

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

FORBA HOLDINGS, LLC, a Delaware
limited liability company,

Plaintiff,

v.

LICSAC, LLC, a Colorado limited liability
company; DD MARKETING, INC., a
Colorado corporation; DEROSE
MANAGEMENT, LLC, a Colorado limited
liability company; LICSA NY, LLC, a New
York limited liability company; DANNY E.
DEROSE; EDWARD J. DEROSE;
MICHAEL A. DEROSE; MICHAEL W.
ROUMPH; RICHARD B. LANE;
WILLIAM A. MUELLER; ADOLPH R.
PADULA; and PADULA FAMILY
PARTNERSHIP, LLLP

Defendants.

Civil Action No. 09-cv-02305-CMA-MJW

AMENDED COMPLAINT

Plaintiff FORBA Holdings, LLC (“New FORBA”) for its Amended Complaint against defendants LICSA NY, LLC; DD Marketing, Inc.; DeRose Management, LLC; LICSA NY, LLC, (collectively, “Old FORBA”) and Danny E. DeRose; Edward J. DeRose; Michael A. DeRose, Michael W. Roumph; Richard B. Lane, William A. Mueller, Adolph R. Padula, and Padula Family Partnership, LLLP (collectively, “Individual Defendants”) avers as follows:

NATURE AND BASIS OF ACTION

1. This is an action seeking damages and declaratory relief resulting from Old FORBA's breaches of the Asset Purchase Agreement, as amended, ("the APA") with New FORBA and from Old FORBA's and the Individual Defendants' breach of their indemnification obligations. (A copy of the APA, including Amendment No. 1 thereto, is attached to this Amended Complaint as Exhibit A.)

2. Old FORBA and its partners, the Individual Defendants, managed 50 dental centers across the country that provided dental care to underprivileged children on Medicaid. Many of the dental centers used the name "Small Smiles." Among other things, Old FORBA provided its affiliated dental centers with services relating to dentist recruitment, orientation, human resources, marketing, legal, government affairs, compliance, procurement, IT support, finance and book keeping pursuant to Management Services Agreements. In carrying out their obligations under the Management Services Agreements, Old FORBA partners and personnel interacted closely with the Small Smiles dental centers on a daily basis.

3. Pursuant to the Management Services Agreement, Old FORBA received a monthly fee from each of its affiliated dental centers of "the greater of (i) forty percent (40%) of the Gross Revenues of the Clinic or (ii) One Hundred Seventy-Five Thousand Dollars (\$175,000) per month, or (iii) one hundred percent (100%) of the Residual . . . during such calendar month but not less than One Hundred Fifty-Eight Thousand Four Hundred Dollars (\$158,400) annually during the term of this Agreement." (A sample Management Services Agreement is attached to this Amended Complaint as Exhibit B.) Over the course of its management of the dental centers, Old FORBA earned tens of millions of dollars in management fees. Old FORBA regularly distributed the management fees to the Individual Defendants.

4. Beginning in 2004, Old FORBA, acting through the Individual Defendants, launched efforts to sell its assets, including its Management Services Agreements with the Small Smiles dental centers. After two failed attempts with other bidders, Old FORBA entered into the APA with Sanus Holdings, LLC ("Sanus") (which later became New FORBA) in 2006.

5. On September 26, 2006, New FORBA closed on the APA with Old FORBA. Pursuant to the APA, New FORBA paid Old FORBA \$435 million for Old FORBA assets. Old FORBA distributed the proceeds of the sale to the Individual Defendants immediately upon the closing of the transaction.

6. The APA was premised on a series of representations and warranties by Old FORBA that, among other things, it had disclosed all material facts about the business, that it had complied with all applicable laws, and that its financial statements fairly reflected its financial condition. APA, §§4.1 through 4.24. The representations and warranties were based not only on the knowledge of Old FORBA as an entity, but also on the actual knowledge of the Individual Defendants and their related corporate entities. APA, §4.23.

7. The APA also provided for certain indemnification obligations, stating that Old FORBA shall:

[I]ndemnify and hold harmless [New FORBA] from, against and for any damages, claims, costs, loss, liabilities, expenses or obligations (including, without limitation, reasonable attorneys' fees and associated expenses, but not including time spent by employees of such party), whether or not involving a third-party claim (collectively "losses"), incurred or suffered by any of them as a result of or arising from (a) any breach of or inaccuracy in any representation or warranty made by FORBA in this Agreement or any other Transaction Agreement; (b) any breach of a covenant or agreement made by FORBA in this Agreement or any other Transaction Agreement; (c) Excluded Assets and Excluded Liabilities; (d) FORBA's ownership or operation of the Assets or the Business prior to the Effective Time; and (e) FORBA's acts or omissions prior to the Effective Time.

APA, §10.1.

8. Because it was anticipated that Old FORBA would distribute the proceeds of the asset sale to the Individual Defendants, each of the Individual Defendants signed a Joinder to the APA providing that “[t]o facilitate the consummation of the transactions contemplated in this Agreement and in consideration of the substantial economic and other benefits inuring to the undersigned as a member of FLLC, DMLLC or NYLLC or a shareholder of DDM, the undersigned hereby joins this Agreement for the sole purpose of being responsible, on a pro-rata basis, with FORBA for the obligations of FORBA pursuant to Article 10 of this Agreement.” APA, p. 41 (“Joinder”).

9. As described in detail below, the APA contains a number of representations and warranties by Old FORBA that were not accurate. In addition, Old FORBA and the Individual Defendants have failed and refused to honor their obligations to indemnify New FORBA as required under §10.1 of the APA.

10. As a result of Old FORBA’s inaccurate representations and warranties in the APA, as detailed below, and Old FORBA and the Individual Defendants’ failure to honor the indemnification obligations under the APA, New FORBA has sustained damages in excess of \$50,000,000, including but not limited to damages sustained from overpaying Old FORBA for the Old FORBA assets described in the APA (based on Old FORBA’s improperly inflated EBITDA), damages sustained in defending and paying claims (*e.g.*, claims made by government agencies in New York and Georgia) relating to payments received by Old FORBA while Old FORBA owned the assets, and legal fees incurred by New FORBA in connection with government requests for documents and information relating to Old FORBA’s management and operation of the dental centers.

PARTIES

11. New FORBA, formerly known as Sanus, is a limited liability company and a wholly owned subsidiary of Small Smiles Holding Company, LLC. New FORBA is incorporated in Delaware and maintains its principal place of business at 618 Church Street, Nashville, TN 37219. Sanus was a signatory to the APA.

12. Defendant LICCSAC, LLC ("LICCSAC") is a Colorado limited liability company, formerly known as FORBA, LLC. LICCSAC's registered agent is Danny E. DeRose, and its registered office is located at 504 N. Grand Avenue, Pueblo, Colorado 81003. The members of LICCSAC are Danny E. DeRose, Edward J. DeRose, Michael A. DeRose, Michael W. Rounph, Richard B. Lane, William A. Mueller, Adolph R. Padula, and Padula Family Partnership. Danny E. DeRose is the President of LICCSAC, Edward J. DeRose and Michael A. DeRose are Vice Presidents, Adolph R. Padula is the Treasurer, and William A. Mueller is the Secretary. LICCSAC provided management services to the Small Smiles Centers, and was a signatory to the APA.

13. Defendant DD Marketing, Inc. ("DD Marketing") is a corporation organized under the laws of the State of Colorado. Its registered agent is Danny E. DeRose, the President of DD Marketing, and its registered office is located at 504 N. Grand Avenue, Pueblo, Colorado 81003. The Shareholders of DD Marketing are Danny E. DeRose and Michael W. Rounph. Michael W. Rounph is the Vice President of DD Marketing. DD Marketing entered into Services Agreements with the Small Smiles Centers and was a signatory to the APA.

14. Defendant DeRose Management, LLC is a Colorado limited liability company. Its registered agent is Edward J. DeRose, and its registered office is located at 504 N. Grand Avenue, Pueblo, Colorado 81003. DeRose Management provided management services to certain Small Smiles Centers and was a signatory to the APA.

15. Defendant LICCSAC NY, LLC, formerly known as FORBA NY, LLC, is a New York limited liability company. LICCSAC NY, LLC does not have a registered agent for service of process in New York. The President of LICCSAC NY, LLC is Danny E. DeRose. LICCSAC NY, LLC provided management services to the New York Small Smiles Centers pursuant to Management Services Agreements and was a signatory to the APA.

16. Defendant Danny E. DeRose is a Member of LICCSAC, LLC, a Shareholder of DD Marketing and is the President of DD Marketing, LICCSAC, LLC, and LICCSAC NY, LLC. His business address is 504 N. Grand Avenue, Pueblo, Colorado 81003. Danny DeRose personally received approximately \$80 million from the proceeds of the sale to New FORBA. Mr. DeRose communicated daily with the Small Smiles Centers prior to the sale to New FORBA.

