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15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION
19

20 S.M., individually and on behalf of all others)
21 similarly situated,)

22 Plaintiff,)

23 v.)

24 PACIFIC FERTILITY CENTER and)
PRELUDE FERTILITY, INC,)

25 Defendants.)
26)
27)
28)

Case No. _____

CLASS ACTION COMPLAINT

- 1. Negligence and/or Gross Negligence;
- 2. Breach of Contract;
- 3. Bailment; and
- 4. Violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*

DEMAND FOR JURY TRIAL

1 Plaintiff S.M. (“Plaintiff”), on behalf of herself and all other similarly situated individuals, files
2 this action against Defendants Pacific Fertility Center (“Pacific Fertility”) and Prelude Fertility, Inc.
3 (“Prelude”) (collectively, “Defendants”) and alleges as follows.

4 **NATURE OF THE ACTION**

5 1. This is a class action on behalf of individuals who contracted with Defendants to
6 securely store their frozen eggs and embryos to preserve their future reproductive choices. Defendants
7 breached that agreement and committed gross negligence by failing to keep the human tissue under its
8 care frozen, resulting in its permanent loss.

9 2. Plaintiff entrusted Defendants with maintaining and preserving her frozen eggs
10 indefinitely. But on March 11, 2018, Plaintiff received an email from Pacific Fertility providing
11 notice of “a very unfortunate incident.” The email stated that “earlier this week” the cryo-storage tank
12 containing her frozen eggs “lost liquid nitrogen for a brief period of time,” which may have resulted in
13 the loss of the eggs. The email clarified that a “preliminary analysis” suggested only some of the
14 human tissue in the affected tank was destroyed. Plaintiff called Pacific Fertility and learned from one
15 of its doctors that, unfortunately, her eggs were destroyed and could never be used. Hundreds of other
16 patients with eggs and embryos stored with Defendants received the same email as Plaintiff.

17 3. Plaintiff seeks appropriate relief on behalf of the other individuals whose eggs or
18 embryos were destroyed in this incident.

19 **JURISDICTION AND VENUE**

20 4. The Court has subject matter jurisdiction over this action under the Class Action
21 Fairness Act of 2005, 28 U.S.C. § 1332(d), because (a) Plaintiff is a citizen of a state different from
22 Prelude, (b) the amount in controversy exceeds \$5,000,000, excluding interest and costs, (c) the
23 proposed class consists of more than 100 individuals, and (d) none of the exceptions under the
24 subsection applies to this action.

25 5. This Court has personal jurisdiction over Defendants. They conduct substantial
26 business in this District and intentionally availed themselves of the laws and markets of this District.
27 A significant portion of the acts and omissions complained of occurred in the District, and Plaintiff
28 and many class members suffered harm in the District.

1 6. Venue is proper in this District under 28 U.S.C § 1391 because a substantial part of the
2 events or omissions giving rise to the claims occurred in this District.

3 **INTRADISTRICT ASSIGNMENT**

4 7. Assignment to the San Francisco Division is proper under Local Rule 3-2(c) because a
5 substantial part of the events or omissions giving rise to the claims occurred in San Francisco County.

6 **PARTIES**

7 8. At all relevant times, Plaintiff was a citizen and resident of San Francisco County,
8 California. Plaintiff is using her initials in this litigation to protect her privacy, and if required by the
9 Court, will seek permission to proceed under this pseudonym.

10 9. At all relevant times, Defendant Prelude Fertility, Inc. was a Delaware corporation
11 headquartered in Florida. Prelude was launched in October 2016 and runs a network of fertility
12 clinics across the country.

13 10. Defendant Pacific Fertility Center is a private unincorporated entity located at 55
14 Francisco Street, Suite 500, San Francisco, California 94133.

15 11. At all relevant times, Prelude owned and operated Pacific Fertility Center.

16 **FACTUAL ALLEGATIONS**

17 12. Defendants market and provide intrauterine insemination (IUI), in vitro fertilization
18 (IVF), cryo-preservation of a woman’s eggs and embryos, and genetic testing of embryos, among
19 other fertility services.

