

# EXHIBIT “D”

Chartis  
Healthcare Malpractice Claims  
101 Hudson Street, 28th floor  
Jersey City, NJ 07302  
www.chartisinsurance.com



July 27, 2010

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Small Smiles Holding Company  
ATTN: Linda S. Zoeller  
Assistant Vice President, Legal  
618 Church Street, Suite 520  
Nashville, Tennessee 37219

Re: *Parnell v. Forba Holdings, LLC et al.*

Insured: Small Smiles Holding Company  
Insurer: National Union Fire Insurance Company of Pittsburgh, PA  
Policy: Dentists Liability Policy No. DNU3375848 (the "Entities Policy")  
Policy Period: (September 26, 2009 to September 26, 2010)  
Policy: Dentists Liability Policy No. DNU6360128 (the "Individuals Policy")  
Policy Period: (December 1, 2009 to December 1, 2010)  
File Nos.: 027-097120 (DNU3375848 policy)  
027-097121 (DNU6360128 policy)

Dear Ms. Zoeller:

Chartis Claims, Inc. ("Chartis") is the claims administrator for National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), which issued the following policies placed through the Dentist's Advantage Program to Small Smiles Holding Company ("SSHC"):

- Dentists Liability Policy No. DNU3375848, for the policy period of September 26, 2009 to September 26, 2010 (the "Entities Policy"); and
- Dentists Liability Policy No. DNU6360128, for the policy period of December 1, 2009 to December 1, 2010 (the "Individuals Policy") (collectively, the "Policies").

We are in receipt of the July 2, 2010 letter from your counsel, John H. Fontham, whereby Mr. Fontham gave notice of the Amended Class Action Complaint (the "Amended Complaint"), filed on or about June 30, 2010, in the action styled Janice Parnell, Individually and as Guardian of De Andre Webb and Natasha Lee, Minors, on Behalf of Herself and Others Similarly Situated v. FORBA Holdings, LLC; FORBA Services, Inc., Small Smiles Holding Company, LLC; Small Smiles of Toledo LLC; John/Jane Does 1 Through 74 and American Capital, Ltd., et al., pending in the U.S. District Court for the Northern District of Ohio, Case No. 10-CV-00172 (the "Parnell Class Action").

As you are aware, by letter dated March 8, 2010, National Union disclaimed coverage for FORBA Holdings, LLC, FORBA Services, Inc., Small Smiles Holding Company, LLC and Small Smiles of Toledo, LLC (collectively, the "Small Smiles Defendants") with respect to the Parnell Class Action, based upon its review of the original complaint in the Parnell Class Action and under the Entities and Individual Policies. We also advised that National Union was filing a declaratory judgment complaint seeking a declaration that National Union has no duty to defend or indemnify the Small Smiles Defendants under the Policies in connection with the Parnell Class Action.

We have since received and reviewed the Amended Complaint. The purpose of this letter is to advise you that in light of allegations made in the Amended Complaint that were not asserted in the original complaint, National Union hereby withdraws its disclaimer with respect to the Entities Policy and agrees to provide a defense to FORBA Holdings, LLC, FORBA Services, Inc., Small Smiles Holding Company, LLC and Small Smiles of Toledo, LLC under the Entities Policy, subject to a complete reservation of rights with respect to insurance coverage under the Professional Liability Coverage Part.

We also wish to advise you that National Union disclaims coverage under the Billing Errors and Omissions Coverage Part to the Entities Policy, insofar as the insurance specified therein is not implicated in the Amended Complaint. Also, as discussed more fully below, certain of the claims asserted in the Amended Complaint fall outside the scope of the applicable coverages under the Policies.

Please be advised that National Union disclaims coverage with respect to the Individuals Policy for the Amended Complaint. The Individuals Policy is not even potentially triggered because the Small Smiles Defendants are not insureds under the Individuals Policy. We note that SSHC is the Named Insured under the Individuals Policy; however, the Policy provides no coverage to SSHC at all, as discussed below. Therefore, National Union has no duty to defend or indemnify SSHC (or any of the other Defendants in the Parnell Class Action<sup>1</sup>) with respect to the Amended Complaint under the Individuals Policy.

In addition, National Union has no duty to defend or indemnify American Capital, Ltd. ("American Capital") in respect of the Amended Complaint under both the Entities and the Individuals Policies because American Capital is not an insured under either Policy, as discussed more fully below. Therefore, National Union disclaims coverage for American Capital under the Policies. Accordingly, National Union will not pay for the defense of American Capital in connection with the Parnell Class Action. If you have information concerning American Capital's insured status under the Policies, please provide it to us right away.

We are aware that SSHC has already retained both local and national counsel to represent the Small Smiles Defendants in the Parnell Class Action. Please provide us with the complete list of lawyers that are representing Small Smiles Defendants and who the Small Smiles Defendants wish to represent them with respect to the Parnell Class Action, including their CVs and hourly billing rates (or any other billing arrangement between the Small Smiles Defendants and their lawyers for the Parnell Class Action). Please be advised that National Union will pay only reasonable rates – that is, rates that are

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<sup>1</sup> Please note that "Defendants" as used herein, refers to all of the Defendants named in the Amended Complaint collectively.

considered reasonable for the jurisdiction (in this case, Toledo, Ohio). In addition, National Union will not pay for both national counsel and local counsel in the Parnell Class Action. National Union also will not pay any defense costs incurred prior to tender of the Amended Complaint. Please contact the undersigned as soon as possible to discuss the foregoing.

### **SUMMARY OF COVERAGE POSITION**

We provide below a summary of National Union's coverage position with respect to the Amended Complaint. National Union agrees to defend the Small Smiles Defendants under the Entities Policy with respect to the Amended Complaint, subject to a complete reservation of rights. National Union has no duty to defend or indemnify, and disclaims coverage for the Small Smiles Defendants under the Individuals Policy because they are not insureds under the Policy and, with respect to SSHC, there is no coverage for SSHC under the Policy. National Union also disclaims coverage for American Capital under both Policies because American Capital is not an insured under both Policies.

For the reasons set forth in more detail herein, there is no coverage under the Policies as to any damages alleged in the Amended Complaint that are not the result of a "dental incident", as that term is defined in the Policies. Moreover, the Policies do not provide coverage for any punitive or statutory damages sought by Plaintiffs in the Amended Complaint.

Additionally, National Union further reserves all rights as to: (1) the insured status, and the extent of the insured status, of one or more of the Small Smiles Defendants under the Entities Policy; (2) the applicability of Exclusion B, which bars coverage for "dental incidents" arising out of any dishonest, fraudulent, criminal, or knowingly wrongful acts, errors, or omissions; (3) the applicability of Exclusion O, which bars coverage for an expected or intended "dental incident"; (4) the applicability of Exclusion A, which bars coverage for "dental incidents" that occurred prior to the inception dates of the Policies and which any insured knew or should have known would result in, or had resulted in, a claim; (5) the applicability of Exclusions K(1) and/or I, which bar coverage for a "dental incident" arising out of the unlicensed dispensation of drugs or the administration of "general anesthesia" by unlicensed personnel, respectively; and (6) the Other Insurance Clause.