17. Defendant Dr. Edward J. DeRose is the President of DeRose Management, LLC, and a Vice President and Member of LICCSAC, LLC. He practiced in the Small Smiles Centers in Pueblo, Colorado, Colorado Springs, Colorado, and Denver, Colorado, and managed centers in Pueblo, Colorado Springs, Denver, Albuquerque and Sante Fe. His address is 1615 Augusta Place, Pueblo, Colorado. Dr. Edward DeRose personally received approximately \$58 million from the proceeds of the sale to New FORBA. Dr. Edward DeRose is the father of defendants Danny and Michael DeRose.

18. Defendant Dr. Michael A. DeRose is a Vice President and Member of LICCSAC, LLC. Dr. Michael DeRose practiced in the Small Smiles Centers in Pueblo, Colorado, Colorado Springs, Colorado, Aurora, Colorado, Sante Fe, New Mexico, and Gary, Indiana. His address is 183 East Greenway, Pueblo West, Colorado. Dr. Michael DeRose personally received approximately \$58 million from the proceeds of the sale to New FORBA. In addition to his interest in Old FORBA, Dr. Michael DeRose also owned several Medicaid dental clinics in

North Carolina that were the subject of state and federal Medicaid fraud investigations that began well before the sale of Old FORBA's assets to New FORBA, and that ultimately resulted in a \$10 million settlement with the Department of Justice, the Office of the Inspector General of the Department of Health and Human Services, the State of North Carolina and the North Carolina Division of Medical Assistance. This settlement resolved claims involving four of the North Carolina clinics for the period of 2001 to 2003. Dr. Michael DeRose also entered into Consent Orders with the North Carolina Board of Dental Examiners and the Kansas Dental Board. Dr. Michael DeRose did not renew these dental licenses or his licenses in Indiana, Oklahoma, Colorado, and New Mexico.

19. Defendant Richard B. Lane is a Member of LICCSAC, LLC, and the Chief Operating Officer of DD Marketing. His address is 4208 St. Andrews Drive, Pueblo, Colorado 80011. Mr. Lane personally received approximately \$6 million from the proceeds of the sale to New FORBA. Mr. Lane communicated daily with the Small Smiles Centers prior to the sale to New FORBA.

20. Defendant Michael W. Roumph is a Member of LICCSAC, LLC and a shareholder and Vice President of DD Marketing, LLC. His address is 184 East Saddlewood Court, Pueblo West, Colorado, 81007. Mr. Roumph personally received approximately \$37 million from the proceeds of the sale to New FORBA. Mr. Roumph communicated daily with the Small Smiles Centers prior to the sale to New FORBA.

21. Defendant William A. Mueller is a Member of LICCSAC, LLC and the Corporate Secretary. His address is 120 South Marion Parkway, Denver, Colorado, 80209. On information and belief, Dr. Mueller personally received approximately \$58 million from the proceeds of the sale to New FORBA. Dr. Mueller also provided dental services at Small Smiles Centers.

22. Defendant Adolph R. Padula is a Member of LICCSAC, LLC and its Treasurer. His address is 4202 St. Andrews Drive, Pueblo, Colorado 81001. On information and belief, Dr. Padula personally received approximately \$58 million from the proceeds of the sale to New FORBA. Dr. Padula also provided dental services at Small Smiles Centers. Dr. Padula is an uncle to defendants Danny and Michael DeRose.

23. Defendant Padula Family Partnership, LLLP ("Padula Family Partnership") is a Colorado limited liability limited partnership and is a Member of LICCSAC, LLC. Adolph R. Padula is the General Partner of Padula Family Partnership. Padula Family Partnership maintains its principal place of business at 4202 St. Andrews Drive, Pueblo, Colorado 81001.

JURISDICTION AND VENUE

24. This action seeks damages for breach of contract in connection with the sale of Old FORBA's assets to New FORBA on September 26, 2006, and Old FORBA's and the Individual Defendants' indemnification obligations in the APA and the Joinder thereto. This action also seeks declaratory relief in connection with (1) Old FORBA's and the Individual Defendants' indemnification obligations in the APA; and, (2) the obligations of the Individual Defendants pursuant to the Joinder to the APA.

25. This Court has jurisdiction over New FORBA's claims under 28 U.S.C. § 2201 and 28 U.S.C. § 1332. New FORBA and the Defendants are citizens of different states and this dispute involves an amount in controversy in excess of \$75,000.

26. This Court has personal jurisdiction over the Defendants because all of the Defendants other than LICCSAC NY are citizens of Colorado. This Court has personal jurisdiction over LICCSAC NY because it was a party to the APA, and its President, Danny E.

DeRose, a Colorado resident, conducted extensive APA negotiations with New FORBA in Colorado.

27. Venue in this Court is proper under 28 U.S.C. § 1391 because a substantial portion of the events giving rise to this litigation occurred in this District.

28. Under the terms of the APA, the parties have agreed that this dispute is governed by Colorado law and they have waived their right to a jury trial.

GENERAL ALLEGATIONS

29. Prior to the sale of its assets to New FORBA, Old FORBA provided management services to 50 dental centers across the country serving Medicaid and SCHIP (State Children's Health Insurance Program) children. Many of the dental centers do business under the name "Small Smiles." Because Medicaid and SCHIP are funded by the state and federal governments, the Small Smiles Centers and Old FORBA were subject to continuous state and federal governmental scrutiny.

30. The Small Smiles Dental Centers trace their roots to a dental clinic in Pueblo, Colorado founded in 1928 by Dr. Bruno DeRose. In 1961, Dr. Bruno DeRose's son, Defendant Dr. Edward J. DeRose, joined the Pueblo dental clinic. Nine years later, the Pueblo clinic began treating children covered by Medicaid.

31. Beginning in the mid-1990s, Dr. Edward DeRose, his son Dr. Michael DeRose, and other family members, including Dr. Padula, opened additional Small Smiles Centers in Colorado and New Mexico, focusing on providing dental care to Medicaid children.

32. In 2001, another of Dr. Edward DeRose's sons, Dan DeRose, formed Old FORBA to manage the Small Smiles Centers and to open and manage additional Small Smiles Centers throughout the country. By the end of 2002, Old FORBA managed 12 Small Smiles

Centers. By 2003, the number rose to 16 Centers. By 2004, Old FORBA managed 26 Small Smiles Centers. In 2005, the number of Small Smiles Centers under Old FORBA management jumped to 38, and by the time of the transaction in September 2006, Old FORBA managed 50 Small Smiles Centers. Old FORBA provided the capital to open new Small Smiles Centers, interviewed and hired the dentists and staff for the Centers, provided orientation and training, and provided additional management services to the Centers under the Management Services Agreements.

33. In June 2004, Old FORBA was negotiating to sell the company to a third party. However, on the brink of closing the deal, the prospective purchaser raised certain concerns about Old FORBA's management and operation of the Small Smiles Centers, and, as a result, the talks broke off. Old FORBA had discussions with another potential purchaser in 2005 that also ended unsuccessfully. Old FORBA continued its efforts to sell the company and focused intensely on the production of the Small Smiles Centers -- going so far as to "creatively suggest opportunities to increase production" to the dentists at the Centers -- to ensure a profitable transaction in the future.

34. In April 2006, Old FORBA representatives, including Defendants Dan DeRose and Michael Roumph, met with representatives of Sanus/New FORBA in Denver, Colorado to discuss the parties' interest in a sale of Old FORBA's assets to New FORBA. At the meeting, the parties agreed to a purchase price based on a simple mathematic formula: New FORBA would pay ten times Old FORBA's 2006 EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) Forecast. Old FORBA's EBITDA was based on the production of the Small Smiles Centers.

35. On June 14, 2006, New FORBA entered into an Asset Purchase Agreement with Old FORBA to purchase Old FORBA's assets, including its Management Services Agreements with Small Smiles Dental Centers, for \$470 million. This purchase price was based on Old FORBA's 2006 EBITDA budget of \$47 million.

36. Based on their prior unsuccessful efforts to sell the business, and based on the fact that the purchase price in the Asset Purchase Agreement was tied directly to Old FORBA's EBITDA, Old FORBA and the Individual Defendants were concerned that New FORBA would seek to lower the purchase price if the performance of the Small Smiles Centers in any way did not meet projections, and that New FORBA could even walk away. Old FORBA redoubled its efforts to increase the performance of the Small Smiles Centers, sending regular emails to the Centers urging them to increase production, and having conversations with the dentists and staff regarding ways to increase production.

