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 18

19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**
 21 **SAN FRANCISCO DIVISION**

22
 23 IN RE PACIFIC FERTILITY CENTER
 24 LITIGATION

) Case No. 3:18-cv-01586-JSC

) **CONSOLIDATED AMENDED CLASS**
 25 **ACTION COMPLAINT**

) DEMAND FOR JURY TRIAL
 26
 27

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1 Plaintiffs A.B., C.D., E.F., G.H., I.J., K.L., M.N., and O.P. (“Plaintiffs”), individually and on
2 behalf of all others similarly situated, file this Consolidated Class Action Complaint against
3 Defendants Pacific Fertility Center (“Pacific Fertility” or “PFC”), Prelude Fertility, Inc. (“Prelude”),
4 and Chart Industries (“Chart”) (collectively, “Defendants”) and allege as follows:

5 **NATURE OF THE ACTION**

6 1. Prelude and Pacific Fertility market and sell egg and embryo cryopreservation services.
7 They liken these services to an insurance policy for women and families, claiming the services provide
8 peace of mind to those who wish to defer having children and relief to those seeking to overcome a
9 diagnosis of infertility. Cryopreservation involves preservation of tissue—here, human eggs and
10 embryos—using cooling techniques. In the 1980s, facilities began using a cryopreservation technique
11 known as “slow freezing” to preserve human reproductive tissue. Cryopreservation became more
12 prevalent after the advent in the early 2000s of vitrification, a process by which tissue is cooled more
13 quickly, resulting in higher egg and embryo survival rates. Eggs or embryos frozen through
14 cryopreservation are stored in specially designed metal tanks.

15 2. Recognizing that the eggs and embryos entrusted to their care are irreplaceable, Prelude
16 and Pacific Fertility promise their clients, including Plaintiffs, that they will use state-of-the-art
17 laboratory equipment and protocols to ensure the safekeeping of the eggs and embryos. Safe storage
18 requires backup redundancies to guard against a catastrophic failure, daily inspections of the tanks, and
19 alarm systems to immediately notify staff of a potential failure.

20 3. On March 4, 2018, Pacific Fertility discovered that the liquid nitrogen levels in a tank
21 known as “Tank 4” had dropped to an unsafe level for an undetermined period of time, destroying or
22 jeopardizing the eggs and embryos stored in the tank, including those belonging to Plaintiffs. Chart
23 manufactured Tank 4.

24 4. Pacific Fertility’s first notification of the failure of Tank 4 was via an email sent at four
25 in the morning Pacific time on Sunday, March 11, 2018. Pacific Fertility described the failure as “a
26 very unfortunate incident” in which the storage tank containing Plaintiffs’ cryopreserved eggs and
27 embryos “lost liquid nitrogen for a brief period of time,” and stated that a “preliminary analysis”
28 suggested some of the eggs and embryos in the tank may have been destroyed.

1 5. Over a month later, on April 19, 2018, Pacific Fertility again wrote to Plaintiffs,
2 notifying them that an investigation had shown the incident resulted from “a failure of the tank’s
3 vacuum seal.” Four days later, Chart recalled several of its cryopreservation tanks, citing “reports of a
4 vacuum leak or failure that could compromise the product.”

5 6. Pacific Fertility and Prelude were responsible for monitoring Tank 4’s performance for
6 fluctuations in temperature or liquid nitrogen levels, which could endanger the enclosed eggs and
7 embryos, and to maintain safety systems to mitigate a tank failure. Pacific Fertility and Prelude failed
8 in that responsibility, committed gross negligence, and breached their agreement by failing to safely
9 preserve the eggs and embryos under their care.

10 7. To Plaintiffs’ shock and dismay, Pacific Fertility and Prelude did not separate their eggs
11 or embryos into different tanks to ensure that at least some tissue would be safe if one tank failed.

12 8. As a result of Defendants’ failures, Plaintiffs and the proposed class have suffered harm.
13 Learning that their reproductive tissue was compromised has caused them devastation, panic, and
14 distress. For many, the tissue in Tank 4 represented their last and only chance for a biological child.
15 Pacific Fertility and Prelude have informed Plaintiffs that it is not possible to know whether their eggs
16 or embryos are viable until they are warmed, and even then, the full extent of the damage cannot be
17 known without attempting a pregnancy. These messages have cast a cloud of uncertainty over women
18 and families, causing anguish and despair.

19 9. Plaintiffs, individually and on behalf of the class, seek appropriate relief through this
20 action.

21 **JURISDICTION AND VENUE**

22 10. This Court has subject matter jurisdiction over this action under the Class Action
23 Fairness Act of 2005, 28 U.S.C. § 1332(d), because (a) Plaintiffs are citizens of states different from
24 Prelude and Chart, (b) the amount in controversy exceeds \$5,000,000, excluding interest and costs, (c)
25 the proposed class consists of more than 100 individuals, and (d) none of the exceptions under the
26 subsection applies to this action.

27 11. This Court has personal jurisdiction over Defendants. They conduct substantial business
28 in California and intentionally availed themselves of the laws and markets of this state. A significant

1 portion of the acts and omissions at issue occurred in California, and Plaintiffs and many class
2 members suffered harm in California. Plaintiffs' claims against Defendants are meaningfully
3 connected to California in that: (1) each Plaintiff had eggs and embryos stored at Pacific Fertility,
4 which is located in California and within the Prelude network; and (2) each Plaintiff had eggs and
5 embryos stored in Chart's tank, which was physically located at Pacific Fertility's San Francisco
6 facility, and which failed, resulting in damage to Plaintiffs.

7 12. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the
8 events or omissions giving rise to Plaintiffs' claims occurred in this District.

9 **INTRADISTRICT ASSIGNMENT**

10 13. Assignment to the San Francisco Division is proper under Local Rules 3-2(c) and (d)
11 because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in San
12 Francisco.

13 **PARTIES**

14 **A. Plaintiffs**

15 14. Plaintiff A.B. is a citizen and resident of Sacramento County, California.

16 15. Plaintiff C.D. is a citizen and resident of Sacramento County, California.

17 16. Plaintiff E.F. is a citizen and resident of San Francisco County, California.

18 17. Plaintiff G.H. is a citizen and resident of San Francisco County, California.

19 18. Plaintiff I.J. is a citizen and resident of San Francisco County, California.

20 19. Plaintiff K.L. is a citizen and resident of San Francisco County, California.

21 20. Plaintiff M.N. is a citizen and resident of San Francisco County, California.

22 21. Plaintiff O.P. is a citizen and resident of San Mateo County, California.

23 22. Given the sensitive nature of their claims and the services they purchased from Pacific
24 Fertility and Prelude, Plaintiffs are using initials in this litigation to protect their privacy. If required by
25 the Court, Plaintiffs will seek permission to proceed under these pseudonyms.

1 **B. Defendants**

2 **1. Prelude**

3 23. At all relevant times, Defendant Prelude Fertility, Inc. was a Delaware corporation
4 headquartered in Florida. Prelude owns and runs a network of fertility clinics and egg and embryo
5 storage facilities—including Pacific Fertility Center—across the country.

6 24. Prelude was founded in 2016 by startup entrepreneur Martin Varsavsky with a \$200
7 million investment by New York-based Lee Equity Partners. Prelude’s stated business plan is to create
8 a national network of fertility clinics, as well as egg and embryo cryopreservation and storage centers
9 “all delivered with the highest level of personalized care by the nation’s leading reproductive
10 endocrinologists and practitioners.”¹ According to Varsavsky, “What Prelude does is bridge the gap, it
11 makes people’s biology meet their psychology” through “The Prelude Method”: “You freeze your
12 gametes when fertile, thaw them and create embryos when ready, genetically sequence the embryos,
13 and then transfer one embryo at a time. And you continue to do this until you achieve your desired
14 number of children.”²

15 25. Included within the Prelude network is MyEggBank, which Prelude claims has the
16 largest and most diverse selection of egg donors in the country. Prelude also claims that its embryo
17 survival rates are greater than 90% and that women who use eggs from MyEggBank have a 90%
18 pregnancy success rate within three cycles.³

19 26. Prelude acquired Pacific Fertility in September 2017 as part of Prelude’s business plan
20 to build its national network. Prelude directs potential clients to Pacific Fertility via its website and its
21 network of fertility clinics. Prelude also provides financing plans for services at Pacific Fertility.
22
23
24

25 ¹ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 18, 2018).

26 ² Martin Varsavsky, *Why I founded Prelude Fertility: Background on vision and bringing on the team to make it*
27 *thrive* (Mar. 7, 2017), <http://vator.tv/news/2017-03-07-why-i-founded-prelude-fertility> (last visited May 30, 2018).

28 ³ *Have Questions?*, Prelude Fertility, <https://preludefertility.com/faq> (last visited May 18, 2018).

1 27. Prelude represents that Pacific Fertility is one of “Our Clinics.”⁴ It represents that
2 Pacific Fertility’s clients are “Our” clients.⁵

3 28. In its press release announcing the addition of Pacific Fertility to its network of fertility
4 clinics, Prelude described “egg freezing, in vitro fertilization (IVF), genetic screening of embryos, and
5 donor egg matching” as part of “Prelude’s comprehensive services.”⁶

6 29. Prelude owns the laboratory, storage facility, and tanks at Pacific Fertility. It owned
7 Tank 4 at the time of the March 4, 2018, incident.

8 30. The employees responsible for performing daily monitoring and maintenance of the
9 tanks, including Tank 4, are employees of Prelude.

10 **2. Pacific Fertility**

11 31. Defendant Pacific Fertility Center is a private unincorporated entity located at 55
12 Francisco Street, Suite 500, San Francisco, California 94133.

13 32. Pacific Fertility was founded in 1999 and provides a full range of fertility services,
14 including egg cryopreservation, IVF, genetic testing, “cutting-edge laboratory techniques and
15 technology such as . . . vitrification,” and storage of cryopreserved eggs and embryos.⁷

16 33. At all relevant times, Pacific Fertility’s on-site San Francisco laboratory has
17 cryopreserved and stored eggs and embryos, including those belonging to Plaintiffs.⁸

18 34. At the time of the March 4, 2018, incident, Tank 4 was located at Pacific Fertility
19 Center’s laboratory in San Francisco.

20
21 ⁴ *Options Preserved, Our Clinics*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited
22 May 18, 2018).