20 **A. Prelude Fertility**

21 13. Prelude Fertility operates a nationwide network of fertility clinics offering IVF, genetic
22 testing, and egg and embryo freezing, storage, and donation services. Prelude announced the addition
23 of San Francisco-based Pacific Fertility to its network of fertility clinics on September 25, 2017.

24 14. Prelude emphasizes the safety of its egg storage services: “Eggs have been safely stored
25 and then thawed after many years with the same success as eggs that are fresh or frozen for a short
26 time. There is currently no evidence that suggests that frozen eggs deteriorate with time.”¹ Prelude
27

28 ¹ <https://www.preludefertility.com/freeze-eggs>.

1 advises its patients to “[s]et it and forget it until you’re ready”—once a customer is ready to start a
2 family, “frozen eggs are thawed and combined with sperm to create embryos.”² According to Prelude,
3 “[e]ggs can be safely stored as long as you need them.”³

4 15. Prelude directs those who visit its website to Pacific Fertility for egg and embryo
5 freezing services, specifying that its “services” are available in San Francisco.⁴

6 **B. Pacific Fertility Center**

7 16. Pacific Fertility offers its egg and embryo freezing services as a means of preserving “a
8 precious resource, limited to just a few years of your life” and states that freezing reproductive tissue
9 “can increase your chances of conception by 5 to 10 times.”

10 17. The purpose of egg freezing is to allow people to preserve their own eggs so that they
11 may be fertilized and implanted at a later time.

12 18. Eggs and embryos are preserved through a rapid freezing process called vitrification,
13 which Pacific Fertility describes as a “technology that is used in the embryo and egg freezing process
14 so that they can be stored for later use.” The eggs are to remain frozen indefinitely, until the woman
15 decides to fertilize them. Pacific Fertility represents that its customers’ “[e]ggs remain frozen until
16 you need them.” It also touts the newer vitrification process as safer than earlier slow freezing
17 technologies, which could lead to crystallization threatening the viability of frozen tissue. “Avoiding
18 ice formation in this way,” Pacific Fertility represents, “successfully protects the embryos from
19 damage and allows them to be warmed later giving survival rates consistently above 90%.”

20 19. Pacific Fertility’s egg-freezing services are not cheap. One cycle of freezing and
21 retrieval, including storage for a year, costs \$8,345. A second cycle costs \$6,995. Additional costs
22 arise from other of Pacific Fertility’s services, such as new patient consultations, lab work, and
23 continuing tissue storage, as well as from needed medications. Pacific Fertility charges an annual fee
24 of \$600 for storing human reproductive tissue. Embryo freezing services similarly involve significant
25 costs.

26
27 ² <https://preludefertility.com/freeze-eggs>.

28 ³ <https://www.preludefertility.com/faq>.

⁴ <https://www.preludefertility.com/faq>.

1 20. The value of the eggs and embryos that Plaintiff and other class members entrusted to
2 Defendants—and for which Defendants accepted legal responsibility to store, preserve, and protect—
3 is substantial. For some families, these fertility services provide their only opportunity to conceive a
4 child.

5 21. Like Prelude, Pacific Fertility emphasizes its services are safe: “At Pacific Fertility
6 Center, the egg recovery rate after vitrification and later thawing is 83 percent, and fertilization rate is
7 84 percent.”⁵ Regarding frozen embryo services, Pacific Fertility specifies: “there is no limit to how
8 long cells remain viable in the frozen state. We have had some patients return to thaw embryos after
9 more than 10 years and the embryos were no different tha[n] when they were frozen.”⁶

10 **C. Plaintiff Purchases Egg Storage Services From Pacific Fertility Center**

11 22. Plaintiff first contacted Pacific Fertility about the possibility of having her eggs frozen in
12 or around April 2014.

13 23. In or around August 2016, Plaintiff contracted with Defendants to have her eggs
14 preserved for potential future use.

15 24. Plaintiff’s insurance company paid for a portion of Defendants’ services and of the
16 necessary medications. She paid the remaining costs—totaling approximately \$10,000—herself.