Accordingly, and to the extent that it is determined that coverage is not available under the Entities Policy, National Union reserves its rights to withdraw its defense. In addition, National Union specifically reserves its right to seek and obtain reimbursement from the Small Smiles Defendants of all defense costs expended and/or incurred by National Union with respect to the Parnell Class Action in the event it is determined that the underlying claims in the Parnell Class Action are not covered in whole or in part under the Entities Policy. We remind you that National Union has filed a declaratory judgment action captioned National Union Fire Insurance Company of Pittsburgh, Pa. v. FORBA Holdings, LLC, FORBA Services, Inc., Small Smiles Holding Company and Small Smiles of Toledo, LLC, pending in the U.S. District Court for the Northern District of Ohio, No. 3:10-cv-00491-JGC, and advise you that this coverage position/reservation of rights letter does not change or otherwise affect National Union's position in that action.

Further, and not only as to the Amended Complaint and the Parnell Class Action, but also with respect to all similar lawsuits that are pending in other jurisdictions, National Union is investigating whether the limits of insurance listed in Item 5 of the Declarations and the coverages identified therein for the Entities Policy as well as the Individuals Policy accurately reflect the parties' intent at the time the Policies were issued with respect to the applicable limits. In addition, National Union is also investigating whether material misrepresentations and/or omissions were made by SSHC and/or any of the insureds during the underwriting of each of the Policies. As National Union's investigation remains ongoing, National Union reserves all rights to: (1) claim that the limits of insurance listed in the Declarations of both Policies are inaccurate and to seek reformation; and/or (2) seek, based upon its investigation, rescission of the Policies.

After you have reviewed the letter, please provide the undersigned with the additional information requested herein as well as any other information you would like National Union to consider. Also, if you have any questions about the letter, please contact me.

In considering your request for coverage for the Amended Complaint in the Parnell Class Action, we have carefully reviewed the Policies and the allegations asserted in the Amended Complaint. No other policies were considered. If you assert a right to coverage under another policy issued by any other member company of Chartis, please submit notice pursuant to the notice provisions contained in that policy.

### **BACKGROUND**

#### **A. The Parnell Class Action**

On or about January 25, 2010, Janice Parnell, individually and as guardian of minors De Andre Webb and Natasha Lee ("Plaintiffs"), filed a class action complaint against the Small Smiles Defendants in the U.S. District Court for the Northern District of Ohio.

On or about June 30, 2010 Plaintiffs<sup>2</sup> filed their Amended Class Action Complaint against the Small Smiles Defendants and American Capital. Plaintiffs allege that the Small Smiles Defendants participated in a nationwide conspiracy to perform medically unnecessary dental procedures upon children at pediatric dental clinics located in at least 22 states throughout the United States in order to defraud the parents and guardians of the children and third-party payors. Plaintiffs also allege that they alternatively seek recovery for damages arising from the Defendants' negligence in breaching duties owed to Plaintiffs, including failure to properly train, certify and supervise agents, malpractice and negligent infliction of emotional distress.

The putative class action is brought on behalf of the proposed Plaintiff Class, which is defined as "any child and/or the parent/guardian of any child who received medically unnecessary or excessive

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<sup>2</sup> We note that the Amended Complaint appears to identify only one "Plaintiff", Janice Parnell, in her individual capacity and as guardian of minors. However, throughout the Amended Complaint, there are references to "Plaintiffs", and allegations are made regarding injuries sustained by the two named minors, in addition to Plaintiff Parnell. Accordingly and, unless otherwise noted, the plural form of Plaintiff is used in this letter.

treatment, x-rays, sedation and/or restraints at any of Defendant's nationwide clinics." Plaintiffs also propose an Ohio subclass, which is defined as "any child and/or the parent/guardian of any child who resided in the State of Ohio and received medically unnecessary or excessive treatment, x-rays, sedation and/or restraints at any of Defendant's Ohio clinics."

Based on the information we have received to date, the following sets forth a summary of the allegations of the Amended Complaint in the Parnell Class Action. We recognize that the allegations in the Amended Complaint are unsubstantiated and we do not mean to suggest there is any merit to the allegations. Nevertheless, for ease of reference, we summarize those allegations that are relevant to our coverage position below.

**1. Factual Allegations of the Amended Complaint**

The Amended Complaint alleges that the FORBA Entities<sup>3</sup> issued and enforced guidelines, policies, procedures, practices and "billing production goals" to the nationwide clinics, including Small Smiles of Toledo ("SS Toledo"), that were designed to result in the battery of minor children and defrauding of parents and guardians and third party payors through the performance of medically unnecessary dental procedures upon children at the clinics, including pulpotomies (baby root canals), extractions, fillings and crowns. The Amended Complaint also alleges that children were subject to improper and unnecessary or excessive use of nitrous oxide sedation, physical restraints and/or behavior management techniques during the procedures. The Amended Complaint further alleges that these medically unnecessary or improper acts were taken by Defendants in order to obtain additional compensation from the parents and/or guardians and from third-party payors.

The Amended Complaint alleges that during employee training in Colorado, employees of the Small Smiles Defendants, including employees of SS Toledo, were taught the policy of "conversion", whereby Defendants required their clinics to "convert" patients who entered the clinics to receive routine care and cleaning into receiving medically unnecessary and far more invasive and expensive procedures. The Amended Complaint alleges that employees were taught to attempt to convert the routine procedures, such as receiving simple fillings, into pulpotomies and steel crown implants. This allegedly allowed the Small Smiles Defendants to bill the parents/guardians and third-party payors for much more expensive procedures.

The Amended Complaint alleges that following a routine checkup, parents/guardians were told that extensive additional procedures were medically necessary, even though the majority of the recommended procedures were not medically necessary. The Amended Complaint alleges that often the determination as to what procedures were medically necessary was made by employees, agents and servants of the Small Smiles Defendants who were not licensed to practice dentistry in that state.

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<sup>3</sup> In the Amended Complaint, Plaintiffs use the term "FORBA" throughout the complaint, which they state refers to SSHC, FORBA Holdings and FORBA Services collectively (Amended Complaint, ¶ 14). Accordingly, this letter's references to FORBA refer to those three entities.

The Amended Complaint alleges that the Small Smiles Defendants executed this fraudulent scheme to commit battery and defraud parents/guardians as third party payors as follows:

- Medicaid-eligible children would have an appointment for a routine check-up and cleaning with Defendants' clinics.
- The children would be given x-rays, a cleaning and then the dentist would evaluate the child's mouth.
- The x-rays were often not medically necessary, were taken incorrectly, were taken by employees not licensed to operate the x-ray machine, and/or were unreadable or even blank.
- The parents/guardians were then brought to a consultation room where they were told by the dentist or other clinic employee/independent contractor that their children needed extensive dental work including, but not limited to, pulpotomies and implanting steel crowns. Parents were told that these procedures were medically necessary when, in fact, the majority were not medically necessary.

