

STATE OF NEW YORK : FIFTH JUDICIAL DISTRICT  
SUPREME COURT : COUNTY OF ONONDAGA

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In Re: SMALL SMILES LITIGATION :

Index No. 2011-6084 :

Index No. 2011-2128

Index No. 2011-6223

LCP Case No. 011-2011 :

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JURY TRIAL

September 18 2013

Onondaga County Courthouse  
401 Montgomery Street  
Syracuse, New York 13202

B E F O R E:

HONORABLE DEBORAH H. KARALUNAS,  
Justice of the Supreme Court and a Jury

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25

1 Bohn v. Small Smiles, et al

2 (Morning Session - September 18, 2013.)

3 THE COURT: Okay. Jim, would you shut that  
4 door. Are any of the jurors in the courtroom? I  
5 don't see any, but I want to be sure that none of  
6 them are.

7 So the Court had a few motions to decide. I  
8 know I had reserved decision with respect to  
9 whether or not the defendant dentists could  
10 testify as expert witnesses in this case.

11 Uhm, and I believe under the authority of  
12 Stark v. Semeran, 244 AD2d 894, Fourth Department  
13 case from 1997, that the fact that they were not  
14 disclosed as expert witnesses does not -- will not  
15 bar them from testifying as experts in this case.

16 However, the Court is not going to hear  
17 cumulative, duplicative testimony from many  
18 people. So with that said, they are fact  
19 witnesses in this case, and I'm not going to allow  
20 lengthy opinion testimony from the defendants in  
21 this case because the Stark case says you don't  
22 have to disclose them, but the Court still has  
23 discretion not to allow cumulative testimony so  
24 you can't have, you know, four or five experts  
25 testifying about the same thing. So the motion to

1 Bohn v. Small Smiles, et al  
2 preclude then defendants from giving opinions is  
3 denied.

4 I asked for expert disclosure from counsel,  
5 and I think I got it from Old FORBA, and no, I got  
6 it from -- I got it from the dentists and New  
7 FORBA.

8 Would Old FORBA and the plaintiffs, do you  
9 have that to pass up or --

10 MR. HIGGINS: I'm sorry, Judge. We can  
11 have that in fifteen minutes. I'll go back to the  
12 hotel and get it.

13 THE COURT: All right. Not a problem.

14 MR. HIGGINS: Very well.

15 THE COURT: And then there was also -- I  
16 didn't ask either party to -- any party to prepare  
17 orders with respect to the motions in limine.

18 Anyone want to do a draft of the proposed --

19 MR. HIGGINS: Of course, Judge, I will do  
20 a draft. I will do a draft on the plaintiff's  
21 motion or all of them.

22 THE COURT: It's up to you. You guys can  
23 do it.

24 MR. HIGGINS: I'll do the whole thing.

25 THE COURT: Okay. All right. Thank you.

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2 There is also a motion by the plaintiffs brought  
3 by an Order to Show Cause to preclude New FORBA  
4 from asserting untimely objections to the  
5 deposition testimony of Dr. Adair and Michael  
6 Lindley.

7 Secondly, to preclude them from offering  
8 additional deposition testimony of Dr. Steven  
9 Adair, Michael Lindley and Kenneth Knott that was  
10 not timely designated.

11 Third, from calling Michelle Sobotka and  
12 Hillary Doyle as witnesses in this case.

13 Fourth, from -- to preclude Doctors Aman,  
14 Bonds and Khan from calling Dr. Albino Bellini as  
15 a witness in this case.

16 I understand that he is not testifying so  
17 that that motion -- or that is -- is that correct?

18 MS. MARANGAS: Your Honor, we wish to  
19 reserve our right to produce him. There was a  
20 little bit of confusion yesterday. Clarified it  
21 with plaintiff's counsel late in the day.

22 THE COURT: Okay. Nobody clarified to the  
23 Court, so I didn't address that motion because I  
24 didn't realize it was still a motion that was  
25 before me.

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2 MS. MARANGAS: I apologize, Your Honor.

3 THE COURT: Okay. I won't address that  
4 then. And to preclude Old FORBA from calling  
5 Crystal Hutchins, Kathleen Pfohl, Sandra Rossetti  
6 and Nadine Vandewalker as witnesses because they  
7 were not disclosed in response to discovery  
8 requests. So with respect to the -- let's start  
9 with Old FORBA, who is going to argue that motion?

10 MS. FOLEY: Your Honor, I will be arguing  
11 that on behalf of the plaintiffs.

12 THE COURT: All right. Come up to the  
13 podium.

14 MS. MEYERS: Okay.

15 THE COURT: I'm not really needing  
16 argument, but I have some specific questions I  
17 want to ask, but I want to be sure the court  
18 reporter can hear you.

19 MS. MEYERS: Okay.

20 THE COURT: Okay. So I want to know why  
21 the late disclosure of these witnesses?

22 MS. MEYERS: Uhm, are you referring to the  
23 late disclosure? To be clear, we disclosed our  
24 witness list on time. It was a timely disclosure  
25 of the witness list.

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2 THE COURT: Didn't identify those  
3 individuals.

4 MS. MEYERS: When we produced the trial  
5 witness list, we identified them in the identical  
6 manner that the plaintiffs had identified them.  
7 They said two to three witnesses, hour long.

8 THE COURT: Do two wrongs make a right?

9 MS. MEYERS: No, two wrongs do not make a  
10 right. As soon as they asked us for the names, I  
11 think eleven days later --

12 THE COURT: Within two hours the paper say  
13 you supplied them. Okay.

14 MS. MEYERS: And in no manner are we  
15 attempting to conceal these witnesses from them.  
16 In fact, that they -- they knew about these  
17 witnesses, at least one of them they actually  
18 contacted.

19 THE COURT: All right. So Crystal  
20 Hutchins, Sandra Rossetti and Nadine Vandewalker  
21 were not identified by plaintiffs or defendants in  
22 any of the disclosure that took place by name.  
23 Although, there were some salary charts that  
24 referenced them -- these individuals.

25 Uhm, there was a discovery demand addressed

1       Bohn v. Small Smiles, et al  
2       to Old FORBA that asked for the identity of names  
3       and addresses of all persons who were witnesses to  
4       any of the occurrences or to any of the events  
5       surrounding any of the occurrences that are the  
6       subject of this action, or were witnesses to any  
7       of the conditions that are the subject of this  
8       action or were witnesses to any of the plaintiff's  
9       injuries, and those individuals were not  
10      identified in the response to that discovery  
11      demand.

12           MS. MEYERS: Your Honor, if I may. By way  
13      of background, we received in the plaintiff's  
14      demand, and they were voluminous, and so the  
15      parties agreed we had, I believe it was nine disks  
16      of discovery materials to turn over.

17           So in lieu of actual a formal response to  
18      the disclosure, we agreed that we would just turn  
19      over the disks and instead of making a formal  
20      response.

21           Uhm, now, I know in -- to be forthright with  
22      the Court, they had requested insurance  
23      information, and at that point we didn't have any  
24      witnesses that we were aware of by specific name.

25           Uhm, they had disclosed in their disclosure



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2 that they knew hygienists, they knew office  
3 managers, and they knew dental assistants had  
4 personal knowledge of the case, and so when we  
5 turned all of the documents, there were lists of  
6 these employees in there, we felt it was  
7 sufficient to put them on notice.

8 We didn't try to conceal any witnesses, and  
9 in hindsight should we have explicitly listed  
10 them, perhaps. But in no way were these witnesses  
11 ever concealed from them, and, in fact, like I  
12 said before, they were actually contacting,  
13 reaching out to the witnesses, and I did a search  
14 and we got this motion in on -- I believe I read  
15 it at six o'clock on Monday night.

16 THE COURT: I read your papers. You did a  
17 search and you came up with some documents that  
18 identified those three individuals, Hutchins,  
19 Rosetti and Vandewalker.

20 MS. MEYERS: That's right.

21 THE COURT: By on those salary like  
22 charts, and then there was also the Kathleen Pfohl  
23 who was identified in an office chart. I know.  
24 So I understand that. Those were disclosed by  
25 name, the three on September 3rd, 2013.

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2 Uhm, let me -- so really you're saying you  
3 don't believe it was late disclosure to identify  
4 them by name on September 3rd, notwithstanding the  
5 discovery demands and the Court's order, that  
6 order of disclosure of witnesses and the length of  
7 time each witness would testify by August 23rd?

8 MS. MEYERS: I would submit to you that  
9 we -- there was no intent to conceal these  
10 witnesses or that so -- yeah, I would submit that  
11 we did timely disclose our intention to call the  
12 clinic employees at the time of trial.

13 THE COURT: Can you tell me when, how and  
14 who first contacted each of those individuals  
15 about testifying at this trial?

16 MS. MEYERS: Uhm, I can tell you that Mr.  
17 First began contacting them a couple of months  
18 before trial.

19 Specifically, I think some of these have  
20 been actually within the past month or so that we  
21 have actually talked to them and located them, so  
22 I can't give you the specific dates right now. I  
23 can probably provide that to the Court.

24 THE COURT: Okay. With respect to Miss  
25 Hutchins?

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2 MS. MEYERS: I do want to clarify, Miss  
3 Vandewalker we have -- have known about for  
4 several months. I think back in maybe May we  
5 contacted her and that was actually in response to  
6 Mr. Leyendecker contacted her first, and she  
7 actually -- we became aware of that through -- Mr.  
8 Leyendecker contacted her, not by Mr. Leyendecker,  
9 but through Mrs. Vandewalker we learned that  
10 information.

11 THE COURT: I'd like an offer of proof  
12 with respect to Miss Hutchins if the Court were to  
13 allow her to testify, what would she testify to?

14 MS. MEYERS: Uhm --

15 MR. FIRST: Can I interject, Judge?

16 THE COURT: Certainly.

17 MR. FIRST: Miss Hutchins is a dental  
18 assistant who worked at the clinic in Syracuse  
19 from when it opened in 2004 until the sale in  
20 2006. She will testify to the procedures there as  
21 a dental assistant, what her role was, what her  
22 observations were during the relevant time period.  
23 And, you know, she obviously has firsthand  
24 knowledge.

25 She was in the general time period involved.

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2 I don't believe -- we haven't been able to connect  
3 her to actually Jeremy Bohn, but she was there,  
4 and I think that the jury should be entitled to  
5 hear from her, and I don't know, I think this is  
6 clear to the Court, but these names were well  
7 known to the plaintiffs. There is nothing new  
8 about this. I mean they --

9 THE COURT: Well, the names may be well  
10 known, but their relevance to the lawsuit and the  
11 claims that are made in this lawsuit and the  
12 defenses to this lawsuit is what the witness  
13 identification list is for in discovery, so the  
14 fact that their names were among the thousands  
15 probably of names that appeared on documents  
16 doesn't mean that they had information that was  
17 relevant to the claims in this case.

18 So for you to say that they saw these names  
19 on documents with perhaps the exception of  
20 Kathleen Pfohl, who is identified on the office  
21 chart, I believe, of Jeremy, I saw no reference on  
22 any of the office charts to Miss Hutchins, Miss  
23 Rossetti or Miss Vandewalker --

24 MR. FIRST: Yeah.

25 THE COURT: -- so -- so basically she's --

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2 she didn't treat Mr. Bohn, but -- Jeremy, but  
3 you're saying she would just testify generally to  
4 the -- to the procedures and the role -- her role?

5 MR. FIRST: Exactly.

6 THE COURT: Okay.

7 MR. FIRST: You know, how the office  
8 worked, what she observed and things of that sort.  
9 You know, Your Honor, they're very broad claims  
10 being made in that case that may seem general, but  
11 it is nothing compared to the broadness of the  
12 claims being made in this case and that's why I  
13 respectfully submit that that is relevant. Very  
14 relevant in this case.

15 THE COURT: Well, that's -- I guess the  
16 problem I'm stuck on because if it was very  
17 relevant, as you are saying, Mr. First, why  
18 weren't these people identified by name at the  
19 time of when discovery was still ongoing so that  
20 the plaintiffs would make -- be able to make a  
21 determination as to whether or not they wanted to  
22 take discovery of these individuals before we get  
23 into the courtroom.

24 And why weren't they identified on the  
25 witness list by name on August 23rd when at least

1 Bohn v. Small Smiles, et al  
2 what I understand they were already contacted by  
3 you with regard to -- with regard to testifying at  
4 trial.

5 MR. FIRST: The plaintiffs didn't identify  
6 them.

7 THE COURT: I understand that.

8 MR. FIRST: And the -- you know, as soon  
9 as they asked for it, I gave it to them. There  
10 was no surprise. I mean Miss Vandewalker was  
11 actually contacted we know, and the others may  
12 have been contacted, too, for all I know, but that  
13 one I knew was.

14 THE COURT: What would Miss Rossetti  
15 testify to? Offer of proof?

16 MR. FIRST: She's a hygienest who would  
17 testify to her role as a hygienest, which I know  
18 is a little different from the dental assistant  
19 that she works in the hygiene bay and does the  
20 hygienic care at the clinic. She was one of  
21 several. She was there during the relevant time  
22 period.

23 THE COURT: So the role of a hygienest at  
24 Small Smiles dental clinic is your offer of proof  
25 of what she will testify to?

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2 MR. FIRST: Yeah. She will testify as to  
3 how it worked and the -- in the hygiene  
4 department, because Jeremy Bohn was there, how it  
5 worked, how the system was, how it was set up. I  
6 can prove that through other people, too, she was  
7 actually in there. It's relevant. You know, the  
8 same time period as this case.

9 THE COURT: How about Nadine Vandewalker?

10 MR. FIRST: Nadine Vandewalker was the  
11 office manager, and she was what is called a front  
12 office person. She was not clinical, but she will  
13 give the jury insight as to how the office worked  
14 and the front and in the office and the front end  
15 of the clinic. Largely the appointments and  
16 things like that, and contact -- the initial point  
17 of contact with the public.

18 She -- that's what she did. And she -- each  
19 of these people kind of represent a different  
20 aspect of the clinic.

21 THE COURT: And Kathleen Pfohl?

22 MR. FIRST: She's a hygienist also, and  
23 she actually was involved in the care and  
24 treatment of Jeremy Bohn. She has no specific  
25 memory of him, but her name is in the chart.

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2 THE COURT: Okay. All right. Thank you.

3 MR. FIRST: Thank you. All right.

4 THE COURT: All right. New FORBA? Mr.  
5 Hulslander? So with respect to the witnesses, you  
6 also did not identify in response to discovery --  
7 defendant's discovery responses either Michelle  
8 Sobotka or Hillary Doyle.

9 They were first disclosed, Michelle Sobotka  
10 on September 5th; and Hillary Doyle on September  
11 9th. So I basically have the same questions of  
12 you, why the late disclosure?