37. On July 28, 2006, the parties executed Amendment No. 1 to the APA. Among other things, the amendment lowered the purchase price of the transaction from \$470 million to \$435 million. The lower purchase price reflected a lowered projection of Old FORBA's 2006 EBITDA as of July 28, 2006. According to financial information provided by Old FORBA purporting to reflect actual results for January through May, 2006, Old FORBA was not meeting its EBITDA budget of \$47 million. Using the EBITDA reported in Old FORBA's financial results for January through May, 2006, and Old FORBA's estimated results for June 2006, New FORBA made certain adjustments and re-calculated a 2006 EBITDA forecast of approximately \$43.5 million (the "Re-calculated 2006 EBITDA Forecast"). Based on the Re-calculated 2006 EBITDA Forecast, New FORBA agreed to pay \$435 million to buy the Old FORBA assets.

38. Old FORBA continued to manage the Small Smiles Centers and continued to pressure the dentists to increase production levels fearing that New FORBA would continue to lower the purchase price or walk away from the transaction prior to the anticipated September 2006 closing. Old FORBA instituted a “contest” to encourage greater production by the dental centers, and Old FORBA personnel continued to have regular communications with the Lead Dentist and Office Manager in each of the Small Smiles Centers regarding production. For example, defendant Michael Roumph sent emails to Small Smiles Centers emphasizing that “production per patient . . . [s]hould be an area to focus on with your dentists;” and “[a]s we have discussed, our focus needs to be on increasing production per patient.” Old FORBA personnel also ran a series of reports for Old FORBA’s use in managing the Small Smiles Centers, including “Dentist Efficiency Reports” and “Dentist Daily Average Reports.” Dan DeRose recognized the sensitivity of certain of these reports, denying the existence of these reports to Sanus and suggesting that such reports were the “number one trigger point for fraud.”

39. The asset purchase transaction closed on September 26, 2006. On information and belief, the proceeds of the sale, other than amounts remaining in escrow, were distributed to the members of Old FORBA; none of the proceeds of the sale were retained by LICSAAC, LLC, DD Marketing, DeRose Management, LLC or LICSAAC NY, LLC. Old FORBA and LICSAAC did not pursue any new business enterprises, and have become dormant. On information and belief, the Old FORBA entities do not have the financial resources to compensate New FORBA for the damages incurred as a result of Old FORBA’s breach of contract and failure to honor its indemnification obligations.

40. The APA was signed by Dan DeRose on behalf of FORBA, LLC (now known as LICSAAC, LLC), DD Marketing, Inc., and FORBA NY, LLC (now known as LICSAAC NY,

LLC), and by Edward DeRose on behalf of DeRose Management, LLC. In addition, the Members of FORBA, LLC (now known as LICCSAC, LLC) -- Dan DeRose, Michael Rounph, William Mueller, Edward DeRose, Adolph Padula, Michael DeRose, Richard Lane, and the Padula Family Partnership -- signed a Joinder to the APA providing that “[t]o facilitate the consummation of the transactions in this Agreement and in consideration of the substantial economic and other benefits inuring to the undersigned as a member of FLLC, DMLLC or NYLLC or a shareholder of DDM, the undersigned hereby joins this Agreement for the sole purpose of being responsible, on a pro-rata basis, with FORBA for the obligations of FORBA pursuant to Article 10 of this Agreement.” APA, p. 41.

41. As noted above, the APA includes detailed representations and warranties. Among other things, the representations and warranties relate to Old FORBA’s Financial Statements (§ 4.5); Licensure and Compliance (§ 4.6); Assumed Contracts, Contract Practices (§ 4.7); Associated Practices, Dentists and Professionals (§ 4.8); Litigation, Actions and Orders (§ 4.11); Compliance with Laws (§ 4.14); No Undisclosed Liabilities (§ 4.18); and Disclosure (§4.24).

42. Under the terms of the APA, Old FORBA warranted and represented, among other things, that:

a. the “Financial Statements present fairly (and those delivered pursuant to Section 6.7, will present fairly) the financial condition and the results of operations . . . of [Old FORBA] at the respective dates of and for the periods referred to in such Financial Statements, all in accordance with GAAP. . . . The Financial Statements have been prepared from and are in accordance with the books and records of FLLC, DDM, and DMLLC as applicable. The Financial Statements reflect (and those delivered pursuant to Section 6.7 will reflect) the

consistent application of such accounting principles throughout the periods involved, except as disclosed in the notes thereto” (APA §4.5);

b. “[Old] FORBA and each of the Practices possess all permits, licenses, consents, authorizations, certificates, variances, exemptions, orders and approvals of and from all, and has made all declarations and filings with, Governmental Authorities necessary for the lawful conduct of their respective businesses. . . .” (APA §4.6(a));

c. the “activities and business of [Old] FORBA and each of the Practices are being and have been conducted in compliance with the Applicable Laws. . . . Neither [Old] FORBA nor any Practice has received any notice of any investigation by any Governmental Authority with respect to the Business or any Practice and, to the knowledge of [Old] FORBA, no such investigation is pending or threatened” (APA §4.6(b));

d. “[Old] FORBA has performed its obligations, and is not in breach or default, nor do any circumstances exist which with or without notice or lapse of time, or both, would result in breach or default, nor is there any claim of such breach or default with respect to any obligation to be performed, under any Assumed Contract, which breach or default, if not cured, would, individually or in the aggregate, have a Material Adverse Effect. [Old] FORBA has performed its obligations, and is not in breach or default, nor do any circumstances exist which with or without notice or lapse of time, or both, would result in breach or default, nor is there any claim of such breach or default with respect to any obligation to be performed, under any Management Agreement ” (APA §4.7(b));

e. “[e]ach Associated Dentist now employed by or contracting with any Practice engages in dental practice only for the corresponding Practice . . . has graduated from an accredited school of dentistry or its equivalent in the case of certain foreign Associated Dentists,

is fully accredited as, and has all permits or a pending application for all permits, licenses, consents, authorizations, certificates, variances, exemptions, orders and approvals of and from all, and has made all declarations and filings with, Governmental Authorities and other governmental authorizations necessary to practice dentistry in each state in which such Associated Dentist engages in dental practice. . . . To the extent required by Applicable Law, each Practice Owner is fully accredited, and has all necessary Governmental Permits, in each state (i) in which such Practice Owner engages in dental practice or (ii) where any professional corporation or other entity through which any Practice operates in which the Practice Owner has any interest conducts its operations” (APA §4.8(c));

f. “each Governmental Permit required to be maintained by an Associated Dentist, Associated Professional or Practice Owner is valid and in full force and effect and each Associated Dentist, Associated Professional or Practice Owner is in compliance in all respects with all of the terms and requirements thereof” and that “no event has occurred or circumstance exists that may (with or without notice or lapse of time) constitute or result directly or indirectly in a violation of or a failure to comply with any term or requirement of any Governmental Permit maintained by any Associated Dentist, Associated Professional or Practice Owner, or result directly or indirectly in the revocation, withdrawal, suspension, cancellation or termination of, or any modification to, any Governmental Permit maintained by any Associated dentist, Associated Professional or Practice Owner” (APA §4.8(e));

g. “each Practice is and has been, with respect to conduct of its operations, in compliance with all Applicable Laws. . . .” and “no Practice has been charged with or given notice of, and to the knowledge of FORBA, is not under investigation with respect to any violation of any Applicable Law” (APA §§ 4.8(f));

h. except as specifically disclosed in schedules to the APA, “there are no Actions pending or, to the knowledge of [Old] FORBA, threatened against, affecting, or relating to FORBA, any Practice, the Assets or the Business.” (APA §4.11);

i. “[Old] FORBA is and has been, with respect to the operation of the Business, in compliance with guidelines of the American Academy of Pediatric Dentistry and all Applicable laws,” that “[Old] FORBA has not been charged with or given notice of, and to the knowledge of FORBA, is not under investigation with respect to any violation of any Applicable Law,” that “each Practice is and has been, with respect to the operation of its respective business, in compliance with all Applicable Laws,” and that “no Practice has been charged with or given notice of, and to the knowledge of [Old] FORBA is not under investigation with respect to any violation of any Applicable Law” (APA §4.14); and

j. “[e]xcept for those listed on any Schedule to this Agreement or reflected or reserved against in the Financial Statements and current liabilities incurred in the ordinary course of business since the Balance Sheet Date, [Old] FORBA has no liabilities or obligations of any nature (whether absolute, accrued, contingent, or otherwise). Since the Balance Sheet Date, there has not been any material adverse change in the business, operations, prospects, assets, results of operations or condition (financial or otherwise) of [Old] FORBA, and no event has occurred or circumstance exists that may result in such a material adverse change. Since the Balance Sheet Date, there has not been any material adverse change in the business, operations, prospects, assets, results of operations or condition (financial or other) of a Practice, whether individually or in the aggregate, and no event has occurred or circumstance exists that may result in such a material adverse change.” (APA §4.18).