23 ⁵ *Pacific Fertility Center: San Francisco*, Prelude Fertility, [https://www.preludefertility.com/clinic/pacific-
24 fertility-center](https://www.preludefertility.com/clinic/pacific-fertility-center) (last visited May 18, 2018).

25 ⁶ *Prelude Fertility Expands Network with Pacific Fertility Center in San Francisco*, Prelude Fertility,
26 [https://www.prnewswire.com/news-releases/prelude-fertility-expands-network-with-pacific-fertility-center-in-
27 san-francisco-300524534.html](https://www.prnewswire.com/news-releases/prelude-fertility-expands-network-with-pacific-fertility-center-in-san-francisco-300524534.html) (last visited May 18, 2018).

28 ⁷ *Prelude Fertility Expands Network with Pacific Fertility Center in San Francisco*, Prelude Fertility,
[https://www.preludefertility.com/press-release/prelude-fertility-expands-network-pacific-fertility-center-san-
francisco](https://www.preludefertility.com/press-release/prelude-fertility-expands-network-pacific-fertility-center-san-francisco) (last visited May 20, 2018).

⁸ *Sperm and Embryo Freezing*, Pacific Fertility Center, [https://www.pacificfertilitycenter.com/treatment-
care/sperm-and-embryo-freezing](https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing) (last visited May 18, 2018).

1 **3. Chart**

2 35. Defendant Chart Industries, Inc. is a Delaware corporation headquartered in Georgia.⁹

3 36. Founded in 1992, Chart is a publicly traded global manufacturer of equipment used in
4 the production, storage, and application of industrial gases. Chart produces a variety of cryogenic
5 equipment. On its website, Chart states that its “focus is cryogenics.”¹⁰ Chart claims that its products
6 “utilize our proprietary vacuum and insulation technologies, including storage equipment,” and that
7 “[o]ur industry-proven core-competency provides the highest insulation thermal performance in
8 cryogenics[.]”¹¹ Chart touts itself as “a recognized global brand for the design and manufacture of
9 highly engineered cryogenic equipment” and a “leading global manufacturer of vacuum insulated
10 products and cryogenic systems.”¹²

11 37. In its annual report for 2017, Chart described itself as a “leading diversified global
12 manufacturer of highly engineered equipment, packaged solutions, and value-add services used
13 throughout the gas to liquid cycle in all industries that require gases as cryogenic liquids or alternative
14 equipment for gas generation, generally for the industrial gas, energy, and biomedical industries.”¹³

15 38. Through its MVE brand, Chart sells a line of cryogenic equipment that includes freezers
16 and metal storage tanks. Chart claims that its cryogenic products “are engineered for reliability and
17 durability”¹⁴ and that its MVE brand “is the benchmark for biological storage systems, used for the
18 cryogenic preservation of human . . . tissues.”¹⁵

19
20 _____
21 ⁹ Plaintiffs only recently discovered the identity of the manufacturer—Defendant Chart—of the cryostorage tank
22 in which Plaintiffs’ and class members’ eggs and embryos were stored at Pacific Fertility. Chart is being served
23 concurrently with the filing of this Consolidated Amended Complaint.

24 ¹⁰ *About Chart*, Chart Industries, <http://www.chartindustries.com/About-Chart> (last visited May 20, 2018).

25 ¹¹ *Cryogenics*, Chart Industries, <http://www.chartindustries.com/Industry/Markets-Served/Cryogenics> (last
26 visited May 20, 2018).

27 ¹² *MVE Cryopreservation for Life Science*, Chart Industries,
28 <http://files.chartindustries.com/Cryopres%20Catalog%20ML-CRYO0009%20K%203b.pdf> (last visited May 20,
2018).

¹³ *SEC Form 10-K*, Chart Industries, <http://ir.chartindustries.com/Cache/392303934.pdf> (last visited May 20,
2018).

¹⁴ *Life Sciences*, Chart Industries, <http://www.chartindustries.com/Life-Sciences> (last visited May 20, 2018).

¹⁵ *About Chart*, Chart Industries, <http://www.chartindustries.com/About-Chart> (last visited May 20, 2018).

1 39. Chart's BioMedical segment accounted for around 20% of its total sales. Its
 2 "cryobiological storage products include vacuum insulated containment vessels for the storage of
 3 biological materials."¹⁶ Chart describes the competition for cryobiological storage products as
 4 "significant" and notes that "competition in this field is focused on design, reliability, and price."¹⁷

5 40. Chart designed and manufactured the storage tank in which Plaintiffs' eggs and embryos
 6 were stored on the date of the subject incident.

7 FACTUAL ALLEGATIONS

8 **I. Plaintiffs Entrusted Prelude and Pacific Fertility with Keeping their Eggs and Embryos** 9 **Safe and Secure.**

10 41. Defendants Prelude and Pacific Fertility have partnered to offer cryopreservation and
 11 storage of eggs and embryos, among other fertility services.

12 42. Prelude claims that it is "on a mission" to provide "the best options, science, and care so
 13 everyone can have the opportunity to be a mom or dad when they are ready."¹⁸

14 43. Pacific Fertility states that it has one goal: to help clients build a healthy family.¹⁹

15 **A. Defendants market their cryopreservation services as an insurance policy that** 16 **unwinds the biological clock, preserving the opportunity to have children when** 17 **the time is right.**

18 44. Human eggs, also known as oocytes, are a limited resource. According to Pacific
 19 Fertility, a woman has about 600,000 eggs at birth, and this supply diminishes at the rate of about 1,000
 20 per month, beginning at her birth.²⁰ This decline is part of the natural aging process and is commonly
 21 referred to as a woman's biological clock. The loss of oocytes from the ovaries is relentless and

22 ¹⁶ SEC Form 10-K, Chart Industries, <http://ir.chartindustries.com/Cache/392303934.pdf> (last visited May 20,
 23 2018).

24 ¹⁷ *Id.*

25 ¹⁸ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 18,
 26 2018).

27 ¹⁹ *Pacific Fertility Center*, Pacific Fertility Center, [https://www.pacificfertilitycenter.com/the-center/infertility-](https://www.pacificfertilitycenter.com/the-center/infertility-center)
 28 [center](https://www.pacificfertilitycenter.com/the-center/infertility-center) (last visited May 28, 2018).

²⁰ *Egg Freezing in Northern California*, Pacific Fertility Center,
<https://www.pacificfertilitycenter.com/treatment-care/fertility-preservation-egg-freezing> (last visited May 27,
 2018).

1 continues even in the absence of menstrual cycles, and even when women are pregnant, nursing, or
 2 taking oral contraceptives. In addition, as Pacific Fertility acknowledges, egg quality diminishes with
 3 time, with miscarriages and chromosomal abnormalities occurring more frequently the older a woman
 4 is at the time of pregnancy. By their early-to-mid 40s, women typically can no longer conceive a child
 5 naturally.²¹

6 45. The purpose of egg cryopreservation is to allow women and their reproductive partners
 7 to preserve eggs so that they may be fertilized and implanted at a later time. Both Pacific Fertility
 8 Center and Prelude emphasize that their cryopreservation and storage services allow for flexibility in
 9 their clients' family planning, freeing women, for example, to wait for the right person and to focus on
 10 their careers during their most fertile years.

11 46. Prelude advertises its cryopreservation and storage services as providing women with
 12 "peace of mind" and more control over their childbearing choices.²² In marketing its cryopreservation
 13 and storage services, Prelude specifically appeals to women's declining fertility and limited eggs: "Age
 14 Matters . . . We're born with all the eggs we'll ever have—and their quantity and quality decrease as we
 15 age. If you think you might want a baby someday, but aren't ready right now, freezing your eggs keeps
 16 your options open."²³ Prelude likewise states that young women cryopreserve eggs "to have the
 17 option—an insurance policy that unwinds the biological clock and lets women pursue career
 18 advancement as freely as men without having to compromise in their choice of partner."²⁴

19 47. In large type, Prelude states on its website, "Options Preserved," and proceeds to
 20 advertise multiple benefits from cryopreservation and storage:
 21
 22
 23

24 ²¹ *Id.*

25 ²² *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17,
 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

26 ²³ *Options Preserved*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

27 ²⁴ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17,
 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

1 Find that right person. Focus on your career. Finish your education. The age
2 of your eggs (not you) is the number one cause of infertility. Freeze your eggs
to preserve your option to build a family when you're ready.²⁵

3 Prelude goes on to describe the storage process as hassle free: "Set it and forget it until you're ready."²⁶

4 48. Pacific Fertility offers egg cryopreservation services as a means of preserving "a
5 precious resource, limited to just a few years of your life[.]" and states that cryopreserving eggs and
6 embryos "can increase your chances of conception by 5 to 10 times."²⁷

7 49. Pacific Fertility touts similar benefits from its fertility preservation services:

8 6 Reasons to Preserve Your Fertility Today! (1) For a future family . . . (2) To
9 allow for educational pursuits . . . (3) To have time to develop a business or
10 career . . . (4) To give your relationship time to mature . . . (5) To reduce the
11 risk of medical treatments that might impact fertility . . . (6) To achieve
control over your future.²⁸

12 **B. Defendants market their cryopreservation and storage services to people
13 struggling with infertility.**

14 50. Defendants also promote their egg and embryo cryopreservation and storage services
15 to people diagnosed with infertility.

16 51. Infertility is defined as the inability to conceive after one year of unprotected
17 intercourse if a woman is under the age of 35, or after six months if a woman is 35 or older.

18 52. Pacific Fertility states that it sees infertility as a "workable challenge."²⁹

19 53. Similarly, Prelude states: "we're here to help you become a parent. We'll use all of
20 our training, science, technology, lab skills, and most importantly, human-kindness skills, to fully
21 support you through every step of the process."³⁰

22 ²⁵ *Options Preserved*, Prelude Fertility, <https://www.preludefertility.com/freeze-eggs> (last visited May 18, 2018).

23 ²⁶ *Id.*

24 ²⁷ *Should I freeze my eggs?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs> (last visited May 18, 2018).

25 ²⁸ *6 Reasons to Preserve Your Fertility Today!*, Pacific Fertility Center (June 30, 2017),
26 <https://www.pacificfertilitycenter.com/fertility-preservation/blog/6-reasons-to-preserve-your-fertility-today>.

27 ²⁹ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May
20, 2018).

28 ³⁰ *Let's Make a Baby*, Prelude Fertility, <https://www.preludefertility.com/ivf> (last visited May 27, 2018).