13 MR. HULSLANDER: It was in the answer to  
14 interrogatory. She was the office manager from --

15 THE COURT: She was identified as the  
16 office manager, but in response to the question  
17 that asked about because there was a specific  
18 question which asked who were the office managers  
19 at each of the facilities, but the question about  
20 what witnesses had knowledge about -- again, I'm  
21 going to pull out the demand here.

22 MR. HULSLANDER: Well, we hadn't talked to  
23 Sobotka. We haven't talked. We hadn't talked to  
24 Hillary. As soon as we were able to -- all of us  
25 were trying to contact these people. There were



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2 investigators that were chasing them down. We  
3 were all trying to contact these people for  
4 months, and so as a result, initially, I wasn't  
5 able to identify a witness when I never talked to  
6 her.

7 I mean Sobotka was an office manager and  
8 also a dental assistant, and then a lead dental  
9 assistant throughout this time period from 2004  
10 until the end of the clinic.

11 I wasn't going to identify a witness that I  
12 have not talked to, and I don't think that's  
13 appropriate especially when --

14 THE COURT: So when did you talk -- when  
15 did someone on behalf of New FORBA first speak  
16 with them?

17 MR. HULSLANDER: I had -- I had breakfast  
18 with her. That was the first time I talked to  
19 her. First time anyone from my office talked to  
20 her about -- substantively about the case, other  
21 than just the meeting for breakfast and on the  
22 following Friday we identified her.

23 THE COURT: When was this breakfast?

24 MR. HULSLANDER: I mean the following  
25 Monday we identified her. So I'm thinking the

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2 breakfast was Sunday morning in Parish, Labor Day  
3 weekend.

4 THE COURT: Okay. So that's the first  
5 time anyone from your office contacted her? I  
6 know you have "of counsel" and somebody else  
7 was -- somebody else had -- somebody else  
8 contacted her? How did you meet her in Parish,  
9 Kevin?

10 MR. HULSLANDER: We finally chased her  
11 down. Okay. Karen Krogman in my office chased  
12 her down where she works. We've been looking for  
13 her for months.

14 Investigators were after her for months,  
15 from plaintiffs and all of the parties were after  
16 her. She was avoiding everyone. We went into the  
17 office where she worked. She wasn't particularly  
18 friendly at the time.

19 We did get her cellphone number. I then  
20 contacted her by cellphone. Left her several  
21 messages. Finally got a hold of her. Established  
22 a meeting place. Went to her on Sunday during  
23 Labor Day. Met with her and identified her.

24 So I wasn't going to -- I wasn't going to  
25 identify a witness that was going to testify at

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2       trial without me talking to her. These guys knew  
3       about her. They were after her, too. So I mean  
4       it would have been disingenuous for me to identify  
5       a witness, especially when, you know, the Court is  
6       concerned about scheduling and who we're going to  
7       call and when we are going to call them, and I'm  
8       not going to identify a witness that I'm not going  
9       to call or that I haven't talked to. And frankly  
10      the same goes for Hillary. Hillary Doyle is a  
11      dental assistant.

12           THE COURT: Wait! Tell me what -- make me  
13      an offer of proof with respect to Michelle  
14      Sobotka.

15           MR. HULSLANDER: Michelle Sobotka has  
16      intimate knowledge of the workings of the Small  
17      Smiles center in New York. She received e-mails.  
18      She dealt with the dentists on a daily basis. She  
19      was not only office manager, she was a dental  
20      assistant.

21           She was able to discuss the policies and  
22      procedures at the Small Smiles. She is able to  
23      discuss the communication -- the communications  
24      with the higher-ups at Small Smiles.

25           She's able to discuss what went on at Small

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2 Smiles on a daily basis. And that's the offer of  
3 proof. The substance of her testimony, depending  
4 on the plaintiff's case, as always with every case  
5 where a defendant defends a case, depending on  
6 what they offer for proof, but that's what she's  
7 going to testify about and she's my only  
8 representative. I have a bankrupt client, Judge,  
9 with no employees.

10 THE COURT: I find it difficult to  
11 understand why in a case of this significance,  
12 with the millions of dollars in attorneys' fees  
13 that have been spent in preparing this case and  
14 the depositions and the -- you know, everything  
15 that is happened in this case, that all of the  
16 sudden somebody appears a week before trial, and  
17 if this person is that important to your case, it  
18 seems very suspect to me that nobody spoke with  
19 her and that this witness just appears in the week  
20 before the trial.

21 If she was that important, I mean you  
22 guys -- these are your Old FORBA employees and New  
23 FORBA's employees, and you guys knew who these  
24 people were.

25 MR. HULSLANDER: So did they!

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2 THE COURT: Well, they knew she was an  
3 office manager. However, she wasn't identified as  
4 a witness with any knowledge.

5 MR. HULSLANDER: Why were they after her?  
6 Why were they after her?

7 THE COURT: You have to determine whether  
8 or not she had any knowledge.

9 MR. HULSLANDER: That's exactly right!  
10 That's what we were doing, too. We were after her  
11 and that's when we found her. I can't -- I mean I  
12 can't say we weren't trying to find her. We were.  
13 We were trying to find her, Judge. You know this  
14 is --

15 THE COURT: When did you first find her?

16 MR. HULSLANDER: Sunday.

17 THE COURT: That's when you first met her?

18 MR. HULSLANDER: Labor Day weekend.

19 THE COURT: Met with her?

20 MR. HULSLANDER: That Sunday of Labor Day  
21 weekend.

22 THE COURT: When did you first find her?

23 MR. HULSLANDER: Several days before.

24 THE COURT: How about Miss Doyle, when did  
25 you first contact her?

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2 MR. HULSLANDER: I contacted her.

3 THE COURT: When I say "when did you," I  
4 mean anyone on behalf of New FORBA?

5 MR. HULSLANDER: Yeah. The first time was  
6 two days before I identified her as a witness.  
7 When was that?

8 THE COURT: Okay.

9 MR. HULSLANDER: Two days before I  
10 identified her as a witness. The only way I got  
11 to Doyle was through Sobotka because Doyle -- just  
12 like we've been trying to get Doyle, Doyle was the  
13 dental assistant on this case. Jeremy Bohn, she  
14 treated Jeremy Bohn, and it's her name that is all  
15 over this chart.

16 That's why they were after her. Everyone is  
17 after her. We have an investigator, investigators  
18 were after her. She wasn't cooperative. The only  
19 reason we got her to cooperate was because Sobotka  
20 contacted her and said, you know, I'm a good guy.  
21 That's basically it.

22 So as soon as I was able to talk to her on  
23 the phone substantively, I identified her. I mean  
24 this is a fluid process, Judge. I mean we haven't  
25 started the trial yet.

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2 THE COURT: You know, I didn't practice a  
3 whole lot in State Court, Kevin. I was mostly in  
4 Federal Court, and I would never have not  
5 identified a witness as directed by a Court on the  
6 deadlines that were imposed. And we were stuck  
7 with that. When the Court imposed a deadline for  
8 disclosure of witnesses that was it. You were  
9 done.

10 MR. HULSLANDER: That's --

11 THE COURT: And -- and -- and --

12 MR. HULSLANDER: That's Federal Court,  
13 though, Judge. I know what the rules are in  
14 Federal Court.

15 THE COURT: But what I'm finding, and it's  
16 the same thing with the deposition designations  
17 here, is that it seems to me that there is really  
18 been -- I'm not blaming you, plaintiffs are guilty  
19 of this as well, a lack of respect for the Court.

20 I really do feel like people think I have  
21 nothing better to do and I have no other cases,  
22 and I do. I mean I was up until two this morning  
23 reading transcripts, two yesterday morning reading  
24 the deposition transcripts because of the late  
25 designations.

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2 I find that a little bit disrespectful that  
3 everybody is expecting that at this 11th hour on  
4 this case going -- which has been going on for  
5 years that I have to be making decisions because  
6 I'm just getting material.

7 Mr. Cahalan of your office in his papers in  
8 opposition to this motion, you know, he complains  
9 that your office only had seven days, this is with  
10 respect to the transcripts, only seven days to  
11 review the transcripts and make objections and  
12 counter designations.

13 Uhm, my order which required the  
14 designations and the counter designations and then  
15 the submission of the transcripts with those to me  
16 by September 9th.

17 Now this trial was scheduled to begin on  
18 September 16th, which meant I would only have  
19 seven days, having never read any one of the  
20 transcripts or participated in, presumably you  
21 guys have all done that because you participated  
22 in them and got them ready for trial. So  
23 basically I didn't hear anybody say, hey, Judge,  
24 you know, that schedule you set, that's going to  
25 be impossible, you will never be able to read all



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2 those transcripts and rule on all those objections  
3 and all those counter designations along with  
4 everything else that is happening in that week.  
5 So your scheduling order you ought to make us do  
6 this earlier because you will need more time to do  
7 this.

8 And it just -- it just baffles me that --  
9 and by the way, I read all the transcripts. Well,  
10 all the plaintiffs' transcripts, although I'm  
11 having trouble putting my hands on where I left  
12 the last transcript. I am not going to preclude  
13 anybody because it worked both ways.

14 I've read the transcripts, the objections,  
15 the designations, the counter designations, the  
16 supplemental objections, the supplemental counter  
17 designations and I'm -- I'm ruling on the  
18 transcripts on the merits because I was able to  
19 accomplish that.

20 But with respect to the witnesses, the  
21 Court's going to reserve decision. Hillary Doyle  
22 you said she will testify. Make an offer of  
23 proof.

24 MR. HULSLANDER: Yes, she is.

25 THE COURT: Kevin, I'm not just addressing

1 Bohn v. Small Smiles, et al  
2 this to you. I know you're standing up here now.  
3 This is a comment for all of the attorneys in the  
4 room that you really have to think about what the  
5 role of the Court is in a trial and why we do  
6 these things. It's not just for you guys. It's  
7 for the ability to run a trial smoothly and I --  
8 that's it. Okay. So Miss Doyle will testify?

9 MR. HULSLANDER: Miss Doyle was a dental  
10 assistant involved in the care of Jeremy Bohn.  
11 She will be able to testify to what was done.  
12 What she did. What observations she made of  
13 Jeremy. What observations she made of the  
14 dentists.

15 What her involvement was that she had in the  
16 care and treatment of Jeremy Bohn. What she did  
17 with respect to the chart and the policies and  
18 procedures that she followed at the Small Smiles  
19 dental center in Syracuse. That's what she's  
20 going to testify to.

21 THE COURT: Okay. All right. I'm going  
22 to reserve decision on that because I do want to  
23 get the jurors who are here in and we will do  
24 opening statements.

25 MR. HULSLANDER: Just so you know, I have

1       Bohn v. Small Smiles, et al     Opening/Leyendecker  
2       great respect for the Court.

3               THE COURT: I understand that, Kevin.  
4       Okay. You can bring in the jurors.

5               (Jury seated in the jury box at 9:40 a.m.)

6               THE COURT: Morning. Please be seated.  
7       Okay. As I told you yesterday, this morning we're  
8       going to have opening statements by the attorneys.  
9       Are you guys ready? All right.

10              MR. LEYENDECKER: May it please the Court.  
11       Your Honor, may I approach the easel?

12              THE COURT: Yes, you may.

13              MR. LEYENDECKER: Good morning. I'd like  
14       to spend twenty minutes plus or minus talking to  
15       you about what I expect to prove in this case and  
16       what it's going to show.

17              And I expect the proof is going to show,  
18       ladies and gentlemen, that the answer to this  
19       question, is it proper for a corporation to  
20       pressure and influence doctors to perform more  
21       procedures on their patients and threaten them  
22       with their jobs if they don't?

23              I fully expect the proof in this case is  
24       going to say the answer to that question is  
25       absolutely, positively no. Not for a dentist.

1       Bohn v. Small Smiles, et al     Opening/Leyendecker  
2       Not for an internist. Not for a therapist. Not  
3       for a surgeon. Absolutely improper, that's what I  
4       expect the evidence is going to show.

5             Neither this community, nor any other  
6       community can tolerate an environment where  
7       doctors are focusing on the profit desires of the  
8       corporations that employ them, as opposed to being  
9       focused on what their patients need.

10            Because once that happens, those patients  
11       will be exposed to unnecessary risk of harm,  
12       injury and abuse. And nobody, and I mean nobody,  
13       is entitled to unnecessarily expose and needlessly  
14       expose our community to unnecessary risk of harm,  
15       injury and abuse.

16            I expect in this case that you're going to  
17       hear and the defendants, I expect, Dr. Michael  
18       DeRose, Mike Rounph, Dr. William Mueller, Danny  
19       DeRose and Dr. Padula will take the stand.

20            I expect they will raise their right hand to  
21       tell the truth, the whole truth and nothing but  
22       the truth, and I fully expect them to testify that  
23       the only pressure that -- the only influence  
24       that -- the only threats they made to the dentists  
25       that worked in their clinics where to show up at

1       Bohn v. Small Smiles, et al     Opening/Leyendecker  
2       8:00 a.m., work until lunch, and then continue to  
3       work hard until 5:00 p.m.. That's what I expect  
4       them to testify to.

5             Now, you're going to get to see a lot of  
6       documents in this case. Lots of documents. And  
7       one thing a good lawyer cannot do, and make no  
8       mistake about it, there are good lawyers in this  
9       courtroom on behalf of both the plaintiff and  
10       Kelly Varano and her son, Jeremy, that's who I  
11       represent, and on behalf of each of the  
12       defendants, the Old FORBA defendants, the New  
13       FORBA defendants and the doctors. Very good  
14       lawyers.

15            But one thing, no matter how good a lawyer  
16       is, one thing that a lawyer cannot do is he cannot  
17       change the words that appear on a piece of paper.

18            We all know lawyers work with their clients.  
19       They get them ready for their testimony. Lawyers  
20       no matter how good they are, cannot change what is  
21       written on a piece of paper, and at the end of  
22       this trial, you're going to get to decide, you've  
23       seen -- you will have seen the testimony from the  
24       defendants, and you will have seen the words that  
25       they wrote at the time the events were unfolding,

1       Bohn v. Small Smiles, et al     Opening/Leyendecker  
2       words that I believe you will hear that they never  
3       expected would be exposed in this kind of light,  
4       and you will get to decide, is that testimony  
5       consistent with what I expect the proof is going  
6       to show on those documents.

7               Now, the defendants, in my judgment, believe  
8       that the big dispute in this case is over whether  
9       Jeremy Bohn needed to see a dentist, whether  
10       Jeremy Bohn needed some treatment on his teeth.

11              But let me clarify for you, that is not what  
12       the dispute in this case is about.  Jeremy did  
13       need to see a dentist.  Jeremy did need some  
14       treatment on a few of his teeth.

15              That Jeremy needed to see a dentist and he  
16       needed some treatment on a few of his teeth does  
17       not give them a pass for what Jeremy endured.