17 25. In October 2016, Plaintiff underwent procedures to prepare for egg freezing.
18 Defendants then retrieved and froze her eggs.

19 26. At all relevant times thereafter, Plaintiff’s eggs were under Defendants’ protection,
20 custody, and control. Defendants kept Plaintiff’s eggs within a steel storage tank—Tank No. 4—at
21 their San Francisco laboratory facility on Francisco Street.

22 27. Frozen eggs and embryos belonging to many hundreds of other people were stored in the
23 same tank. Tank No. 4 housed up to 15 percent of Pacific Fertility’s total frozen tissue, consisting of
24 several thousand eggs and embryos.

25 _____
26 ⁵ <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#success> (last visited March 13,
2018).

27 ⁶ <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited March
28 13, 2018).

1 **D. Defendants’ Storage Tank Fails**

2 28. On or around March 4, 2018, Plaintiff’s frozen eggs were irreplaceably damaged due to
3 a loss of liquid nitrogen in the tank in which they were being stored.

4 29. The nitrogen in these tanks continuously evaporates at a slow rate, requiring it to be
5 replenished on a daily basis.

6 30. On March 11, 2018, Pacific Fertility advised Plaintiff via email that her stored tissue
7 “*may have been impacted*” when the equipment housing it lost liquid nitrogen (the “Incident”). The
8 email further stated, “[w]e are incredibly sorry that this happened and for the anxiety that this will
9 surely cause. We are heartbroken by this situation and our thoughts are with each of you who may
10 have been touched by this event.” Pacific Fertility also stated that it had “hired independent experts
11 and launched an in-depth investigation of the matter.” Several hundred other people received this
12 email.

13 31. Plaintiff called Pacific Fertility. A doctor there informed her that her eggs were
14 compromised.

15 32. Thousands of frozen eggs and embryos belonging to other people also were destroyed in
16 the Incident.

17 33. “The Incident’s root cause has not yet been definitively identified, but experts suspect a
18 leak in the tank’s seal.”⁷

19 34. Whatever the cause, electronic tank monitoring sensors should have detected the rise in
20 temperature and alerted staff to the problem earlier. As one storage facility operator noted, “It is
21 standard to have a monitoring system that alarms locally when level or temperature are out of
22 acceptable range and that calls out to staff following a ‘call tree’ structure.”⁸

23 35. The American Society for Reproductive Medicine announced that it planned to review
24 the Incident with other clinics and their equipment suppliers.

25
26
27 ⁷ <https://www.mercurynews.com/2018/03/12/fertility-center-failures-would-oversight-help/> (last
28 visited March 13, 2018).

⁸ *Id.*

CLASS ACTION ALLEGATIONS

36. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff seeks certification of a class defined as:

All individuals whose eggs or embryos stored in Pacific Fertility Center’s San Francisco laboratory were destroyed in March 2018.

37. Excluded from the class are Defendants, their affiliates and subsidiaries, and their officers, directors, partners, employees, and agents; class counsel, their immediate family members, and employees of their firms; counsel for Defendants, their immediate family members, and employees of their firms; and judicial officers assigned to this case and their staffs and immediate family members.

38. Numerosity. The members of the class are so numerous that their individual joinder is impracticable. There are at least 400 class members, whose names and addresses are readily available from Defendants’ records.

39. Existence and Predominance of Common Questions of Fact and Law. This action involves common questions of law and fact that predominate over any questions affecting individual class members, including, without limitation:

a. Whether the March 4, 2018, loss of liquid nitrogen at a tank in Defendants’ San Francisco facility resulted from Defendants’ negligence or other wrongful conduct;

b. Whether Defendants failed to take adequate and reasonable measures to ensure that their systems were protected;

c. Whether Defendants failed to take available steps to ensure that liquid nitrogen levels in their storage tanks would remain sufficient;

d. Whether Defendants owed a duty to Plaintiff and class members to protect the eggs and embryos entrusted to Defendants’ care;

e. Whether Defendants breached their duties to protect the eggs and embryos that Plaintiff and class members entrusted to their care;

f. Whether Defendants breached their contracts with Plaintiff and class members;

1 g. Whether Defendants' conduct violated the Unfair Competition Law, Cal. Bus. &
2 Prof. Code § 17200 *et seq.*; and

3 h. Whether Plaintiff and class members suffered harm as a result of Defendants'
4 violations and, if so, the appropriate measure of damages, restitution, or rescission.