The Amended Complaint alleges that parents were pressured to sign consent forms immediately and that the unnecessary procedures were performed on the same day as the initial consultation. The Amended Complaint further alleges that the Small Smiles Defendants did this for two reasons: (1) to ensure that the patients did not leave the clinics and not actually have the procedures performed; and (2) to prevent the patients from obtaining a second opinion as to the medical necessity of the procedures.

The Amended Complaint alleges that unqualified assistants with no formal education or training performed unnecessary and/or excessive nitrous oxide sedation. It is also alleged that FORBA encouraged the clinics to use a papoose board to restrain the children and render them unable to move their extremities, and that policies were instituted at clinics whereby parents/guardians of every child under the age of five were to be told that their child required immobilization, regardless of the true nature of the need for restraint. The Amended Complaint alleges that the Small Smiles Defendants unnecessarily used these papoose boards both for the convenience of the clinics' employees/independent contractors and so they could add to the bill charged to the parents/guardians and third party payors.

The Amended Complaint alleges that as a result of the battery upon the minor children and the fraud upon parents/guardians and third-party payors, the Small Smiles Defendants received significant amounts of additional revenue from each "converted" patient. The Amended Complaint also alleges that FORBA created and enforced nationwide corporate policies that set daily, monthly and annual billing quotas, or "billing production goals", for each facility and in connection with which monetary bonuses were given to employees to encourage conversion of routine patients into ones requiring extensive additional procedures. It is also alleged that the Small Smiles Defendants fraudulently hold themselves out as pediatric dentists even though the employees and independent contractors do not hold the requisite certification.

With respect to the minor Plaintiffs Webb and Lee, Plaintiffs allege in the Amended Complaint that Webb and Lee were patients at Small Smiles Toledo for "at least the past four years" and that the treatment they received and the harm they suffered are consistent with the treatment and harm suffered by "the numerous other minor children whom [sic] compromise the injured parties in this matter." Plaintiffs also allege that beginning in 2006 and continuing until December 2009, Webb and Lee were "regular patients" at Small Smiles Toledo and received "dental care" at least every six months. It is alleged that during this time, Webb and Lee underwent numerous improper, unnecessary and/or excessive dental procedures, sedation and physical restraining methods. Plaintiffs also allege that the treatment methods and procedures that Webb and Lee underwent failed to comport with the regular practices of other dentists practicing in the field of pediatric dentistry.

## **2. Allegations Against American Capital in the Amended Complaint**

The Amended Complaint alleges that American Capital is a corporation organized under the laws of the State of Delaware, with its principal place of business in Maryland. It is alleged that American Capital has been the majority owner of "Defendant FORBA" since September 2006. The Amended Complaint alleges that at the time American Capital acquired FORBA, American Capital knew or should have known of the tendency of FORBA to promote overtreatment and performance of unnecessary dental procedures, as well as the actual overtreatment and unnecessary procedures that were performed by FORBA's staff. It is alleged that American Capital exercised actual control over the daily operations of FORBA and that American Capital failed to take reasonable steps to "modify and eliminate" FORBA's practices of overtreatment and performance of unnecessary services, despite the fact that American Capital should have known that such practices constituted "either negligent or intentional misconduct" by FORBA. The Amended Complaint alleges that American Capital focused solely on maximizing its profits at the expense of the duties owed by FORBA to Plaintiffs and others.

We note that the foregoing allegations are found in the "Parties" section of the Amended Complaint (Amended Complaint, ¶¶16-22), and that American Capital is not specifically mentioned in any of the Common Factual Allegations set forth in the Amended Complaint (¶¶ 38-70). In addition, there are no actual claims for relief specifically asserted against American Capital or as a result of American Capital's conduct and no injuries or damages are asserted specifically against American Capital or as a result of American Capital's conduct.

In any event, and as addressed below, there is no coverage for American Capital under the Policies because American Capital is not an Insured under the Policies. As such, National Union disclaims coverage for American Capital under the Policies with respect to the Amended Complaint.

## **3. Claims for Relief in the Amended Complaint**

As and for the first claim for relief, the Amended Complaint alleges Fraud (Count I of the Amended Complaint). The Amended Complaint alleges that since their formation to the present, the Small Smiles Defendants have engaged in a continuous pattern and practice of intentionally misrepresenting and/or concealing information relating to the medical necessity of procedures to be performed and sedation and

restraints to be used on minor patients and relating to the qualification, training and certification of their employees.

As and for the second claim for relief, the Amended Complaint alleges Violation of the Ohio State RICO Statute (Count II). The Amended Complaint alleges that from the Defendants' formation to the present, persons controlling or directing the affairs of the enterprise conspired to, and did, engage in conduct involving the commission of two or more specifically prohibited state or federal criminal offenses, including systematic administration of and billing for medically unnecessary procedures, fraud, falsification of information, aiding and abetting of the criminal conduct of its agents, perjury, records destruction, witness intimidation, civil rights violations and mail and/or wire fraud. It is alleged that these acts were undertaken with the common scheme and purpose to commit battery upon minor children in order to obtain compensation. The Amended Complaint alleges that the criminal conduct of the enterprise constitutes a pattern of corrupt activity, a direct and proximate result of which Plaintiffs sustained unnecessary procedures, x-rays, sedation and/or restraining methods and suffered and continue to suffer severe emotional distress and psychological injuries.

As and for the third and fourth claims for relief, the Amended Complaint alleges Assault and Battery (Counts III and IV). The Amended Complaint alleges that the Small Smiles Defendants knew with substantial certainty, and intended, that their wrongful acts would result in a harmful or offensive contact with the patients and that the patients would be reasonably placed in fear of such contact. It is alleged that as a direct and proximate result of the acts, the minor Plaintiffs sustained pain and trauma, economic expenses, severe emotional distress and psychological injuries.

As and for the fifth and sixth claims for relief, the Amended Complaint alleges Intentional and/or Negligent Infliction of Emotional Distress (Counts V and VI). The Amended Complaint alleges that (as a part and parcel of their fraudulent scheme to commit battery and fraud for profit) the Small Smiles Defendants intentionally, willfully, wantonly and/or recklessly intended to cause emotional distress to Plaintiffs and knew or should have known that their actions would result in emotional distress. It is also alleged that the Small Smiles Defendants' fraudulent and wrongful actions constitute extreme and outrageous conduct that goes beyond the bounds of decency and/or is intolerable in a civilized community and that, as a direct and proximate result of the Small Smiles Defendants' actions, minor Plaintiffs have incurred pain and trauma, economic expenses and severe emotional distress and psychological injuries.