18              Because when you live in a situation where  
19       dentists are pressured and influenced to perform  
20       more procedures on their patients, to put those  
21       profits first at their corporate employers, you  
22       expose those patients to unnecessary risk of harm  
23       and abuse, and I expect the proof in this case is  
24       going to demonstrate that Jeremy suffered that  
25       abuse.

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2 So the fact that he needed to see a dentist  
3 and needed treatment does not give them a pass for  
4 what they did to him.

5 So what are some of the things that happened  
6 to Jeremy when he went to Small Smiles. Well, his  
7 very first visit was on May 23rd of 2006. He was  
8 about three years old.

9 About a week prior to that time, Jeremy woke  
10 up with some swelling on his face. And on that  
11 same day his mother, Kelly Varano, took him to the  
12 pediatrician, same day he woke up with swelling on  
13 his face, that's what I expect the proof is going  
14 to show.

15 The pediatrician, I expect you will hear  
16 from, is going to say she looked in his mouth, and  
17 by the way, he was perfectly cooperative with her,  
18 he knew her, had rapport, he trusted her, felt  
19 comfortable.

20 Opens his mouth and she says, I expect you  
21 will hear from her, and the proof will show, I  
22 think he's got an abscess tooth.

23 What does she do? Prescribes some  
24 penicillin. Recommends to Jeremy's mom, you  
25 should take him to see the dentist.

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2 So a couple of days later she does that. I  
3 expect the proof will show she took him to the  
4 family dentist that treated Jeremy's older sisters  
5 for a long time. And at that dentist he, Jeremy,  
6 was very uncooperative. Very uncooperative.

7 New environment. Didn't know anyone. The  
8 dentist said, looks like the swelling is down, but  
9 I think he needs to be seen by a child specialist.

10 I expect that you will hear in this case  
11 that the family dentist thought a child specialist  
12 who has training in how to interact with young  
13 children who are uncooperative, to get their  
14 cooperation, to make them feel comfortable, to  
15 help them understand it is important to have a  
16 positive attitude about seeing a dentist be  
17 willing and cooperative with their dental care,  
18 that that dentist I expect the proof will show  
19 said the specialists are at Small Smiles.

20 And so Jeremy's mom, a couple of days later,  
21 took him to Small Smiles. And on that very first  
22 day, the very first thing that happened to Jeremy,  
23 I expect you will see it in the record and hear it  
24 from the witnesses, is Dr. Koury Bonds, this  
25 gentleman in the back, strapped him down from his



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2       ankles to his shoulders so that he could conduct a  
3       routine oral examination of his mouth.

4             And to get that permission to strap him down  
5       in that papoose board, he represented to Jeremy's  
6       mother that there were no known risks associated  
7       with doing that, and she had to sign a form  
8       acknowledging the form itself, says there are no  
9       known risks.

10            Now, he didn't write the form. He didn't  
11       make the decision about what should or should not  
12       be disclosed to Jeremy's mother. That form that  
13       contained the no known risk language, ladies and  
14       gentlemen, I expect the proof will show Dr.  
15       Mueller drafted that form and drafted that "no  
16       known risks" language, and that he presented to  
17       the board of FORBA, and they all agreed, we're  
18       going to insist that each and every one of our  
19       dentists, and each and every one of our clinics  
20       this is what the parents are going to be told.  
21       That's what I expect the proof is going to show in  
22       this case.

23            So they didn't leave to Dr. Bonds what the  
24       risks or benefits were of the purposed treatment.  
25       They didn't leave that to his judgment. They

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2       insisted you're going to tell the parents there  
3       are no known risks, and what I expect the proof to  
4       show, ladies and gentlemen, Dr. Mueller, these  
5       individuals that were the owners and founders of  
6       FORBA and Dr. Bonds all knew that the preeminent  
7       pediatric dental association in the country, I  
8       expect you will hear testimony about it, had  
9       guidelines, and those guidelines describe a number  
10      of very serious and potential physical and  
11      psychological risks associated with the use of a  
12      papoose board.

13             And yet they insisted that each and every  
14      dentist, including Dr. Bonds, tell the parents  
15      there were no known risks and to get that  
16      permission.

17             Now, on May 23, 2006, when Dr. Bonds first  
18      met Jeremy, Dr. Bonds did not find that Jeremy had  
19      any infection. You will get to see the dental  
20      records that's going to come in. You will see  
21      that Dr. Bonds did not find that Jeremy had any  
22      abscess teeth. He didn't make any diagnosis of an  
23      abscess tooth. Dr. Bonds didn't diagnose Jeremy  
24      with any pain. He didn't diagnose Jeremy with any  
25      discomfort. He didn't diagnose Jeremy with

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2 anything.

3 But after he had him strapped down and he  
4 got permission to do that, after he had him  
5 strapped him down so he can look in his mouth, he  
6 took him out of that papoose board. Carried him  
7 to another room and strapped him down again so he  
8 could pull two teeth.

9 Now, Jeremy was not at that Small Smiles on  
10 May 23, 2006 as a child who had fallen off a  
11 jungle gym, that had nerves exposed and is in a  
12 great deal of pain that needed emergency care.

13 He was taking the penicillin from the  
14 pediatrician and the infection was gone. There  
15 was no need to strap him down not once, but twice  
16 on that day to get the care taken care of.

17 One or two months later, August 31st, 2006,  
18 staying at a time frame when Old FORBA owned that  
19 clinic, Jeremy is treated by Dr. Naveed Aman, one  
20 of the gentleman in the back.

21 Dr. Aman on that date performs four  
22 unnecessary pulpotomies and crowns on Jeremy's top  
23 four teeth.

24 Now, Dr. Bonds thought he needed some  
25 fillings, but what I expect the proof is going to

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2       show is that a few months prior to the time that  
3       Dr. Bonds performed this unnecessary pulpotomies  
4       and crowns, he had been admonished by his  
5       supervisor, by the lead dentist at Small Smiles,  
6       because he was not generating enough money for the  
7       clinic.

8             I expect that you will get to see that  
9       document. And that after being admonished for not  
10      generating enough money for the clinic, Dr. Bonds  
11      and his supervisor, the lead dentist, excuse me,  
12      Dr. Aman, I apologize. Dr. Aman. Dr. Aman and  
13      his supervisor, the lead dentist, created a plan  
14      for what they were going to do.

15            And that plan, ladies and gentlemen, was for  
16      Dr. Aman to increase the amount of revenues he was  
17      generating for the clinic by doing more procedures  
18      on each of his patients.

19            I expect that you will get to see that piece  
20      of evidence in this case. You will get to see his  
21      signature on it.

22            About six weeks later, Jeremy's third visit  
23      to the clinic, I expect the proof is going to  
24      show, he returned and was treated by Dr. Bonds  
25      again.

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2 On that date, Dr. Bonds, again, did not  
3 diagnose Jeremy with any infection. Did not  
4 diagnose Jeremy with any discomfort. Did not  
5 diagnose Jeremy with any pain. Did not diagnose  
6 Jeremy with any abscess.

7 But he strapped him down again from his  
8 ankles to his shoulders, and he drilled and filled  
9 three of his teeth. And he started drilling and  
10 filling those teeth even though he knew full  
11 well -- you're going to get to see the document,  
12 his operative report, even though he knew full  
13 well that Jeremy's heart was racing at more than  
14 200 beats per minute and that his oxygen  
15 saturation was under 90 percent.

16 I fully expect you will hear testimony in  
17 this case that a three-year-old whose heart is  
18 racing at more than the 100 beats per minute and  
19 oxygen saturation is under 90 percent is a clear  
20 signal of a child in serious distress.

21 Now, Dr. Bonds while he had Jeremy strapped  
22 down to do those fillings did not give him any  
23 local anesthesia. Did not give him any Novocain.  
24 Had not given him any nitric oxide or laughing  
25 gas. Those things take time.

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2 As we all know when you go to dentist, you  
3 get a shot and it takes time for your mouth to get  
4 numb. If you've ever had nitrate, it takes time  
5 to get you nitrated up. Takes time for that to  
6 take effect. Makes things longer.

7 The longer it takes with the patient, the  
8 fewer patients you can see during the day.

9 Those examples from his first visit with the  
10 papooses, to the second visit with the unnecessary  
11 pulpotomies and crowns, to the third visit where  
12 he -- and you will see the x-rays, you will decide  
13 for yourself if you think the fillings are  
14 nothings or whether they have enough size that  
15 they were.

16 But you will see the operative report where  
17 he started drilling and filling on Jeremy's teeth  
18 when he knew his heart was racing at more than 200  
19 beats per minute.

20 Now, why did all that happen? Well, in --  
21 during the months of those first couple of visits  
22 that Jeremy was treated at the Small Smiles while  
23 it was being operated by Old FORBA, during those  
24 months in 2006, Dr. Michael DeRose, Dr. William  
25 Mueller, Daniel DeRose, Dr. Padula, the patriarch

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2       of the family, Dr. Eddie DeRose were each putting  
3       \$300,000 a month in their pockets.

4             That was the amount of FORBA profits that  
5       they were putting in their pockets month in and  
6       month out in 2006.

7             They actually had been putting \$250,000 each  
8       in their pockets in the second half of 2005, but  
9       apparently their American dream was larger than  
10       \$250,000 a month, and by the way, those are  
11       taxpayer dollars primarily. Those profits were  
12       coming from Medicaid. That's what I expect the  
13       proof to show.

14            Now, I also expect the proof to show the  
15       only way they were able to put those profits in  
16       their pockets is because the very first thing Old  
17       FORBA did when it opened the clinic in the State  
18       of New York, or any other state for that matter,  
19       was to deceive the authorities as to who the true  
20       owner of that clinic was.

21            Because I expect the proof to show, for  
22       example, in New York that to own a dental clinic  
23       you need to be a licensed dentist in this state,  
24       and a for-profit corporation cannot lawfully own a  
25       dental clinic in the State of New York.

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2 MR. FIRST: I object to counsel -- I'm  
3 sorry, Mr. Leyendecker, addressing the law of the  
4 Court to the jury.

5 MR. LEYENDECKER: I expect the proof will  
6 demonstrate that, ladies and gentlemen. I also  
7 expect the proof will show that these gentlemen  
8 decided to send Dr. Padula to New York to get his  
9 license so they can put him on -- down on the  
10 paperwork and represent to the authorities in the  
11 State of New York that he was the true owner, but  
12 the reality is that the proof will demonstrate  
13 that the very management agreements Mr. First said  
14 only relate to nondental, those management  
15 agreements caused each and every penny of profit  
16 from the New York clinics and every other clinic  
17 they were operating across the country to go to  
18 FORBA, and they took those profits, and they  
19 distributed themselves.

20 Now, \$250,000 a month, \$300,000 a month, I  
21 don't mean the whole group, I mean individually,  
22 those distributions reached, I expect the proof  
23 will show, reached as high as \$500,000 a month  
24 before they sold that business.

25 But that wasn't enough because the real



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2       prize I expect we will hear is what they would get  
3       if they sold that business. And on September 26,  
4       2006, about a month after Jeremy had undergone  
5       those unnecessary pulpotomies and crowns, they  
6       sold the business, and when they did, Dr. Michael  
7       DeRose put \$56 million in his pocket.

8             Michael Rounph, I expect the evidence will  
9       show, put \$37 million in his pocket. Dr. William  
10      Mueller put \$56 million in his pocket. I expect  
11      the proof will show that Daniel DeRose put \$100  
12      million in his pocket.

13            Dr. Adolph Padula, the doctor they sent to  
14      get his license and to pretend he was the owner,  
15      when he was not, \$56 million; and the patriarch of  
16      the family, Dr. Eddie DeRose, I expect the proof  
17      will show, put \$65 million in his pocket.

18            So that takes us to New FORBA. I think what  
19      you will hear from the witness stand and/or  
20      perhaps from some of the depositions in the case  
21      is that New FORBA's plan was to double the number  
22      of clinics in the country so that they could flip  
23      it and get their payday, too. I expect that you  
24      will hear evidence about that.

25            Now, we heard a lot yesterday about

1       Bohn v. Small Smiles, et al     Opening/Leyendecker  
2       pioneers, and the American dream, and all about  
3       trying to find access for needy young children who  
4       otherwise didn't have it. We heard a lot about  
5       that.

6             What I want to ask you to do as you reflect  
7       throughout the course of this case on that  
8       American dream and what it is we are being  
9       pioneers in. I want you to think about three  
10      things.

11            Number one, who do you think was applying  
12      the pressure and the influence and threats. It's  
13      the people that had the most to gain from it. I  
14      expect the evidence will show that Dan DeRose set  
15      the tone from the top and that it was either the  
16      FORBA way or the highway. Number one.

17            Number two, this notion that we're all about  
18      the kids. They started this business on  
19      October -- they opened the first clinic, I  
20      believe, October of 2001. November 2003, just  
21      about at the two-year anniversary after when they  
22      opened the first clinic, they were hiring, looking  
23      to hire investments bankers on Wall Street and  
24      wanting to know how much could this business be  
25      worth.

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2 And what they were told in 2003, two years  
3 after they started the business, it could be worth  
4 between 400 and \$500 million. I expect that is  
5 what the proof will show.

6 Now, at that time, they hadn't opened the  
7 Syracuse or Albany or Rochester clinic so they had  
8 to grow it some more, some more.

9 Two years into the business, before they  
10 wanted to say how much can we get if we sell it,  
11 and the third piece of information that I expect  
12 the proof to show, I want you to think about as  
13 you are considering this, was this all about  
14 helping poor kids or could there be something else  
15 at play.

16 They sold the business to an entity that did  
17 not have a single dentist, not one dentist in  
18 its -- in its ownership group. Not a healthcare  
19 organization. They sold it to the Wall Street  
20 hedge fund types, bankers.

21 Now, I don't know whether this is a big  
22 case. I tend not to think about cases as being  
23 big or small. I tend to think that this is a very  
24 important case. I don't know if it's big, but I  
25 know it's important.

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2 You will have an opportunity, ladies and  
3 gentlemen, to decide whether this community is  
4 going to tolerate corporations that pressure and  
5 influence and threaten doctors in ways that will  
6 help them make profits, and in ways that are  
7 absolutely calculating to expose patients to  
8 unnecessary risk of harm and abuse.

9 That's what you're going to get to decide at  
10 the end of the day. I thank you for your time.

11 THE COURT: Thank you. Mr. First.

12 MR. FIRST: Good morning. Ladies and  
13 gentlemen, this case is entitled, Jeremy Bohn  
14 against these defendants. The subject of this  
15 case is the care and treatment that Jeremy Bohn  
16 received at the Syracuse clinic on May 23rd and  
17 August 31st.

18 Keep your eye on that ball. Keep your eye  
19 on the facts of this case that relate to what's  
20 being decided because a lot of things are being  
21 thrown at you, just like I told you yesterday,  
22 that have nothing to do with the care and  
23 treatment that Jeremy Bohn received on those  
24 dates.

