact, Dr. Aman added the notation "NSP?" to the portion of the May 23 treatment plan that called for fillings on the front teeth.[184] Jeremy's dental record, thus, appeared to show that Dr. Bonds, on May 23, 2006, thought Jeremy might need root canals and crowns on his front teeth and that Jeremy's mother had consented to a plan that might include baby root canals and crowns on Jeremy's four front teeth.[185] Neither was

[179] Ex. 907 [Bonds] at 382, 410-11; ex. 199 at sheet 5.
[180] Expert Affirmation ¶ 53; ex. 199 at sheet 5.
[181] Ex. 907 [Bonds] at 416-18; ex. 199 at sheet 5.
[182] Ex. 199 at sheet 7.
[183] Expert Affirmation ¶¶ 77-78.
[184] Ex. 901 [Aman] at 377-78; ex. 199 at sheet 2.
[185] *Id*.

true.[186] Instead, Dr. Aman performed unnecessary baby root canals and placed unnecessary crowns on Jeremy's front teeth—all without consent.[187]

On October 11, 2006, Jeremy came to the clinic for the third time.[188] He was assigned again to Dr. Bonds who planned to fill three of the teeth on his May treatment plan.[189] Although Jeremy had been terribly stressed when he was restrained in May, Dr. Bonds restrained him again.[190] Jeremy was so stressed this time that his heart rate raced to a dangerously high 204.[191] His oxygen saturation level dropped to dangerous low level of 88%.[192] Dr. Bonds admitted in his deposition that a prudent dentist should not restrain a child under such circumstances because it could cause the child to have a stroke or incur brain damage.[193] But, Dr. Bonds restrained Jeremy anyway.[194] And while he was restrained, Dr. Bonds drilled and filled three of his teeth without giving him a local anesthetic.[195] Dr. Bonds' treatment of Jeremy Bohn was cost-productive for Forba—he did it in ten minutes.[196] But in the process, he traumatized and abused a four year-old little boy.

Jeremy and his parents trusted the clinic and its dentists and believed they were looking out for Jeremy's best interest.[197] For that reason, Jeremy came back to the clinic on October 23, 2006, March 22, 2007 and January 21, 2008 to complete the May treatment plan.[198] Each time,

[186] Ex. 907 [Bonds] at 436; ex. 901 [Aman] at 378-79.
[187] Expert Affirmation ¶¶ 77-78.
[188] Ex. 199 at sheet 9.
[189] Ex. 199 at sheets 9, 2.
[190] Ex. 199 at sheet 9.
[191] *Id*.
[192] *Id*.
[193] Ex. 907 [Bonds] at 456-57, 245-46, 237-40.
[194] Ex. 907 [Bonds] at 456-58.
[195] Ex. 199 at sheet 9.
[196] *Id*.
[197] Ex. 942 [Varano] at 232, 364.
[198] Ex. 199 at sheets 2, 10, 14, 19.

Drs. Bonds, Aman and Khan, drilled and filled Jeremy's teeth without giving him the most basic form of pain prevention, a local anesthetic.[199]

In sum, Jeremy was repeatedly abused and terrorized by the dentists, who took him away from his parents, put him in a restraint device three times in non-emergency situations, had him endure lengthy and traumatic baby root canal and crown procedures that were unjustified and unnecessary, pulled his teeth without justification, and repeatedly caused him to suffer the pain and anguish of having his teeth drilled and filled without a local anesthetic.[200] Each of these acts, under the circumstances of Jeremy Bohn's case, was contrary to good and accepted dental practice and violates the applicable standard of care.[201] The expert affirmation of the pediatric dentist tendered in opposition to these motions. Because the expert affirmation creates disputed issues of fact as to whether the conduct of Drs. Bonds, Aman and Khan constitutes malpractice, their motions for summary judgment should be denied.

B. Malpractice by Shiloh Lorraine's Dentists

Elizabeth Lorraine brought her twenty-month old son, Shiloh, to the Rochester clinic on August 23, 2007 for his first dental check-up.[202] He was not in pain and did not have any problems with his teeth.[203] Ms. Lorraine took Shiloh to the clinic only because his pediatrician suggested that Shiloh start regular dental visits.[204]

Like many children that young, Shiloh got very anxious when he was separated from his mother.[205] Indeed, Ms. Lorraine warned the nurses and dentists that Shiloh had severe separation

[199] *Id*.; Expert Affirmation ¶¶ 47-100.
[200] Expert Affirmation ¶¶ 47-100.
[201] *Id*.
[202] Ex. 562; ex. 921 [excerpts from November 21, 2012 dep tr Elizabeth Lorraine] at 55-56 (the complete transcript is Defendants' Joint Exhibit T).
[203] *Id*. at 55-56.
[204] *Id*. at 46, 55-56.
[205] *Id*. at 164.

anxiety.[206] Nevertheless, the clinic personnel and dentists told Ms. Lorraine that she could not stay with Shiloh while his teeth were cleaned and later, while he was restrained and abused.[207] Indeed, the clinic posted a sign that said, parents were not allowed to stay with their children because their presence would violate privacy laws a claim that is demonstrably false.[208]