1 54. For many individuals and couples experiencing infertility, Defendants' embryo
2 cryopreservation services represented their best and only hope of having a biological child or of
3 having children who are biological siblings.

4 **C. Defendants promised to keep Plaintiffs' eggs and embryos safe in a state-of-the-**
5 **art facility.**

6 55. Defendants emphasize that eggs and embryos will be safely stored, indefinitely, for
7 future family planning.

8 56. Prelude's marketing messages recognize the importance of proper egg storage for those
9 who use its services. A Prelude spokesperson, Allison Johnson, said: "If you know that your eggs are
10 safe and sound, what decisions would you make about your life? . . . Go pursue that graduate degree.
11 Wait for your soul mate. Go travel the world. Your eggs are waiting for you. For me that's as
12 liberating for women as the pill was in the 60s."³¹

13 57. Pacific Fertility states that its clients' "[e]ggs remain frozen until you need them"³² and
14 that "there is no limit to how long cells remain viable in the frozen state."³³

15 58. Regarding embryos, Pacific Fertility similarly reassures its clients that some "have come
16 back after 10-15 years and the embryos have been thawed successfully and created healthy babies."³⁴

17 59. Pacific Fertility claims that its laboratory is state of the art, meeting a "gold standard,"³⁵
18 and that it has a large and experienced laboratory staff dedicated to the "care and well being of eggs,
19 embryos and sperm."³⁶

20 _____
21 ³¹ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17,
22 2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

23 ³² What is the process?, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#treatment> (last visited May 18, 2018).

24 ³³ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited May 18, 2018).

25 ³⁴ *Id.*

26 ³⁵ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May
20, 2018).

27 ³⁶ *IVF Laboratory Team*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-specialists/ivf-laboratory-team>
28 (last visited May 20, 2018).

1 60. Since the advent of cryopreservation, the main techniques to cryopreserve eggs and
2 embryos have been slow freezing and vitrification. With slow freezing—first used in 1986—it takes
3 about two hours for eggs to reach final storing temperature. Starting in the mid-2000s, eggs and
4 embryos began to be preserved through a rapid cryopreservation process called vitrification.

5 61. Vitrification is a more advanced and reliable technology that Pacific Fertility describes
6 as being “used in the embryo and egg freezing process so that they can be stored for later use.”³⁷
7 Pacific Fertility states the newer vitrification process is safer than earlier slow-freezing technologies,
8 which could lead to crystallization threatening the viability of cryopreserved tissue. “Avoiding ice
9 formation in this way,” Pacific Fertility represents, “successfully protects the embryos from damage
10 and allows them to be warmed later giving survival rates consistently above 90%.”³⁸

11 62. Pacific Fertility further states that all eggs and embryos would be stored in vacuum-lined
12 liquid nitrogen tanks—“like a large thermos flask”—that “are computer controlled and monitored 7
13 days a week with a dedicated alarm system.”³⁹

14 63. Pacific Fertility claims that liquid nitrogen “is very stable and easy to work with” and
15 that each tank is equipped with numerous sensors to monitor temperature increases above -196°C or a
16 drop in the level of liquid nitrogen.⁴⁰ Pacific Fertility also claims that the sensors “are connected to a
17 telephone alarm system that will alert staff to an alarm condition outside of normal working hours. . . .
18 The alarm system is tested weekly and continues to run on battery power in the event of a power
19 failure. The alarm system can also be checked remotely.” When a tank alarm goes off, the on-call
20 embryologist is supposed to arrive within 30 minutes regardless of time of day and must conduct a
21 physical inspection of the tank before the alarm can be turned off.⁴¹

22
23
24 ³⁷ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

25 ³⁸ *Id.*

26 ³⁹ *Sperm and Embryo Freezing*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/sperm-and-embryo-freezing> (last visited Mar. 23, 2018).

27 ⁴⁰ *Id.*

28 ⁴¹ *Id.*

1 64. Pacific Fertility further claims that, in addition to being constantly monitored, each tank
2 “gets a physical inspection daily, looking for problems or signs of problems,” and that the amount of
3 nitrogen in the tank “is assessed as a means of monitoring for a possible slow leak or an impending
4 tank failure.”⁴²

5 65. Each tank is also supposed to receive a daily refill of nitrogen because the nitrogen in
6 the tanks continuously evaporates at a slow rate.⁴³ It is standard in the egg and embryo storage industry
7 for facilities to equip their tanks with autofilling mechanisms to refill the liquid nitrogen when the
8 system detects that levels are low.

9 66. Pacific Fertility advertises the durability of its tanks and storage facility on its website,
10 stating:

11 The storage tanks require no power and would not be impacted by a power
12 failure or blackout. They are made of metal and would probably survive a
13 small or moderate fire. If the tanks were not physically damaged or knocked
14 over in a disaster, they should survive intact. Even if no one was able to
15 physically check the tanks, or if we were unable to obtain liquid nitrogen, the
16 tanks should still maintain their temperature for several days.⁴⁴

17 67. Pacific Fertility represents that its egg and embryo cryopreservation and freezing
18 services are highly successful, with egg survival rates of 83%⁴⁵ and embryos survival rates consistently
19 above 90%.⁴⁶

20 68. Prelude also touts “greater than 90%” egg and embryo survival rates.⁴⁷

21
22 ⁴² *Id.*

23 ⁴³ *Id.*

24 ⁴⁴ *Lab FAQs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/lab-faq> (May 20, 2018).

25 ⁴⁵ *What are your success rates?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/my-eggs#success> (last visited May 20, 2018).

26 ⁴⁶ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

27 ⁴⁷ *Have Questions?, What are the chances of pregnancy with frozen embryos?*, Prelude Fertility, <https://www.preludefertility.com/faq> (last visited May 27, 2018).

1 **II. Precision and Care Are Required in the Cryopreservation and Storage of Eggs and**
 2 **Embryos.**

3 **A. The process of retrieving and storing eggs and embryos is demanding, time**
 4 **consuming, and expensive.**

5 69. People who use Defendants' cryopreservation services typically make an enormous
 6 emotional investment. They endure painful and invasive procedures, financial stress, and the strain the
 7 process puts on their mental health and relationships with others, all in the hopes that one day they will
 8 be able to have a child.

9 70. Women take drug and hormone cocktails and injections over several weeks to stabilize
 10 the uterine lining, stimulate ovaries into producing follicles, and stop these ovary follicles from
 11 releasing eggs. Then, after an ovulation trigger injection, eggs are collected under sedation or a general
 12 anesthetic. A woman may be subjected to multiple painful injections each day, resulting in bruising,
 13 swelling, and overall discomfort. The drug and hormone therapy may also trigger other side effects,
 14 such as tiredness, nausea, headaches, and blood clots, as well as negative emotions. Many women also
 15 undergo acupuncture sessions, recommended by Pacific Fertility, to improve IVF outcomes. The
 16 process can limit travel and other activities, and often requires time off from work. The harvesting
 17 procedure itself can be painful and hard to endure, requiring insertion of a thick needle through the
 18 vaginal wall to drain the ovary follicles of their fluid. After the procedure, a woman often experiences
 19 residual pain for about a week and may need bed rest for several days. Some women suffer significant
 20 side effects, such as ovarian hyperstimulation syndrome, requiring hospitalization.

21 71. Undergoing egg retrieval is "emotionally trying" as well as physically demanding.⁴⁸
 22 Pacific Fertility acknowledges that feelings of anxiousness, depression, isolation, and helplessness are
 23 common among clients undergoing IVF services, and that strained and stressful relations with spouses,
 24 partners, and other loved ones are also common. IVF typically causes those undergoing treatment to
 25
 26

27 ⁴⁸ *Patient Support*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/patient-support>
 28 (last visited May 27, 2018).

1 rely heavily on friends and significant others for support, including, for example, with coping with
2 stress and providing rides to and from appointments.⁴⁹

3 72. According to Pacific Fertility’s website, “the time and energy that is needed, both
4 physically and emotionally can drain even the staunchest crusader.”⁵⁰

5 73. According to one research study, half of women seeking IVF services described
6 infertility as the most upsetting experience of their lives.⁵¹ Other studies show that infertility causes
7 anguish similar to that accompanying a cancer diagnosis or the loss of a loved one.⁵² Infertility is
8 associated with anger, depression, anxiety, marital problems, and loss of self-esteem among prospective
9 parents experiencing infertility.⁵³ Pacific Fertility warns clients that they may experience intense anger,
10 despair, and guilt, and that it is “is very common to experience symptoms of anxiety and depression as
11 a result of this experience.”⁵⁴

12 74. The cryopreservation process compounds these emotions and stresses. For many, this
13 process represents their last hope for having children. Each cycle can produce anxiety and fear that
14 there won’t be enough eggs retrieved, or that the eggs retrieved won’t be of a high enough quality.
15 Multiple cycles are often required. Many women experience and express strong feelings of anxiety,
16 failure, hopelessness, and disappointment during this process.

17 75. Prelude acknowledges its clients’ vulnerability during the cryopreservation process and
18 trains its staff on how to empathize with clients:

19 _____
20 ⁴⁹ *Resources at Your Fingertips*, Pacific Fertility Center (Nov. 22, 2004),
21 <https://www.pacificfertilitycenter.com/blog/fertility-resources-your-fingertips>.

22 ⁵⁰ *Id.*

23 ⁵¹ *The psychological impact of infertility and its treatment*, Harvard Medical School (May 2009),
24 https://www.health.harvard.edu/newsletter_article/The-psychological-impact-of-infertility-and-its-treatment.

25 ⁵² A.D. Domar et al., *The psychological impact of infertility: a comparison with patients with other medical*
26 *conditions*, *Journal of Psychosomatic Obstetrics & Gynecology* (1993),
27 [https://www.massgeneral.org/bhi/assets/pdfs/publications/Domar%201993%20J%20Psychosom%20Obstet%20](https://www.massgeneral.org/bhi/assets/pdfs/publications/Domar%201993%20J%20Psychosom%20Obstet%20Gynaecol.pdf)
28 [Gynaecol.pdf](https://www.massgeneral.org/bhi/assets/pdfs/publications/Domar%201993%20J%20Psychosom%20Obstet%20Gynaecol.pdf); C. A. Bryson, *Post IVF syndrome? Psychological implications of failed IVF*, *The Obstetrician &*
Gynaecologist (2002), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.2002.4.4.201>.