25 I told you my clients made a lot of money in

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2       this business, and they did, particularly when the  
3       business was sold. No doubt about that.

4             But it all comes back -- it all comes back  
5       because the only question before you is whether  
6       Jeremy Bohn received appropriate care when he went  
7       to the Small Smiles clinics on those days.

8             Now, don't lose perspective. Keep your eye  
9       on the ball. I think you'll see that the proof is  
10      going to show you that the care and treatment that  
11      he received on those days was within the standard  
12      of care.

13            Jeremy Bohn arrived at that office at that  
14      clinic with severe dental disease. He had a  
15      severe dental disease that was dangerous to his  
16      health. That caused swelling and pain and  
17      difficulty in his life and that is what was being  
18      addressed at the time of these visits.

19            You'll see that he was treated appropriately  
20      to arrest what was an infectious disease. Let me  
21      go into some of the facts in more detail because I  
22      think you really haven't seen the full picture of  
23      what was going on here in terms of Jeremy Bohn's  
24      condition.

25            The proof's going to show, and I don't say

1 Bohn v. Small Smiles, et al Opening/First  
2 this accusatorily towards anyone, it's just a  
3 fact, that before he went to Small Smiles, before  
4 Jeremy went to Small Smiles at the age of three  
5 and a half, he had very poor dental hygiene.

6 You'll also see that he'd never been to a  
7 dentist before, and like a lot of children, he had  
8 an affection for sweets, and his favorite sweet  
9 and one that he would consume regularly were gummy  
10 bears, and it was a bad combination of events that  
11 led him to develop this severe dental disease.

12 To the point where in May of 2006, the left  
13 side of his face swelled up. It became swollen  
14 because the gums had swollen and the cheek had  
15 swollen because of an infection. That's what  
16 causes that is an infection.

17 And it had gotten so bad that he had to get  
18 care from somebody at that point in time. And the  
19 first person -- the first care provider that Miss  
20 Varano took Jeremy to was the pediatrician, and  
21 the pediatrician at that point in time looked at  
22 Jeremy and said, oh, he has abscess. A tooth  
23 abscess.

24 But she didn't only say that. She actually  
25 got to look in his mouth and found that he had

1 Bohn v. Small Smiles, et al Opening/First  
2 multiple cavities in his premolar teeth on both  
3 sides. So this is a pediatrician that looked in  
4 his mouth and diagnosed those conditions.

5 But in addition to that, you have lay  
6 testimony from Miss Varano, and Mr. Bohn's father,  
7 who may not be here I understand, but has  
8 testified under oath at a deposition and that  
9 testimony will be that his top teeth were  
10 discolored and brownish and had a gap in them.  
11 These are baby teeth by the way. And you will  
12 also hear that at least according to Mr. Bohn they  
13 had rot. His words, not mine.

14 So let there be any doubt about his  
15 condition he presented at Small Smiles with a  
16 severe case of infectious dental disease.

17 So what did the pediatrician do, Dr.  
18 Vivienne Taylor? She recommended he get some  
19 dental care. Okay. Mrs. Varano brings him to Dr.  
20 Patel. That's on May 17th, 2006. And Dr. Patel  
21 describes Jeremy as being very, very  
22 uncooperative.

23 So there was very little he can do with him  
24 and didn't do very much. He did manage to look  
25 into his mouth and found that two teeth, which he

1 Bohn v. Small Smiles, et al Opening/First  
2 specifically notes in his chart "B" and "I" are in  
3 very bad shape. That there's exposure on one of  
4 them and the other one looks bad. His words.

5 Now, those two teeth are behind the canines  
6 on the bottom. I'll defer to the dentists on  
7 that. I believe that's where they are. And  
8 that's -- those are the teeth that Dr. Patel  
9 specifically noted looked very bad. He didn't do  
10 a full exam. He did recognize the need for Jeremy  
11 Bohn to get immediate dental care, and he  
12 recommended that he go to Small Smiles.

13 Now, let me back up a second because  
14 something was said about -- said by Mr.  
15 Leyendecker that I think you have to consider in  
16 the proof.

17 Dr. Taylor did prescribe an antibiotic.  
18 Where when you have an infection, what you hear  
19 about is you prescribe an antibiotic, and she  
20 prescribed penicillin. Penicillin is a well-known  
21 antibiotic. I'm sure you all know that.

22 Antibiotics do not cure a tooth abscess.  
23 All they do is control the amount of swelling in  
24 the gums and the cheek. They do not get rid of  
25 the underlying problem and that is exactly why Dr.



1 Bohn v. Small Smiles, et al Opening/First

2 Taylor referred Jeremy for dental care.

3 So Dr. Patel recommends that he go to Small  
4 Smiles and that is located about forty -- I  
5 believe around forty to fifty miles from where  
6 they lived, and Mrs. Varano didn't really want to  
7 go that far so she decided to call around and see  
8 if she could find a place closer to take Jeremy.

9 She calls around, I believe her testimony  
10 will be, to about seven dentists or so, and she  
11 couldn't find one dentist willing to see Jeremy  
12 and that's because there's a lack of access to  
13 care. A lack of access to care for children like  
14 Jeremy, which is the whole reason why FORBA was  
15 started.

16 Now, when I say that Jeremy had an  
17 infectious disease, I think there's a lot of  
18 misunderstanding that cavities and tooth decay are  
19 directly related to eating sugar and things like  
20 that. But actually, the sugar prompts bacteria.  
21 Bacteria is what actually causes decay and sets  
22 the wheels in motion for the decay and that is an  
23 infectious disease that will spread unless it's  
24 arrested. And it's very insidious and it can  
25 result in serious lifetime problems.

1 Bohn v. Small Smiles, et al Opening/First

2 It could and most immediately it causes  
3 problems in kids because it's painful. They lose  
4 their ability to concentrate, miss time from  
5 school, and it can have an impact on their adult  
6 teeth if it's left untreated.

7 So those are baby teeth, but there are  
8 consequences to not treating these teeth. So that  
9 brings us to coming to Small Smiles.

10 Now, at Small Smiles on May 23rd, 2006,  
11 Jeremy was seen by Dr. Bonds. Unfortunately, like  
12 his behavior at Dr. Patel's office, this is a kid  
13 who has had an abscess. He's not comfortable.  
14 He's in a new place going to a dentist for a first  
15 time. He's out of control. And that's what it  
16 says in the chart, "he's out of control."

17 And yet he had this condition which Dr.  
18 Bonds diagnosed and which had been previously  
19 diagnosed of a dental abscess. And you heard  
20 yesterday, and it is true, dental abscesses left  
21 untreated, and antibiotics don't treat them, they  
22 just control the effects of them, left untreated  
23 can cause catastrophic problems in a person,  
24 including a child.

25 So here he is at Small Smiles with this

1       Bohn v. Small Smiles, et al     Opening/First  
2       severe dental disease and needs immediate  
3       treatment. Dr. Bonds diagnoses him. Does what a  
4       dentist does in fully examining him, he finds, of  
5       course, the abscesses, but in addition to that, he  
6       has nine other issues with his teeth as Dr. Taylor  
7       had indicated, he has multiple cavity and that was  
8       correct, and Dr. Bonds went through that very  
9       specifically and came up with a treatment plan to  
10      treat Jeremy.

11             Now, you heard a lot and it's said to  
12      inflammate the situation about the papoose and about  
13      the consent, but let me tell you this, he needed  
14      this treatment. He had to have this treatment.  
15      And he was placed in a papoose, as is often done  
16      in dental offices and medical offices. We heard a  
17      lot about that yesterday during the jury  
18      selection. It's done as a last resort.  
19      Unfortunately, Jeremy was sick, and he was out of  
20      control, and he was frightened, I'm sure.

21             But he needed this dental treatment, and Dr.  
22      Bonds went through everything with Miss Varano. I  
23      think the testimony will be even from her point of  
24      view that he spent a lot of time with her. As  
25      much time as she would expect. Explained what the

1 Bohn v. Small Smiles, et al Opening/First  
2 treatment plan was. Talked to her about the use  
3 of the papoose, the use of the medical --  
4 protective stabilization. She consented to its  
5 use, and you will hear a lot about, oh, the  
6 consent wasn't right, didn't list risks  
7 specifically, none, no.

8 There was no injury or problem to Jeremy  
9 from the use of this papoose. To the contrary,  
10 Dr. Bonds successfully extracted these teeth and  
11 dealt with the most immediate problem, and by the  
12 way, the teeth were "B" and "I," "B" and "I."

13 The exact same teeth that were noted  
14 specifically by Dr. Patel before Jeremy ever  
15 arrived at Small Smiles.

16 So that's what happened on the first visit.  
17 He was medically stabilized during the extractions  
18 for twenty minutes. And by the way, it is always  
19 documented, it's always documented when that's  
20 done. How long it is done for. It's documented  
21 what the vital signs are. So we know looking at  
22 the record what happened, even if the memories  
23 aren't always there.

24 So then he returns, Jeremy that is, after  
25 having his extractions. The immediate problem

1       Bohn v. Small Smiles, et al     Opening/First  
2       there, of course, it is always preferable to  
3       restore a tooth, if you can, but these teeth were  
4       beyond repair, and obviously abscess which is an  
5       infection inside the tooth that spreads to the  
6       gums and the cheek.

7                So he returns three months later, and at  
8       that point Dr. Naveed Aman sees him. And the  
9       teeth that had been previously diagnosed as having  
10      decay, those four front top teeth, the same ones  
11      described as yellow and brown and gapped and rot,  
12      rotted, Dr. Aman addressed in that visit.

13             And what he did was he performed a pulpotomy  
14      and crowns. Put crowns on them. Now, it's  
15      important to keep in mind that with those baby  
16      teeth, the pulp chamber which is below the enamel,  
17      and the dent in his, barely below the surface.  
18      It's very easy for that chamber to be invaded by  
19      decay, and Dr. Aman determined that with his  
20      presentation this was the best way to go, to do  
21      the pulpotomy, preserve the root of the tooth.

22             Pulpotomy does not involve the root. The  
23      roots are left intact. It is actually a  
24      relatively quick procedure. He did it under -- by  
25      the way, Dr. Bonds did it as well. He did it

1 Bohn v. Small Smiles, et al Opening/First  
2 under -- he did his procedure extractions under  
3 anesthesia. Local anesthesia that is, and Dr.  
4 Aman did as well under local anesthesia.

5 And Jeremy Bohn was given crowns that were  
6 white in color. They looked, I'm sure, better  
7 than what he came in with, but more importantly  
8 than that, he was -- the infectious disease that  
9 was running rampant in his mouth was arrested by  
10 that treatment. And that's the critical point  
11 that he was allowed to heal, dentally speaking,  
12 and go on.

13 Now, I'm going to stop there because there  
14 were only two visits that occurred at Small Smiles  
15 while my clients owned FORBA, and it is after that  
16 the business was sold, as you heard, to New FORBA,  
17 and they operated or they were the management  
18 company after that. So I'm not going to address  
19 that specifically, but let me say this to you,  
20 suffice it to say that after these visits to Small  
21 Smiles, Jeremy's mouth stabilized. This  
22 infectious disease was arrested. He was allowed  
23 to lose his baby teeth naturally and normally,  
24 except, of course, for the two extractions, and he  
25 -- his adult teeth came in and he was returned to

1       Bohn v. Small Smiles, et al     Opening/First  
2       dental health. Meaning that after that he learned  
3       hygiene habits. He started regularly going to a  
4       dentist.

5             He has had some issues like a lot of kids do  
6       with cavity, but has had as far as we know no  
7       major problems. He was essentially cured of the  
8       serious dental disease that he came with.

9             Keep your eye on the ball, ladies and  
10       gentlemen. It's not pleasant to go to the  
11       dentist. It was not fun for Jeremy to have those  
12       infections and to have that swelling and to have  
13       that pain and to go in to a scary dental office  
14       and be treated. Like a lot of kids I'm sure he  
15       cried. In his case he was out of control  
16       according to multiple providers, not only Small  
17       Smiles. It's -- you know, that's just unfortunate  
18       but that's what happened. So keep your eye on the  
19       ball.

20             Now, let me talk, by the way, in addition to  
21       what -- in addition to the fact that he's gone on  
22       to dental health, he also has thrived, at least at  
23       the time of the deposition, there's been a gap  
24       since the deposition, also thrived in school.

25       Done well in school. Appears to be a

1 Bohn v. Small Smiles, et al Opening/First  
2 well-adjusted child.

3 And Mr. Leyendecker talks about risks and  
4 problems. There will not be one iota of proof I  
5 expect in this courtroom from a medical provider  
6 or psychological provider saying that Jeremy Bohn  
7 was in any way harmed or injured in the care  
8 from -- the care he received at Small Smiles. Not  
9 one iota. Keep your eye on the ball.

10 Now, let me tell you about my clients. I  
11 want to start with Eddie DeRose, who Mr.  
12 Leyendecker refers to as the patriarch. Dr. Eddie  
13 DeRose practiced in Pueblo, Colorado many years.  
14 As I indicated yesterday, he has Parkinson's, and  
15 unfortunately he will not be here because of his  
16 condition. He is an older gentleman now.

17 But he practiced for years and years in  
18 Pueblo, and he had a dental office in Pueblo, and  
19 shortly after he started practicing, he decided he  
20 was going to really emphasize the practice of  
21 children or caring for children. That was his  
22 interest and that's what he did, and he developed  
23 a practice where a lot of kids came to his office.

24 About I think roughly a third of which were  
25 Medicaid kids. Meaning poor kids. Poor kids.



1       Bohn v. Small Smiles, et al     Opening/First  
2       When I say Medicaid kids, I mean poor kids who  
3       qualify under the Medicaid program. It was not  
4       most of his practice, but it was a part of it, and  
5       through the years it became apparent that more and  
6       more kids as they found out, the families found  
7       out about would come from all over, all over the  
8       place, sometimes hundreds of miles to get  
9       treatment for their kids at Dr. Eddie DeRose's  
10      office.

11             It became so essential to take care of these  
12      poor kids that the State of Colorado actually  
13      approached him and said, could you open a place  
14      that would accept Medicaid from these poor kids'  
15      families in other places such as Colorado Springs,  
16      or Denver, and they did that.

17             You know, they talk -- Mr. Leyendecker  
18      talked about, oh, they're going to sell this  
19      business within a couple of years. They forget  
20      about all the history. They don't want to ignore  
21      the whole history and evolution of this business  
22      or this practice.

23             This practice started back -- way back and  
24      the additional clinics were built in the 90s. It  
25      got to the point because they were getting so many

1       Bohn v. Small Smiles, et al     Opening/First  
2       people from New Mexico, kids from New Mexico, that  
3       the State of New Mexico asked them, would you open  
4       an office down here so you can care for our kids  
5       down here, and he did. He opened an office in  
6       Sante Fe and Albuquerque and people -- these kids  
7       came from all around.