As and for the seventh and eighth claims for relief, the Amended Complaint alleges Negligence and Malpractice (Counts VII and VIII). The Amended Complaint alleges that alternative to the allegations of fraud, conspiracy and assault and battery, the treatment provided by "Defendants' professionals" was negligent and violated the applicable standard of care. It is alleged that the Defendants had an ongoing duty to Plaintiffs and others to ensure that their agents received proper training and the certifications necessary to practice pediatric dentistry in accordance with the applicable professional standards and state statutory requirements. It is further alleged that Defendants had an ongoing duty to Plaintiffs and others to provide adequate supervision of Defendants' agents to ensure that the agents did not deviate from the appropriate standards of care. Moreover, Plaintiffs allege that Defendants owed a duty of care to adhere to a treatment methodology that comported with applicable professional standards. The

Amended Complaint alleges that "[t]hough the actions of the Defendants may not have been undertaken for any fraudulent, dishonest, or knowingly wrongful purpose, and even though the injuries to the Plaintiff may not have been expected on [sic] intended by any Defendant," Defendants nevertheless breached duties owed to Plaintiffs and to others. (Amended Complaint, ¶106). The Amended Complaint alleges that the Small Smiles Defendants' breaches constitute the proximate cause of the pain and trauma suffered by Plaintiffs and others.

As and for the ninth claim for relief, the Amended Complaint alleges Loss of Consortium (Count IX). It is alleged that plaintiff Janice Parnell, the guardian of the minors Webb and Lee, lost the affection, society, love and companionship of the minors as a direct and proximate result of the Small Smiles Defendants' misconduct.

As and for the tenth claim for relief, the Amended Complaint alleges Violation of the Ohio Consumer Sales Practices Act (Count X). It is alleged that Plaintiffs are consumers and the Small Smiles Defendants are suppliers under the statute and that the Small Smiles Defendants knowingly took advantage of plaintiff Janice Parnell's inability to reasonably protect the interests of her children. It is further alleged that the Small Smiles Defendants engaged in deceptive acts or practices and that Defendants' acts, which were designed to induce Plaintiffs into accepting the services, were unconscionable. The Amended Complaint alleges that as a direct and proximate result of the Small Smiles Defendants' deceptive acts or practices, minor Plaintiffs have incurred pain and trauma, economic expenses and severe emotional distress and psychological injuries.

As and for the eleventh claim for relief, the Amended Complaint alleges Punitive Damages (Count XI). It is alleged that the Small Smiles Defendants' misconduct constitutes malice, oppression, aggravated or egregious fraud and/or conscious disregard for the safety of others with a great probability of causing substantial harm. The Amended Complaint alleges that the Small Smiles Defendants' misconduct resulted in actual damages and Plaintiffs are entitled to punitive damages.

As relief, the Amended Complaint seeks judgment against the Small Smiles Defendants jointly and severally and seeks: (1) a determination that the action may proceed as a class action; (2) compensatory damages; (3) punitive damages; (4) reasonable attorney's fees and costs; (5) treble damages; (6) pre-judgment interest; and (7) such further and other relief the court deems just, equitable and proper.

### **THE POLICIES**

National Union issued Claims Made Dentists Liability Policy No. DNU3375848 to SSHC for the policy period of September 26, 2009 to September 26, 2010 (the "Entities Policy"). The Entities Policy provides Professional Liability Coverage and Billing Errors and Omissions Coverage, only. The retroactive date with respect to Professional Liability Coverage is February 1, 2001 and the retroactive date with respect to Billing Errors and Omissions Coverage is September 26, 2007.

National Union also issued Claims Made Dentists Liability Policy No. DNU6360128 to SSHC for the policy period December 1, 2009 to December 1, 2010 (the "Individuals Policy"). The Individuals Policy

provides Professional Liability Coverage only and has a general retroactive date of February 1, 2000 and specific, varying retroactive dates for each Individual Named Insured Dentist.

Attached to this letter as Exhibit 1 are the relevant policy provisions for your convenient review. Except where specified, the language of the provisions set forth in Exhibit 1 is identical to that in the Policies. Kindly refer to the Policies for their complete terms and conditions.

### **COVERAGE ANALYSIS**

As addressed in greater detail below, no coverage under the Policies will be afforded to the extent that the allegations in the Amended Complaint do not constitute "dental incidents" as that term is defined therein or to the extent coverage is otherwise barred by operation of one or more exclusions in the Policies.

#### **A. Insured Status of the Named Defendants**

##### **1. Insured Status Under the Entities Policy**

##### **a. SSHC and the FORBA Entities**

Item 1 of the Declarations page of the Entities Policy identifies the First Named Insured as "Small Smiles Holding Company"; thus, SSHC is a Named Insured under the Entities Policy. The Entities Policy includes a Schedule of Named Insureds Endorsement (unnumbered), which amends Item 1 of the Declarations to include as Named Insureds those listed on the Schedule on File with Agent. A Schedule of "Owners - Entity renewal 9/26/09" lists, among others, FORBA Holdings, LLC and FORBA Services, Inc. Therefore, it appears that FORBA Holdings and FORBA Services also qualify as Named Insureds under the Entities Policy.

Section III of the Entities Policy [Who Is An Insured] provides that if the First Named Insured is listed on the Declarations page as a limited liability company, "you and your members are insureds, but only with respect to the conduct of your 'dental business'." Section III also provides that if the Named Insured is an organization other than a partnership, joint venture or limited liability company, it is an insured only with respect to the conduct of its "dental business". Accordingly, coverage for Named Insured business entities under the Entities Policy applies only with respect to the conduct of their "dental business". National Union reserves its rights accordingly.

##### **b. SS Toledo**

The Additional Insured Endorsement to the Entities Policy amends the Who Is An Insured section of that Policy to include as an insured the person or entity shown in the Schedule on File with the Agent, but only with respect to their liability arising out of the conduct of "your business". "Your" is defined, on the first page of the Entity Policy's Professional Liability Coverage Part, to mean the First Named Insured identified on the Declarations page, or SSHC. The schedule of Additional Insureds includes "Small Smiles of Toledo, LLC - Jodi Kuhn, DDS and Patricia Nicklas, DDS", among others.

Accordingly, SS Toledo qualifies as an additional insured under the Entities Policy, but only with respect to its liability arising out of the conduct of SSHC's business, which is dental management.

We understand that SSHC's business includes management of the dental practice of dental clinics, dentists and other dental professionals, and certain of the allegations in the Amended Complaint may potentially arise out of SSHC's dental business. Thus, it appears that SS Toledo is an additional insured in connection with certain allegations in the Amended Complaint but would not be an additional insured to the extent the Amended Complaint contains allegations that do not arise out of SSHC's dental business. Accordingly, National Union hereby reserves all rights with respect to the insured status of SS Toledo to the extent it is held liable for conduct that does not arise from the conduct of SSHC's business.