After Shiloh was taken by strangers from his mother, he screamed and cried.[209] Forba dentists and staff labeled that behavior as "negative".[210] Initially, Gary Gusmerotti, the lead dentist at the clinic, helped clean Shiloh's teeth and examined him.[211] Afterwards, Dr. Gusmerotti spoke with Shiloh's mother and showed her x-rays that he said were of Shiloh's teeth.[212] In fact, Dr. Gusmerotti never took x-rays of Shiloh.[213] Instead, without radiographic or any other supporting clinical evidence, Dr. Gusmerotti told Ms. Lorraine that her son needed four baby root canals and four crowns to restore his mouth to a good level of health.[214] Relying on Dr. Gusmerotti's expertise and the phony x-rays he showed her, Ms. Lorraine signed the authorization form that Dr. Gusmerotti presented and also signed.[215]

A few minutes later, Dr. Gusmerotti transferred Shiloh to his associate, Dr. Kamara, to carry out the treatment plan.[216] The dental records show that Dr. Kamara did not perform her own clinical examination.[217] Rather, Dr. Kamara immediately told Ms. Lorraine that she intended to put Shiloh in a swaddling blanket to calm him down.[218] Dr. Kamara presented Ms. Lorraine with a restraints consent form that represented that there were no known risks to the

[206] *Id*. at 102-03, 215.
[207] *Id*. at 60, 61, 80-81.
[208] *Id*. at 58-59, 60, 61.
[209] *Id.* at 102-04.
[210] Ex. 562 at sheet 4.
[211] Ex. 562 at sheet 1; ex. 913 [Gusmerotti] at 95-96.
[212] Ex. 921 [Elizabeth Lorraine] at 68-69.
[213] Ex. 562 at sheet 1; ex. 913 [Gusmerotti] at 117.
[214] Ex. 921 [Elizabeth Lorraine] at 68-69; ex. 562 at sheet 2.
[215] *Id*.
[216] Ex. 562 at sheet 4; ex. 921 [Elizabeth Lorraine] at 75-76.
[217] Ex. 562 at sheet 4 (no limited oral exam to confirm treatment and rule out other conditions).
[218] Ex. 921 [Elizabeth Lorraine] at 79.

procedure when, in fact, Dr. Kamara knew that representation was untrue.[219] She also told Ms. Lorraine to stay in the waiting area while she treated Shiloh because that would be best for him.[220] She then spent over an hour doing four baby root canals and placing four crowns on the front teeth of a twenty-month old.[221] During that time, Shiloh was strapped to a board, unable to move his arms, legs or any part of his body, while his mother was kept from him.[222] By the end of the procedure, Shiloh's heart rate was at 151.[223] In addition to the terror and trauma that a twenty-month-old must have experienced undergoing unnecessary root canals and crowns while tied down, Shiloh left the clinic with blood all over his mouth and cheeks, bruises on his wrist, head and ankles, bloodshot eyes, broken blood vessels on his face, and soiled underwear.[224]

A New York pediatric dentist has found Dr. Gusmerotti's conduct fell below the standard of care for at least the following reasons: (1) he prepared a treatment plan and obtained consent to perform four pulpotomies and four crowns, without a diagnosis or any evidence to support such plan; and (2) used another person's x-rays to persuade Shiloh's mother to consent to treatment.[225] As to the last point, Dr. Gusmerotti denies it happened, but concedes that it would be malpractice if it did.[226]

Dr. Kamara's conduct also was contrary to good and accepted dental practice and fell below the standard of care in the following ways: (1) she failed to refer Shiloh to pediatric dentist or other dentist who was trained in advanced behavior management; (2) she restrained Shiloh for an hour in a non-emergency situation; (3) she performed four unnecessary baby root canals and placed four unnecessary crowns on his teeth without a clinical basis to do so; (4) she

[219] Ex. 562 at sheet 3; ex. 915 [Kamara] at 51-54.
[220] Ex. 921 [Elizabeth Lorraine] at 80-81.
[221] Ex. 562 at sheet 4.
[222] Ex. 562 at sheet 4; ex. 921 [Elizabeth Lorraine] at 80-81.
[223] Ex. 562 at sheet 4.
[224] Ex. 921 [Elizabeth Lorraine] at 85-88.
[225] Expert Affirmation ¶¶ 104-109.
[226] Ex. 913 [Gusmerotti] at 26-28.

utilized restraints although she was not trained in diagnosing the need for or the use of such behavior management techniques; and (5) she told Ms. Lorraine there were no risks of restraints when she knew there were.[227]

This record demonstrates that the diagnosis and treatment of Shiloh Lorraine by Drs. Gusmerotti and Kamara were contrary to good and accepted dental practice. The self-serving affidavits of these dentists do nothing but create an issue of fact for the jury.

C. Malpractice by Shadaya Gilmore's Dentists

Shadaya Gilmore was six years old when her mom brought her to the Albany clinic on October 9, 2007 for a routine checkup and cleaning.[228] Her records show that her mother did not believe she had any dental problems or concerns with her teeth.[229] Shadaya came to the clinic in response to the company's television commercials promoting dental services for children.[230]

When Shadaya's mom asked if she could stay with her daughter, she was told that it was company policy that parents remain in the waiting area.[231] During her first visit to the clinic in October and the follow-up visit in December, Shadaya was taken into the back rooms without her mother with her.[232]

Shadaya was assigned to Dr. Maziar Izadi, who cleaned her teeth, examined her, and noted that Shadaya's oral hygiene was good and she did not have gingivitis.[233] Dr. Izadi ordered x-rays of Shadaya's mouth.[234] Afterwards, Dr. Izadi prepared a plan to treat nine teeth.[235] He