8             The reason why they came -- well, they were  
9       treated well, but they also -- because there was a  
10      real lack of access and FORBA came out of that  
11      history. It didn't start in 2001. It started  
12      years before that.

13            But in 2001, because of this tremendous  
14      need, there was an opportunity to maybe give this  
15      advantage to poor kids in other places outside of  
16      Colorado and New Mexico, and it's out of that that  
17      FORBA evolved.

18            Now, FORBA started in 2001. You heard Dan  
19      DeRose referred to as the head of FORBA and he  
20      was. Dan was a little different than his dad and  
21      his brother in that he had a business background,  
22      and he was familiar with how to start a business  
23      and try to get something going.

24            And it was that expertise that allowed this  
25      to evolve the way they did. So FORBA started with

1 Bohn v. Small Smiles, et al Opening/First  
2 Dr. Eddie DeRose, Dr. Michael DeRose, Dan DeRose,  
3 and Dr. Rudy Padula and Dr. Bill Mueller. Dr.  
4 Bill Mueller I want to talk about in a second  
5 because for -- little more than a second because  
6 it is important that you understand who he is and  
7 who he was.

8 At the time FORBA was forming, Dr. Mueller  
9 was a very prominent pediatric dentist who came  
10 out of the Children's Hospital. He ran the  
11 residency program for pediatric dentists at the  
12 Children's Hospital in Denver.

13 He was prominent and well-known, and the  
14 reason why he became involved in this is that he  
15 and Eddie served -- Dr. Eddie, sometimes they call  
16 these doctors by their first name, Dr. Eddie  
17 DeRose on a committee concerning -- they had a  
18 shared interest in treating these poor kids, and  
19 he sat on a committee with him, and they often  
20 would confer and talk about this issue and how  
21 best to get access because it is no secret. It is  
22 well-known, I don't think they will dispute it,  
23 that there is a real problem with access for these  
24 poor kids getting into dental facilities to get  
25 care.

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2 And that's what FORBA was all about "For  
3 Better Access." And they described in questions  
4 yesterday about big business, small business.

5 This started as a small business. All these guys  
6 had to take loans and start from scratch to try to  
7 do this. They took a lot of risk. There was no  
8 guarantee. Hindsight is always clear. There is  
9 no question, they had demand.

10 But there was no certainty that they would  
11 be successful. It's only in hindsight now you  
12 know that they were successful.

13 So what -- why is it that there is such a  
14 problem among this population? Statistically  
15 speaking, 80 percent of the decay among children  
16 in this country are in 20 percent of the  
17 population. That's just a fact.

18 Twenty percent of the population and that  
19 population tends to be poor and this population  
20 has the greatest problem. Why is that? There's a  
21 lot of ideas, reasons why. There is a lack of  
22 dental education. Lack of good hygiene habits.  
23 Lack of access to care. Diet. A lot of different  
24 reasons are talked about.

25 But it's a fact that that is where a large

1 Bohn v. Small Smiles, et al Opening/First  
2 part of the problem rests, and the Surgeon General  
3 has written about it. The Center for Medicaid  
4 Services, CMS has written about it, and also the  
5 AAPD, the American Association of Pediatric  
6 Dentistry also has written about it. It's  
7 well-known. Not disputed in this case.

8 The basic recommendation because you are  
9 dealing with this infectious disease is to treat  
10 it definitively and aggressively, because if you  
11 don't, and if the patient doesn't come or even if  
12 the patient does come back, you will be doing it  
13 over again. Those are the treatment  
14 recommendations.

15 Every case is different. Every doctor has  
16 to look at what the situation is and make his own  
17 decisions on care and treatment, but that's what  
18 the overall recommendations are for the treatment  
19 of this condition.

20 Now, lack of access, why is there a lack of  
21 access? The reason why is the vast, vast majority  
22 of dentists will not take Medicaid as  
23 reimbursement for services. There are a lot of  
24 reasons for that. Part of it is the reimbursement  
25 rates are very low. There is also a high --

1 Bohn v. Small Smiles, et al Opening/First  
2 well-known high broken appointment rate --

3 MR. HIGGINS: Objection, Your Honor.  
4 Standard of care motion in limine.

5 THE COURT: Yeah. You have about two or  
6 three more minutes here, too, Mr. First.

7 MR. FIRST: I have a little more than  
8 that, Judge.

9 THE COURT: I know we talked about a half  
10 an hour each.

11 MR. FIRST: Okay. Any way the -- there is  
12 a lack of access because of most dentists won't  
13 take Medicaid and because there is a high broken  
14 appointment rate. So there is nowhere for them to  
15 go. As Mrs. Varano experienced seven calls and  
16 there was no place to take Jeremy.

17 So what my clients did was come up with a  
18 way to accommodate those problems causing lack of  
19 access. And the way they did that is that they  
20 built a substantial facility from -- they built a  
21 substantial facility, usually with three or four  
22 dentists, multiple hygienists and assistants, and  
23 they were able because of economy of scale,  
24 because of the ability to purchase things in bulk,  
25 to overcome -- they would overbook patients just

1       Bohn v. Small Smiles, et al     Opening/First  
2       so you take into account this high broken  
3       appointment rate so people wouldn't be sitting  
4       around. The average dentists cannot do that. He  
5       cannot have people sitting around, so they were  
6       able to overcome these issues.

7             So as I indicated yesterday, the dental  
8       management company took care of all the  
9       nonclinical functions of the clinic. Got the  
10      property. Took care of the rent. Did the HR,  
11      human relations, provided the equipment. Did the  
12      technology. And the dentists were enabled to  
13      practice dentistry. And that's all they really  
14      had to focus on.

15            The lead dentist, the lead dentist would  
16      basically run the office. These clinics,  
17      including the one in Syracuse, were set up in  
18      accordance with the law. Dr. Rudy Padula was the  
19      owner to the clinic. He's a licensed dentist in  
20      this state, and they were operating or run day to  
21      day mostly by the lead dentist, and each of the  
22      dentists made their own clinical decisions.

23            Now, you see that quote over there,  
24      plaintiff's counsel focused on it a lot, and we  
25      talked about this in voir dire.

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2 First of all, let's make no mistake about it  
3 that the proof will show that they did monitor how  
4 much revenue, how much work was done in a clinic  
5 on a given day. Every business in America does  
6 that. Every business in America does that. And  
7 you do keep track of -- they try to keep track of  
8 what is going on. Nobody was expected to do any  
9 more than work their regular hours and work hard.

10 Let me say this to you, there was never any  
11 lack of work to do because of the epidemic going  
12 on among this population with dental decay.  
13 Nobody had to do anything. Nobody felt any  
14 pressure to do anything that didn't need to be  
15 done.

16 There were so many patients waiting to be  
17 treated, the proof is going to show, there was  
18 never any reason to do something that a dentist  
19 did not feel was indicated.

20 So all this pressure was just so-called  
21 pressure. It's about working hard and it only  
22 concerned folks from time to time who may not have  
23 been working hard.

24 In other words, if there was an under  
25 performance, that's all you will see is the under



1       Bohn v. Small Smiles, et al     Opening/First  
2       performance, you're not going to see all the  
3       clinics that never had any issues of that sort  
4       whatsoever.

5             They popped out these e-mails and they want  
6       to say, oh, you were pressuring, pressuring,  
7       pressuring, but in reality these are just unique  
8       situations. All unique unto themselves.

9             So it all comes back, by the way, 90 percent  
10       of the dentists in America treat and the proof is  
11       going to show this work on a fee-for-service  
12       basis. What they make. The guys with the  
13       shingles out, which are most dentists in America,  
14       what they make is directly related to the amount  
15       of dentistry that they do and the amount of which  
16       is ultimately the amount of procedures that they  
17       perform and to suggest that because you work  
18       because according to fee or service that that  
19       means you are doing something wrong really doesn't  
20       make a lot of sense and that's essentially what  
21       they are saying in this case.

22             That they, my clients, somehow convinced by  
23       the ends of 200 dentists to do something, do  
24       things that aren't appropriate, jeopardize their  
25       license and the like. Doesn't make any sense.

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2 So at the end of this case it all comes back  
3 to Jeremy Bohn. Keep your eye on the ball.  
4 Because that's really what is at issue in this  
5 case is the care and treatment he received. And  
6 at the end of this case I'm going to ask you for a  
7 verdict of -- a verdict of no cause for action  
8 because they're not going to prove fraud because  
9 there wasn't any fraud. They're not going to  
10 prove deviation from accepted practice, and  
11 they're not going to prove the other claims in  
12 this case. Thank you.

13 THE COURT: Okay. Thank you, Mr. First.  
14 We're going to take a morning recess. Fifteen  
15 minutes. Come back for the last two.

16 (Proceedings in recess at 10:38 a.m..)

17 (Jury seated in the jury box at 10:55 a.m..)

18 THE COURT: Be seated. Ready to proceed?

19 MR. HULSLANDER: Yes. May it please the  
20 Court. It's a beautiful, sunny day in Syracuse,  
21 New York. Let's appreciate that, ladies and  
22 gentlemen. Beautiful, sunny morning. Good  
23 morning.

24 (Jurors responded with "good morning.")

25 MR. HULSLANDER: You know who I am. You

1 Bohn v. Small Smiles, et al Opening/Hulslander  
2 listened very attentively, as you should, to Mr.  
3 Leyendecker, and you remember Mr. Leyendecker said  
4 to you "this is an important case." I'm not sure  
5 how big it is. Mr. Higgins thinks it's a big one.  
6 Mr. Leyendecker wasn't able to say that. Not sure  
7 it's big, but it's important.

8 Indeed it's important to Mr. Leyendecker and  
9 Mr. Higgins and Mr. Frankel, and those lawyers  
10 from Texas, and Mr. Moriarty, Mr. Hackerman, Mr.  
11 Dorr, it's an important case for all of them.

12 Ladies and gentlemen, you hardly heard  
13 anything about Jeremy Bohn. He's the plaintiff.  
14 You hardly heard Mr. Leyendecker say anything  
15 about Jeremy Bohn.

16 You know, he put this statement up here.  
17 Where is Jeremy's name on this? Where is the  
18 Syracuse center on this statement? Where is --  
19 what about Jeremy?

20 You know, it's not what he told you, it's  
21 what he didn't tell you, ladies and gentlemen.  
22 Did he tell you that Jeremy actually went and saw  
23 Dr. Bellini after his time at Small Smiles and did  
24 very well. Did very well. No problems with his  
25 teeth. No problems with going to the dentist. No

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2 fear of the dentist.

3 Did he tell you that Jeremy is doing very  
4 well in school. That he has no social issues.  
5 He's got no problems. He's got no psychological  
6 problems. He's got no physical problems. Jeremy  
7 is doing awesome.

8 He didn't tell you that Jeremy is just a  
9 normal kid. Is this case about Jeremy Bohn or is  
10 it about something else, ladies and gentlemen? Is  
11 it about Jeremy Bohn or is it about something  
12 else?

13 It will be for you to examine these  
14 witnesses, examine their credibility, consider the  
15 195 documents that he wants you to consider and  
16 see behind it. Look behind it. Keep your eye on  
17 the ball, Mr. First said that, yes. Don't get  
18 caught up in to this drama brought on by these  
19 lawyers.

20 Now, he talked about good lawyers, and he  
21 talked about, well, lawyers can't change the  
22 facts. Well, guess what, Mr. Leyendecker can't  
23 change the fact that his client wasn't injured at  
24 Small Smiles. That his client wasn't harmed at  
25 Small Smiles.

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2             That his client sustained no damages or  
3 injury or harm at all and his client is doing very  
4 well. He can't change the fact, certainly, that  
5 he will not be calling an expert treating  
6 psychologist, psychiatrist, pediatrician,  
7 whatever, to talk about how this apparent trauma  
8 that he would have you believe happened affected  
9 Jeremy.

10            Let's not talk about that. That's right.  
11 He can't change that fact. That's why he didn't  
12 say anything to you about it, ladies and  
13 gentlemen, because we're not here for Jeremy.  
14 We're here for some other reason.

15            Now, ladies and gentlemen, let's talk about  
16 what happened here. You heard, gummy bears, gummy  
17 bears. Every three days gummy bears, that's what  
18 you will hear from Mrs. Varano, gummy bears, gummy  
19 bears.

20            You heard -- you may hear from the father,  
21 Mr. Bohn, who talked a lot about gummy bears.  
22 Now, it doesn't take a dentist to tell you that  
23 gummy bears are going to cause your teeth to rot.  
24 It doesn't tell you -- take a dentist to tell you  
25 that.

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2 MR. HIGGINS: Objection.

3 MR. HULSLANDER: It doesn't take --

4 MR. HIGGINS: Objection.

5 THE COURT: Mr. Hulslander. Would counsel  
6 approach, please.

7 (A discussion off the record at the Bench, all  
8 counsel present.)

9 THE COURT: Sustained.

10 MR. HULSLANDER: Now, you heard Mr. First  
11 talk about what was going on with Jeremy's teeth.  
12 We know, even though Kelly Varano testified that  
13 she brushed them every day herself, and she even  
14 took floss and flossed them every day herself.

15 But we also know that with an infected,  
16 abscessed tooth, that that was developing over a  
17 long period of time. Starts with a cavity.  
18 Starts with a cavity. Then the cavity gets  
19 deeper. Time passes. Tooth begins to die and rot  
20 and becomes infected with bacteria over time.

21 And we know, ladies and gentlemen, that he  
22 went to see his pediatrician. His pediatrician,  
23 who is not a dentist, looked at his mouth, said,  
24 he's got an infection from an abscess tooth, and  
25 not only does he have an infection from an abscess

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2 tooth or teeth, but he has rampant decay. So his  
3 teeth have been in a condition which requires  
4 dental treatment. His teeth.

5 You know in some ways, gee, thank the Lord  
6 that there was this abscess and infection because  
7 the pediatrician got him to a dentist, Dr. Patel,  
8 a family dentist. Not a pediatric dentist. A  
9 family dentist, and the family dentist couldn't do  
10 a thing. And why was that?

11 Well, Mrs. Varano says, uhm, he just was  
12 stubborn and wouldn't open up his mouth. Well,  
13 Dr. Patel says he was very, very uncooperative.  
14 Out of control. Not able to be treated. He  
15 referred her to Small Smiles to be treated for  
16 this infection, this abscess, this decay.

17 And he went to Small Smiles and they  
18 examined him, and they treated him, and they  
19 treated him for that abscess, and they got him  
20 better from that abscess and that infection. They  
21 took those teeth out.

22 Why? Because everyone knows that infection  
23 can endanger you. It can endanger your health.  
24 It can endanger your safety. It can lead to other  
25 problems, certainly. They took those teeth out.

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2       The teeth were causing -- the decayed teeth were  
3       causing this infection which was creating a risk  
4       to Jeremy's health.