**c. American Capital**

Our review of the Entities Policy indicates that American Capital does not qualify as a Named Insured or Insured under the Entities Policy. As stated above, the Entities Policy includes a Schedule of Named Insureds Endorsement that amends Item 1 of the Declarations to include as Named Insureds those listed on the Schedule on File with Agent. American Capital is not listed on the Schedule of "Owners - Entity renewal 9/26/09" (which does list FORBA Holdings and FORBA Services, as noted above). Therefore, American Capital is not a Named Insured under the Entities Policy.

In addition, Section III of the Entities Policy [Who Is An Insured] provides that if the First Named Insured is a limited liability company, "you and your members are insureds, but only with respect to the conduct of your 'dental business'". American Capital is not alleged to be a member of SSHC or any FORBA entity and, therefore, does not qualify as an insured in this manner. Section III of the Entities Policy also identifies the following as an insured: "your employees" while acting within the scope of their employment; "temporary substitute dentists", but only for certain "dental incidents"; "any licensed dental hygienist" that is contracted by SSHC, but only for acts, errors or omissions committed in the course of his or her duties; and "any insured while providing 'professional services' as a Good Samaritan", in certain situations. Based on our review of the allegations of the Amended Complaint, American Capital does not fall within any of the foregoing categories and, therefore, does not qualify as an Insured in that respect.

Accordingly, American Capital is not an Insured under the Entities Policy, and National Union disclaims coverage for American Capital under the Entities Policy for the Amended Complaint. National Union will not pay for the defense of American Capital in and will not indemnify American Capital with respect to the Parnell Class Action.

**2. Insured Status Under the Individuals Policy**

**a. SSHC**

Item 1 of the Declarations page to the Individuals Policy identifies the First Named Insured as "Small Smiles Holding Company". The Declarations of the Individuals Policy, however, expressly states that

the policy provides no coverage to SSHC, stating that its limits for all other insureds, *i.e.*, all insureds other than the named individual insured dentists, are “none.” Accordingly, National Union will not defend or indemnify SSHC under the Individuals Policy with respect to the Parnell Class Action.

In any event and even if it was intended that SSHC would be an insured and would be afforded coverage under the Individuals Policy, there is no coverage under the Individuals Policy, and National Union has no duty to defend or indemnify SSHC, to the extent the allegations in the Amended Complaint do not constitute “dental incidents” or are otherwise barred by one or more exclusions in the Individuals Policy, as addressed below.

**b. FORBA Holdings, FORBA Services, SS Toledo and American Capital**

The Individuals Policy includes a Schedule of Named Insureds Endorsement (unnumbered), which amends Item 1 of the Declarations to include as Named Insureds those listed on the Schedule on File with Agent. The schedule annexed to the Individuals Policy does not include any of the following: FORBA Holdings, FORBA Services, SS Toledo and American Capital. In addition and, unlike the Entities Policy, the Individuals Policy does not contain an additional insured endorsement.

Accordingly, FORBA Holdings, FORBA Services, SS Toledo and American Capital do not qualify as insureds under the Individuals Policy. In any event, there is no coverage under the Individuals Policy, and National Union has no duty to defend or indemnify FORBA Holdings, FORBA Services, SS Toledo and American Capital, to the extent the allegations in the Amended Complaint do not constitute “dental incidents” or are otherwise barred by one or more exclusions in the Individuals Policy, as addressed below.

**B. The Defense and Indemnity Provisions of the Professional Liability Coverage Agreement of the Policies**

The Professional Liability Coverage Part of the Policies provides that National Union will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as “damages” because of a “dental incident”. The “dental incident” must occur on or after the Retroactive Date and prior to the end of the “policy period” and the “claim” for “damages” must be first made against an insured, in writing, during the “policy period”. Although National Union has the right and duty to defend the insured against any “claim” to which the Policies apply, National Union has no duty to defend against any “claim” to which the Policies do not apply.

Accordingly, while National Union will provide a defense to FORBA Holdings, FORBA Services, SSHC and SS Toledo in the Parnell Class Action subject to a full and complete reservation of rights, to the extent it is determined that the Small Smiles Defendants are not entitled to insured status and/or the Entities Policy does not apply to the claims asserted in the Amended Complaint of the Parnell Class Action, National Union reserves all rights under the Entities Policy as more fully set forth herein. We reiterate that National Union reserves its right to seek reimbursement of defense costs in the event it is determined that there some or all of the claims asserted in the Amended Complaint are not covered by the Entities Policy.

National Union has no duty to defend or indemnify the Small Smiles Defendants under the Individuals Policy because they are not covered under the Policy and, accordingly, National Union disclaims coverage with respect to the Amended Complaint. Even if the Individuals Policy provided coverage – which it does not – coverage may be barred, as discussed below.

C. **Certain of the Allegations in the Amended Complaint Do Not Constitute “Dental Incidents” and, Thus, Do Not Potentially Trigger Coverage Under the Policies**

As noted above, the Policies provide that National Union will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages because of a “dental incident”. “Dental incident” is defined in the Policies as any act, error or omission in the rendering of or failure to render “professional services” by an insured or by any person for whose acts, errors or omissions the insured is held legally liable. “Professional services” is defined as dental services provided to others by a person trained and qualified to perform those services pursuant to a valid and unrestricted dental, dental hygiene, or dental assisting certificate or license.

1. **Allegations That Defendants Issued and Enforced Corporate Policies and Procedures Do Not Constitute “Dental Incidents”**

The Amended Complaint alleges that FORBA issued and enforced guidelines, policies, procedures, practices and “billing production goals” to nationwide clinics, including SS Toledo, that were designed to result in the battery of minor children and defrauding of parents/guardians and third party payors through the performance of medically unnecessary dental procedures. Such allegations do not constitute a “dental incident” because they do not allege an act, error or omission in the rendering of or failure to render “professional services”, which is defined as dental services provided to others by certain qualified individuals.

Accordingly, allegations that FORBA and other Defendants issued and enforced corporate policies, guidelines and procedures do not constitute “dental incidents” and do not potentially trigger coverage under the Policies.

2. **Allegations of Improper and/or Excessive Sedation of Children by Unqualified Individuals Do Not Constitute “Dental Incidents”**

The Amended Complaint alleges that part of the unnecessary dental procedures included the improper and/or excessive use of nitrous oxide sedation of children by unqualified individuals. It is alleged that the dental clinics, including SS Toledo, routinely used unqualified assistants who were neither properly trained nor certified to administer nitrous oxide sedation. Such allegations do not constitute “dental incidents” because allegations that unqualified individuals performed acts related to dental services do not constitute “professional services”, which term is defined as dental services provided to others by a person trained and qualified to perform those services pursuant to a valid and unrestricted dental, dental hygiene, or dental assisting certificate or license. Accordingly, allegations of improper and/or excessive use of nitrous oxide sedation by untrained or unlicensed individuals do not potentially trigger coverage under the Policies.