⁵³ P.K. Dekar et al., *Psychological aspects of infertility*, *British Journal of Medical Practitioners* (2010),
<http://www.bjmp.org/content/psychological-aspects-infertility>.

⁵⁴ *Coping Strategies*, Pacific Fertility Center, [https://www.pacificfertilitycenter.com/treatment-care/coping-](https://www.pacificfertilitycenter.com/treatment-care/coping-strategies)
[strategies](https://www.pacificfertilitycenter.com/treatment-care/coping-strategies) (last visited May 20, 2018).

1 Fertility is such an incredibly personal and vulnerable subject. The World
2 Health Organization has designated infertility as the ‘third biggest global
3 epidemic,’ and yet as a society, we hardly even talk about it . . . until it gets
4 personal. As more people delay childbirth past their peak fertility years to
5 pursue careers, advanced degrees, or the right life partner, the chances of
6 having a baby the old fashioned way start to decline.⁵⁵

7 * * *

8 As women, mothers, sisters, and daughters we make it a priority to educate
9 and support all of our staff on how it feels to go through these journeys and
10 how much it means.⁵⁶

11 76. “The emotional part is driving what we are trying to do,” Prelude’s chief revenue officer
12 said. She further noted that a number of Prelude’s own employees have been touched by infertility.⁵⁷

13 77. “Emotional health” and “well being” are central to Pacific Fertility’s stated mission:

14 We are dedicated to a whole patient approach. We recognize that fertility
15 treatment may impact all corners of our patient’s lives, including work,
16 personal relationships and financial concerns. When designing their treatment
17 course, our physicians, nurses and counselors work with them to
18 accommodate all of these considerations.

19 Our support is integrated. Emotional health and well being are central to our
20 patient’s care. Our clinic’s services include acupuncture and an array of
21 Mind/Body and stress reduction workshops, seminars and support groups.
22 Our in-house family therapist is available to any patient and will also gladly
23 provide referrals to other qualified professionals.⁵⁸

24 78. Pacific Fertility recognizes the need to address clients’ “emotional and even spiritual
25 needs” during the “emotional ups and downs” of infertility:

26 At PFC, we know that the physical demands and emotional ups and downs of

27 ⁵⁵ *A Modern Approach to Family*, Prelude Fertility, <https://www.preludefertility.com/about> (last visited May 20,
28 2018).

⁵⁶ *Id.*

⁵⁷ *Meet Prelude Fertility, The \$200 Million Startup That Wants To Stop The Biological Clock*, Forbes (Oct. 17,
2016), <https://www.forbes.com/sites/miguelhelft/2016/10/17/prelude-fertility-200-million-startup-stop-biological-clock/#d05688c7260f>.

⁵⁸ *Fertility Treatment and Care*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/fertility-treatment-and-care> (last visited May 27, 2018).

1 infertile experience can impact life at home, at work and with family. This
 2 is a path that one likely did not anticipate and, while there is much reason for
 3 hope, the treatment process can also be emotionally trying. The well being of
 4 our patients is a crucial aspect of fertility treatment, and we encourage our
 5 patients to take advantage of the many resources we have developed to
 6 address the emotional and even spiritual needs they may have as a part of their
 7 journey.

8 PFC's extensive support system includes a devoted patient care team,
 9 experienced clinical coordinators and educators and an in-house marriage and
 10 family therapist who has long specialized in fertility and third party parenting
 11 issues.⁵⁹

12 79. Acknowledging the stress and challenges those contending with infertility face, Pacific
 13 Fertility promises its clients that it will be "by their side every step of the way":

14 A diagnosis of infertility can feel overwhelming and stressful for individuals
 15 and couples who always assumed that pregnancy would come easily. At
 16 Pacific Fertility Center, we see infertility as a workable challenge. . . .

17 We feel strongly that the physical well being is tied to emotional well being,
 18 and we take into account all of the challenges[,] . . . [including d]iagnosis,
 19 treatment and the inevitable 'waiting game' as well as financial stress We
 20 are by their side every step of the way to help address each and all of these
 21 needs.⁶⁰

22 80. Pacific Fertility and Prelude's services are costly. Clients pay more than \$8,000 for a
 23 single cycle of egg cryopreservation, which includes clinical monitoring, egg retrieval,
 24 cryopreservation, and one year of egg storage. Additional cycles cost \$6,995 each. Pacific Fertility
 25 recommends storing more eggs than a woman typically produces in a single cycle.⁶¹ It is not
 26 uncommon for women to undergo three or more egg cryopreservation cycles.

27 ⁵⁹ *Patient Support*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/patient-support>
 28 (last visited May 27, 2018).

⁶⁰ *Pacific Fertility Center*, <https://www.pacificfertilitycenter.com/the-center/infertility-center> (last visited May
 20, 2018).

⁶¹ *How many eggs do I need to freeze?*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/fertility-preservation/ask-us#how-many> (last visited May 21, 2018); *How Many Eggs Should I Freeze?*, Southern
 California Reproductive Center, <https://blog.scrxiv.com/how-many-eggs-should-i-freeze> (last visited May 21,
 2018).

1 81. The costs incurred to cryopreserve embryos are even higher. Pacific Fertility charges
2 \$11,595 for basic IVF, including clinical monitoring, egg retrieval, lab processing, and embryo
3 transfer.⁶² If a client chooses to use Comprehensive Chromosome Screening to select the healthiest
4 embryo to transfer, Pacific Fertility's basic IVF costs rise to \$16,085.⁶³

5 82. The above amounts do not include the costs of in-person consultations (\$375), pre-cycle
6 lab work, egg cryopreservation medications (\$2,000–6,000), embryo transferring (\$2,845–4,460),
7 embryo transfer medications (\$300–600), and continuing charges for egg and embryo storage (\$600 per
8 year).⁶⁴ Clients typically also pay thousands of dollars for fertility drugs leading up to egg retrieval,
9 and often spend hundreds of dollars on acupuncture and other recommended services to improve
10 outcomes. The entire process often costs many tens of thousands of dollars.

11 83. Most insurance plans do not cover egg cryopreservation and other fertility services.⁶⁵ A
12 2017 study by Mercer found that only 26% of companies with over 500 employees cover IVF.⁶⁶ As a
13 result, people seeking fertility services have taken out home equity loans, borrowed from their 401(k)
14 accounts, tapped their lines of credit, and moved in with their parents.⁶⁷

15 84. In part because of these challenging processes, costs, and experiences, many clients
16 form strong emotional attachments to their eggs and embryos. It is not unusual for women and their
17 reproductive partners to think about their eggs or embryos every day.

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19
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21 ⁶² *In-Vitro Fertilization (IVF) Costs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/financing-fees/vitro-fertilization-ivf-costs> (last visited May 21, 2018).

22 ⁶³ *Id.*

23 ⁶⁴ *Id.*

24 ⁶⁵ *Fertility treatments are becoming a financial and physical risk for many Americans*, CNBC (Nov. 20, 2017),
<https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arent-covered-by-insurance.html>; M. Inhorn et al.,
Medical egg freezing: How cost and lack of insurance cover impact women and their families, Reproductive
25 Biomedicine & Society Online (Jan. 21, 2018),
<https://www.sciencedirect.com/science/article/pii/S2405661818300017>.

26 ⁶⁶ *Fertility treatments are becoming a financial and physical risk for many Americans*, CNBC (Nov. 20, 2017),
<https://www.cnbc.com/2017/11/17/most-patients-getting-ivf-arent-covered-by-insurance.html>.

27 ⁶⁷ *Id.*; *Infertility Treatment Grants and Scholarships*, RESOLVE, [https://resolve.org/what-are-my-](https://resolve.org/what-are-my-options/making-infertility-affordable/infertility-treatment-grants-scholarships/)
28 [options/making-infertility-affordable/infertility-treatment-grants-scholarships/](https://resolve.org/what-are-my-options/making-infertility-affordable/infertility-treatment-grants-scholarships/) (last visited May 21, 2018).

1 **B. The loss of eggs and embryos results in emotional trauma.**

2 85. Prelude and Pacific Fertility are well aware of the lengths to which people go to obtain
3 eggs and embryos, how much these eggs and embryos mean to their clients, the clients' emotional
4 investment in the survival of the eggs and embryos, and the clients' expectations that great care will be
5 taken to preserve and protect the eggs and embryos to avoid irreparable, devastating harm.

6 86. Eggs and embryos are precious. They offer the opportunity to fulfill one of the most
7 fundamental human urges: to become a parent and create one's own family when the time is right.
8 Even for those who have already met their family planning goals, their remaining eggs and embryos
9 retain emotional value. Many opt to continue storing their eggs and embryos for years after they have
10 successfully had children. Some hold funeral ceremonies for embryos.⁶⁸ Others who no longer plan to
11 use their eggs and embryos hope to donate them to a family member or other couple struggling with
12 infertility, or toward beneficial research.

13 87. Eggs and embryos are irreplaceable. As women age, their egg quantity and quality
14 diminish. The most determinative factor in IVF success is the woman's age at the time her eggs were
15 extracted. At some point, usually around her mid-40s, a woman can no longer produce viable eggs.
16 Even if additional eggs can be retrieved, one cannot replace 35-year-old eggs with 42-year-old eggs and
17 expect the same result. When eggs and embryos are damaged or compromised, it may be impossible
18 for clients to have their own biological children. There is no possibility of creating substitute embryos
19 for cancer survivors or those whose spouses have died. Likewise, those who used donor eggs or sperm
20 to create embryos may find it impossible to retrieve additional material from the same donors. Thus,
21 donor-users who already have children may be prevented from having additional children who are
22 biologically related to their siblings.

23 88. At the time of their freezing, most of the eggs and embryos that Pacific Fertility stored
24 were viable rather than being compromised or incapable of successful fertilization or implantation.

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26
27 ⁶⁸ J. Fraga, *After IVF, Some Struggle With What To Do With Leftover Embryos*, NPR (Aug. 20, 2016),
28 <https://www.npr.org/sections/health-shots/2016/08/20/489232868/after-ivf-some-struggle-with-what-to-do-with-leftover-embryos>.