5               Now, Mr. Leyendecker talked about  
6       unnecessary treatment. As if -- as if Jeremy's  
7       teeth were in pristine condition. He's got two  
8       abscessed teeth and yet he doesn't have any other  
9       cavities? No other problems? No other issues?  
10       Does that make sense?

11              Does that -- is that what you would expect  
12       if he's got two teeth so decayed and so infected  
13       that they actually have to be removed. Yet, oh,  
14       all this other treatment they were just doing it  
15       for money, according to Mr. Leyendecker.

16              These three dentists, who are licensed to  
17       practice dentistry, who have worked to help kids  
18       their -- not entire life, but certainly during  
19       their time at Small Smiles, they were risking  
20       their license by doing unnecessary treatment?

21              Well, let's back up. Do you really think  
22       that some -- a kid with that kind of progressed  
23       infection that's on antibiotics and has to have  
24       two teeth extracted indeed doesn't have any other  
25       cavity? No other problems?



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2 Why? Because apparently Miss Varano brushed  
3 them every day and flossed them every day for two  
4 and a half years. Common sense. Common sense.

5 Yes, they did establish a treatment plan.

6 And you will hear -- you heard Mr. Leyendecker  
7 say, well, you know, procedures, you know, they  
8 were really addressing all these procedures just  
9 to make money.

10 Well, just think about it, if they didn't  
11 develop a treatment plan for this young man, he'd  
12 be back in that chair with more teeth needing to  
13 be pulled due to abscess and infection. So they  
14 indeed treated this man.

15 And they treated him -- treated this child  
16 over a period of time. And you'll see that in --  
17 Mr. Leyendecker didn't really get past that  
18 October visit and there is a reason why, because  
19 Jeremy did well. He came in to that first visit,  
20 and just like with Dr. Patel, he was incredibly  
21 uncooperative. Couldn't even get his mouth open.  
22 Couldn't see inside his mouth and he continued to  
23 be that way, but he got better with the dentist  
24 over time.

25 He did not need to be papoosed for his own

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2       safety. He was able to go to the dentist without  
3       being papoosed, and they saw him multiple times  
4       after September 26th, when my client bought FORBA.

5             And you know what, Jeremy actually improved  
6       during that time, and not only did he -- his  
7       behavior improve, but his teeth improved. And you  
8       will hear from the experts, ladies and gentlemen,  
9       that it's important to take care of baby teeth.  
10       Don't think for one minute that you can let those  
11       teeth rot and those -- that term "rot" that isn't  
12       my word, that's his father's word. His father  
13       said "his teeth were rotting. I could see some  
14       rot there." So he knew. His father knew.

15            Certainly, we know that his dental hygiene  
16       improved. That his mouth improved. He went to  
17       Dr. Bellini after this and he didn't have any  
18       problem with the dentist and he's had no further  
19       problems with teeth. Thank God he got the  
20       treatment that he got from Small Smiles.

21            Oh, yeah. But let's not think about that.  
22       What is that? Let's not think about the good  
23       treatment he got from these three dentists. Why?  
24       Because you remember what Mr. Leyendecker started  
25       with here, started with this statement, is it

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2       proper for a corporation to pressure and influence  
3       doctors to perform more procedures on their  
4       patients and threaten them with their jobs if they  
5       don't?

6             Let's look at that statement.  As you know,  
7       that's not the issue.  Not more procedures.  He  
8       needs to prove that they were pressuring and  
9       influencing the doctors to perform malpractice.

10            He's got to prove malpractice.  Not just  
11       that he was -- they were performing more  
12       procedures.  He's got to establish that this was  
13       malpractice by these three dentists.  That's what  
14       he's got to establish and that's why he wants you  
15       just to sort of, well, yeah, they did more  
16       procedures but, you know, the truth is, ladies and  
17       gentlemen, he's got to show malpractice.

18            MR. HIGGINS:  Objection, Judge.  Misstates  
19       the law.

20            MR. HULSLANDER:  Now --

21            MR. HIGGINS:  Objection.

22            MR. HULSLANDER:  Now --

23            THE COURT:  Overruled.

24            MR. HULSLANDER:  Thank you.  Now, let's  
25       look at this statement right here because it's a

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2 good one. But I have to change it. Just change  
3 it just a little. Okay.

4 Is it proper for a corporation to pressure  
5 and influence dentists -- is it proper for a  
6 corporation to pressure and influence dentists to  
7 work harder and help more kids and if they don't  
8 to let these dentists go.

9 You know, all these 195 documents that they  
10 are going to show you, none of them, none of them  
11 encourage the dentists or pressure the dentists to  
12 commit malpractice. None of them say, well, do  
13 pulpotomies whether these kids need them or they  
14 don't. None of them say that.

15 What they do say is they want the dentists  
16 to work harder and produce more. Just like any  
17 employer would. Just like any dentist would who  
18 worked for himself. The harder you work, the more  
19 you bill, the more you make.

20 Come on! Yes! They want him to work  
21 harder, and the ones that didn't work hard and do  
22 what they needed to do were let go. Because  
23 FORBA -- by the way, FORBA, FORBA, "For Better  
24 Access." That's where FORBA came from, "For  
25 Better Access." Helping kids.

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2 Oh, yes, these guys made money. And, boy,  
3 Mr. Leyendecker stood here and four times he  
4 pointed his finger, I guess that's what they do  
5 maybe in Texas, but pointed his finger at these  
6 gentlemen like they are criminals because they  
7 made some money. That's not nice. That ain't  
8 right, not in America.

9 So, ladies and gentlemen, you'll see  
10 e-mails, you'll see e-mails that were colorfully  
11 worded to say the least. You'll see e-mails that  
12 involve private e-mails that no one really  
13 expected anyone to see, like you guys that have  
14 ever sent an e-mail, and I'm sure that they wished  
15 they worded it differently or wish they didn't  
16 send. I hit the send button, ooh.

17 You will see e-mails that look to inflame  
18 you. That are about the offices in Topeka and  
19 Boise and Albuquerque, out west, Denver, Pueblo.

20 You know what, they still have to prove that  
21 it happened in the Syracuse office and that there  
22 is some connection. And I only heard Mr.  
23 Leyendecker talk about one e-mail. And, yes,  
24 there were performance reviews; and yes, the  
25 performance reviews wanted doctors to work harder

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2 and produce more and perform more good work for  
3 these kids that needed it.

4 And yet these gentlemen right here, they're  
5 criminals? They're criminals?

6 Jeremy Bohn, ladies and gentlemen, is a  
7 success story. It's a FORBA success story that  
8 you're about to hear. Keep your eye on the ball  
9 and don't get caught in the drama of this case.  
10 Thank you.

11 THE COURT: Thank you, Mr. Hulslander.

12 MR. STEVENS: I have some help. Dr.  
13 Bonds, Dr. Aman, and Dr. Kohn who pronounces his  
14 name "Haun" who you haven't yet met, three  
15 dentists treating children.

16 You deserve to know something about these  
17 individuals so you can -- can make a decision,  
18 informed decision as to how they act, what their  
19 mission was, what their goals and aspirations were  
20 for their own careers and for the children they  
21 helped.

22 Dr. Bonds was born in South Carolina. Went  
23 to Howard University College of Dentistry.  
24 Graduated. Was able to secure one of the vaunted  
25 residencies in this country at Columbia University

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2       and took a course called Advance Education in  
3       General Dentistry, and that was a residency which  
4       was geared for idealists all about public health  
5       and serving the underserved.

6             Primary care was the topic of this  
7       residency. Going out in to the community and  
8       treating patients at Phoenix House and covering  
9       drug addicts, going to a clinic in PS-2 in New  
10      York City right there in the school. Going into a  
11      home for -- a group home for teens with special  
12      problems.

13            Taking his turn on the mobile van that goes  
14      into the largely Dominican neighborhood around  
15      Columbia University and treating people who had no  
16      other access.

17            And also working in the dental clinic on the  
18      8th floor of Columbia Presbyterian Hospital. This  
19      opened Dr. Bonds' eyes to a segment of society  
20      that often sees the dentist when it is too late.  
21      Teeth that are lost, health that is ruined that  
22      doesn't have to be, and he learned what can be  
23      done by an individual.

24            Dr. Bonds didn't stop there. His next  
25      residency, and he applied for it, and he got one

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2       at Harlem Hospital. Harlem hospital in New York  
3       City, and there he worked in the hospital, and for  
4       that year treating sick patients for their dental  
5       problems, patients in the HIV clinic, patients  
6       with diabetes, patients with oral cancers,  
7       patients from the community. Patients who  
8       couldn't afford private specialists and were  
9       grateful for the help and patients who needed help  
10      because this -- the mouth was the last thing that  
11      they were thinking about helping.

12             At Harlem Hospital he met his wife. She was  
13      here from the Syracuse area. That's how he ended  
14      up in Syracuse, because he found that there was a  
15      place opening up that was serving the underserved,  
16      and he made an application and within -- this is  
17      now a couple of years later, he gets a job in  
18      2005, I believe, at Small Smiles clinic, and they  
19      are doing exactly what he wants to do with his  
20      life, they are giving him an opportunity to treat  
21      one poor kid after another, to make a difference  
22      in their lives and he knows it and he believes it,  
23      and he likes this work.

24             Dr. Bonds didn't start off at Small Smiles  
25      as a dentist. He started off as a dental



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2       assistant, and for a year he worked chairside to  
3       the lead dentist, Dr. Bob Turner. And that  
4       further education, that clinical -- that  
5       observational time he spent working chairside with  
6       all the kids who came in was training. It was  
7       training in how to do this work well.

8             When Jeremy Bohn came in to see Dr. Bonds  
9       that's who he saw on the first visit. He came in  
10      as a kid who had what dentists call rampant  
11      caries. A technical term from the pediatric  
12      dentist is ECC, early childhood caries. It's the  
13      infectious disease you heard about.

14            There was a fluoride treatment applied  
15      there. They want to stabilize whatever they can.  
16      But the big thing is he needed care. You heard  
17      more of the story than I really have to tell you  
18      everything that happened before he came to us is  
19      kind of proof of what went on.

20            There were three generalized things that Dr.  
21      Bonds found that were important to the diagnosis  
22      of Jeremy.

23            He found that the caries, the decay, were  
24      generalized, meaning all over and that is a sign  
25      that you are at risk because kids with generalized

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2 decay, and it is typically kids that have not had  
3 dental treatment before they run the risk of  
4 getting worse.

5 Going through the mouth. He found here poor  
6 oral hygiene, and they found that he had a high  
7 caries risk assessment and that's the thing that  
8 says, we're worried for his future.

9 You know that Jeremy was out of control.  
10 They wrote that exact phrase on the sheet. But  
11 it's been suggested to you that in order to help  
12 Jeremy, that he was just in the very almost --  
13 phrase that was used "strapped down."

14 What you will see is one of these papooses,  
15 one of these cocoons, and it has two blankets that  
16 come over with Velcro. They don't use any hand  
17 straps at Small Smiles.

18 The papoose is the last option that Dr.  
19 Bonds uses, not the first, contrary to what is  
20 being suggested to you. Techniques are used.  
21 Methods are taught that you are chairside and  
22 taught him all the various types of things to try,  
23 and you will hear about them during the course of  
24 the trial.

25 The key thing is he doesn't even consider

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2       doing what the child needs without the parent's  
3       consent. You will see another page in this form  
4       which is a consent form, and you know what the  
5       consent form is the least part of the process, and  
6       in another way, the papoose is the least part.

7             It is something to help get this done. Like  
8       it is having a parent or assistant hold a child  
9       who is, you know, moves. Movements are too  
10      dangerous for his own good with sharp, steel  
11      instruments in the mouth.

12            He explains the papoose. That's the  
13      important thing between the doctor and the  
14      patient, the dentist and the patient, the private  
15      communication. And what you heard on opening  
16      statement that as if he was told what to say,  
17      well, Dr. Bonds does not write what is in the --  
18      in the consent form.

19            But he's the only one who decides what to  
20      tell the parents, and he tells the parents what he  
21      believes. This is needed and in this case he  
22      believed it was. The child won't like it. He'll  
23      continue to cry. There could be some swelling.  
24      Could even be a little bit of bruising. We hope  
25      there won't be, and in fact -- but in terms of

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2       this device, this -- these two blankets that wrap  
3       around being safe, the way Dr. Bonds uses these,  
4       uses this device, never too tight, never too long,  
5       watching Jeremy every second. Watching the  
6       patient every second.

7             He knows from his experience exactly how  
8       this is. He wouldn't say otherwise if he didn't  
9       believe it to be true. And, of course, it wasn't  
10      too tight. It was very short -- very short period  
11      of time, and when I say watching him every second,  
12      I mean his face is in the patient's face almost  
13      down. You can't be closer. You can't be more  
14      attentive than that relationship.

15            So Jeremy has twelve teeth that have decay,  
16      and they are seen by Dr. Bonds on the very first  
17      day and they make these marks, these little marks  
18      in this identity gram to indicate which of the  
19      teeth have decay, and if you count them up, there  
20      are twelve of those teeth that have decay. That's  
21      two with the abscesses and ten of those and made a  
22      treatment plan, not for all twelve, but for eleven  
23      of those, and two had to be extracted, and over  
24      time, all the rest were dealt with. Over time.

25            In fact, one of the later treatment plan

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2       deals with that 12th teeth -- 12th tooth and  
3       that's actually kind of interesting one, on the  
4       sixth visit, by the way, I should have had a  
5       little chronology up here for you, because you  
6       deserve it, but Jeremy came to Small Smiles and  
7       came to see Dr. Bonds and Dr. Aman and Dr. Khan  
8       ten times.

9             On the sixth visit, he sees Dr. Kahn, and  
10       Dr. Kahn is the lead dentist and Dr. Kahn  
11       addresses to "S" which is already to be seen to be  
12       a problem, and he says, I think that this tooth  
13       will need on the next visit a pulpotomy.

14            On the next visit when he examines the tooth  
15       to determine -- by the way, you need a pulpotomy  
16       if the nerve is going to be involved because you  
17       don't -- an inflamed or infected nerve underneath  
18       the crown or you will have problems later.

19            What does Dr. Kahn do on that 7th visit?  
20       Although the mother has already agreed and signed  
21       off on the proposed treatment plan to perform a  
22       pulpotomy, on examination, Dr. Kahn finds, I don't  
23       need to do that.

24            He doesn't say this is money on the table.  
25       My goal is to get this in for the company. He

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2 says, Jeremy doesn't need this. I'm not doing it.  
3 That's the kind of thing we are dealing with in  
4 this case.

5 On the second visit, Jeremy comes in and  
6 sees this sweet man sitting back there, Dr. Naveed  
7 Aman. And in the clinics they are known by their  
8 first name. The kids know them as Dr. Naveed,  
9 know Dr. Bonds is Dr. Koury, K-O-U-R-Y. And Dr.  
10 Naveed sees Jeremy on the second visit. And you  
11 say, is there a continuity of care, you know, do  
12 they talk to each other?