**3. Allegations of Conspiracy, Fraud, Violations of State RICO and Consumer Protection Statutes Do Not Constitute "Dental Incidents"**

The Amended Complaint alleges fraud in that the Small Smiles Defendants conspired to perform medically unnecessary procedures and unnecessarily and/or excessively administer sedation and restrain children in order to defraud parents/guardians and third party payors out of money (Count I). The Amended Complaint also alleges that the Small Smiles Defendants have engaged in a continuous pattern and practice of intentional misrepresentation and/or concealment of information in their fraud of the parents/guardians and third party payors. It is also alleged that the Small Smiles Defendants fraudulently held themselves out as specialists, specifically pediatric dentists, when their employees and independent contractors had not obtained the necessary certification. In addition, the Amended Complaint alleges violations of the Ohio state RICO statute (Count II) in that Defendants conspired to and engaged in conduct involving the commission of two or more prohibited state or federal criminal offenses, including billing for medically unnecessary procedures, falsification of information and mail and/or wire fraud – which acts were taken in furtherance of the scheme to commit battery upon minor children in order to obtain compensation. The Amended Complaint also alleges violations of the Ohio Consumer Sales Practices Act (Count X) in that the Small Smiles Defendants engaged in deceptive acts or practices that were designed to induce Plaintiffs into accepting Defendants' services and that such conduct was unconscionable.

The foregoing allegations do not constitute "dental incidents" because they do not allege an act, error or omission in the rendering of or failure to render "professional services". Accordingly, they do not potentially trigger coverage under the Policies.

**4. Allegations of Infliction of Emotional Distress Do Not Constitute "Dental Incidents"**

The Amended Complaint alleges that the Small Smiles Defendants intended to cause Plaintiffs emotional distress and that the Small Smiles Defendants' fraudulent and wrongful actions constitute extreme and outrageous conduct beyond the bounds of decency (Counts V and VI). The Amended Complaint also alleges that the Small Smiles Defendants breached the trust that plaintiff Parnell had in them and therefore plaintiff Parnell has suffered loss of the affection, society, love and companionship of the minors (Count IX). Such allegations do not constitute "dental incidents" because they do not allege an act, error or omission in the rendering of or failure to render "professional services". Accordingly, they do not potentially trigger coverage under the Policies.

**D. Certain of the Allegations in the Amended Complaint May Be Barred From Coverage by Operation of Policy Exclusions**

**1. Coverage May Be Barred by Exclusion B**

Exclusion B under the Policies bars coverage for "dental incidents" arising out of any dishonest, fraudulent, criminal, or knowingly wrongful acts, errors, or omissions committed by or at the direction of any insured.

The Amended Complaint alleges that the Small Smiles Defendants collectively engaged in a nationwide conspiracy to perform medically unnecessary procedures, administer unnecessary or excessive sedation and apply unnecessary or excessive restraints upon their minor patients in order to defraud parents/guardians and third party payors. The Amended Complaint also alleges that corporate guidelines, policies and procedures were issued and enforced by FORBA and adopted by the nationwide Small Smiles clinics, including SS Toledo, and were specifically designed to commit battery upon minor children and defraud parents/guardians and third party payors through the performance of medically unnecessary procedures and other unnecessary related acts. The Amended Complaint alleges that, to that end, Small Smiles employees implemented training, policies and guidelines developed by FORBA to intentionally misrepresent and otherwise conceal information pertaining to the medical necessity of the dental procedures, including related x-rays, sedation or restraint, to be performed on their minor patients.

Thus, regardless of whether or not the allegations of medically unnecessary procedures and unnecessary and/or excessive physical restraints constitute "dental incidents" as previously defined, Exclusion B may bar coverage to the extent such allegations arise out of alleged dishonest, fraudulent, criminal or knowingly wrongful acts committed by or at the direction of one or more of the Small Smiles Defendants. The Amended Complaint's allegations of medically unnecessary and/or excessive procedures may constitute allegations of dishonesty, insofar as they are alleged to have been falsely represented to be medically necessary, and allegations of fraudulent and knowingly wrongful acts, insofar as they are alleged to have been undertaken in order to defraud parents/guardians and third party payors. Moreover, the establishment of guidelines, policies, procedures and training in order to, as alleged in the Amended Complaint, commit battery, defraud, perform medically unnecessary procedures and subject children to unnecessary and/or excessive physical restraints may constitute allegations of dishonest, fraudulent and knowingly wrongful acts. In addition, the alleged conspiracy to perform intentional acts with the intent to commit fraud appears to constitute an allegation of a dishonest, fraudulent, knowingly wrongful or possibly even criminal act committed by and at the direction of one or more of the insureds.

Thus, aside from whether or not any allegations in the Amended Complaint constitute "dental incidents", to the extent they constitute allegations of dishonest, fraudulent, criminal or knowingly wrongful acts committed by or at the direction of the Small Smiles Defendants, coverage may be barred by Exclusion B.

Consistent with the foregoing, National Union hereby reserves all rights as to the applicability of Exclusion B.

**2. Coverage May Be Barred by Exclusion O**

Under Exclusion O of the Policies, there is no coverage for a “dental incident” that is expected or intended by any insured or by any person for whose acts, errors or omissions an insured may be held liable.

The Amended Complaint repeatedly alleges that the Small Smiles Defendants performed medically unnecessary dental procedures on children and that the children suffered pain and trauma associated with these procedures, as well as severe emotional distress and psychological injuries. The Amended Complaint also alleges that the Small Smiles Defendants – so they could defraud the parents/guardians and third party payors by increasing the bills – unnecessarily and excessively immobilized and physically restrained the children on papoose boards outside the presence of their parents or guardians (who were improperly barred by the clinics’ staff from the treatment rooms) and that the children were traumatized as a result.

It is alleged in the Amended Complaint that the dental procedures and the use of physical restraints were not accidentally undertaken, but were intentionally performed. Moreover, the Amended Complaint alleges that the Small Smiles Defendants committed these acts with the intent that the injury would result, or with the knowledge that the acts would result in consequences of the kind that actually and naturally flow from the intentional acts. As alleged in the Amended Complaint, the Small Smiles Defendants performed these medically unnecessary dental procedures and unnecessarily and/or excessively used restraints with the knowledge that the consequences that resulted (or of the general type that resulted) were substantially certain to occur. To that end, the alleged unnecessary procedures in and of themselves caused harm, and it is alleged that the Small Smiles Defendants knew that the harm was substantially certain to occur.

For example, in Counts III and IV, the Amended Complaint alleges assault and battery. Specifically, the Amended Complaint alleges that the minor named Plaintiffs were placed in fear of harmful or offensive contact and were made to suffer numerous improper, unnecessary, excessive and harmful dental procedures, x-rays, sedation and physical restraints at the hands of the Small Smiles Defendants. These allegations reflect intentional acts and the intent to harm.