[227] Expert Affirmation ¶¶ 110-120.
[228] Ex. 440 at patient information and sheet 1; ex. 935 [excerpts from November 6, 2012 dep tr Sherain Rivera] at 94, 100 (the complete transcript is Defendants' Joint Exhibit M).
[229] *Id*. at patient information.
[230] Ex. 935 [Rivera] at 95-96.
[231] *Id*. at 128-130, 274-75. Forba taught its employees how to keep parents in the waiting area away from their children. (Ex. 286 [October 12, 2007 Mullinix e-mail] Indeed, the company manual said the "rule" was child-parent separation. Ex. 285 [November 21, 2007 Grossman e-mail enclosing Forba company policies]).
[232] Ex. 935 [Rivera] at 101-03, 128-130.
[233] Ex. 440 at sheet 1.
[234] Ex. 440 at sheet 1.

never spoke to Shadaya's mother, but instead, had a clinic staff member present the treatment plan for signature.[236]

At that point, another dentist at the clinic, Dr. Lancen, took over the case. The dental records show that Dr. Lancen did not examine Shadaya, but instead began immediately carrying out the Izadi treatment plan.[237] Before he began drilling on Shadaya, Dr. Lancen had a staff member bring her mother a form to sign consenting to the procedure described as "protective immobilization".[238] The form said there were no known risks so she signed it.[239]

For the next thirty-five minutes, Dr. Lancen strapped Shadaya to a papoose board while he worked on her teeth.[240] During that time, Dr. Lancen performed a baby root canal and placed a crown in Shadaya's mouth that she did not need.[241]

Unaware that her daughter had been unnecessarily restrained and received an unnecessary root canal and crown, Shadaya's mom brought her back to the clinic in December 2007 to complete the treatment plan.[242] This time, Dr. Izadi did the work.[243] Like Dr. Lancen, Dr. Izadi had his staff present Shadaya's mother with a restraint consent form containing the same misrepresentations as the one she signed in October.[244] Shadaya's mother signed the form giving her consent.[245]

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[235] Expert Affirmation ¶ 123; ex. 440 at sheet 2.
[236] Ex. 440 at sheet 2; ex. 935 [Rivera] at 112, 105-07, 110.
[237] Ex. 440 at sheet 3 (no limited oral exam to confirm treatment and rule out other conditions).
[238] Ex. 935 [Rivera] at 171-74; ex. 440 at October 9, 2007 restraint consent.
[239] Ex. 440 at October 9, 2007 restraint consent.
[240] Ex. 440 at sheet 3.
[241] Ex. 440 at sheet 3; Expert Affirmation ¶ 131.
[242] Ex. 935 [Rivera] at 122-24, 128-29, 302.
[243] Ex. 440 at sheet 6.
[244] Ex. 440 at October 9, 2007 restraint consent and sheet 5; ex. 935 [Rivera] at 184-88.
[245] Ex. 440 at sheet 5.

Dr. Izadi put Shadaya back in the papoose restraint and began drilling on her.[246] While she was restrained, Dr. Izadi performed two more unnecessary baby root canals and placed two more unnecessary crowns on Shadaya's teeth.[247]

Shadaya had to endure the trauma of three baby root canals and three crowns she did not need.[248] And during those procedures, she was strapped to a device she considered a "straight-jacket."[249] The second time she was restrained she was so frightened she urinated in her pants.[250] The trauma that Shadaya suffered at Small Smiles affected her for years. Nearly three years after she was last seen at Small Smiles, her new dentist recommended she see a pediatric dentist because of her history of emotional trauma from her experiences at the Albany clinic.[251]

All of Shadaya's emotional and physical harm was avoidable. Plaintiffs on this motion have tendered the affirmation of a qualified pediatric dentist. That expert found that Shadaya received substandard and abusive treatment by Dr. Lancen and Dr. Izadi.[252]

Dr. Lancen's conduct on October 9, 2007, was contrary to good and accepted dental practice and fell below the standard of care in, at least, the following respects: (1) he performed a baby root canal and placed a crown on a tooth that based on the x-rays and dental record did not need any treatment; (2) he put Shadaya in restraints to perform non-emergency dental treatment; (3) he undertook to perform dental procedures without first examining the patient; (4) he failed to refer Shadaya to a pediatric dentist or other dentist who was trained in behavior guidance techniques; (5) he undertook to use advanced behavior management techniques without having

[246] Ex. 440 at sheet 6.
[247] Ex. 440 at sheet 6; Expert Affirmation ¶¶ 140-141.
[248] Expert Affirmation ¶¶ 126, 141.
[249] Ex. 912 [excerpts from November 6, 2012 dep tr Shadaya Gilmore] at 13 (the complete transcript is Defendants' Joint Exhibit L).
[250] Ex. 440 at sheet 6; ex. 935 [Rivera] at 131-33, 149-50.
[251] Ex. 20 [Dr. Schwartz dental records] at 27.
[252] Expert Affirmation ¶¶ 121-150.

been properly trained to do so and (6) he obtained consent to restrain Shadaya by failing to disclose the risks of doing so.[253]

Dr. Izadi's treatment of Shadaya on December 27, 2007, was equally bad. He violated the standard of care in many of the same ways that his associate, Dr. Lancen, had done two months earlier. For example, (1) he performed two baby root canals and placed two more crowns in Shadaya's mouth that were unnecessary; (2) he put Shadaya in restraints to perform non-emergency dental treatment; (3) he failed to use sufficient local anesthesia to prevent, control and manage the pain she felt from his drill; and (4) he obtained consent to restrain Shadaya by failing to disclose the risks of doing so.[254]

The conflicting expert opinions regarding whether Drs. Lancen and Izadi committed malpractice raises a disputed issue of material fact that can only be resolved by a jury.