13 Well, they work side by side and talk to  
14 each other all the time, and the fact that Dr.  
15 Naveed now goes in and examines Jeremy on the  
16 second visit, it's like having -- it's like having  
17 a second opinion and get to check each other's  
18 work and see what is going on and you get to give  
19 the best care.

20 Now, I'll go back to his real name, Dr.  
21 Aman. Dr. Aman was a dentist who was trained in  
22 Pakistan, and after going through the finest  
23 dental school in Pakistan and taking residency  
24 there, he worked for seven years as a dentist  
25 before he came to this country.

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2 His father is a physician who is an academic  
3 physician with an interest in public health and  
4 still teaches at age 77.

5 Dr. Aman is proud to carry on a tradition.  
6 He's the oldest brother in the family. When he  
7 came to this country, already as a trained,  
8 experienced practicing dentist, seeing a  
9 population of kids who needed care.

10 He trained again at Boston University  
11 College of Dentistry. He was trained twice. And  
12 he performed his own residency here, and while at  
13 Boston University, I think he interviewed with  
14 Small Smiles.

15 So Dr. Aman who is both qualified and  
16 motivated sees Jeremy who has -- who is one of  
17 these kids with ECC, early childhood caries and  
18 just wants to stabilize the mouth.

19 Those four bad front teeth which have  
20 already been found by Dr. Bonds to at least need  
21 fillings now three more months have past and decay  
22 is a little further, and when he examines Jeremy,  
23 he goes out and tells the mom, I think I need to  
24 do a little more to stabilize your son.

25 They stabilize the inside of the tooth which

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2       is the pulpotomy, and put those little white  
3       crowns on you heard about. And the key thing is  
4       they were successful. They were 100 percent  
5       successful. They stood Jeremy in good stead.

6             Unlike fillings in the upper front teeth  
7       which can sometimes fall out and sometimes not  
8       work and sometimes have new cavities form around  
9       them and have infection, these are secure and  
10      stable, and it worked and Jeremy kept those teeth  
11      until they were ready to leave his mouth and the  
12      new ones come in.

13            So I told you something about Dr. Bonds, and  
14      I told you something about Dr. Aman. Dr. Kahn has  
15      a very similar story in terms of his training in  
16      Pakistan and second training also at Boston  
17      University. And you heard that Dr. Khan, the lead  
18      dentist, one that also has to deal with all these  
19      e-mails that what they call the pressure to  
20      produce and the -- to get everyone to be more  
21      efficient, Dr. Khan is the one who turns down the  
22      work, who proves him wrong, who says, it's been  
23      agreed to, it's been signed off on and been given  
24      permission, but I'm not doing it because it's in  
25      Jeremy's best interest not to.



1 Bohn v. Small Smiles, et al Opening/Stevens

2 You heard the other lawyers here talk about  
3 the fact that Jeremy is doing well. Well, the  
4 evidence will show that that's the truth.

5 We engaged a psychologist, Frank Doberman  
6 who looked at the records, the testimony, the  
7 education, school, medical, hospital, other  
8 records, just everything and interviewed Jeremy,  
9 and Jeremy is doing great.

10 And he's a delightful boy, and after talking  
11 with Jeremy for 30, 45 minutes, and asking him  
12 some pretty good questions, having him make  
13 drawings that are pretty interesting, smiling  
14 family, funny sense of humor, calls his sister  
15 "the she devil," the -- at the end of the  
16 interview, Dr. Doberman, who is a child and family  
17 psychologist, asked Jeremy, is there anything else  
18 that I should have asked you or I didn't?

19 And Jeremy replied to him, you forgot to ask  
20 me how awesome I am. How awesome I am. This is  
21 Jeremy in a nutshell.

22 And on behalf of Dr. Aman and Dr. Bonds, I  
23 hope to think we can take credit for him being  
24 awesome. That we helped him on his way to good  
25 health. We helped him on his way to good oral

1 Bohn v. Small Smiles, et al  
2 health for whatever little bit that played in  
3 making Jeremy what he is today and we're proud.

4 At the end of this case, when they ask the  
5 question, did my three clients act in a reasonable  
6 and prudent manner as would other dentists under  
7 the same circumstances, I urge you that the answer  
8 will be, yes, they did. Thank you.

9 THE COURT: Thank you. Okay. We are done  
10 with opening statements. I want you to have a  
11 good four days, five days. I will see you on  
12 Monday morning. We will start again at 9:00 a.m..

13 I'm going to remind you of this every day,  
14 don't talk about the case with anybody. Don't do  
15 any research at all on any parties or issues in  
16 this case. Thank you very much. Enjoy the nice  
17 afternoon.

18 (Jury excused.)

19 (Open Court, all counsel present, outside the  
20 presence of the Jury.)

21 THE COURT: Okay. Uhm, I've got gotten  
22 through the deposition transcripts. I just was a  
23 little bit confused, and I don't think I actually  
24 brought this stuff down. Everybody can we seated.

25 Mr. Hulslander, you submitted some

1 Bohn v. Small Smiles, et al  
2 additional pages for the Adair deposition.

3 MR. HULSLANDER: Counter designations.

4 THE COURT: Counter designations, and you  
5 have in someplaces like a single line, and then  
6 there's a single line right below it. I don't  
7 have the document.

8 MR. HULSLANDER: I know why because they  
9 left out the line. They like go down, and then if  
10 you looked at their designations, they would leave  
11 out a line from time to time.

12 THE COURT: Okay. So they weren't because  
13 it was like they were two together. One line and  
14 then one line after that.

15 MR. HULSLANDER: Yes.

16 THE COURT: You didn't mean you wanted to  
17 designate the stretch between those two? Those  
18 were just single line you wanted to add?

19 MR. HULSLANDER: Okay. Can I check it. I  
20 mean I did that a week ago, Judge, at two o'clock  
21 in the morning so I mean I can't --

22 THE COURT: Sure. Sure.

23 MR. HULSLANDER: Can I check it and let  
24 you know?

25 THE COURT: Sure. I guess what I need to

1 Bohn v. Small Smiles, et al  
2 talk with you guys about, I want to rule on the  
3 motions. I want to tell you what transcript  
4 portions are coming in. I'm going to need to know  
5 that answer before I can finalize that.

6 Do you want to come back this afternoon at  
7 some point and -- but I would want Mr. Hulslander,  
8 your designations. I think everything else I  
9 understood.

10 I did not yet do Andrus and Knott, who were  
11 the defendants' designations because that's not  
12 going to happen on the plaintiff's case, so I  
13 haven't gotten to those yet.

14 MR. LEYENDECKER: Your Honor, we are --

15 THE COURT: Not Andrus. Knott, Reilly.  
16 Reilly.

17 MR. HULSLANDER: Reilly.

18 MR. FRANKEL: Your Honor --

19 THE COURT: Andrus, Knott's I haven't done  
20 either. Those are the individuals, though, who  
21 are suppose to be coming to testify so I haven't  
22 done their transcripts yet either.

23 MR. FRANKEL: Your Honor, the designations  
24 they made in the last three or four days that were  
25 the subject of our motion to exclude, we haven't

1 Bohn v. Small Smiles, et al  
2 had a chance to object to those.

3 I mean we -- our position was we have them  
4 very light, we didn't believe that they were  
5 timely, and we moved, and so if Your Honor is  
6 inclined to let them put them in any way, we at  
7 least would like the opportunity to review them  
8 and file objections.

9 THE COURT: Certainly I will give you that  
10 opportunity to do that. But, you know, what I did  
11 was I just read every transcript. I took a blue  
12 pen for New FORBA, a red pen for Old FORBA, added  
13 the new line next to the new designations, wrote  
14 on if it is an objection, so my transcripts are  
15 all marked up.

16 Thankfully the plaintiff had done a great  
17 job of marking up the transcripts with the  
18 defendants' first set of designations so I had to  
19 add all the new stuff that came in.

20 You are free to object. I won't -- I won't  
21 rule, but I tried to make rulings based on the  
22 law.

23 MR. LEYENDECKER: Your Honor, let me see  
24 if I can simplify that. We are ones that took  
25 those depositions, and I'm the one that prepared

1 Bohn v. Small Smiles, et al  
2 the few objections you may have seen to some of  
3 the original counter designations. I don't think  
4 there will be a lot of objections since we took  
5 them. So I'm not worried we will have a big issue  
6 that somehow you exerted a lot of energy and come  
7 back and say we won't want you to redo that.

8 I will say I don't really have a good feel  
9 how much more they put back in the last few days,  
10 and I just didn't get a sense of that. I'm not  
11 anticipating a lot of objections.

12 THE COURT: So I'm certainly glad to take  
13 that. What I did was I looked at the transcripts.  
14 You know, I looked to generally what objections  
15 might come in.

16 For the most part, there were portions of  
17 the counter designations that don't really qualify  
18 as counter designations because, you know, they're  
19 suppose to help elicit the part that is already  
20 put in, so to the extent that -- that some of it  
21 was just a totally new subject or that, I didn't  
22 need you to tell me that it's not proper.

23 But I will take your objections so I was  
24 trying to do this so that you could get your  
25 videotapes edited. Tell me when it is you will

1       Bohn v. Small Smiles, et al  
2       submit your objections and I'm glad to -- I'm  
3       guessing it won't be that much time for me. I  
4       don't mind doing it again, those parts, but when  
5       do you want -- when are you going to want to have  
6       your video?

7               MR. LEYENDECKER: I will make it easy for  
8       you. We will deal with what you done so far. We  
9       will live -- you read the transcripts and called  
10      it cover to cover, you've seen it, we will live  
11      with what you got there.

12             THE COURT: Okay. And to the extent that  
13      the defendants think that it's without having a  
14      formal objection the reason why I'm doing that is  
15      because you guys were late with those  
16      designations.

17             And so I'm -- I ruled based on what the law  
18      is on those portions of the transcripts. The  
19      alternative was that I just exclude the late  
20      designations. So the defendants have any problem  
21      with that? Do you want to see their --  
22      plaintiff's objections before I rule?

23             MR. HULSLANDER: Plaintiff's objections?

24             THE COURT: To your counter designations.

25             MR. HULSLANDER: He just said he wasn't

1 Bohn v. Small Smiles, et al

2 going to object.

3 MR. LEYENDECKER: I'm saying --

4 THE COURT: No. No. I think what he is  
5 saying is he's going to go with what I have ruled  
6 without formally objecting. However, I want the  
7 record --

8 MR. HULSLANDER: Isn't that the same  
9 thing? He's not objecting.

10 MR. LEYENDECKER: Can I ask a technical  
11 question?

12 THE COURT: Yes.

13 MR. LEYENDECKER: There what Your Honor  
14 just described as counter designations might sort  
15 of complete or balance the testimony that is being  
16 offered. Then there is what you described as new  
17 stuff.

18 My understanding in the plaintiff's case is  
19 the counter designations may come in as part of  
20 their case, but the new stuff can only be offered  
21 by them in their part of the case or am I missing  
22 what you are describing, Your Honor?

23 THE COURT: Well, I guess I'm not saying  
24 that it comes in their case or not because they  
25 were there witnesses. I guess there's a lot that



1       Bohn v. Small Smiles, et al  
2       would go into the mix of whether new parts can  
3       come in from those transcripts.

4               MR. HULSLANDER: You know, Judge, I'm  
5       not -- as long as you accepted our counter  
6       designations, I'm fine. I'm going to go with what  
7       you decided and --

8               THE COURT: Okay.

9               MR. HULSLANDER: -- I mean it's not like  
10       it's a critical part. It's critical that we get  
11       read stuff that they omitted.

12              However, we're going to live by your ruling,  
13       so let's move on. I will live by your ruling and  
14       I will -- I'm not going to continue to raise  
15       objections.

16              THE COURT: I hear what you're saying, Mr.  
17       Hulslander. I think the concern that I have is I  
18       want a record because I have no doubt that  
19       whatever happens in this case it's going up on  
20       review.

21              So what I'm saying to you is to the extent I  
22       may have crossed out some of your counter  
23       designations on the theory that they weren't  
24       properly counter designations, are you saying that  
25       you're waiving any objection to that fact that the

1 Bohn v. Small Smiles, et al  
2 plaintiffs didn't formally make an objection?

3 MR. HULSLANDER: No. What I'm saying is  
4 you're going to rule, and I don't think you need  
5 to take exception to your rulings in order for us  
6 to get to the Fourth Department. That's not the  
7 law any more.

8 So I'm not -- if I wanted to -- if I want --  
9 if I want to fight about something you ruled on, I  
10 will let you know. And if we -- if you're going  
11 to say that we can't bring in parts of the  
12 deposition unless it's purely responsive, even  
13 though they were asking the questions and these  
14 witnesses are unavailable, then I don't know, I  
15 have to see what you did. I'm not thinking it  
16 will be a lot. It's not going to be tremendously  
17 complex.

18 MR. LEYENDECKER: I simply read the  
19 depositions. If they wanted to ask there own  
20 questions --

21 MR. HULSLANDER: They can ask their own  
22 questions.

23 MR. LEYENDECKER: -- free to do what they  
24 wanted to do or not want to do.

25 MR. HULSLANDER: Sure.

1 Bohn v. Small Smiles, et al

2 MR. FIRST: Your Honor, the counter  
3 designations that don't relate directly to what  
4 they are offering can come in at some point if  
5 it's otherwise relevant to the case.

6 So I just don't know. It's just maybe  
7 adding another step if that's the grounds for  
8 keeping it out because we can read that in our own  
9 case, certainly.

10 THE COURT: This is what I'm going to do,  
11 I want the plaintiffs to -- I want the record to  
12 be preserved. If I'm taking your objections late  
13 and counter designations, I'm going to give the  
14 plaintiffs an opportunity to make objections to  
15 the counter designations.

16 I want the record to be complete. So you  
17 can submit that to me. What that means is that if  
18 you can have -- respond to those by, you know,  
19 tomorrow at some point then --

20 MR. LEYENDECKER: If I can get those  
21 before lunch, I can get it back to you by three  
22 o'clock this afternoon with comments on them.

23 THE COURT: Okay. Then do you want to  
24 come back tomorrow for me to tell you what my  
25 rulings are alternatively because I'm the nice

1       Bohn v. Small Smiles, et al  
2       person, I'm glad to have them scanned in and you  
3       can -- I just crossed out -- you will see where I  
4       crossed out the transcripts. I think I should  
5       probably not offer up my secretary that way, but  
6       scan in the transcripts.

7               MR. LEYENDECKER: I think, Your Honor, if  
8       we can get our hands on them PDQ, which we'll  
9       study them, get them back this afternoon, and the  
10      defendants will have a chance to look at that and  
11      see what they want to do, if anything.

12             MR. HULSLANDER: There is another issue,  
13      though, because Mr. Higgins e-mails us last night  
14      and says that the father, Mr. Bohn, is not coming  
15      and that they're going to offer his deposition.