To the extent that Plaintiffs’ allegations of medically unnecessary dental procedures consist only of alleged intentional acts and the intent to harm on the part of the Small Smiles Defendants, Exclusion O bars coverage (*e.g.*, Counts III and IV).

Moreover, Exclusion O may bar coverage to the extent that any allegations that arguably constitute “dental incidents” were intended to or could have been reasonably expected to occur as a result of the Small Smiles Defendants’ acts, errors or omissions. To that end, Exclusion O may bar coverage as to fraud and conspiracy to defraud and violations of the state RICO statute (Counts I and II) if Defendants’ acts in furtherance of their fraudulent scheme and conspiracy were intended to or otherwise expected to result in a “dental incident”. Exclusion O would also bar coverage as to any allegations of intentional infliction of emotional distress, or as to any emotional distress that may have been reasonably expected by Defendants as a result of their acts, errors or omissions (Counts V and VI).

Accordingly, National Union hereby reserves all rights as to the application of Exclusion O.

**3. Coverage May Be Barred by Exclusion A**

Under Exclusion A of the Policies, there is no coverage for any “dental incident” that occurred prior to the inception date of the Policies if any insured under the policies knew or should have known that the “dental incident” could result in or had resulted in a claim. The inception date of the Entities Policy is September 26, 2009, and the inception date of the Individuals Policy is December 1, 2009.

The Amended Complaint alleges that the minor Plaintiffs Webb and Lee were patients at SS Toledo for “at least the past four years” and that beginning in 2006 through December 2009, they were “regular patients” and received dental care at least every six months during that time period.

To the extent one or more of the Small Smiles Defendants knew or reasonably should have known that “dental incidents” had occurred prior to the inception dates of the Policies and that the “dental incidents” could result in, or had resulted in, a claim, there is no coverage under the Entities Policy for “dental incidents” that occurred prior to September 26, 2009, and no coverage under the Individuals Policy for “dental incidents” that occurred prior to December 1, 2009. National Union reserves its rights as to the application of Exclusion A.

Additionally, and as discussed in more detail in Section I (entitled “Rescission”) of this letter, National Union has become aware that, in January 2010, FORBA Holdings entered into a settlement with the United States of America, acting through the United States Department of Justice (“DOJ”) and on behalf of the Office of Inspector General of the Department of Health and Human Services (“HHS”) (collectively, the “United States”) and relators in three *qui tam* actions that were filed in 2007 and 2008, to settle claims by the United States and 22 states plus the District of Columbia that FORBA Holdings and its dental clinics and personnel committed Medicaid fraud.

As explained below, we are investigating whether or to what extent these allegations have any relationship to the allegations in the Parnell Class Action, as well as other actions that have been or are in the process of being filed against SSHC and its related companies and employees. While our investigation is pending, National Union reserves its right to disclaim coverage under Exclusion A to the extent one or more of Defendants knew or reasonably should have known that “dental incidents” had occurred prior to the inception dates of the Policies and that the “dental incidents”, including the acts being investigated and complained of in the *qui tam* actions, could result in, or had resulted in, a claim.

**4. Coverage May Be Barred by Exclusion K(1) and/or Exclusion I**

The Amended Complaint alleges that the Small Smiles Defendants performed unnecessary and/or excessive nitrous oxide sedation and that unqualified assistants with no formal education or training in the administration of inhalation analgesia nonetheless administered nitrous oxide sedation to the children.

Exclusion K(1) of the Policies bars coverage for a “dental incident” arising out of the prescribing or dispensing of any drugs, pharmaceuticals or controlled substances by anyone without the appropriate

license, registration or certification. Thus, to the extent nitrous oxide qualifies as a drug, pharmaceutical or controlled substance, Exclusion K(1) bars coverage for "dental incidents" that were caused by "unqualified assistants."

Exclusion I of the Policies bars coverage for a "dental incident" which involves the use of intravenous or intramuscular injections or "general anesthesia". "General anesthesia" is defined to include deep sedation and to mean a controlled state of depressed consciousness or unconsciousness, accompanied by partial or complete loss of protective reflexes, produced by a pharmacologic or non-pharmacologic method or combination thereof. To the extent the Amended Complaint's allegations of excessive and improper administration of nitrous oxide sedation constitute use of "general anesthesia" not administered by a licensed provider of anesthetic services, coverage is barred by Exclusion I.

To the extent allegations of improper or excessive nitrous oxide sedation by unqualified individuals constitute "dental incidents", National Union reserves all rights as to the application of Exclusion K(1) and/or Exclusion I to bar coverage for such "dental incidents."

**E. The Allegations of the Amended Complaint do not Trigger Coverage Under the Billing Errors and Omissions Coverage Part of the Entities Policy**

In addition to Professional Liability coverage, the Entities Policy includes coverage for Billing Errors and Omissions. Specifically, the Coverage Part provides that National Union will pay those sums the insured becomes legally obligated to pay as "billing damages" resulting from a "wrongful act" to which the policy applies. "Billing damages" is defined as any monetary amount which the insured is legally obligated to pay as a result of a "billing claim", including sums paid as awards, judgments, settlements and civil fines and penalties imposed by a "government entity". "Billing claim" is defined as: (1) a demand for money or services, brought by or on behalf of any "government entity" or commercial payor against the insured seeking "billing damages" for a "wrongful act"; (2) commencing an audit or investigation of a "wrongful act"; or (3) seeking injunctive relief on account of a "wrongful act".

The allegations in the Amended Complaint do not trigger a duty to defend under the Billing Errors and Omissions Coverage part because they do not constitute a "billing claim". The Amended Complaint is not a demand for money or services brought by or on behalf of a government entity or commercial payor; does not constitute the commencement of an audit or investigation of a "wrongful act" and does not seek injunctive relief on account of a "wrongful act". Moreover, the Amended Complaint does not seek "billing damages", which is defined as any monetary amount in excess of the applicable limit of liability that the insured is legally obligated to pay as a result of a "billing claim". Because the allegations in the Amended Complaint do not constitute a "billing claim", there are no "billing damages" covered under this coverage part.

Accordingly, National Union has no duty to defend or indemnify with respect to the Amended Complaint under the Billing Errors and Omissions Coverage Part of the Entities Policy.

**F. No Coverage for Punitive Damages**

The Amended Complaint seeks an award of punitive damages (Count XI). Punitive damages may not be insurable under applicable public policy and law. Therefore, National Union reserves its rights as to whether or to what extent it has a duty to defend or indemnify the Small Smiles Defendants with respect to the punitive damages claim asserted in the Amended Complaint.

**G. No Coverage for Treble Damages**

The Amended Complaint seeks an award of treble damages. The Policies provide that National Union will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as "damages" because of a "dental incident". However, the Policies define "damages" to specifically exclude "administrative, civil or criminal penalties, fines or sanctions." Treble damages constitute civil or criminal penalties. Therefore, there is no coverage under the Policies for treble damages. National Union reserves all of its rights consistent with the foregoing.