D. The Error In Judgment Rule Does Not Apply

The Six Dentists also contend that a dentist who uses his best judgment in rendering care and treatment cannot be held liable for a mere error in judgment. "The 'error in judgment rule is applicable' only in a narrow category of medical malpractice cases in which there is evidence that [the] defendant physician considered and chose among several medically acceptable treatment alternatives" (*Wulbrecht v Jehle*, 89 AD3d 1470 [4th Dept 2011]).

The cases are rare because the courts will not let a defendant violate an accepted medical standard of care and then avoid responsibility by claiming that it was a mere error in judgment (*Anderson v House of Good Samaritan Hosp*, 44 AD3d 135, 141 [4th Dept 2007]). Every physician/dentist act involves medical judgment (*id.*) The error in judgment rule therefore

[253] Expert Affirmation ¶¶ 128-138
[254] Expert Affirmation ¶¶ 140-150.

applies only when a physician or dentist chooses in good faith between different treatment options – all of which meet the standard of care (*id.*)

This is not one of those cases. Like the medical malpractice defendants in *Wuhlbrecht*, neither the Six Dentists nor their expert witness have demonstrated that the Six Dentists chose between or among medically acceptable alternatives meeting the standard of care, or that such alternatives existed. This Court, therefore should reach the same result as the trial court and Fourth Department in *Wulbrecht*, and deny the Six Dentists' summary judgment motion on this basis. [255]

Plaintiffs have also not alleged that the dentists failed to use their best judgment in choosing among acceptable alternatives. Rather, plaintiffs allege that these dentists violated accepted dental standards of care in diagnosing and treating the plaintiffs. Where, as here, "there is no allegation that the defendant physician failed to use his or her best judgment, the only issue of fact is whether the physician's assessment or treatment of the patient fell short of the medically accepted standard of care" (*Anderson v House of Good Samaritan Hosp*, 44 AD3d 135, 141 [4th Dept 2007]). Plaintiffs have submitted abundant proof that the Six Dentists violated that standard of care, creating such issues of fact.

POINT IX

THE INFORMED CONSENT CAUSE OF ACTION PRESENTS MATERIAL ISSUES OF FACT FOR THE JURY[256]

Plaintiffs have sued Drs. Lancen, Izadi, Bonds and Kamara, for restraining them without obtaining their parents' informed consent. Plaintiffs' claim is for informed consent if the failure

[255] Plaintiffs, in any event, through the expert affirmation and motion record, tendered proof in evidentiary form that the dental/medical issues at bar are not subject to the error in judgment rule. Expert Affirmation ¶¶ 156-160.

[256] This joint point opposes the Six Dentists' Point VI. Shiloh Lorraine is not asserting an informed consent claim against Dr. Gusmerotti since he neither restrained Shiloh nor sought his mother's consent to do so.

to disclose was careless and for fraud, battery and breach of fiduciary duty, if it was intentional or reckless.[257]

Drs. Bonds, Izadi, Lancen and Kamara, failed to disclose the foreseeable risks of restraints. Indeed, the undisputed evidence is that the plaintiffs' parents were told there were no known risks. Without knowing of those risks, the parents of plaintiffs consented to having their children tied down for non-emergency dental procedures. As a result, the children suffered physical and psychological trauma.

On the informed consent cause of action, a defendant must tender proof in admissible form whether a reasonably prudent person in plaintiff's position would have undergone the procedure if she had been fully informed of the risks (*see Przespo v Garvey*, 34 Misc.3d 1240[A] [Sup Ct, Erie County 2012]). The Dentist Defendants on this motion tendered no such proof[258] and, therefore, their motion against plaintiffs' informed consent cause of action should be denied irrespective of the sufficiency of the plaintiffs' opposing papers.

Although the dentists purported to obtain written consent from the parents before restraining their child, they make the extraordinary argument that applying a restraint on a child is not a procedure covered by the informed consent statute. Public Health Law 2805-d imposes a duty on a dentist to obtain the patient's informed consent before he performs a procedure or operation involving the physical "disruption of the integrity of the body" of the patient. Placing a child in restraints is such a procedure.[259]

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[257] The dentists correctly point out that the informed consent statute is narrow and does not cover the failure to disclose many types of material facts such as the defendants' fraudulent course of conduct and their lack of training in behavior management. But, then a battery claim based on the concealment of those facts, cannot be dismissed as duplicative.

[258] Kamara aff ¶¶14-16; Bonds aff ¶¶ 14-17; Izadi aff ¶¶ 19-23; Aman aff ¶¶ 12, 13, 21,27; Izadi aff ¶¶ 14-17.

[259] Expert Affirmation ¶ 33.

First, when the dentists seek consent to use a restraint device, they tell the child's parents, on the consent form, that the child needs a "protective stabilization *procedure*" or an "immobilization *procedure*" and disclose the benefits and risks (or lack thereof) of "this *procedure*." The dentists sign the form. Second, a procedure that completely immobilizes a child "involves the physical disruption of the integrity" of the patient's body. Tying a child to a "papoose board" does just that. Thus, a dentist must comply with Public Health Law 2805-d before restraining a child for dental treatment.