16             So if that's true, then they need to  
17      designate what they will read, even though it is  
18      late. You know, I'm not going to file an Order to  
19      Show Cause to preclude them from offering that  
20      deposition. It's not the way I practice. But I  
21      will do -- I do think we are entitled to see what  
22      they are going to read to this jury.

23             MR. HIGGINS: I totally agree with that,  
24      Judge. It was on the agenda for today. Mr. Bohn  
25      is a nonparty. He was deposed in the fall of 2012

1       Bohn v. Small Smiles, et al  
2       with Kelly Varano and everyone, Jeremy Bohn. We  
3       were planning to call him on Friday, September  
4       21st, when the case was suppose to start on the  
5       16th. Okay. He is currently a short haul  
6       trucker. He is on Saturday morning. He's taking  
7       a bus to Minnesota, Greyhound bus, and he will be  
8       gone training for a long haul trucking position  
9       for approximately two or three weeks. He doesn't  
10      know, it's up to them.

11             So basically my understanding is under  
12      3117-A3, small 2, he is now out of the state so at  
13      this point either party will be able to read in  
14      testimony substantively and so, or if he comes  
15      back, we would like to call him out of turn. I  
16      don't know if he will come back or not. So I did  
17      tell them that yesterday and so you know I can do  
18      that in the next hour. He's not a critical  
19      witness.

20             The defendants obviously want to use him  
21      because the word "rot" is in that transcript.  
22      They can substantively do that. It's not a  
23      counter designation. Because if he is out of the  
24      state, then they can read it on their case and we  
25      understand that. So just that is -- that is an

1 Bohn v. Small Smiles, et al  
2 issue, and I'll get that -- I think I have a  
3 transcript here. He's a nonparty. It's like a  
4 100 pages. It's not a video. Doesn't have to be  
5 cut. Okay. So.

6 MR. HULSLANDER: I think they missed the  
7 deadline.

8 MR. HIGGINS: Well, we're more than  
9 willing to be have Mr. Bohn precluded if this  
10 Court --

11 MR. HULSLANDER: Well --

12 MR. HIGGINS: Excuse me, let me finish  
13 counsel.

14 MR. HULSLANDER: Don't point at me.

15 MR. HIGGINS: Let me finish.

16 MR. HULSLANDER: Do not point at me.

17 THE COURT: Hey, gentlemen!

18 MR. HIGGINS: We are willing to preclusion  
19 of Mr. Bohn if this Court wants to preclude all  
20 the other witnesses, either way we will invite the  
21 Court's ruling.

22 MR. FIRST: Your Honor, since we are  
23 moving on to these other issues, you know, under  
24 the rule of goose versus gander, I have been  
25 served, and everything on the defense side has

1       Bohn v. Small Smiles, et al  
2       been served with new designations on exhibits as  
3       well way past Your Honor's deadline. I also don't  
4       practice that way. I didn't want to bring on an  
5       Order to Show Cause, but I feel constrained to ask  
6       the Court to consider rejecting the use of any of  
7       those exhibits that have been provided late by the  
8       plaintiffs.

9               MR. FRANKEL: Well, Your Honor, I don't  
10       know how Mr. First practices, but he might want to  
11       read your order, which is dated July 10. It says  
12       paragraph two, the parties are expected to make a  
13       good faith effort to include all exhibits that  
14       they may use at trial, at trial, but will not be  
15       precluded from -- from adding to their exhibit  
16       list before or during trial. That's your order.

17              THE COURT: That's an order that somebody  
18       here drafted that I signed. Probably in a state  
19       of stupor of some kind.

20              MR. LEYENDECKER: Just to be clear on how  
21       much, I'll take responsibility for it. I went  
22       from about 350 or 375 down to 190. I think I  
23       might have added a handful or less that weren't  
24       part of that 350. I was thinking maybe I been  
25       doing us favor by cutting in half and putting in a

1 Bohn v. Small Smiles, et al  
2 couple that I missed going through. So I will  
3 heat whatever heat I have to favor that.

4 THE COURT: Miss Marangas?

5 MS. MARANGAS: Morning, Your Honor. If I  
6 may indulge the Court. We asked for an  
7 opportunity to revisit the plaintiff's Order to  
8 Show Cause regarding the preclusion of Dr.  
9 Bellini.

10 THE COURT: Okay.

11 MS. MARANGAS: Certainly every  
12 opportunity, Your Honor, we will seek to reduce  
13 the number of witnesses and the length of the  
14 testimony of the witnesses that will be testifying  
15 in this case.

16 Our witness disclosure list went out  
17 properly on August 23rd, 2013 in compliance with  
18 your order, Your Honor.

19 At that time, we had not made a decision on  
20 Dr. Bellini. Dr. Bellini has been known to the  
21 plaintiffs all along in this case. He is the only  
22 subsequent treating dentist. In fact, the  
23 plaintiffs have reserved at times to use him as a  
24 witness in this case. They certainly knew about  
25 his records or familiar with his records.



1 Bohn v. Small Smiles, et al

2 It took substantial time to continue to get  
3 updated records from Dr. Bellini, and Mr.  
4 McPhilliamy, who is in the back of the courtroom  
5 here, has been making extensive efforts to get  
6 those records from Dr. Bellini and to actually  
7 supply them to the plaintiffs and everybody else  
8 in this case, so absolutely no prejudice in our  
9 disclosing Dr. Bellini; and yes, it was, in fact,  
10 added to our list ten days later on September 3,  
11 2013, well before the beginning of this trial.

12 And he is a known treater in the case.  
13 There is no reason that the plaintiffs can claim  
14 prejudice in this case or surprise. We also had  
15 an issue with expired Arons Authorizations, and we  
16 were attempting to get updated Arons  
17 Authorizations in order to talk to Dr. Bellini  
18 subsequently about the treatment to make a  
19 decision regarding whether to produce at this  
20 trial. We're not looking to make this trial any  
21 longer than it has to be, Your Honor.

22 We proceed to have Dr. Bellini added to the  
23 witness list and the right to potentially call him  
24 based upon the proof in this case.

25 THE COURT: Thank you.

1 Bohn v. Small Smiles, et al

2 MS. MARANGAS: Thank you, Your Honor.

3 THE COURT: Somebody want to be heard on  
4 behalf of the plaintiffs.

5 MR. LEYENDECKER: Your Honor, I'll just  
6 say this on the Arons Authorizations, we gave  
7 them -- I believe I have to go see exactly who we  
8 gave them a pile of those in November of 2011.  
9 And I remember now coming back to me is about 30  
10 days or so we were suppose to start a trial  
11 getting a request that says, can you please get me  
12 new Arons for Jeremy right now, and I don't have  
13 any idea what they did or didn't do between  
14 November of 2011 and 30 days ago.

15 So we know who Dr. Bellini is. I -- this --  
16 I -- the real problem want to call him -- don't  
17 want to call him, they do. I don't know what do  
18 they want to do. "Let us know" I think is really  
19 where we are.

20 MR. FRANKEL: Really the preclusion  
21 motion, Your Honor, was really about -- I don't  
22 want to go back to the hotel today, look on the  
23 web, on my file and serve and see the next witness  
24 and the next witness.

25 Last night we didn't talk about it, Mr.

1 Bohn v. Small Smiles, et al

2 Andrus, Dr. Andrus we now have designations that  
3 was after I served the preclusion and a week after  
4 you had ordered that he come.

5 They're filing designations. We want some  
6 more testimony from Dr. Andrus. We have to -- I  
7 thought the purpose of your order, and it's  
8 obviously common in Federal court, is to have an  
9 efficient system so you start to narrow things so  
10 we go from 300 exhibits to 190, we have fewer  
11 witnesses and decide not to use experts so we can  
12 have a more efficient thing, not that we expand it  
13 and every day there is another witness we want to  
14 add and another witness we want to add.

15 So that is really the purpose of the motion  
16 with respect to Dr. Bellini. It is just -- it has  
17 to stop. We can't keep adding is what I'm --  
18 that's our position. And we just ask that you  
19 enforce the order that you signed, otherwise you  
20 might as well tear it up if the deadlines don't  
21 mean anything.

22 THE COURT: I don't have to tear it up  
23 because you guys already tore it up. All right.  
24 My -- what I'm going to do right now is I haven't  
25 gotten -- I don't think I have any more

1 Bohn v. Small Smiles, et al  
2 designations last night. I'm not sure. Maybe I  
3 did.

4 MR. HULSLANDER: No, it was Monday. He is  
5 wrong. I did Andrus on Sunday. I served it on  
6 Monday. He's wrong. Didn't get mine yesterday.  
7 He got mine on Monday morning and there is about  
8 15 of them.

9 THE COURT: Okay.

10 MR. HULSLANDER: Believe me, you know.

11 THE COURT: So because everyone seems to  
12 think my time is unlimited, too, I'm going to make  
13 everybody come back tomorrow. We're going to be  
14 here at nine o'clock. I'm going to give rulings  
15 on I hope everything that is outstanding. And  
16 other than your objections to the counter  
17 designations that you just received, is there  
18 anything else that I will be expecting to receive  
19 from you guys today?

20 MR. HULSLANDER: I'm going to fix Adair.

21 THE COURT: You're going to fix Adair for  
22 me, right. Okay.

23 MR. FIRST: I just got designations during  
24 this trial this morning on Richard Lane who is a  
25 witness who worked for us and was deposed. I

1 Bohn v. Small Smiles, et al  
2 haven't looked at it yet, but I saw that it came  
3 in.

4 MR. LEYENDECKER: Let me -- we started  
5 like exhibits, Your Honor, we started with this  
6 much on Richard Lane and we -- I have done work  
7 down -- it is this. There is nothing new in  
8 there. I have taken it from here down to here.

9 Unfortunately, sounds like you may very well  
10 done a lot of work. I'm sorry for that. We have  
11 not had it -- we have gone from here to here on  
12 Lane.

13 MR. FIRST: I haven't seen it. I saw that  
14 it came in.

15 THE COURT: Okay. So nine o'clock  
16 tomorrow morning. We don't have to have all of  
17 you guys come back in. I'm sure your clients  
18 might appreciate a little -- I understand there  
19 has been some money flowing around here that maybe  
20 not everybody needs to be here tomorrow morning.

21 MR. HULSLANDER: What are we doing  
22 tomorrow, going through the designations?

23 THE COURT: I will let you know what the  
24 designations are and the transcripts. I will rule  
25 on the motion with respect to the late disclosed

1 Bohn v. Small Smiles, et al

2 witnesses. Yeah, the deposition objection and  
3 counter designations. And perhaps we'll spend a  
4 few moments going over the witnesses again. Do we  
5 have any more idea whether Andrus and Knott --

6 MR. HULSLANDER: They're not coming.

7 THE COURT: They're not coming?

8 MR. HULSLANDER: I mean I'm going to try  
9 to get -- I keep trying to get them to come. Do  
10 we have an order signed by Your Honor on that?

11 THE COURT: On what?

12 MR. HULSLANDER: On the compelling me to  
13 bring Andrus and Knott? Because I need that order  
14 signed so that I can try to compel them even more  
15 than I already am.

16 THE COURT: Well, I looked at so many  
17 papers in the last week, I can't tell you if I  
18 signed that order or didn't sign that order. But  
19 my Law Clerk is back here in the corner, and she  
20 reviews all orders before I do. Did I get that?

21 THE CLERK: You did. You signed it.

22 MR. HULSLANDER: Okay.

23 THE COURT: Okay.

24 MR. HULSLANDER: If I can get that order,  
25 that will help me maybe get them here, but

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2 unlikely.

3 THE COURT: So if I signed it, my  
4 secretary, just like my Court Clerk and my Law  
5 Clerk, who are all awesome, would have already  
6 sent it to you because I didn't sign that order  
7 today.

8 MR. HULSLANDER: Because I didn't get it  
9 and he didn't get it.

10 MR. FRANKEL: Your Honor asked us to  
11 submit it to you. We submitted it, I think,  
12 Monday.

13 MR. HULSLANDER: Monday.

14 THE COURT: Okay.

15 MR. FRANKEL: Monday morning? I lost  
16 track of the day. I think Monday morning I  
17 brought it to Janice and said, here are the orders  
18 you asked for.

19 THE COURT: I probably signed it  
20 yesterday. And did you get it to me yesterday?

21 MR. HULSLANDER: If we can get it.

22 THE COURT: And Janice would have -- she  
23 filed orders in Small Smiles yesterday afternoon.  
24 So my guess is she -- what does he do e-mail them  
25 to you?

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2 MR. HULSLANDER: Yes.

3 MR. FRANKEL: Maybe coming.

4 MR. HULSLANDER: Okay.

5 THE COURT: You will have it now, I'm  
6 sure. If you don't have it right now, if you want  
7 to come upstairs, we will make sure you get a  
8 copy.

9 MR. LEYENDECKER: Last question, Your  
10 Honor, where can I find your marked up transcripts  
11 so I can review those and have it back to you this  
12 afternoon, all the depositions?

13 MR. HULSLANDER: Doing that tomorrow now.

14 MR. LEYENDECKER: I thought you let us  
15 look at those, and I will get back to you this  
16 afternoon with any objections on them on the new  
17 stuff.

18 THE COURT: No. What I was -- so to the  
19 extent there have been new counter designations,  
20 what I want you to do is to identify any  
21 objections you have to those counter designations  
22 that were received after August 30th.

23 MR. LEYENDECKER: Okay. That may take  
24 longer than three this afternoon. I thought I  
25 would be looking at the transcripts marked up by



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2 the end of the day today. No problem.

3 THE COURT: That's fine.

4 MR. HULSLANDER: We can come and look at  
5 them before tomorrow at nine? No? Now we will  
6 come back here at nine and go through them  
7 together?

8 THE COURT: I will tell you what I'm going  
9 to do. Either I'll -- yeah, I will rule tomorrow  
10 morning on the outstanding issues I have before  
11 me, and I will let you know what transcript  
12 portions are coming in.

13 MR. HIGGINS: Judge, one final  
14 housekeeping issue, during Mr. Stevens' closing,  
15 he referred to two exhibits -- I'm sorry, his  
16 opening sorry.

17 THE COURT: I only wish it was the  
18 closing.

19 MR. HIGGINS: We had seen those exhibits  
20 beforehand. We didn't have any objection. I  
21 notice they weren't identified for the record.  
22 They are still not identified. I ask that they be  
23 identified so we know what the are jurors looking  
24 at during the opening.

25 THE COURT: Okay. You can have that

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2 marked.

3 MS. MARANGAS: I can take care of that,  
4 Your Honor. Defendant's No. ABK 1243-A with  
5 today's date of September 18, 2013.

6 THE COURT: Anything else? See you  
7 tomorrow morning at nine.

8 MS. MARANGAS: Thank you, Your Honor.  
9 (Proceedings adjourned.)

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