5 40. Typicality. Plaintiff's claims are typical of the other class members' claims because
6 Plaintiff and class members were subjected to the same wrongful conduct and damaged in the same
7 way by having their human tissue destroyed.

8 41. Adequacy of Representation. Plaintiff is an adequate class representative. Her interests
9 do not conflict with the interests of the other class members she seeks to represent. She has retained
10 counsel competent and experienced in complex class action litigation, and she intends to prosecute this
11 action vigorously. Plaintiff and her counsel will fairly and adequately pursue and protect the interests
12 of the class.

13 42. Superiority. A class action is superior to all other available means for the fair and
14 efficient adjudication of this controversy. The damages or other financial detriment suffered by
15 Plaintiff and the other class members are relatively small compared to the burden and expense that
16 would be required to individually litigate these claims. As a result, it would be impracticable for class
17 members to seek redress individually. Individualized litigation would also create a potential for
18 inconsistent or contradictory judgments and increase the delay and expense to all parties and the court
19 system. By contrast, the class action device presents far fewer management difficulties and provides
20 the benefits of single adjudication, economy of scale, and comprehensive supervision by a single
21 court.

22 **FIRST CLAIM FOR RELIEF**
23 **Negligence and/or Gross Negligence**

24 43. Plaintiff incorporates the above allegations by reference.

25 44. Defendants owed Plaintiff and class members a duty to exercise the highest degree of
26 care when maintaining, inspecting, monitoring, and testing the liquid nitrogen storage tanks used for
27 the preservation of eggs and embryos at Defendants' San Francisco laboratory.

1 45. Defendants breached these duties and acted with negligence and gross negligence in at
2 least the following respects:

3 a. failing to adequately maintain, inspect, monitor, and/or test their liquid nitrogen
4 storage tanks, in accordance with industry standards, including through a functional electronic tank
5 monitoring system capable of detecting a rise in temperature or a drop in liquid nitrogen levels and
6 promptly alerting staff to the immediate problem;

7 b. permitting a leakage to occur from one of their liquid nitrogen storage tanks
8 containing human eggs and embryos;

9 c. failing to properly safeguard the human reproductive tissue in its care; and

10 d. failing to follow accepted scientific and laboratory procedures for safeguarding
11 the human reproductive tissue in its care.

12 46. Defendants' acts and omissions constitute gross negligence because they constitute an
13 extreme departure from what a reasonably careful person would do in the same situation to prevent
14 foreseeable loss of human reproductive tissue.

15 47. Defendants acted willfully, wantonly, and with conscious and reckless disregard for the
16 rights and interests of Plaintiff and class members. Defendants' acts and omissions had a great
17 probability of causing significant harm and in fact did.

18 48. As a proximate result of Defendants' negligence and/or gross negligence, Plaintiff and
19 class members suffered harm in an amount to be determined at trial.

20 **SECOND CLAIM FOR RELIEF**
21 **Breach of Contract**

22 49. Plaintiff incorporates the above allegations by reference.

23 50. Defendants entered into contracts with Plaintiff and each of the other Class members,
24 under which Defendants agreed to collect, store, and preserve their eggs or embryos.

25 51. Defendants' form contract provided, in part, that "[e]ggs are stored in a tank of liquid
26 nitrogen and maintained at low temperatures until utilized." More specifically, "[a]t a later date, when
27 pregnancy using the cryopreserved eggs is desired, the eggs are thawed and the remaining steps in IVF
28 are resumed."

1 52. In consideration of Defendants' promises, including to keep the eggs and embryos safe
2 and secure, Plaintiff and class members agreed to pay, and did pay, substantial sums for the services
3 rendered.

4 53. Plaintiff and class members performed all of the terms and conditions required of them
5 under their contracts.