The Six Dentists rely on cases that found the informed consent statute inapplicable because the patient did not undergo a procedure or treatment, and thus, a "physical disruption of the integrity" of her body. Those cases are inapposite here. Each plaintiff was tied down as part of an immobilization procedure.

As a second excuse for failing to inform the parents of the risks of restraints, The Dentist Defendants claim that the risks of restraints were remote and did not need to be disclosed. But as one dentist after another has testified, the risks set forth in the AAPD Guidelines are significant enough that they should be disclosed to parents when they are asked to consent to the procedure.[260] The affirmation of a New York pediatric dentist with over thirty years experience submitted in opposition to these motions, confirms that a dental practitioner in 2006 and 2007 who intended to restrain a child for a dental procedure, should have disclosed to his parents, as part of the consent process, the risks of restraints.[261]

The dentists' conduct further proves that they should have disclosed the risks of restraints. Since March 2008, all of the dentists working at the clinics have told parents, using the

[260] Ex. 914 [Izadi] at 44-45; ex. 915 [Kamara] at 53-56; ex. 929 [Padula] at 161-166; ex. 900 [excerpts from December 6, 2012 dep tr Steven Adair] at 123-24, 128-29 (the complete transcript is Defendants' Joint Exhibit E); ex. 932 [November 6, 2012 dep tr Kim Pham] at 116-118; ex. 916 [November 30, 2012 dep tr Sonny Khanna] at 117-18.

[261] Expert Affirmation ¶¶ 64, 117,136, 150.

revised Forba consent form, that the use of restraints "has the potential to produce serious consequences, such as physical or psychological harm".[262] Those risks are no less remote than they were in 2006 and 2007 when the plaintiffs were restrained. Indeed, the risks that the Dentist Defendants have disclosed to their patients since 2008 are identical to those described in the 2005 AAPD Guidelines. The testimony and conduct of the Dentist Defendants, as well as the affirmation of the New York pediatric dentist expert, create a disputed material issue of fact as to whether the parents of the plaintiffs were adequately informed.

Finally, the Six Dentists complain about the sufficiency of plaintiff's' pleadings. To state an informed consent claim, plaintiffs must show that (1) defendant failed to disclose the alternatives and reasonably foreseeable risks and benefits of the procedure that a reasonable dental practitioner would disclose in similar circumstances; (2) that a reasonably prudent person in the plaintiff's position would not have undergone the procedure if he had been fully informed, and (3) the lack of informed consent was a proximate cause of injury (see Public Health Law 2805-d [1], [3]; *Foote v Rajadhyax*, 268 AD2d 745 [3d Dept 2000]). The last element may be satisfied by showing that the procedure was a proximate cause of injury (*Id.*).

Plaintiffs have pled an informed consent claim against the Dentist Defendant by alleging they failed to advise the parents of dangerous risks of restraints; that a reasonable person in their position would not have consented to the procedure if he had been fully informed; and, that the lack of informed consent caused the children to incur substantial damages. Plaintiffs also disclosed that one or more experts are expected to testify that the Dentist Defendants knowingly or with gross negligence failed to disclose known risks such as physical and psychological harm,

[262] Ex. 900 [Adair] at 132-34; ex. 907 [Bonds] at 258-61.

which a reasonably prudent dentist under similar circumstances would disclose, failed to discuss alternative treatment options, and generally failed to obtain informed consent.[263]

POINT X

PUNITIVE DAMAGES IS AN ISSUE FOR THE JURY[264]

A. The Evidence Raises A Material Issue Of Fact As To Nature Of The Defendants' Conduct

Punitive damages may be assessed against a party for grossly negligent, reckless, intentional, wanton, malicious or other conduct that evinces an indifference to or a reckless disregard of the health or safety of others (See *Garber v Lynn*, 79 AD3d 401 [1st Dept 2010] [upholding punitive damages award against owner of dental clinic for callously and repeatedly using dentists unlicensed in New York to perform complicated procedures]; *Tillery v Lynn*, 607 F Supp 399 [SDNY 1985] [denying summary judgment on punitive damages claim against dentist who misrepresented need for treatment and concealed facts regarding treatment for which dentist had fiduciary duty to disclose]; *McWilliams v Catholic Diocese of Rochester*, 145 AD 2d 904, 905 [4th Dept 1988] [punitive damages claim warranted for overmedicating and physically abusing mentally retarded individual]; *Abraham v Kosinski*, 251 AD2d 967 [4th Dept 1998] [punitive damages claim valid against physician who intentionally withheld medical records and information from patient to avoid malpractice claim]). "The purpose of punitive damages goes beyond simply punishing the perpetrator for the morally culpable act committed but is also intended to deter repetition of such acts" by the wrongdoer and those similarly situated (*Guariglia v Price Chopper Operating Company, Inc*., 38 AD3d 1043 [1st Dept 2007]; *Randi*

[263] Ex 5 [Bohn Expert Disclosures] at 7,12, 13, 15, 17, 19; ex.16 [Gilmore Expert Disclosures] at 7, 11, 14, 28, 31; def j. ex. II [Lorraine Expert Disclosures] at 7, 8, 13, 30; def. j. ex. W [Varano (Syracuse) Am. Compl.] at ¶¶ 228-233; def. j. ex. P [Johnson (Rochester) Am. Compl.] at ¶¶ 236-441; def j. ex. I [Angus (Albany) Am. Compl.] at ¶¶ 228-233.