43. The APA also contains a Disclosure provision reflecting Old FORBA's obligation to disclose all material facts:

4.24 Disclosure. No representation or warranty made by [Old] FORBA in this Agreement contains any untrue statement of a material nature or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading.

44. The APA provides that the representations and warranties are made by all of Old FORBA's members. To the extent that any of the APA's provisions refer to the "knowledge of [Old] FORBA" or use "similar terms," they are intended to refer not only to the corporate entity but also to the "actual knowledge of . . . any officer of DeRose Management, LLC, DD Marketing, Inc., FORBA, LLC, or FORBA NY, LLC." APA, §4.23.

45. New FORBA reasonably relied on these representations and warranties, and other representations and warranties made by Old FORBA, when it agreed to purchase the assets from Old FORBA and executed the APA. In APA §10.6, "[t]he parties expressly agree and acknowledge that each is relying upon the representation or warranties of the other made in this Agreement and that neither [Old FORBA] nor [New FORBA] would be willing to execute and deliver this Agreement if any limitations were placed on such reliance."

46. New FORBA's reliance on Old FORBA's warranties is not limited by any due diligence that was conducted or that could have been conducted: "The right to indemnification, reimbursement or other remedy based upon the representations, warranties, covenants and obligations in this Agreement shall not be affected by any investigation conducted with respect to, or any information or knowledge acquired (or capable of being acquired) at any time, whether before or after the execution and delivery of this Agreement or the Closing date, with respect to the accuracy or inaccuracy of or compliance with any such representation, warranty, covenant or obligation. The waiver of any condition based upon the accuracy of any representation or

warranty, or on the performance of or compliance with any covenant or obligation, will not affect the right to indemnification, reimbursement or other remedy based upon such representations, warranties, covenants and obligations.” APA, §10.6. New FORBA did not have access to many of the emails and other communications between Old FORBA and the Small Smiles Centers prior to the closing of the APA. Many of these emails and other communications remain in the possession of Old FORBA personnel.

47. The representations and warranties contained in APA §§4.5, 4.6, 4.7, 4.8, 4.11, 4.14, 4.18 and 4.24 include untrue statements of a material nature and/or omit a material fact necessary to make the representations and warranties contained in each of the above-referenced paragraphs, in light of the circumstances in which they were made, not misleading.

Breach of APA §§4.5 and 4.18 - Financial Statements

48. The warranties in APA §4.5 provide that:

The Financial Statements present fairly (and those delivered pursuant to Section 6.7, will present fairly) the financial condition and the results of operations . . . of [Old FORBA] at the respective dates of and for the periods referred to in such Financial Statements, all in accordance with GAAP. . . . The Financial Statements have been prepared from and are in accordance with the books and records of FLLC, DDM, and DMLLC as applicable. The Financial Statements reflect (and those delivered pursuant to Section 6.7 will reflect) the consistent application of such accounting principles throughout the periods involved, except as disclosed in the notes thereto.”

49. The warranties in APA §4.18 provide that:

Except for those listed on any Schedule to this Agreement or reflected or reserved against in the Financial Statements and current liabilities incurred in the ordinary course of business since the Balance Sheet Date, FORBA has no liabilities or obligations of any nature (whether absolute, accrued, contingent, or otherwise). Since the Balance Sheet Date, there has not been any material adverse change in the business, operations, prospects, assets, results of operations or condition (financial or otherwise) of FORBA, and no event has occurred or circumstance exists that may result in such a material adverse change. Since the Balance Sheet Date, there has not been any material adverse change in the business, operations, prospects, assets, results of operations or condition (financial or other) of a

Practice, whether individually or in the aggregate, and no event has occurred or circumstance exists that may result in such a material adverse change.

50. Old FORBA breached the warranties set forth in APA §§4.5 and 4.18 because its financial statements contained untrue statements of a material nature in that they did not present fairly or accurately the financial condition of Old FORBA. Old FORBA also breached these warranties because its financial statements failed to properly recognize revenue and/or did not disclose or account for certain loss contingencies, and were therefore not in accordance with GAAP (Generally Accepted Accounting Principles).

51. Old FORBA's financial statements were false and misleading. Specifically, Old FORBA took steps and implemented methods designed to overstate its income, and thereby to artificially inflate the value of the business. Old FORBA increased its 2006 EBITDA and thereby increased the price under the APA. For every dollar the EBITDA was overstated, the price under the APA was increased by ten dollars.

52. While representing to New FORBA that it did not track dentists' production or discuss production with the dentists or staff at the Small Smiles Centers, Old FORBA's management in fact tracked such production and exerted increased pressure on dentists and staff within its network of clinics to increase production levels through regular emails, conversations, and salary negotiations. Increased production levels would result in higher revenue and a higher EBITDA. This push for production became especially intense after Old FORBA's attempt to sell the business failed in the Summer of 2004.

53. Old FORBA pressured its dentists to increase production even more in 2006 because it understood that increases in production would help sell the business at a high price by artificially inflating revenue and thus inflating its EBITDA. Old FORBA took these steps despite its knowledge that government investigators were concerned about the possibility that pressure to

produce could lead to over-treatment, substandard quality of care, poor charting, and improper claims for payment, and lead to requests for repayment, denial of claims, and fines and penalties.

54. Old FORBA's management, including, but not limited to, Dan DeRose and Michael Rounph, threatened and berated Small Smiles dentists in an effort to increase production. Old FORBA exerted significant pressure on Small Smiles dentists across the country, including dentists in Colorado; Georgia; New York and Ohio.

55. In addition, Old FORBA instituted a "contest" to encourage greater production by the Small Smiles Centers in order to artificially and improperly increase revenue, and thereby EBITDA.

56. Old FORBA concealed the fact that it was pressuring dentists to increase production. For example, during negotiations with New FORBA, Dan DeRose falsely represented that Old FORBA "never used" data regarding "production per dentist." In a June 20, 2006 email to New FORBA, Dan DeRose stated: "We will not be forwarding production per dentist as it is an irrelevant calculation. Never used it never will. Meaningless and dangerous (number one trigger point for fraud)."

57. In fact, internal communications and documents show that Old FORBA actively monitored production per dentist, and actively and repeatedly pressured dentists to keep their production up. For instance, Old FORBA generated spreadsheets tracking "Dentist Efficiency" that specifically tracked individual dentist production. Old FORBA discussed these production metrics with Small Smiles dentists, and sent emails emphasizing the need for increased production. For example, in a May 6, 2004 email, Dan DeRose instructed senior management to "creatively suggest opportunities [for Atlanta dentists] to increase production" and noted that the Atlanta clinic "is dead last out of all 18 clinics." In a June 23, 2006 email, Michael Rounph

praised senior managers for pressuring dentists to produce: "Excellent job this week on the production emails. Let's keep the pressure on. It will make a difference." Mr. Rounph sent emails directly to the Centers emphasizing that "production per patient . . . [s]hould be an area to focus on with your dentists;" and "[a]s we have discussed, our focus needs to be on increasing production per patient."

58. After entering into the Asset Purchase Agreement, Old FORBA continued to pressure dentists to produce specifically to ensure that the purchase price would not decrease. In fact, in July 2006, the purchase price was reduced from \$470 million (which had been based on Old FORBA's budgeted EBITDA for 2006), to \$435 million (based on the Re-calculated 2006 EBITDA Forecast). Old FORBA was concerned that any further decrease in production would reduce revenue, which would lower EBITDA and further reduce the purchase price. The pressure to produce continued, continuing to improperly inflate Old FORBA's EBITDA.

59. Contrary to the representations and warranties in the APA, Old FORBA's financial statements did not reflect the true financial condition of Old FORBA, nor did they disclose the reasonable possibility of government action to recover payments for unnecessary or improperly documented services resulting from Old FORBA's inappropriate push for production.

60. New FORBA agreed to close on the transaction in reliance on all of the financial information provided up to the Closing. Because the financial information provided to New FORBA was inflated, New FORBA's purchase price was inflated.

61. Old FORBA's financial statements were also inaccurate, in breach of the warranties in §§4.5 and 4.18 of the APA, because they included amounts received from certain states (including Georgia -- \$216,216, and New York -- \$2.3 million), that have been reclaimed

by those states as improper overpayments. The inclusion of this revenue in Old FORBA's financial statements had the direct effect of inflating New FORBA's purchase price.

62. As a direct and proximate cause of the material inaccuracies in Old FORBA's financial statements, New FORBA overpaid substantially in purchasing Old FORBA's assets.