6 54. Based on the conduct described herein, Defendants breached their contracts with
7 Plaintiff and class members.

8 55. As a direct and proximate result of Defendants' breach of contract, Plaintiff and class
9 members suffered harm in an amount to be determined at trial.

10 **THIRD CLAIM FOR RELIEF**

11 **Bailment**

12 56. Plaintiff incorporates the above allegations by reference.

13 57. Plaintiff and class members delivered to Defendants for safekeeping personal property to
14 be safely and securely kept for the benefit of Plaintiff and class members, and to be redelivered to
15 them upon demand.

16 58. Defendants received eggs and embryos from Plaintiff and class members on this
17 condition.

18 59. Plaintiff and class members agreed to pay, and did pay, substantial sums in exchange for
19 Defendants' promise to safeguard their eggs and embryos for the benefit of Plaintiff and class
20 members.

21 60. Defendants had a duty to exercise care in maintaining, preserving, and protecting
22 Plaintiff's and class members' eggs and embryos that were delivered to Defendants. Further,
23 Defendants had a duty to return the eggs and embryos, undamaged, to the individuals to whom they
24 belonged.

25 61. Defendants invited the general public, including Plaintiff and class members, to entrust
26 eggs and embryos to Defendants' care by holding out Pacific Fertility as a competent, capable, and
27 established reproductive and storage facility able to handle and care for eggs and embryos in a safe
28 and satisfactory manner.

1 62. Because of Defendants' wrongful conduct, as set forth herein, the property of Plaintiff
2 and class members was irreplaceably damaged, precluding its redelivery to them as provided for under
3 the bailment contract.

4 63. Defendants breached their duty to exercise care in the safekeeping of Plaintiff's and
5 class members' eggs and embryos delivered to Defendants and to return the eggs and embryos,
6 undamaged, to Plaintiff and class members.

7 64. As a direct and proximate result of Defendants' breach of bailment contract, Plaintiff
8 and class members have been deprived of the opportunity to use the eggs and embryos they entrusted
9 to Defendants, and have suffered damages in an amount to be determined at trial.

10 **FOURTH CLAIM FOR RELIEF**
11 **Violation of the Unfair Competition Law ("UCL"),**
12 **Cal. Bus. & Prof. Code § 17200 *et seq.***

13 65. Plaintiff incorporates the above allegations by reference.

14 66. The UCL prohibits acts of "unfair competition," including any "unlawful, unfair or
15 fraudulent business act or practice."

16 67. Defendants' conduct set forth herein is unlawful because it constitutes negligence, gross
17 negligence, breach of contract, and bailment.

18 68. Defendants' conduct is unfair because it is immoral, unethical, unscrupulous,
19 oppressive, and substantially injurious. The gravity of the harm resulting from Defendants' conduct
20 detailed above far outweighs any conceivable utility of this conduct. There are reasonably available
21 alternatives that would further Defendants' legitimate business interests, such as ensuring the
22 continued protection of the human reproductive tissue in their custody and control.

23 69. Plaintiff and class members could not have reasonably avoided injury from Defendants'
24 unfair conduct. Plaintiff and class members did not know, and had no reasonable means of learning,
25 that Defendants were not ensuring the continued protection of the human reproductive tissue in their
26 custody and control.

27 70. As a direct and proximate result of Defendants' unlawful and unfair conduct, Plaintiff
28 and class members have suffered injuries in fact and seek appropriate relief under the UCL.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the class defined above, respectfully requests that the Court:

- A. Certify this action as a class action under Rule 23 of the Federal Rules of Civil Procedure, appoint Plaintiff as class representative, and appoint the undersigned counsel as class counsel;
- B. Award Plaintiff and class members compensatory, restitutionary, rescissory, general, consequential, punitive and/or exemplary damages in an amount to be determined at trial;
- C. Award pre-judgment interest as permitted by law;
- D. Enter appropriate equitable relief;
- E. Award reasonable attorneys' fees and costs, as provided for by law; and
- F. Grant such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable.

Dated: March 13, 2018

Respectfully submitted,

GIRARD GIBBS LLP

By: /s/ Adam E. Polk

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