1 Most of the embryos that Pacific Fertility stored had been tested and found free of chromosomal
2 abnormalities.

3 89. The success or failure of egg and embryo cryopreservation and storage services has
4 emotional and psychological ramifications for those seeking to become parents. Losing an egg or
5 embryo provokes the fear that having a child is no longer possible, causing feelings of devastation and
6 despair. Many experience grief and anguish when fertility treatment does not result in pregnancy or
7 when they lose fertility choices.⁶⁹ Pacific Fertility’s website itself provides coping strategies and
8 techniques for reducing stress.⁷⁰

9 **C. Successful cryopreservation depends on strict adherence to protocols.**

10 90. Eggs and embryos are fragile. It is critical that they be handled and stored
11 carefully. Cooling, warming, and the removal of cryoprotectants must follow precise, controlled
12 protocols. Failure to adhere to these protocols can kill the egg or embryo, impair implantation and
13 viability, and introduce chromosomal abnormalities.

14 91. Egg and embryo cryopreservation entails preserving the reproductive material at subzero
15 temperatures. A key goal of cryopreservation is to reduce cell damage caused by the formation of ice
16 crystals and the expansion of water as cryopreserved material cools to subzero temperatures.
17 According to Pacific Fertility, “[t]he key to successful egg freezing is determining a technique that will
18 not damage the fragile chromosomes of the egg”; this is because “the chromosomes of the egg are
19 vulnerable to damage, including damage from the exertion of the freezing and thawing process.”⁷¹

20 92. As noted above, two primary cryopreservation technologies have emerged. Both rely
21 upon cryoprotectants, which are solutions added to the cells that reduce cell damage by displacing
22 water in a manner similar to antifreeze. The first technology, slow freezing (also known as slow
23 programmable freezing), utilizes specialized laboratory equipment that lowers the temperature of
24

25 ⁶⁹ C. A. Bryson, *Post IVF syndrome? Psychological implications of failed IVF*, *The Obstetrician &*
Gynaecologist (2002), <https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.2002.4.4.201>.

26 ⁷⁰ *When to See a Therapist*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/treatment-care/when-to-see-a-therapist> (last viewed May 20, 2018).

27 ⁷¹ *New Clinical Study: New Technique for Egg Freezing*, Pacific Fertility Center (Feb. 25, 2006),
28 <https://www.pacificfertilitycenter.com/blog/new-clinical-study-new-technique-egg-freezing>.

1 embryos conditioned with cryoprotectants in a slow, controlled manner to -190°C . The second and
2 newer technology, vitrification, refers to any process resulting in “glass formation”—that is, the
3 transformation from a liquid to a hardened liquid with minimal crystallization (ice crystals). According
4 to Pacific Fertility, vitrification “cools the cells in the embryo at rates close to 5,000 degrees per
5 minute[,]” and “embryos that are vitrified are exposed to 5-10 times more cryoprotectant than slow
6 frozen embryos.”⁷² The ultra-rapid nature of this process minimizes (1) the formation of ice crystals
7 and (2) toxicity damage to the cells that cryoprotectants can cause during longer exposure to warmer
8 temperatures.

9 93. The process of warming eggs and embryos that have been preserved through
10 cryopreservation is also precise and dependent on specialized techniques and chemical
11 solutions. Pacific Fertility states that “embryos coming out of the freezer (at -196°C) are warmed to
12 room temperature in a maximum of three seconds. This rapid warming method minimizes damage to
13 the embryo from ice crystals that can form during warming.”⁷³ A key part of the warming procedure is
14 the careful dilution and eventual replacement of the toxic cryoprotectant fluid with a solvent compatible
15 with cytoplasmic fluid. Pacific Fertility states that it “incubat[es] the embryo in decreasing
16 concentrations of the antifreeze, and increasing concentrations of water. Over a period of 15 minutes,
17 the embryo is stepped through 3 different solutions, until finally the antifreeze is gone and all the water
18 has been replaced.”⁷⁴

19 94. For slow-frozen tissue, the failure to thaw slowly can result in cells over-expanding,
20 rupturing, and dying. For vitrification, it is important to warm quickly to avoid ice formation. Thus, it
21 is critical that tissue cryopreserved through slow freezing be thawed slowly, and that tissue
22 cryopreserved through vitrification be warmed quickly.⁷⁵ An uncontrolled rise in temperature, like the
23 one at issue here, can have catastrophic consequences for eggs and embryos.

24 _____
25 ⁷² *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center,
<https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

26 ⁷³ *Lab FAQs*, Pacific Fertility Center, <https://www.pacificfertilitycenter.com/the-center/lab-faq> (May 20, 2018).

27 ⁷⁴ *Id.*

28 ⁷⁵ *Vitrification, Oocyte and Embryo Vitrification*, Pacific Fertility Center,
<https://www.pacificfertilitycenter.com/treatment-care/vitrification> (May 18, 2018).

1 **III. Defendants Caused Irreparable Harm to Plaintiffs by Failing to Protect Their Eggs and**
 2 **Embryos.**

3 95. On March 4, 2018, Pacific Fertility discovered a loss of a substantial amount of liquid
 4 nitrogen in one of its cryogenic storage tanks, Tank 4, manufactured by Chart. This incident affected
 5 thousands of cryopreserved eggs and embryos and more than 400 individuals and families.

6 **A. Prelude and Pacific Fertility should have had systems and processes in place to**
 7 **ensure that Plaintiffs' eggs and embryos were not damaged.**

8 96. Liquid nitrogen in cryopreservation tanks evaporates at a slow rate. Absent extreme
 9 circumstances, even when a leak occurs it should take days for a tank to warm enough to cause damage
 10 to the enclosed eggs and embryos.

11 97. Egg and embryo storage facilities have developed and implemented a variety of systems
 12 and processes to protect against liquid nitrogen levels dropping to levels low enough to endanger
 13 clients' eggs and embryos. These systems and processes include daily tank inspections, multiple alarm
 14 systems that detect and send alerts regarding low liquid nitrogen levels, and autofillers that detect and
 15 automatically replenish low liquid nitrogen levels.

16 98. Pacific Fertility promised its clients that its laboratory was state of the art, including that
 17 its tanks were equipped with around-the-clock monitoring, alarm systems, and response protocols as
 18 well as daily walk-throughs. But no alarms or phone alerts notified Pacific Fertility or Prelude of the
 19 March 4 malfunction. Instead, an embryologist discovered the problem during a routine walk-through.
 20 Staff then had to manually replenish liquid nitrogen levels in the tank.

21 99. Pacific Fertility and Prelude have not explained why they did not detect the problem
 22 during prior walk-throughs or why they did not have a functional autofilling mechanism to replenish
 23 the low liquid nitrogen levels. Pacific Fertility and Prelude also lacked monitoring, alarm, and response
 24 systems and processes sufficient to detect and prevent harm from a dangerous temperature rise in Tank
 25 4. Pacific Fertility and Prelude further failed to mitigate risk by failing to implement a policy and
 26 practice of storing multiple eggs and embryos belonging to a given client in separate vials and tanks.

27 100. *Wired* interviewed one laboratory director who noted preventive measures Pacific
 28 Fertility and Prelude should have taken:

1 “It’s really quite sad the samples weren’t split up,” says Nahid Turan, who
2 directs laboratory operations at the Coriell Institute for Medical Research, one
3 of the oldest and largest biobanks in the US. “They were literally putting all
4 the eggs in one basket.” In addition to having samples in multiple tanks at
5 their New Jersey facility, Coriell also has back-up sites in multiple locations
6 around the country. And its software engineers built real-time monitoring
7 systems to flag any tanks trending in a troubling direction *before* they fail.⁷⁶

8 101. Cryopreserved eggs and embryos belonging to many hundreds of other people were
9 stored in the same tank as Plaintiffs’. Tank 4 housed up to 15% of Pacific Fertility’s total
10 cryopreserved tissue, consisting of thousands of eggs and embryos.

11 102. Most people with eggs and embryos stored in Tank 4 had all of their eggs and embryos
12 stored in that single tank. Pacific Fertility has expressed regret to clients affected by the March 4
13 incident for not mitigating the risk by spreading their eggs and embryos across multiple tanks.

14 **B. Chart recalled cryostorage tanks for vacuum seal defects after the Tank 4 incident.**

15 103. On April 23, 2018, Chart, the manufacturer of Tank 4, recalled certain cryostorage
16 tanks, stating in its recall notice: “Chart is presently investigating the possible cause of the **VACUUM**
17 **LEAK AND/OR FAILURE** which may be due to inadequate adhesion of the composite neck to the
18 aluminum unit” (emphasis in original). Chart added that the “issue appears to be an isolated occurrence
19 involving the machine and binding agent used during the manufacturing process.”

20 104. Chart announced the recall four days after Pacific Fertility revealed the conclusion of
21 “independent experts” that the March 4 incident “likely involved a failure of the tank’s vacuum seal.”

22 **C. Multiple investigations were opened after the Tank 4 incident.**

23 105. Various government entities and trade groups have responded to the March 4, 2018,
24 incident. The College of American Pathologists (CAP) opened and is conducting a formal
25 investigation into the incident, as is the State of California. The American Society for Reproductive
26 Medicine also is studying the incident and intends to make recommendations to its members based on
27 its findings.⁷⁷

28 ⁷⁶ M. Molteni, *What Keeps Egg-Freezing Operations From Failing?*, Wired (Mar. 13, 2018),
<https://www.wired.com/story/what-keeps-egg-freezing-operations-from-failing/>.

⁷⁷ A. E. Cha, *FAQ: Are my frozen embryos safe? Everything you need to know about the freezer malfunctions*,
The Washington Post (Mar. 14, 2018), <https://www.washingtonpost.com/news/to-your->

1 **D. Defendants’ failure to keep Plaintiffs’ eggs and embryos safe and secure has caused**
2 **irreparable harm.**

3 106. As a result of Defendants’ conduct, Plaintiffs have suffered emotional trauma, including
4 anxiety, hopelessness, fear, depression, devastation, and grief. Plaintiffs lost the very peace of mind
5 they sought when availing themselves of Pacific Fertility’s services, and the time, energy, and cost
6 associated with storing their eggs and embryos have been lost as well.

7 107. Pacific Fertility asserts that the embryos in Tank 4 must be fully thawed to determine
8 whether they remain viable after the incident. But, because of the risks associated with re-freezing
9 embryos, a family must be prepared before thawing to transfer the affected embryo into a woman’s
10 uterus and attempt a pregnancy if the embryo is deemed viable. Pacific Fertility also asserts that the
11 eggs in Tank 4 must be fully thawed and fertilized to determine whether they remain viable after the
12 incident.