Breach of APA §§4.6(a), 4.8(c), and 4.8(e) - Licenses and Permits

63. Old FORBA breached the warranties contained in APA §§4.6(a), 4.8(c), and 4.8(e), which provide that:

FORBA and each of the Practices possess all permits, licenses, consents, authorizations, certificates, variances, exemptions, orders and approvals of and from all, and has made all declarations and filings with, Governmental Authorities necessary for the lawful conduct of their respective businesses. . . . (APA §4.6(a)).

* * *

Each Associated Dentist now employed by or contracting with any Practice engages in dental practice only for the corresponding Practice . . . has graduated from an accredited school of dentistry or its equivalent in the case of certain foreign Associated Dentists, is fully accredited as, and has all permits or a pending application for all permits, licenses, consents, authorizations, certificates, variances, exemptions, orders and approvals of and from all, and has made all declarations and filings with, Governmental Authorities and other governmental authorizations necessary to practice dentistry in each state in which such Associated Dentist engages in dental practice. . . . To the extent required by Applicable Law, each Practice Owner is fully accredited, and has all necessary Governmental Permits, in each state (i) in which such Practice Owner engages in dental practice or (ii) where any professional corporation or other entity through which any Practice operates in which the Practice Owner has any interest conducts its operations. (APA §4.8(c)).

* * *

Each Governmental Permit required to be maintained by an Associated Dentist, Associated Professional or Practice Owner is valid and in full force and effect and each Associated Dentist, Associated Professional or Practice Owner is in compliance in all respects with all of the terms and requirements thereof" and that "no event has occurred or circumstance exists that may (with or without notice or lapse of time) constitute or result directly or indirectly in a violation of or a failure to comply with any term or requirement of any Governmental Permit maintained by any Associated Dentist, Associated Professional or Practice Owner, or result

directly or indirectly in the revocation, withdrawal, suspension, cancellation or termination of, or any modification to, any Governmental Permit maintained by any Associated dentist, Associated Professional or Practice Owner. (APA §4.8(e)).

64. Old FORBA breached these warranties by, for example, omitting material facts regarding the falsification of licensure materials during Old FORBA's management of the Small Smiles Centers. After the closing of the transaction, New FORBA learned that an Old FORBA employee, Kallene West, had taken certain continuing education courses and exams on behalf of Small Smiles dentists and Practice Owners Robert Andrus and Kenneth Knott during the period that Old FORBA managed the Centers. With the knowledge of Drs. Andrus and Knott, Ms. West fraudulently obtained certificates of completion purporting to show that Dr. Andrus and Dr. Knott had completed required continuing education courses and had used those certificates to obtain state licenses in, at least, New York and Nevada. In addition, Ms. West provided an Associated Dentist in the Toledo Small Smiles Center, Dr. Swapna Kakarla, with the answers to the Ohio Jurisprudence exam on or about March 15, 2006.

65. In breach of the APA, Old FORBA had knowledge of the falsification of licensing information but did not disclose such information to New FORBA.

66. New FORBA suffered losses as a direct and proximate result of Old FORBA's breach of these warranties.

Breach of APA §4.7(b) - Performance of Contractual Obligations

67. Old FORBA breached the APA's warranties, including §4.7(b), providing that Old FORBA had satisfied its contractual obligations under the Assumed Contracts. Section 4.7(b) of the APA provides that:

FORBA has performed its obligations, and is not in breach or default, nor do any circumstances exist which with or without notice or lapse of time, or both, would

result in breach or default, nor is there any claim of such breach or default with respect to any obligation to be performed, under any Assumed Contract, which breach or default, if not cured, would, individually or in the aggregate, have a Material Adverse Effect. FORBA has performed its obligations, and is not in breach or default, nor do any circumstances exist which with or without notice or lapse of time, or both, would result in breach or default, nor is there any claim of such breach or default with respect to any obligation to be performed, under any Management Agreement.

68. Old FORBA breached the APA's warranties in §4.7(b) by omitting material facts regarding its breach of its obligations under certain Assumed Contracts and Management Agreements. For example, in its Management Agreements with a number of Small Smiles Centers, including Albany, Albuquerque, Atlanta, Augusta, Baltimore, Boise, Charleston, Cincinnati, Columbia, Columbus, Dayton, East Albuquerque, Florence, Gary, Greenville, Indianapolis, Lawrence, Lynn, Macon, Mattapan, Myrtle Beach, Oklahoma City, Omaha, Phoenix, Richmond, Roanoke, Rochester, Roselawn, Spartanburg, Springfield, Syracuse, Thornton, Toledo, Tucson, Tulsa, Washington, D.C. and Worcester, Old FORBA agreed to "establish . . . all operational policies and procedures reasonably necessary for establishing the appropriate standards of patient care at the Clinic," and to "maintain and update, as reasonably required, quality control programs for the Clinic, including written procedures for handling patient complaints." However, Old FORBA did not comply with these contractual obligations. Old FORBA provided dentists with selected literature relating to pediatric dentistry practices, and conducted periodic chart audits, for which the centers themselves selected the charts. Old FORBA did not have a sufficient compliance program, did not establish or promote clinical guidelines or quality assurance protocols, and did not establish guidelines regarding proper charting and documentation. Contrary to its contractual obligations, Old FORBA did not establish policies, procedures, or quality control measures to promote appropriate standards of

care at the Small Smiles facilities. As a result, Old FORBA breached the warranties in §4.7(b) of the APA.

69. Another example of Old FORBA's breach of its obligations under the Management Services Agreements relates to Old FORBA's contractual duty to "use its reasonable efforts to obtain and maintain in the name and at the expense of [the Center] all licenses, permits, and Medicare and applicable Medicaid provider numbers required or appropriate in connection with the operation of the Business." As described above, Old FORBA personnel falsified certain licensure information relating to Small Smiles dentists and Center owners Drs. Andrus and Knott, and Toledo Center dentist Swapna Kakarla, in breach of Old FORBA's contractual obligation under the Management Services Agreements. As a result, Old FORBA breached the warranties in §4.7(b) of the APA.

70. Small Smiles Centers have been the subject of federal and state investigations relating to the standard of care and quality control procedures at the Centers. As a direct and proximate cause of Old FORBA's breach of §4.7(b), New FORBA has suffered losses, including legal fees and costs already incurred and to be incurred in responding to government requests for documents and information regarding Old FORBA's pre-sale conduct, as well as losses resulting from requests by certain states for repayment of amounts previously paid by the states for services performed at the dental centers.

Breach of APA §§4.6(b), 4.8(f) and 4.14 -- Compliance with Applicable Laws

71. Pursuant to APA §§ 4.6(b), 4.8(f) and 4.14, Old FORBA provided warranties that Old FORBA and the Small Smiles Practices have complied with Applicable Laws and the standards of the American Academy of Pediatric Dentistry:

“The activities and business of FORBA and each of the Practices are being and have been conducted in compliance with the Applicable Laws. . . .” (APA §4.6(b)).

* * *

“[E]ach Practice is and has been, with respect to conduct of its operations, in compliance with all Applicable Laws. . . .” (APA §§ 4.8(f)).

* * *

“FORBA is and has been, with respect to the operation of the Business, in compliance with guidelines of the American Academy of Pediatric Dentistry and all Applicable laws,” and “each Practice is and has been, with respect to the operation of its respective business, in compliance with all Applicable Laws.” (APA §4.14).

72. Old FORBA breached the warranties in the APA, including §§4.6(b), 4.8(f) and 4.14, by omitting material facts regarding the failure of Old FORBA and certain Small Smiles practices under its management to comply with applicable laws and accepted standards of dental care.

73. For example, Old FORBA knew that certain Small Smiles Centers did not comply with accepted standards for documentation, or “charting,” of dental procedures. As reflected in an August 24, 2005 email from Defendant Richard Lane, Old FORBA understood that certain of the centers under its management were not properly documenting their procedures, and that “poor charting will cause problems in the future.” Nevertheless, Old FORBA did not disclose these charting deficiencies to New FORBA, in breach of the APA.

74. Old FORBA executives were aware of other operational issues at the Small Smiles Centers under their management that they did not disclose to New FORBA. For example, Dan DeRose acknowledged in an internal email dated December 29, 2004, that the Atlanta center “is a mess, a disappointment, a total disaster.” He continued:

I have looked the other way and allowed it to happen. Our employees don't care; our Dr's have no leadership and no professional conduct. Our [Office Manager] is a train wreck immature little girl with a huge mouth. Our systems are not in place. Medical Histories are not being sign[ed], x-rays suck, referrals are being made daily this is not a FORBA clinic and no one to blame but myself. . . . This email is not to be forwarded to anyone printed or duplicated in any way without my permission.

75. In addition, as described above, Old FORBA did not comply with Applicable Laws relating to the licensure of its Associated Dentists and Practice Owners with regard to Small Smiles dentists Andrus, Knott, and Kakarla.