[264] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: Old Forba, Point VIII, New Forba Points V and VI, and the Six Dentists' Point VII.

A.J. v Long Island Surgical Center, 46 AD 3d 74, 81 [2d Dept 2007]). They are particularly appropriate to vindicate a public right such as the violation of a state law (see *Sultan v Kings Highway Hospital Center, Inc*., 167 AD2d 534 [2d Dept 1990] [affirming denial of summary judgment motion on punitive damages since evidence of hospital's violation of state law to provide emergency treatment to public raised issue of fact whether conduct was grossly negligent]).

The evidence shows that defendants engaged in a nationwide scheme that preyed on poor young children for money. The Forba Defendants established, owned, operated and directed illegal dental clinics. They hired, supervised and fired the dentists who worked at the clinics. None of the dentists Forba hired in New York were pediatric dentists.[265] They trained the dentists to practice the Forba way or hit the highway. They influenced the manner in which the dentists practiced dentistry, including their treatment plans. They pressured the dentists to maximize their revenues by doing more procedures and more expensive procedures. And they required the dentists to fraudulently misrepresent the risks of restraints.

To further their own careers, the Dentist Defendants allowed themselves to be directed and influenced to prefer the financial interests of the clinics' owner, Forba, over the best interests of their patients, including the plaintiffs. The Defendant Dentists misrepresented the risks of restraints, and then improperly put the plaintiffs in restraints to treat them. They performed unnecessary baby root canals and placed unnecessary crowns on teeth and, in the case of Jeremy Bohn, repeatedly drilled on his teeth without local anesthesia. Plaintiffs were not isolated victims; rather the methods used on them were part of the Forba clinic model used on patients at Forba clinics throughout the country. Many of the defendants received tens of millions of dollars as a result of the scheme. New Forba aimed to make hundreds of millions more.

[265] Ex. 929 [Padula] at 188; ex. 900 [Adair] at 152-53.

From the evidence, a jury could find that defendants acted fraudulently, committed battery, breached fiduciary duties, induced others to do so, violated state consumer laws, violated public rights that constitute negligence *per se*, and acted otherwise wantonly, recklessly and without regard to the safety and welfare of the public, including the plaintiffs. Any one of these findings would support the imposition of punitive damages. The "decision whether to award punitive damages should reside in the sound discretion of the original trier of the facts" (*Fordham-Coleman v National Fuel Gas Distribution Corp*., 42 AD3d 108, 114 [4th Dept 2007]; accord *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]). That is certainly true here.

B. This Court Has Already Rejected New Forba's Bankruptcy Argument

Two of the New Forba Defendants make a second argument applicable only to them: that the plaintiffs have waived their right to seek punitive damages. The argument is simply a rehash of the motion to renew and reargue that New Forba lost in April.

Relying on an order from the New Forba bankruptcy judge, in October 2012 New Forba moved to renew and reargue the order denying its motion to dismiss and then to dismiss the punitive damages claim and all of the intentional tort claims. This Court denied the motion on April 4, 2013 and signed an order on May 18, 2013.[266]

Undeterred, New Forba again seeks to dismiss the punitive damages claim by repeating the arguments and authorities the Court just considered and rejected in April. Rather than repeating all of the arguments made in their earlier response, plaintiffs refer to and incorporate them herein.[267] The undisputed facts reflected in the affirmations can be summarized as follows: On May 12, 2012, the judge presiding over the New Forba bankruptcy case issued an order reflecting an agreement reached between the plaintiffs and the two bankrupt New Forba

[266] Ex. 28 [May 18, 2013 Order].
[267] Ex. 17 [October 11, 2012 Affirmation of Patrick J. Higgins and October 11, 2012 Affidavit of Richard Frankel, with exhibits].

companies. Those companies agreed to lift the bankruptcy stay to permit plaintiffs to move forward against them in this case. In exchange, plaintiffs agreed to seek to *collect* any judgments they obtain against the bankrupt New Forba entities from their insurance proceeds and not their bankruptcy estates. The undisputed evidence shows that the plaintiffs never agreed to waive the right to prosecute any claims and, indeed, never discussed the subject with counsel for New Forba. For the same reasons the Court rejected New Forba's argument two months ago, New Forba's motion for summary judgment on punitive damages based on the bankruptcy order fails.

POINT XI

THE MOTION FOR SUMMARY JUDGMENT AS TO CONCERTED ACTION LIABILITY SHOULD BE DENIED[268]

The concerted action doctrine imposes joint and several liability on persons who, through an implicit agreement, participate in conduct that creates an unreasonable danger to others (*Herman v Westgate*, 94 AD2d 938 [4th Dept 1983]; *Finn v Morgan*, 46 AD2d 229 [4th Dept 1974]; *Harris v Stanley*, 21 AD3d 612, 613 [3d Dept 2005]). "Concerted action liability rests upon the principle that '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, … are equally liable …'" (*Herman,* 94 AD2d at 938 [quoting from Prosser, *Torts* (4th ed) § 46 and citing *Restatement [Second] of Torts*: § 876]).