13 108. Pacific Fertility has agreed in some instances to thaw eggs or embryos from Tank 4,
14 check their viability, and then refreeze the eggs or embryos. In those instances, however, Pacific
15 Fertility has made clear that the added cycle of thawing and refreezing—resulting from its own
16 mishandling of the eggs and embryos—creates further risks to their ultimate viability. Although this
17 procedure would not be needed absent Defendants’ failures, Pacific Fertility requires clients to sign
18 forms purporting to waive their legal rights merely to check the viability of their tissue.

19 109. Some of Defendants’ affected clients have decided to thaw tissue in Tank 4, and this
20 process confirmed that their eggs or embryos are no longer viable. Many families and individuals have
21 lost their best or only chance of having a child. They have suffered despair, depression, and heartbreak.
22 Those who can undergo additional retrievals face a greater risk that those eggs or embryos will not lead
23 to a successful pregnancy, as the age at which a woman’s eggs are retrieved is the dominant factor for
24 rates of success or failure.

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26
27 [health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-](http://health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm_term=.86e4c34f31f3)
28 [clinics-recent-problems/?utm_term=.86e4c34f31f3.](http://health/wp/2018/03/14/faq-are-my-frozen-embryos-safe-everything-you-need-to-know-given-two-fertility-clinics-recent-problems/?utm_term=.86e4c34f31f3)

1 110. While Pacific Fertility has not shared the data it has collected regarding the number of
2 Tank 4 eggs and embryos that have been thawed and resulting outcomes, the survival rates for these
3 eggs and embryos is lower than it would have been had the incident not occurred.

4 111. Pacific Fertility has not provided a comprehensive analysis of the risks of attempting a
5 pregnancy with any of the tissue from Tank 4, including the risks that the drop in nitrogen levels may
6 have caused chromosomal or other defects that would not be detected from a thaw alone.

7 112. Nevertheless, Pacific Fertility has advised Plaintiffs A.B., C.D., and others with affected
8 eggs and embryos to attempt pregnancies with Tank 4 tissue. Before undergoing an embryo or egg
9 thaw, embryo transfer, or egg fertilization, Pacific Fertility requires clients to sign a consent statement
10 acknowledging that the risks are uncertain and waiving any liability on the part of Pacific Fertility
11 arising out of the thaw, transfer, or fertilization procedure.

12 113. As a result of the Tank 4 incident, Plaintiffs are being asked to make significant
13 reproductive decisions now—depriving them of the very freedom and flexibility they sought when
14 placing their eggs or embryos in Defendants’ care. Pacific Fertility has counseled affected clients to
15 thaw and immediately fertilize eggs, and to transfer embryos to a woman’s uterus, to determine
16 whether their tissue remains viable. Yet the purpose of cryopreservation was to allow these clients to
17 make reproductive choices on their own timelines. Many clients do not yet have a partner with whom
18 they wish to fertilize their eggs, or are not ready to move forward with a sperm donor, much less try to
19 get pregnant now or arrange for a surrogate. Others were busy with their lives when the incident
20 occurred—finishing graduate school, planning for international travel, or even preparing to welcome a
21 new baby—making it impossible or highly inconvenient to attempt a pregnancy now, especially one
22 fraught with more risk and potential heartache than normal.

23 114. People affected by the March 4 incident have described being thrust into a state of
24 limbo, as the “insurance policy” they paid for has vanished. To restore their future fertility options,
25 some are attempting additional retrieval cycles at an older age, with lower-quality eggs, and at
26 considerable cost, burden, and disruption to their lives, subjecting them to substantial physical and
27 emotional strain. These additional retrieval cycles also involve medical risks and potential
28 complications. Many class members completed these cycles only to learn they were incapable of

1 producing sufficient or any viable eggs or embryos. Other class members, for whom additional
2 retrievals are not possible or recommended, have been left to fear the worst—that they will be childless.

3 115. The National Infertility Association recognized the negative impact of the March 4
4 incident on women and families, stating that it was “shocked” to hear of this “unprecedented traged[y]”
5 for “the entire family building community. Our hearts break for each person impacted. We know first-
6 hand what someone goes through to have eggs or embryos to freeze, and to have this outcome is
7 devastating for everyone.”⁷⁸

8 116. In response to a similar incident in Ohio, clinical psychologists advised that the loss of
9 eggs and embryos should be acknowledged like any other death, and suggested grief counseling and
10 organization of a memorial in response.⁷⁹

11 117. In sum, those with eggs and embryos in Tank 4 are devastated, and have compared the
12 resulting feeling of powerlessness to that caused by a natural disaster. Many of those who had saved
13 eggs and embryos report having lost their only chance to have biologically related children. In some
14 cases, those affected have avoided telling family, knowing their loved ones would be “heartbroken” not
15 to have siblings or grandchildren.⁸⁰ One couple, who had gone through the process after a cancer
16 diagnosis, described their emotions:

17 My heart just sank and I felt physically ill. I felt just sick to my stomach. The
18 world of infertility is a very isolating world, it’s very lonely[,] it’s a complete
19 loss of control.

20 * * *

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22
23 ⁷⁸ *Statement on Storage Tank Malfunction Impacting Hundreds of Patients*, RESOLVE (Mar. 12, 2018),
24 <https://resolve.org/about-us/news-and-press-releases/statement-on-storage-tank-malfunction-at-university-hospitals-fertility-center-in-cleveland-oh/>.

25 ⁷⁹ J. Washington, *Experts recommend counseling & support for UH patients who lost eggs, embryos*, The Plain
26 Dealer (Mar. 21, 2018),
27 http://www.cleveland.com/healthfit/index.ssf/2018/03/uh_patient_who_lost_eggs_embryo.html.

28 ⁸⁰ D. Kapp, *What It’s Like to Be a Victim of a ‘Fertility Disaster’*, The Cut (Mar. 15, 2018),
<https://www.thecut.com/2018/03/pacific-fertility-center-clinic-disaster-cleveland-university-hospital.html>; S.
Steimle, *Patients at Troubled San Francisco Fertility Clinic Mull Legal Action*, CBS SF Bay Area (Mar. 14,
2018), <http://sanfrancisco.cbslocal.com/2018/03/14/patients-san-francisco-fertility-clinic-mull-legal-action/>.

1 For some this is their last hope, I mean they physically, financially, mentally
2 can't put themselves through that again. I've gone from anger, I've gone
3 through just feeling a sense of loss, grief, I think right now I'm angry to be
4 honest.⁸¹

5 118. Given the sensitive nature of the eggs and embryos entrusted to their care, as well as
6 their familiarity with the deeply emotional aspects of their services, Pacific Fertility and Prelude were
7 aware of the devastating consequences for their clients that would result from a failure to keep their
8 eggs and embryos safe and secure.

9 **E. Pacific Fertility and Prelude's communications regarding the incident have
10 compounded the harm.**

11 119. Pacific Fertility first attempted to notify its clients of the March 4 incident a week after it
12 occurred.

13 120. At approximately 4 a.m. Pacific time on March 11, 2018, Pacific Fertility sent its clients
14 an email stating:

15 Earlier this week, a single piece of equipment lost liquid nitrogen for a brief
16 period of time. The remainder of the equipment and cryo-storage facility was
17 not affected. As soon as the issue was discovered, our most senior
18 embryologists took immediate action to secure all tissue in that single cryo-
19 storage tank. The tank was immediately retired, and the facility is operating
20 securely.

21 We have hired independent experts and launched an in-depth investigation of
22 the matter. We felt it was imperative to advise you that your tissue was stored
23 in the affected tank and *may* have been impacted. Based on our preliminary
24 analysis, the good news is that we do expect that some of the tissue from that
25 tank remains viable. We are continuing to gather information but wanted to
26 share these developments with you directly.

27 121. The email further stated, "[w]e are incredibly sorry that this happened and for the
28 anxiety that this will surely cause. We are heartbroken by this situation and our thoughts are with each
of you who may have been touched by this event."

⁸¹ *Mother felt "physically ill" after hearing embryos possibly destroyed at fertility center*, CBS Evening News (Mar. 9, 2018), <https://www.cbsnews.com/news/mother-felt-physically-ill-after-hearing-embryos-possibly-destroyed-at-fertility-center/>.

1 122. The email invited Plaintiffs and other families with eggs and embryos stored in Tank 4
2 to call to discuss the incident with their fertility specialists. But the call center has been overwhelmed,
3 and the information provided over the phone and in person has been vague and often inconsistent.
4 Different Pacific Fertility staff members have provided clients with conflicting information.

5 123. Pacific Fertility did not provide further written information until over a month later, on
6 April 19, 2018, when Pacific Fertility wrote to its clients with “several updates following the tank
7 failure that occurred in the embryology lab on March 4, 2018.”

8 124. Pacific Fertility stated that “independent experts have been investigating the incident”
9 and preliminarily determined that it “likely involved a failure of the tank’s vacuum seal.”

10 125. Pacific Fertility also stated that it had implemented new protocols—“re-inspection of
11 onsite storage tanks, the purchase of several emergency tanks beyond our standard back-up tanks, and
12 an extra layer of redundancy in our warning systems”—to avoid future loss of eggs and embryos, steps
13 it should have taken before the incident.

14 126. Pacific Fertility initially told some clients definitively that their tissue was destroyed in
15 the incident. It told other clients it could not determine whether their tissue survived unless they
16 thawed and fertilized their eggs, or thawed and transferred their embryos. Pacific Fertility also refused
17 to tell many other people whether their tissue was even stored in Tank 4, instead stating simply that an
18 incident had occurred at its facility that may have impacted certain clients’ tissue. In post-incident
19 calls, Pacific Fertility stated that it assumed that many were not going to use the tissue stored in Tank
20 4—so clients “should just let it go.” Similarly, on March 11, 2018, a Pacific Fertility employee told
21 ABC News that a large number of families with eggs and embryos stored at the facility were “people
22 who won’t use them anyway.” Other clients with eggs and embryos in Tank 4 were billed for storage
23 fees after the incident occurred and before it was disclosed to them.

24 127. Pacific Fertility has offered some of its clients a free additional cycle for egg retrieval.
25 Pacific Fertility’s proposed remedy is inadequate. The mishandling of client eggs and embryos is
26 devastating and irreparable. Many can no longer undergo additional retrievals. Older women are
27 generally not able to produce as many eggs of as high a quality as when they were younger, and in
28 many cases go through the entire process only to learn they were unable to produce any viable eggs.