76. As described above, another example of Old FORBA's and the Practices' non-compliance with Applicable Laws and standards, and the resultant breach of these warranties, relates to Old FORBA's practice of pressuring dentists to produce in order to inflate revenues. This practice created a culture within the Small Smiles Centers that emphasized production over quality care, in clear contravention of the Applicable Laws and accepted standards of dental care.

77. Old FORBA also was responsible for providing orientation and training to dental center dentists and staff. This training was inadequate, and did not ensure that all dentists and staff were sufficiently familiar with the guidelines of the American Academy of Pediatric Dentistry and Medicaid billing guidelines.

78. As a direct and proximate cause of Old FORBA's breach of APA §§4.6(b), 4.8(f) and 4.14, New FORBA has suffered losses, including legal fees and costs already incurred and to be incurred in responding to government requests for documents and information regarding Old FORBA's pre-sale conduct, as well as losses resulting from requests by certain states for repayment of amounts previously paid by the states for services performed at the dental centers.

Breach of §§4.6(b), 4.8(f), 4.11, and 4.14 - No Investigations, Actions or Litigation

79. Pursuant to APA §§4.6(b), 4.8(f), 4.11 and 4.14, Old FORBA provided warranties that, to its knowledge, no governmental investigations or other actions were pending or threatened against Old FORBA or any Practices:

“Neither FORBA nor any Practice has received any notice of any investigation by any Governmental Authority with respect to the Business or any Practice and, to the knowledge of FORBA, no such investigation is pending or threatened.” (APA §4.6(b)).

* * *

“Except as set forth in Schedule 4.8(f), no Practice has been charged with or given notice of, and to the knowledge of FORBA, is not under investigation with respect to any violation of any Applicable Law.” (APA §§ 4.8(f)).

* * *

“Except as disclosed on Schedule 4.11 . . . there are no Actions pending or, to the knowledge of FORBA, threatened against, affecting, or relating to FORBA, any Practice, the Asserts or the Business.” (APA §4.11).

* * *

“FORBA has not been charged with or given notice of, and to the knowledge of FORBA, is not under investigation with respect to any violation of any Applicable Law,” and “no Practice has been charged with or given notice of, and to the knowledge of FORBA is not under investigation with respect to any violation of any Applicable Law.” (APA §4.14).

80. Old FORBA breached these warranties by omitting material facts, that it had knowledge of, regarding increasing regulatory scrutiny of certain of its affiliated dental centers and its own business model, and the threat of government investigations. In 2005, Old FORBA sought and received advice from a trusted lawyer in connection with then-pending government investigations. The lawyer, who represented Old FORBA, and also represented Mark DeRose, the son and brother of Defendants Edward DeRose, Dan DeRose and Michael DeRose, warned Old FORBA in a memorandum that the pending regulatory actions facing Old FORBA were merely the “initial steps to a full investigation of [Old FORBA’s] dentists and clinics” and that

the “ultimate target” of the investigations was Old FORBA “from a Medicaid reimbursement perspective.” The memorandum noted that the investigation would likely “proceed in a slow and deliberate fashion against what” the regulators “perceive as the weak links in [Old] FORBA’s defense.”

81. The legal memorandum concluded with a warning to Old FORBA: “Although the status of the investigations appears relatively benign at this time, it is not. FORBA, the clinics and the dentists need to treat this situation as an *all out investigation* to ultimately shut down FORBA and the clinics and discipline the dentists.” (emphasis added). The memorandum demonstrates that Old FORBA’s lawyer (in consultation with others in his firm who “were formerly in charge of investigations at the AG’s office”) believed that “the current actions follow the typical pattern leading to full-scale fraud and other investigations,” and recommended that Old FORBA “proceed with extreme caution under the assumption that the investigations will continue and intensify over the next several months.” Old FORBA ignored the advice.

82. Old FORBA had other information indicating the potential for investigations or other legal action, but did not share it with New FORBA, in breach of the APA. For example, in an internal email, Defendant Dr. William Mueller warned of certain “things we do which have caused concern on the part of parents, dental boards or media.” His list included: (1) “Parents [in the] back”; (2) patient “Immobilization”; (3) use of “Stainless steel crowns”; and (4) “Amount of work done at one time.” These very topics were ultimately the subject of a joint federal-state government investigation into the Small Smiles Centers, Old FORBA and New FORBA, coordinated by the United States Department of Justice.

83. In addition, Old FORBA knowingly provided incomplete and misleading information concerning the investigation into Dr. Michael DeRose’s Medicaid Dental Centers in

North Carolina (the “North Carolina Centers”). The investigation of Dr. Michael DeRose and the North Carolina Centers began prior to the APA, and by the time of the APA, Dr. Michael DeRose and his brother Danny, as well as the Old FORBA General Counsel, Joe Bower, were aware that the investigation was serious and likely to result in a settlement in the millions of dollars, and that government investigations were focusing on practices that the North Carolina centers shared with the Old FORBA centers.

84. Old FORBA failed to disclose to New FORBA the seriousness of the North Carolina investigation and its probable impact on the Small Smiles Centers given the practices under investigation and the role of Dr. Michael DeRose and Dr. Bob Andrus in both sets of centers.

85. In April 2008, the North Carolina Centers entered into a Settlement Agreement with the U.S. Department of Justice on behalf of the Office of Inspector General of the United States Department of Health and Human Services, the State of North Carolina, and the North Carolina Division of Medical Assistance. The North Carolina Centers paid \$10,050,000 to settle its potential civil liability for allegedly “submitting [certain] claims for reimbursement . . . that were not medically necessary and/or were performed in a manner that did not meet professionally-recognized standards of care” and “failing, in some cases, to obtain informed consent for medical procedures and services.”

86. New FORBA suffered damages as a result of Old FORBA’s failure to disclose to New FORBA its knowledge that a government investigation of the Small Smiles Centers and the management company was likely. In late 2007, New FORBA learned that it, Old FORBA, and the Small Smiles Centers were the subject of a nationwide government investigation involving many of the issues previously identified by Old FORBA’s counsel and partners prior to the

September 2006 closing, but not disclosed to New FORBA. New FORBA expended significant attorneys' fees and other costs in responding to the investigation. In January 2010, New FORBA entered into a settlement agreement with the Department of Justice, the Office of the Inspector General of the Department of Health and Human Services and a number of states in order to avoid the distraction and further costs associated with the investigation and any possible litigation. There were no findings that New FORBA violated the law. The amount of the settlement, which relates only to claims submitted to the government for payment after September 26, 2006, was \$24 million.

87. In its press release announcing the settlement, the State of New York, Office of the Medicaid Inspector General ("OMIG") stated that "New York State and the federal government took action after hearing complaints that the previous FORBA management [Old FORBA] allowed alleged improper practices in treating children, specifically Medicaid recipients, by restraining them during lengthy dental visits, performing root canals and placing crowns on baby teeth, and not allowing parents to accompany children during dental treatment."

Breach of APA §4.24 -- Disclosure

88. APA §4.24 provides that "[n]o representation or warranty made by FORBA in this Agreement contains any untrue statement of a material nature or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading."

89. Old FORBA breached APA §4.24 because, as detailed above, a number of warranties made by Old FORBA contained untrue statements or omitted material facts, including APA §§4.5, 4.6, 4.7, 4.8, 4.11, 4.14. 4.18.

90. Misleading representations, omissions, and other wrongful conduct by Old FORBA have caused New FORBA to suffer substantial injury.

Breach of APA §10.1 -- Indemnification

91. As Old FORBA's wrongful conduct and misleading and inaccurate representations and omissions came to light, and as various states began to conduct investigations and reclaim alleged overpayments relating to the time period of Old FORBA's management of the Centers, New FORBA exercised its rights under the APA to enforce Old FORBA's indemnification obligations.

92. Pursuant to the APA, notices of indemnification claims against Old FORBA were to be sent to "FORBA, LLC, 415 N. Grand Ave, Pueblo, CO 81003, Attn: Dan DeRose, President." APA § 11.9.

93. On March 21, 2008, New FORBA sent a claims notice to Old FORBA informing Old FORBA that various federal and state government authorities were investigating the dental management business purchased from Old FORBA, and notified Old FORBA that New FORBA sought indemnification under APA §10.1 for any losses relating to Old FORBA's pre-sale conduct, including legal fees and costs already incurred and to be incurred in responding to government requests relating to Old FORBA and to pre-sale conduct of the centers, and any losses resulting from breaches of warranties revealed during the course of the investigations. New FORBA has incurred considerable attorneys' fees and expenses, in excess of \$1 million, in responding to government inquiries relating to Old FORBA and Old FORBA's management of the centers. (APA §10.1 specifically provides that New FORBA is entitled to indemnification "for any damages, claims, costs, loss, liabilities, expenses or obligations (including, without limitation, reasonable attorneys' fees and associated expenses)"). As stated above, New FORBA

also suffered losses and damages as a result of Old FORBA's breaches of warranties. Old FORBA has denied New FORBA's claim for indemnification, in breach of its indemnification obligation. In denying the claim, Old FORBA stated that it did not require any further information from New FORBA.