The agreement may be implied based on the nature of the conduct itself (*Herman,* 94 AD2d at 938; *Harris v Stanley*, 21 AD3d 612, 613 [3d Dept 2005]); *Restatement [Second] of Torts*: § 876, Comment on Clause (a) ["The agreement may be implied and understood to exist from the conduct itself"]). Concerted action applies to all tortious conduct, whether intentional

[268] This joint point opposes the sections of the following defendants' memoranda of law and affirmations: New Forba Point VII; Old Forba Point IX; and Six Dentists Point VII. Gusmerotti moves for judgment on all claims, but does not mention concerted action.

or negligent, and thus applies to all of the underlying causes of action asserted in this case. *Shelley Standish-Parkin v Lorillard Tobacco Co*., 12 AD3d 301 [1st Dept 2004] [fraud]; *City of New York v Lead Industries Ass'n., Inc*., 190 AD2d 173 [1st Dept 1993] [fraud]; *Miele v American Tobacco Co*., 2 AD3d 799, 805 [2d Dept 2003 [negligence]; *Finn v Morgan*, 46 AD2d 229 [4th Dept 1974] [negligence]).

Plaintiffs allege that defendants engaged in concerted action in joining together to implement the scheme that caused the Dentist Defendants to treat plaintiffs for the purpose of increasing Forba's profits rather than for the medical needs of the plaintiffs.[269] Defendants argue they are entitled to summary judgment on the concerted action claim because the evidence allegedly establishes as an undisputed fact there was no agreement to engage in the scheme. The evidence upon which they rely in making this argument is once again the self-serving evidence of the Dentist Defendants that their treatment was appropriate and not influenced by the other defendants. The motion should be denied because this evidence is disputed by the evidence that shows the defendants engaged in the scheme by which the treatment was for the purpose of increasing Forba's profits and not to meet the medical needs of the patients. The nature of the conduct itself establishes the implicit agreement to engage in the scheme.

New Forba argues that "[t]his is not a 'drag race' case in which several parties agreed to engage in risky conduct."[270] They are right that it is not a "drag race" case, but they are wrong that it is not a case where several parties agreed to engage in risky conduct. Concerted action is not limited to drag race cases. It applies to all cases in which parties implicitly agree to engage in risky conduct, including mass tort cases (See *Shelley Standish-Parkin*, 12 AD3d 301 ([cigarettes]; *City of New York,* 190 AD2d 173 [lead-based paint]; *Miele,* 2 AD3d 799

[269] Def. j. ex. W [Varano (Syracuse) Am. Compl.] at ¶¶ 234-6; def. j. ex. P [Johnson (Rochester) Am. Compl.] at ¶¶ 242-4; def j. ex. I [Angus (Albany) Am. Compl.] at ¶¶ 234-6.

[270] New Forba Memo. at 22.

[cigarettes]). The evidence creates a material issue of fact as to whether defendants agreed to engage in risky conduct that damaged plaintiffs and the summary judgment motions as to concerted action should be denied.

Old Forba also argues in one sentence that their motion should be granted because allegedly there is no evidence that the Old Forba Defendants encouraged treatment they knew was wrongful.[271] Old Forba cites no evidence that the Old Forba Defendants did not encourage treatment they knew was wrongful and there is none. Thus Old Forba has not carried its initial burden as to this contention. Furthermore, the evidence of the scheme makes this a disputed fact issue even if Old Forba had carried its initial burden.

Finally, New Forba and the Six Dentists argue that summary judgment should be granted as to concerted action liability for the intentional tort claims because those underlying claims allegedly should be dismissed as duplicative of the malpractice claims. This contention should be denied for the reasons stated above with regard to the underlying claims. In addition, New Forba argues there is no evidence it acted in a manner it knew was harmful. Knowledge that one's conduct will be harmful is not required. As set forth above, conduct that creates an unreasonable condition to others is sufficient. Furthermore, even if it were required the evidence of the scheme makes it a contested fact issue.

Defendants have not shown they are entitled to summary judgment on concerted action and their motions should be denied.

[271] Old Forba Memo. at 25.

POINT XII

DR. GUSMEROTTI'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED[272]

Plaintiff Shiloh Lorraine is pursuing claims against Dr. Gusmerotti only for fraud, breach of fiduciary duty, and malpractice.[273] Shiloh seeks to recover compensatory and punitive damages from Dr. Gusmerotti.

Dr. Gusmerotti argues for a summary judgment on the fraud claim because he claims (1) it is duplicative of the malpractice claim and (2) he did not participate in a scheme to treat children to increase Forba's profits rather than meeting the dental needs of the child patients. For the reasons stated in Point I above, Shiloh Lorraine can sue Dr. Gusmerotti, alternatively, for fraud and malpractice under New York law. The evidence of the scheme as discussed above at pages 3-7 and as set forth in Part 5 of the Higgins Affidavit creates material issues of act as to whether Dr. Gusmerotti's improper treatment of Shiloh Lorraine resulted from the scheme.

Dr. Gusmerotti seeks a summary judgment on the breach of fiduciary duty. He argues that it is duplicative of the malpractice claim, he owed no fiduciary duty to his patient, and the pleadings are not specific enough.[274] As addressed in Point IV above, these arguments have been heard, decided against the defendants, and are on appeal. For the reasons given by Justice Cherundolo and based on the authorities cited in his August 29, 2012 opinion, Dr. Gusmerotti's motion on the breach of fiduciary duty claim should be denied.

Dr. Gusmerotti claims he is not liable for malpractice because his dental care met the standard of care. In Point VIII A above, plaintiffs set forth the evidence that presents a disputed material fact for the jury to decide—was Dr. Gusmerotti's care below the standard of care?

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[272] This point opposes Gusmerotti Points I, II, V and VII.