1 Even where some eggs can be retrieved, women confront a greater risk that those eggs will not lead to a
2 successful transfer and pregnancy. Moreover, additional retrievals are time consuming, expensive, and
3 physically and emotionally exhausting and burdensome, and typically require time away from work.
4 Even two or three cycles may not fully replenish the number of viable eggs or embryos lost.

5 128. Pacific Fertility's April 19, 2018, email blaming the tank failure on Chart left clients
6 with more questions than answers. Pacific Fertility did not say why the remedial steps mentioned in the
7 email, like adding redundancies, were not in place before the incident. Clients were not told why an
8 alarm did not alert Pacific Fertility staff, why a backup system (e.g., an autofill function or additional
9 generator) did not engage, or why the problem went undiscovered until someone walked through the
10 lab during a routine check.

11 129. Pacific Fertility states that tanks can go without power or liquid nitrogen for "several
12 days" without compromising the enclosed reproductive tissue. It is unclear why Pacific Fertility failed
13 to detect the problem with Tank 4 until it was too late.

14 130. Pacific Fertility's April 19 email also raised false hopes, stating that Pacific Fertility
15 "can report several early pregnancies" from thawed and transferred embryos, and had "successfully
16 thawed a limited number of eggs[,] confirm[ing] that there is viable tissue from the tank." Pacific
17 Fertility failed to mention that there is also *unviable* tissue from the tank. Pacific Fertility
18 indiscriminately notified all people with tissue in Tank 4 that their eggs and embryos might be "viable"
19 despite knowing this was *not* true for many of these people.

20 131. Clients who were devastated upon learning, in the days and weeks after Pacific
21 Fertility's first mass email, that their tissue was not viable have been doubly devastated by the
22 insensitivity of Pacific Fertility's second mass email.

23 132. Pacific Fertility executives and employees were well aware that the March 4 incident
24 would cause significant distress. Nevertheless, even though Pacific Fertility has a counselor on staff, it
25 offered no additional support services or counseling to those affected by the incident.

26 133. Pacific Fertility's failure to offer compassionate support services and to communicate
27 clearly and consistently with victims of the incident has caused them further confusion, pain, and
28 distrust.

PLAINTIFF-SPECIFIC ALLEGATIONS

Plaintiffs A.B. and C.D.

1
2
3 134. Plaintiffs A.B. and C.D. first contacted Pacific Fertility in or around January 2015 about
4 the possibility of creating embryos and having their embryos frozen.

5 135. In January 2015, Plaintiffs A.B. and C.D. contracted with Pacific Fertility to create and
6 have their embryos preserved for future use.

7 136. Plaintiffs A.B. and C.D. conducted extensive research concerning IVF and fertility
8 centers and chose Pacific Fertility based on the belief that it provided high-quality services that were
9 state of the art. Before having their embryos cryopreserved with Pacific Fertility, Plaintiffs A.B. and
10 C.D. saw representations about Pacific Fertility’s services on Pacific Fertility’s website, including
11 Pacific Fertility’s claims that it provided high-quality services. Plaintiffs A.B. and C.D. also had a
12 consultation session with Dr. Carl M. Herbert, who told them about Pacific Fertility’s care,
13 professionalism, and state-of-the-art facilities.

14 137. In early 2015, Plaintiffs A.B. and C.D. underwent procedures to prepare for embryo
15 creation and cryopreservation. Before the egg retrieval procedure in March 2015, Plaintiff A.B.
16 underwent a month of treatment and injections. Pacific Fertility ultimately retrieved approximately 21
17 of her eggs, which were then fertilized with Plaintiff C.D.’s sperm. After the fertility treatment ended,
18 the embryos Pacific Fertility created were cryopreserved for storage. At the time of the March 4, 2018,
19 incident, Plaintiffs A.B. and C.D. had eight viable cryopreserved embryos.

20 138. At all relevant times, Plaintiffs A.B. and C.D.’s embryos were under Pacific Fertility’s
21 protection, custody, and control.

22 139. Defendants kept Plaintiffs A.B. and C.D.’s embryos within a metal storage tank—Tank
23 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of
24 tank failure by spreading Plaintiffs A.B. and C.D.’s embryos among several tanks, Defendants stored
25 all of Plaintiffs A.B. and C.D.’s embryos in the same tank.

26 140. Plaintiffs A.B. and C.D. have paid approximately \$21,105.78 for the creation and
27 storage of their embryos. They experienced severe emotional distress when they learned of the March
28 4, 2018, incident and in the weeks that followed.

Plaintiff E.F.

1
2 141. Plaintiff E.F. first contacted Pacific Fertility in or around May 2016 about the possibility
3 of having her eggs frozen.

4 142. In or around June 2016, Plaintiff E.F. contracted with Pacific Fertility to have her eggs
5 retrieved and preserved for potential future use.

6 143. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff E.F. saw
7 representations about Pacific Fertility's services on Pacific Fertility's website, including claims
8 regarding the qualifications of Pacific Fertility's staff and the science behind the clinic's procedures.
9 Plaintiff E.F. also met with Dr. Carolyn Givens, who told her about Pacific Fertility's use of cutting-
10 edge technology and assured her that her eggs would be there for as long as she needed them.

11 144. In the summer of 2016, Plaintiff E.F. underwent procedures to prepare for egg
12 cryopreservation. Before the retrieval procedure, she underwent two months of treatment and
13 injections. Pacific Fertility ultimately retrieved and cryopreserved approximately nine of her eggs.

14 145. At all relevant times thereafter, Plaintiff E.F.'s eggs were under Pacific Fertility's
15 protection, custody, and control.

16 146. Defendants kept Plaintiff E.F.'s eggs within a metal storage tank—Tank 4—at their San
17 Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by
18 spreading Plaintiff E.F.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

19 147. Plaintiff E.F. has paid approximately \$11,000 for the retrieval and storage of her eggs.
20 She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the
21 weeks that followed.

Plaintiff G.H.

22
23 148. Plaintiff G.H. first contacted Pacific Fertility in or around February 2016 about the
24 possibility of having her eggs frozen.

25 149. In or around April 2016, Plaintiff G.H. contracted with Pacific Fertility to have her eggs
26 retrieved and preserved for potential future use.

27 150. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff G.H. saw
28 representations about Pacific Fertility's services on Pacific Fertility's website, including claims about

1 the reputable quality of their services. Plaintiff G.H. also met with Dr. Carolyn Givens, who provided
2 information regarding Pacific Fertility's services.

3 151. In the spring of 2016, Plaintiff G.H. underwent procedures to prepare for egg
4 cryopreservation. Before the retrieval procedure, she underwent two months of treatment and
5 injections. Pacific Fertility ultimately retrieved and cryopreserved approximately two of her eggs.

6 152. At all relevant times thereafter, Plaintiff G.H.'s eggs were under Pacific Fertility's
7 protection, custody, and control.

8 153. Defendants kept Plaintiff G.H.'s eggs within a metal storage tank—Tank 4—at their San
9 Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by
10 spreading Plaintiff G.H.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

11 154. Plaintiff G.H. has paid approximately \$14,500 for the retrieval and storage of her eggs.
12 She experienced severe emotional distress when she learned of the March 4, 2018, incident and in the
13 weeks that followed.

14 **Plaintiff I.J.**

15 155. Plaintiff I.J. first contacted Pacific Fertility in or around November 2012 about the
16 possibility of having her eggs frozen.

17 156. In or around December 2012, Plaintiff I.J. contracted with Pacific Fertility to have her
18 eggs preserved for potential future use.

19 157. Before having her eggs cryopreserved with Pacific Fertility, Plaintiff I.J. saw
20 representations about Pacific Fertility's services in Pacific Fertility's brochure, including claims that
21 Pacific Fertility "had a very strong embryo freezing program" and that its clients "can avoid high order
22 multiple pregnancies by transferring fewer fresh embryos and successfully freezing the remaining
23 embryos." Plaintiff I.J. also saw representations that Pacific Fertility "devoted considerable time and
24 effort into assembling one of the most highly trained teams in the country." Plaintiff I.J. met with staff
25 at Pacific Fertility who assured that her eggs would be there for as long as she needed them.

26 158. In February 2013, Plaintiff I.J. underwent procedures to prepare for egg
27 cryopreservation. Before the retrieval procedure, she underwent two months of treatment and
28 injections. Pacific Fertility ultimately retrieved and cryopreserved approximately 17 of her eggs.

1 159. At all relevant times thereafter, Plaintiff I.J.'s eggs were under Pacific Fertility's
2 protection, custody, and control.

3 160. Defendants kept Plaintiff I.J.'s eggs within a metal storage tank—Tank 4—at their San
4 Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by
5 spreading Plaintiff I.J.'s eggs among several tanks, Defendants stored all of her eggs in the same tank.

6 161. Plaintiff I.J. has paid approximately \$17,000 to Defendants for procedures, medications,
7 and storage of her eggs. She experienced severe emotional distress when she learned of the March 4,
8 2018, incident and in the weeks that followed.

9 **Plaintiff K.L.**

10 162. Plaintiff K.L. first contacted Pacific Fertility on or around June 3, 2010, about the
11 possibility of having her eggs cryopreserved.

12 163. In or around December 2015, Plaintiff K.L. contracted with Pacific Fertility to have her
13 eggs preserved for potential future use.

14 164. Before having her eggs frozen with Pacific Fertility, Plaintiff K.L. saw representations
15 about Pacific Fertility's services on Pacific Fertility's website, including Pacific Fertility's claims that
16 the clinic and its services were safe and reliable, and that eggs could be stored until the right time for
17 the client. Plaintiff K.L. also saw Pacific Fertility's representations that the process was quick and easy
18 for clients and had a very high likelihood of success. In addition, Plaintiff K.L. met with Dr. Eldon
19 Schriock, who told her that storage at Pacific Fertility was safe.

20 165. In February 2016, Plaintiff K.L. underwent procedures to prepare for egg freezing.
21 Before the retrieval procedure, she underwent months of treatment and injections. She also had to take
22 several days off from work and could not travel for work for two weeks. Pacific Fertility ultimately
23 retrieved and froze five of her eggs.

24 166. At all relevant times thereafter, Plaintiff K.L.'s eggs were under Pacific Fertility's
25 protection, custody, and control.

26 167. Defendants kept Plaintiff K.L.'s eggs from her first cycle within a metal storage tank—
27 Tank 4—at their San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk
28

1 of tank failure by spreading Plaintiff K.L.'s eggs from that cycle among several tanks, Defendants
2 stored all of her eggs in the same tank.