94. On June 24, 2008, New FORBA sent a second claims notice to Old FORBA for losses arising from the falsified credentialing of Old FORBA employees and affiliated dentists, including Dr. Robert Andrus, Dr. Kenneth Knott and Dr. Swapna Kakarla. The letter reiterated Old FORBA's obligation under §10.1 (d) of the APA "to indemnify us for 'any damages, claims, costs, loss, liabilities, expenses, or obligations' we incur 'as a result of or arising out of . . . [your] ownership or operation of the Assets or Business prior to the Effective Time,'" and under §10.1(e) "to indemnify us 'for any damages, claims, costs, loss, liabilities, expenses, or obligations' we incur 'as a result of or arising out of . . . [your] acts or omissions prior to the Effective Time.'" Old FORBA has denied this second claim for indemnification in breach of its indemnification obligations.

95. On September 4, 2008, New FORBA sent a third claims notice to Old FORBA seeking indemnification for losses resulting from a civil RICO suit filed against New FORBA and its affiliates, and from a search warrant executed at one of the Small Smiles Centers in Tucson, Arizona. The civil suit sought damages relating to alleged conduct occurring in July and August 2004, and the search warrant sought documents dating back to May 16, 2005 — before New FORBA purchased the business. New FORBA incurred attorneys' fees and other costs in responding to these actions. Old FORBA has denied this third claim for indemnification, in breach of its indemnification obligations.

96. On September 24, 2008, New FORBA sent a fourth claims notice to Old FORBA seeking indemnification for losses, including legal fees, relating to federal and state investigations of Small Smiles Centers in Arizona, Colorado, Georgia, Idaho, Indiana, Kansas, Maryland, Massachusetts, Nebraska, New Mexico, New York, Oklahoma, Ohio, South Carolina, Virginia, and Washington, D.C. dating back to 2002. Old FORBA has denied this fourth claim for indemnification, in breach of its indemnification obligations.

97. On March 11, 2009, New FORBA provided an update on its earlier claims notices. In particular, New FORBA noted that an investigation by the Georgia Department of Community Health determined that the State of Georgia made overpayments, from 2005 through 2007, in the amount of \$408,199.51, of which at least \$290,749.00 was for services rendered prior to September 26, 2009, during the time when Old FORBA managed the Georgia Small Smiles clinics. New FORBA was compelled to pay the State of Georgia \$216,216 for amounts the state claims were improperly paid to the Georgia centers during Old FORBA's management. Old FORBA has denied the claim for indemnification and refused to indemnify New FORBA for payments made to Georgia, in breach of its indemnification obligations.

98. The March 11, 2009 letter also noted that the New York Office of Medicaid Inspector General ("OMIG") had asserted that the state overpaid Small Smiles of Syracuse an amount between \$1,300,233 and \$1,632,080 for the time period January 1, 2005 through December 31, 2006. During 21 of the 24 months covered by OMIG's audit, the Syracuse center was managed by Old FORBA.

99. On November 13, 2009, New FORBA notified Old FORBA that New York OMIG had asserted an estimated overpayment to Small Smiles of Rochester in the amount of \$2,000,347, covering the time period from January 1, 2006 through December 31, 2007

100. New FORBA has agreed to pay the State of New York \$2.3 million to resolve the audit findings from the Syracuse and Rochester centers for periods prior to September 26, 2006. Old FORBA has denied the claim for indemnification and refused to indemnify New FORBA for payments to New York, in breach of its indemnification obligations.

101. Old FORBA and the Individual Defendants have refused to indemnify New FORBA for any of the indemnification claims noticed by New FORBA and breached the indemnification provisions of the APA.

102. All conditions precedent to the institution of this action by New FORBA have been satisfied, waived, or otherwise excused.

CAUSES OF ACTION

COUNT I

(Breach of Contract Against Old FORBA -- APA Representations and Warranties)

103. New FORBA re-alleges and incorporates by reference the allegations of paragraphs 1 through 102 of this Amended Complaint as if fully set forth herein.

104. Old FORBA and New FORBA entered into an APA.

105. The APA contains representations and warranties in §§4.5, 4.6, 4.7, 4.8, 4.11, 4.14, 4.18, and 4.24.

106. Pursuant to the APA (as amended), New FORBA paid \$435 million to purchase certain Old FORBA assets, based on and in reliance on these warranties and representations made by Old FORBA.

107. Old FORBA breached the APA because the representations and warranties in §§4.5, 4.6, 4.7, 4.8, 4.11, 4.14, 4.18, and 4.24 contained untrue statements of a material nature or omitted to state a material fact necessary to make all of the representations and warranties

contained in each of the above-referenced sections, in light of the circumstances in which they were made, not misleading.

108. As a direct and proximate cause of Old FORBA's breach of contract, New FORBA has suffered damages in excess of \$50,000,000.00.

109. New FORBA is entitled to damages arising out of Old FORBA's breach of contract.

COUNT II
(Breach of Contract against Old FORBA -- Indemnification Obligations Under APA §10.1(a))

110. New FORBA re-alleges and incorporates by reference the allegations of paragraphs 1 through 102 of this Amended Complaint as if fully set forth herein.

111. Old FORBA and New FORBA entered into an APA.

112. The APA contains representations and warranties in §§4.5, 4.6, 4.7, 4.8, 4.11, 4.14, 4.18, and 4.24.

113. Pursuant to the APA (as amended), New FORBA paid \$435 million to purchase certain Old FORBA assets, based on and in reliance on these warranties and representations made by old FORBA.

114. Old FORBA breached the APA because the representations contained in APA §§4.5, 4.6, 4.7, 4.8, 4.11, 4.14, 4.18, and 4.24 contained untrue statements of a material nature or omitted to state a material fact necessary to make all of the representations and warranties contained in each of the above-referenced sections, in light of the circumstances in which they were made, not misleading.

115. The APA contains an indemnification provision which provides that Old FORBA shall:

[I]ndemnify and hold harmless [New FORBA] from, against and for any damages, claims, costs, loss, liabilities, expenses or obligations (including, without limitation, reasonable attorneys' fees and associated expenses, but not including time spent by employees of such party), whether or not involving a third-party claim (collectively "losses"), incurred or suffered by any of them as a result of or arising from (a) any breach of or inaccuracy in any representation or warranty made by FORBA in this Agreement or any other Transaction Agreement; (b) any breach of a covenant or agreement made by FORBA in this Agreement or any other Transaction Agreement; (c) Excluded Assets and Excluded Liabilities; (d) FORBA's ownership or operation of the Assets or the Business prior to the Effective Time; and (e) FORBA's acts or omissions prior to the Effective Time.

APA, §10.1.

116. New FORBA provided notice to Old FORBA of its claims for indemnification, as required by the APA, in letters dated March 21, 2008, June 24, 2008, September 4, 2008, and March 11, 2009.

117. New FORBA is entitled to indemnification from Old FORBA pursuant to the APA.

118. Old FORBA breached APA §10.1(a) because it has refused to indemnify New FORBA for losses incurred as a result of Old FORBA's "breach of or inaccuracy in any representation or warranty made by FORBA in this Agreement or any other Transaction Agreement."

119. As a direct and proximate cause of Old FORBA's contractual breach, New FORBA has suffered damages in excess of \$50,000,000.00.

120. New FORBA is entitled to damages arising out of Old FORBA's contractual breach.

COUNT III
(Breach of Contract against Old FORBA -- Indemnification Obligations Under APA
§§10.1(d) and 10.1(e))

121. New FORBA re-alleges and incorporates by reference the allegations of paragraphs 1 through 102 of this Amended Complaint as if fully set forth herein.

122. Old FORBA and New FORBA entered into an APA.

123. The APA contains an indemnification provision which provides that Old FORBA shall:

[I]ndemnify and hold harmless [New FORBA] from, against and for any damages, claims, costs, loss, liabilities, expenses or obligations (including, without limitation, reasonable attorneys' fees and associated expenses, but not including time spent by employees of such party), whether or not involving a third-party claim (collectively "losses"), incurred or suffered by any of them as a result of or arising from (a) any breach of or inaccuracy in any representation or warranty made by FORBA in this Agreement or any other Transaction Agreement; (b) any breach of a covenant or agreement made by FORBA in this Agreement or any other Transaction Agreement; (c) Excluded Assets and Excluded Liabilities; (d) FORBA's ownership or operation of the Assets or the Business prior to the Effective Time; and (e) FORBA's acts or omissions prior to the Effective Time.