[273] Since Shiloh Lorraine is not pursuing claims for battery, GBL violations, negligence *per se* and informed consent against Dr. Gusmerotti, Points III, IV, VI, and VIII of his Memorandum of Law are not at issue.

[274] He also claims that he did not breach his duty because he met the accepted standards of care and that Shiloh admitted he suffered no damages from Dr. Gusmerotti's misconduct. These arguments are addressed below.

Dr. Gusmerotti also claims his malpractice could not be the proximate cause of Shiloh Lorraine's damages because Dr. Kamara independently evaluated and diagnosed Shiloh after Dr. Gusmerotti did. Proximate cause is invariably a fact issue for the jury (*Prystajko v Western New York Public Broadcasting Ass'n*, 57 AD3d 1401, 1403 [4th Dept 2008; *Paul v Cooper*, 45 AD3d 1485, 1487 [4th Dept 2007]). Issues of fact preclude summary judgment when there may be more than one proximate cause (see *Deshais v Prudential Rochester Realty,* 302 AD2d 999 [4th Dept 2003]). Under the facts of this case, the jury may find that Drs. Gusmerotti's misconduct was a proximate cause and find him and Dr. Kamara jointly liable.

Dr. Gusmerotti examined Shiloh, prepared a treatment plan of four baby root canals and crowns and, using phony x-rays, obtained the consent to carry out the plan.[275] He then turned Shiloh's care over to Dr. Kamara who, according to the dental record, did not conduct an independent oral examination.[276] Regardless, Shiloh only saw Dr. Kamara because Dr. Gusmerotti prepared a treatment plan and obtained the consent for baby root canals and crowns Shiloh did not need. From the evidence, a jury can conclude that Dr. Gusmerotti was independently negligent in mishandling Shiloh's case and that his malpractice was a proximate cause of Shiloh's injuries. "This being so, defendant, as the initial wrongdoer, cannot escape liability merely by showing that the subsequent treating physician to whom plaintiff was referred was also negligent" (*Datiz v Shoob*, 71 NY2d 867, 868-869 [1988]; *Derusha v Sellig*, 92 AD3d 1193, 1195 [3d Dept 2012]); See also *Mandel v New York County Public Admin*, 29 AD3d 869 [2d Dept 2006]).

Dr. Gusmerotti also makes the disingenuous argument that Shiloh Lorraine is suing him for fraud, breach of fiduciary duty and malpractice, but not seeking damages. The allegations in

[275] Ex. 562 at sheets 1 and 2; ex. 921 [Elizabeth Lorraine] at 68-69.
[276] Ex. 562 at sheet 4 (no limited oral exam to confirm treatment plan and rule out other conditions).

the Amended Complaint and disclosures in Shiloh Lorraine's Expert Response demonstrate the obvious: Shiloh is suing to recover damages from Dr. Gusmerotti for the injuries caused by his wrongful conduct. In the Amended Complaint, Shiloh Lorraine (along with the other Rochester plaintiffs) alleges that as a result of the Dentist Defendants' fraud, breach of fiduciary duty and malpractice, he has been damaged in a sum of money having a present value, which exceeds the jurisdictional limits of all lower courts. [277] In the prayer, plaintiffs seek a money judgment against each defendant. [278] Shiloh's expert disclosures are more specific. In that document, Shiloh Lorraine discloses that two experts are prepared to testify that "the treatment rendered to Shiloh by the dentists identified below on the dates indicated violated the standard of care and that such violation was a substantial factor in causing Shiloh to suffer trauma and injuries…"[279] Dr. Gusmerotti is the first dentist identified.[280] Clearly, Shiloh Lorraine alleged and Dr. Gusmerotti has known that Shiloh is seeking damages for Dr. Gusmerotti's misconduct.

[277] Def. j. ex. P [Johnson (Rochester) Am. Compl.] at ¶¶ 195, 208, 226.
[278] *Id*. at pages 53-54.
[279] Def. j. ex. II [Lorraine Expert Disclosure] at p. 8, ¶ 16.
[280] *Id.* Gusmerotti also disregards one of Shiloh Lorraine's discovery responses in which his mother details his injuries. She states that "The Dentist and Clinic caused the infant plaintiff physical and mental/psychological harm, trauma and suffering. He had bruises on his face, neck, arms, wrists and ankles. His clothes and underwear were soiled with sweat, urine and poop. He had swollen, puffy and red eyes and face. He was crying and visibly shaken. He had blood on his face. He felt pain in his mouth and body. He wouldn't eat for weeks after. He would wake up at night screaming for me acting like he was tied up." Def. j. ex. GG [Lorraine Discovery Responses] at Response 9 page 5 (8/23/2007 Operative). Instead of that discovery response, Dr. Gusmerotti points to a statement in a different section of the discovery responses in which Shiloh's mother states that Plaintiff is not seeking to recover for any injuries or damages as a result of the Treatment Plan. To the extent necessary and so that his discovery response conforms to the Amended Complaint, the evidence obtained, and the expert disclosures. Shiloh Lorraine requests leave of Court to clarify that Dr. Gusmerotti is jointly liable for the injuries he incurred by having four unnecessary baby root canals and crowns performed on him while being tied to a board for an hour without his mother present.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that this Court deny all the motions for summary judgment filed by all the defendants (except DeRose Management LLC) in the Jeremy Bohn, Shiloh Lorraine and Shadaya Gilmore cases, together with such other and further relief s the Court deems just and proper.

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