**H. Other Insurance**

The Other Insurance clause of the Policies provides that if other valid and collectible insurance is available to an insured for "damages" National Union covers under the Policies, then the Policies are excess over any other such insurance. When the Policies are excess over other insurance, National Union has no duty to defend against any "suit" if any other insurer has a duty to defend against that "suit". However, if no other insurer defends, National Union will undertake the defense but will be entitled to the rights of the insured against all those other insurers. When the Policies are excess, National Union will pay, up to the applicable limits of insurance, the amount of the loss that exceeds the sum of the total amount that all such other insurance would pay for the loss in the absence of the Policies. If other insurance is also excess, National Union will share the remaining loss with the other insurance.

Assuming coverage is not otherwise barred (as explained above), and to the extent there is other valid and collectible insurance that responds to the claims alleged in the Amended Complaint of the Parnell Class Action, the Policies arguably apply excess of such other insurance and National Union would have no duty to defend. Accordingly, National Union reserves its right as to the applicability of the Other Insurance clause of the Policies.

**I. Rescission**

As you know, by letter dated June 18, 2010, your counsel at the law firm of King & Spalding provided our counsel in these matters, Sedgwick, Detert, Moran & Arnold LLP, with an update concerning various claims against Small Smiles<sup>4</sup> including putative class action lawsuits filed against Small Smiles in Ohio and Oklahoma. At this point we are aware of the following claims against Small Smiles:

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<sup>4</sup> Please note that, for the purposes of this letter, "Small Smiles" refers to Small Smiles Holding Company, LLC, FORBA Holdings, LLC, FORBA Services, Inc., Small Smiles of Toledo, LLC and all other Small Smiles clinics and Small Smiles

- *Parnell et al. v. FORBA Holdings, LLC, et al.*, Civil Action No. 10-CV-00172 (JCG) (N.D. Ohio) (the “Parnell Class Action” and the subject of this letter);
- *Hernandez et al. v. FORBA Holdings, LLC, et al.*, Case No. CJ-2010-1632 (Dist. Ct., Oklahoma Cty., State of Oklahoma) (the “Hernandez Class Action”); and
- *Havens et al. v. Dighton, et al.*, No. CV 2009 14194 (Second Judicial Dist. Ct., County of Bernalillo, State of New Mexico) (the “Havens Action”) (the Parnell Class Action, the Hernandez Class Action and the Havens Action are collectively referred to herein as the “Underlying Actions”).

National Union is concerned that, prior to National Union issuing, in 2008, and then renewing, in 2009, four Dentists Liability Policies (two for each year) to SSHC, SSHC and/or its related entities may have known of facts that were material to the risk that National Union was insuring – and may have failed to disclose that information to National Union or to Affinity Insurance Services, Inc. (“AIS”).

In particular, it has come to our attention that in January 2010, Small Smiles entered into a \$24 million settlement agreement (plus interest) (the “Medicaid Fraud Settlement”) with the United States and relators in three *qui tam* actions (the “*Qui Tam* Actions”)<sup>5</sup> to settle claims by the United States and 22 states plus the District of Columbia that Small Smiles committed Medicaid fraud. We also understand that the Medicaid Fraud Settlement was the product of an investigation by the United States and various States (the “Medicaid Fraud Investigation”). We are concerned that Small Smiles may have known about the Medicaid Fraud Investigation prior to the issuance of the National Union policies but did not disclose it (or the existence of the *Qui Tam* Actions) to National Union or AIS. We note that all three of the *Qui Tam* Actions were commenced against Small Smiles prior to the inception of any of the National Union Policies (as defined below).

If Small Smiles is in possession of facts, documents and/or communications<sup>6</sup> which indicate that, prior to the issuance of the National Union policies, Small Smiles was not aware of the Medicaid Fraud Investigation or any of the *Qui Tam* Actions and/or that Small Smiles was aware of Medicaid Fraud Investigation or any of the *Qui Tam* Actions but disclosed them to National Union and/or AIS, provide us with those facts, documents and/or communications as soon as possible.

Accordingly, National Union is reserving its right to rescind, including its right to seek a judicial decision rescinding and an order compelling Small Smiles to refund to National Union any monies it paid to Small Smiles or on behalf of Small Smiles (including all indemnity and all Allocated Loss

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dentists and further includes each of their parents, subsidiaries, divisions, departments, offices, predecessors, successors, assigns, officers, directors, employees, contractors, subcontractors, attorneys and/or agents.

<sup>5</sup> For the purposes of this letter, the *Qui Tam* Actions refer to: *United States ex rel. McDaniel v. FORBA Holdings, LLC*, No. 07-3416 (D. Md.), filed December 21, 2007; *United States of America and Commonwealth of Virginia ex rel. Angela Crawford v. Small Smiles of Roanoke LLC*, Case No. 7:08-cv-00370 (W.D. Va.), filed June 12, 2008; and *John J. Haney o/b/o United States of America v. Children's Medicaid Dental of Columbia, LLC d/b/a "Small Smiles"*, Case No. 3:08-CV2562 (D.D.C.), filed July 16, 2008.

<sup>6</sup> Please note that “documents” and “communications” as used herein, includes both paper documents and electronically stored information and emails and attachments thereto.

Adjustment Expenses) under the following insurance policies that National Union issued to SSHC as the First Named Insured:

- Dentists Liability Policy No. DNU3375848 (policy period September 26, 2009 to September 26, 2010);
- Dentists Liability Policy No. DNU3375848 (policy period September 26, 2008 to September 26, 2009);
- Dentists Liability Policy No. DNU6360128 (policy period December 1, 2009 to December 1, 2010); and
- Dentists Liability Policy No. DNU6360128 (policy period December 1, 2008 to December 1, 2009) (collectively, the "National Union Policies").

At this point, National Union's investigation is ongoing and we would appreciate any information that Small Smiles can provide to shed light on these issues.

#### **REQUEST FOR INFORMATION AND DOCUMENTS**

National Union requests that Small Smiles provide National Union with the following information in Small Smiles's possession or control in order to assist National Union with completing its investigation:

1. All pleadings, discovery and motion papers exchanged in the Parnell Class Action.
2. All reports and/or correspondence prepared by defense counsel concerning the Parnell Class Action.
3. All documents and/or communications maintained by Small Smiles referring or relating to the treatment of minors De Andre Webb and Natasha Lee.
4. All correspondence and/or documents exchanged between Small Smiles and Janice Parnell, De Andre Webb and/or Natasha Lee, and/or any of their representatives.
5. All reports generated by Small Smiles referring or relating to any investigation as to the allegations in the Parnell Class Action.
6. All manuals, written guidelines, written procedures and/or documentation prepared by Small Smiles, or on its behalf, concerning dental operations and/or dental practices at any of the nationwide Small Smiles clinics, including SS Toledo.
7. All documents and/or communications generated by Small Smiles referring or relating to patient care at any of the nationwide Small Smiles clinics, including SS Toledo.