APA, §10.1.

124. New FORBA provided notice to Old FORBA of its claims for indemnification, as required by the APA, in letters dated March 21, 2008, June 24, 2008, September 4, 2008, and March 11, 2009.

125. New FORBA is entitled to indemnification from Old FORBA pursuant to the APA.

126. Old FORBA breached APA §§10.1(d) and 10.1(e) because it has refused to indemnify New FORBA for losses incurred as a result of Old FORBA's "ownership or operation of the Assets or the Business prior to the Effective Time," and Old FORBA's "acts or omissions prior to the Effective Time."

127. As a direct and proximate cause of Old FORBA's contractual breaches, New FORBA has suffered damages in excess of \$5,000,000.00, including legal fees and costs incurred in responding to government requests relating to Old FORBA and to pre-sale conduct of the Centers.

128. New FORBA is entitled to damages arising out of Old FORBA's contractual breaches.

COUNT IV

(Breach of Contract against Individual Defendants -- All Indemnification Obligations)

129. New FORBA re-alleges and incorporates by reference the allegations of paragraphs 1 through 102 of this Amended Complaint as if fully set forth herein.

130. Old FORBA and New FORBA entered into an APA.

131. Article 10 of the APA contains an indemnification provision which provides that Old FORBA shall:

[I]ndemnify and hold harmless [New FORBA] from, against and for any damages, claims, costs, loss, liabilities, expenses or obligations (including, without limitation, reasonable attorneys' fees and associated expenses, but not including time spent by employees of such party), whether or not involving a third-party claim (collectively "losses"), incurred or suffered by any of them as a result of or arising from (a) any breach of or inaccuracy in any representation or warranty made by FORBA in this Agreement or any other Transaction Agreement; (b) any breach of a covenant or agreement made by FORBA in this Agreement or any other Transaction Agreement; (c) Excluded Assets and Excluded Liabilities; (d) FORBA's ownership or operation of the Assets or the Business prior to the Effective Time; and (e) FORBA's acts or omissions prior to the Effective Time.

APA, §10.1.

132. The Individual Defendants signed a "Joinder" to the APA, agreeing to be "responsible, on a pro-rata basis, with FORBA for the obligations of FORBA pursuant to Article 10 of this Agreement."

133. New FORBA provided notice of its claims for indemnification, as required by the APA, in letters dated March 21, 2008, June 24, 2008, September 4, 2008, and March 11, 2009.

134. New FORBA is entitled to indemnification from the Individual Defendants pursuant to § 10.1 of the APA and the Joinder to the APA.

135. The Individual Defendants have refused to indemnify New FORBA for any of the indemnification claims noticed by New FORBA, in breach of the APA.

136. As a direct and proximate cause of the Individual Defendants' failure and refusal to indemnify New FORBA, New FORBA has suffered damages in excess of \$50,000,000.00.

137. New FORBA is entitled to damages arising out of the Individual Defendants' breach of their contractual obligation to indemnify New FORBA.

COUNT V
(Declaratory Judgment Act, 28 U.S.C. §2201(a)- Against All Defendants)

138. New FORBA re-alleges and incorporates by reference the allegations of paragraphs 1 through 102 of this Amended Complaint as if fully set forth herein.

139. Old FORBA and New FORBA entered into an APA.

140. The APA contains an indemnification provision which provides that Old FORBA shall:

[I]ndemnify and hold harmless [New FORBA] from, against and for any damages, claims, costs, loss, liabilities, expenses or obligations (including, without limitation, reasonable attorneys' fees and associated expenses, but not including time spent by employees of such party), whether or not involving a third-party claim (collectively "losses"), incurred or suffered by any of them as a result of or arising from (a) any breach of or inaccuracy in any representation or warranty made by FORBA in this Agreement or any other Transaction Agreement; (b) any breach of a covenant or agreement made by FORBA in this Agreement or any other Transaction Agreement; (c) Excluded Assets and Excluded Liabilities; (d) FORBA's ownership or operation of the Assets or the Business prior to the Effective Time; and (e) FORBA's acts or omissions prior to the Effective Time.

APA, §10.1.

141. The Individual Defendants signed a “Joinder” to the APA, agreeing to be “responsible, on a pro-rata basis, with FORBA for the obligations of FORBA pursuant to Article 10 of this Agreement.”

142. New FORBA provided notice of its claims for indemnification, as required by the APA, in letters dated March 21, 2008, June 24, 2008, September 4, 2008, and March 11, 2009.

143. Old FORBA and the Individual Defendants have refused to indemnify New FORBA and its affiliated Small Smiles Centers for any of the indemnification claims noticed by New FORBA, in breach of the APA.

144. There is a justiciable controversy as to whether Old FORBA and the Individual Defendants must indemnify New FORBA for claims New FORBA has made pursuant to the terms of the APA, as well as any additional costs and losses New FORBA might sustain related to indemnifiable claims in the future, including legal fees and costs incurred in connection with New FORBA’s successful defense of claims brought by Old FORBA in state court in Wisconsin relating to the APA and the Escrow Agreement (*LICSAC, LLC, et al. v. Small Smiles Holding Company, et al.*, Case No. 08-CV-2215).

145. New FORBA is entitled to a declaration of its rights to indemnification for such claims made by New FORBA in its notices dated March 21, 2008, June 24, 2008, September 4, 2008, and March 11, 2009, in amounts to be determined, and a declaration of its right to indemnification for ongoing costs incurred relating to Old FORBA’s conduct, and future claims arising out of the breaches of warranties and breaches of contract outlined above.

COUNT VI
(Declaratory Judgment Act, 28 U.S.C. §2201(a)- Against Individual Defendants)

146. New FORBA re-alleges and incorporates by reference the allegations of paragraphs 1 through 102 of this Amended Complaint as if fully set forth herein.

147. Old FORBA and New FORBA entered into an APA.

148. Article 10 of the APA contains the parties' obligations with respect to "Indemnification and Remedies."

149. The Individual Defendants signed a "Joinder" to the APA, providing that "[t]o facilitate the consummation of the transactions in this Agreement and in consideration of the substantial economic and other benefits inuring to the undersigned as a member of FLLC, DMLLC or NYLLC or a shareholder of DDM, the undersigned hereby joins this Agreement for the sole purpose of being responsible, on a pro-rata basis, with FORBA for the obligations of FORBA pursuant to Article 10 of this Agreement." APA, p. 41.

150. There is a justiciable controversy as to whether the Individual Defendants are liable, on a pro-rata basis, pursuant to the Joinder to the APA, for any portion of any judgment against Old FORBA. In addition, there is a justiciable controversy as to whether the Individual Defendants are liable, on a pro-rata basis, pursuant to the Joinder for any costs or expenses that New FORBA may incur in the future as a result of any breach of the contract or the representations and warranties in the APA.

151. New FORBA is entitled to a declaratory judgment that the Individual Defendants are liable, on a pro-rata basis, for any judgment against Old FORBA.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, New FORBA respectfully requests that the Court enter Judgment in favor of New FORBA granting the following relief:

- A. A declaratory judgment that New FORBA is entitled to indemnification from Old FORBA and the Individual Defendants for those claims in its letters dated March 21, 2008, June 24, 2008, September 4, 2008, and March 11, 2009, and ongoing and future claims arising out of Old FORBA's breaches of warranties and breaches of contract;
- B. That Old FORBA be found liable to New FORBA for monetary damages to which New FORBA is entitled for breach of contract, in an amount to be shown at trial in excess of \$50,000,000.00;
- C. That Old FORBA be found liable to New FORBA for monetary damages to which New FORBA is entitled for breach of §10.1(a) of the APA, in an amount to be shown at trial in excess of \$50,000,000.00;
- D. That Old FORBA be found liable to New FORBA for monetary damages to which New FORBA is entitled for breach of §§10.1(d) and 10.1(e) of the APA, in an amount to be shown at trial in excess of \$5,000,000.00;
- E. That the Individual Defendants be found liable to New FORBA for monetary damages to which New FORBA is entitled for breach of contract, in an amount to be shown at trial in excess of \$50,000,000.00;
- F. A declaratory judgment that the Individual Defendants are liable, on a pro-rata basis, for the judgment against Old FORBA;
- G. That pursuant to APA §11.16, and in addition to any other relief or award to which New FORBA may be entitled, New FORBA be awarded the legal expenses it incurred to enforce the APA, including reasonable attorneys' fees, costs, and necessary disbursements; and
- H. Such other and further relief available that the Court may deem just and proper.

Dated: January 22, 2010

Respectfully submitted,

/s/ Christopher J. Dawes

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, I electronically filed the foregoing **AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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s/ Ed Wesselhoff
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