3 168. Plaintiff K.L. has paid approximately \$12,000 to Defendants for procedures
4 (approximately \$9,300), medications (approximately \$1,200), and storage (approximately \$600 per
5 year) of her eggs. She experienced severe emotional distress when she learned of the March 4, 2018,
6 incident and in the weeks that followed.

7 **Plaintiffs M.N. and O.P.**

8 169. Plaintiff M.N. first contacted Pacific Fertility in or around September 2011 about the
9 possibility of having her eggs frozen.

10 170. In or around late 2011, Plaintiff M.N. contracted with Pacific Fertility to have her eggs
11 preserved for potential future use.

12 171. Before having her eggs frozen with Pacific Fertility, Plaintiff M.N. saw representations
13 about Pacific Fertility's services on its website, including claims regarding its success rates and ability
14 to help couples and single people have a family and plan for the future. Plaintiff M.N. also met with
15 Dr. Eldon Schriock, who told her about Pacific Fertility's statistics and success rates.

16 172. In January 2012, Plaintiff M.N. underwent procedures to prepare for egg freezing. She
17 went through months of invasive and time-consuming treatments, including injections, blood tests, and
18 ultrasounds. She underwent approximately three retrieval cycles, resulting in approximately 37 eggs.

19 173. In 2016, Plaintiff M.N. contracted with Defendants to fertilize half of her eggs with a
20 sperm donor, resulting in three high-quality embryos. Her remaining 15 eggs were stored in Tank 4.

21 174. At all relevant times thereafter, Plaintiff M.N.'s remaining eggs were under Pacific
22 Fertility's protection, custody, and control.

23 175. Defendants kept Plaintiff M.N.'s eggs within a metal storage tank—Tank 4—at their
24 San Francisco laboratory facility on Francisco Street. Rather than mitigating the risk of tank failure by
25 spreading Plaintiff M.N.'s eggs among several tanks, Defendants stored all of her eggs in the same
26 tank.

27 176. After Plaintiff M.N. finally met the right partner, O.P., they decided to move ahead with
28 fertilizing the rest of her eggs. Plaintiffs M.N. and O.P. are in a committed relationship and plan to

1 raise children together. O.P. also became a client of Pacific Fertility in December 2017, when he and
 2 M.N. consulted with Pacific Fertility to begin the process of fertilizing M.N.'s remaining eggs with
 3 O.P.'s sperm. In consultation with Pacific Fertility specialists, M.N. and O.P. decided to proceed with
 4 the fertilization by mid-2018.

5 177. Plaintiff M.N. has paid more than \$25,000 to Defendants for procedures, medications,
 6 and storage of her eggs. The process was mentally and physically draining: Plaintiff M.N. had
 7 approximately 70 blood tests, 30 ultrasounds, and numerous injections and prescriptions. The process
 8 was also time consuming and required her to take time off from work. Plaintiffs M.N. and O.P.
 9 experienced severe emotional distress when they learned of the March 4, 2018, incident and in the
 10 weeks that followed.

11 * * *

12 178. As described above, each Plaintiff encountered specific representations by Pacific
 13 Fertility and/or Prelude regarding their egg and embryo storage services. All Plaintiffs encountered
 14 materially similar pre-treatment materials provided by Pacific Fertility.

15 179. At all relevant times before the incident, the oral representations and promotional and
 16 contractual materials regarding egg and embryo cryopreservation services that Plaintiffs and,
 17 inferentially, the class members received, were standardized, common, and essentially uniform.

18 180. Despite (1) knowledge that their electronic monitoring and alarms, and accompanying
 19 response systems and/or processes, were inadequate to protect against damage to Plaintiffs' eggs and
 20 embryos, and (2) multiple opportunities to inform Plaintiffs of the true condition of such systems and
 21 processes before Plaintiffs purchased and used their storage services, Pacific Fertility and Prelude
 22 uniformly failed to disclose to any Plaintiff that their systems were inadequate.

23 181. Had Defendants disclosed that their storage monitoring and alarm systems were
 24 deficient, nonfunctional, and/or incapable of protecting eggs and embryos during a tank failure,
 25 Plaintiffs would not have purchased and used Defendants' egg and embryo storage services.

26 **CLASS ACTION ALLEGATIONS**

27 182. Plaintiffs propose that the Court streamline the determination of common claims or
 28 issues in this case, as Defendants' misconduct leading to a single incident—the failure in Tank 4—has

1 affected hundreds of people at once. To facilitate such efforts through the joint trial of common
2 questions, Plaintiffs propose certification of the following class, pursuant to Rule 23 of the Federal
3 Rules of Civil Procedure:

4 All individuals, and their reproductive partners, who had eggs, embryos, or
5 other material in Tank 4 at Pacific Fertility Center in San Francisco, California
6 on March 4, 2018.

7 Excluded from this class are Defendants, their affiliates and subsidiaries, and their officers, directors,
8 partners, employees, and agents; class counsel, employees of class counsel's firms, and class counsel's
9 immediate family members; defense counsel, their employees, and their immediate family members;
10 and any judicial officer who considers or renders a decision or ruling in this case, their staff, and their
11 immediate family members.

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

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

- 18 a. Whether Tank 4 was defective;
- 19 b. Whether Defendants owed a duty to Plaintiffs and class members to protect the
20 eggs and embryos they entrusted to Defendants' care;
- 21 c. Whether that duty was non-delegable;
- 22 d. Whether Defendants breached their duties to protect the eggs and embryos that
23 Plaintiffs and class members entrusted to their care;
- 24 e. Whether the March 4, 2018, loss of liquid nitrogen in a tank at Defendants' San
25 Francisco facility resulted from Defendants' negligence or other wrongful conduct;
- 26 f. Whether Defendants failed to take adequate and reasonable measures to ensure
27 that their systems were protected;
- 28

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

3 h. Whether Defendants breached their contracts with Plaintiffs and class members;

4 i. Whether Defendants fraudulently concealed material information regarding their
5 laboratory practices and procedures;

6 j. The type(s) and measure(s) of compensable and other redressable injury incurred
7 by Plaintiffs and class members as a result of Defendants' conduct alleged herein; and

8 k. What measures are necessary to ensure that eggs and embryos stored at Pacific
9 Fertility are properly safeguarded in the future.

10 185. Typicality. Plaintiffs' claims are typical of the other class members' claims because
11 Plaintiffs and class members were subjected to the same wrongful conduct and damaged in the same
12 way by having their eggs and embryos destroyed, damaged, or jeopardized.

13 186. Adequacy of Representation. Plaintiffs are adequate class representatives. Their
14 interests do not conflict with the interests of the other class members they seek to represent. Plaintiffs
15 have retained counsel competent and experienced in complex class action litigation, as well as in
16 matters concerning egg and embryo loss, and they intend to prosecute this action vigorously. Plaintiffs
17 and their counsel will fairly and adequately pursue and protect the interests of the class.

18 187. Superiority. A class action is superior to all other available means for the fair and
19 efficient adjudication of this controversy. The highly sensitive and private nature of the facts involved
20 here, as well as the fear that bringing an individual suit could affect future treatment at Pacific Fertility,
21 counsels toward providing a class vehicle to adjudicate these claims. The damages or other financial
22 detriment suffered by Plaintiffs and the other class members are relatively small compared to the
23 burden and expense that would be required to individually litigate these claims. As a result, it would be
24 impracticable for class members to seek redress individually. Individualized litigation would also
25 create a potential for inconsistent or contradictory judgments and increase the delay and expense to all
26 parties and the court system. By contrast, the class action device presents far fewer management
27

1 difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive
2 supervision by a single court.

3 **CLAIMS FOR RELIEF**

4 188. Plaintiffs bring each of the following claims under California law.

5 189. None of Plaintiffs' claims involves any allegation of medical malpractice.

6 **FIRST CAUSE OF ACTION**
7 **Negligence and/or Gross Negligence**
8 **(Against All Defendants)**

9 190. Plaintiffs incorporate the above and below allegations by reference.

10 191. Defendants owed Plaintiffs a duty to exercise the highest degree of care when
11 maintaining, inspecting, monitoring, and testing the liquid nitrogen storage tanks used for the
12 preservation of eggs and embryos at Defendants' San Francisco laboratory.

13 192. Defendants owed a duty of care to Plaintiffs to act reasonably in all aspects of the
14 storage of Plaintiffs' eggs and embryos so as to avoid destroying them, damaging them, or jeopardizing
15 their viability given that doing so would inevitably lead to emotional distress.

16 193. Defendants assumed that duty of care through communications with actual and
17 prospective clients and by reason of Defendants' special relationship with Plaintiffs arising from the
18 sensitive services Defendants undertook to perform: human egg and embryo cryopreservation and
19 storage.

20 194. Plaintiffs' harms occurred in the course of specified categories of activities,
21 undertakings, or relationships in which negligent conduct is especially likely to cause serious harm. As
22 Pacific Fertility states in its marketing, fertility services, including those relating to cryopreserved egg
23 and embryo storage, can be stressful and overwhelming for those who use them.

24 195. It was reasonably foreseeable to Defendants that Plaintiffs would experience severe
25 emotional distress as a result of Defendants' breach of their duty of care.

26 196. Defendants' carelessness and negligence directly and foreseeably damaged Plaintiffs.
27 Plaintiffs entrusted Defendants with preserving and storing their eggs and embryos, and Defendants'
28 mishandling of those eggs and embryos, and their subsequent mishandling of communications,

1 naturally and foreseeably caused mental anguish and emotional distress, among other injuries, to
2 Plaintiffs.

3 197. There was a close connection between Defendants' conduct and Plaintiffs' injuries.
4 Plaintiffs' emotional distress and other harms occurred because of Defendants' failure to act reasonably
5 in all aspects of the storage of Plaintiffs' eggs and embryos.

6 198. Plaintiffs entrusted Defendants to use reasonable care to safeguard their eggs and
7 embryos to preserve their reproductive options. Defendants' carelessness with this precious material,
8 and ultimately, with the affected families' careful plans for parenthood, is reprehensible.

9 199. Imposing a duty on Defendants to avoid causing emotional distress would promote the
10 policy of preventing future harm, insofar as they will be motivated to: (1) in the case of Prelude and
11 Pacific Fertility, implement more effective processes and systems to ensure that eggs and embryos are
12 safeguarded and properly stored going forward; and (2) in the case of Chart, take steps to ensure that
13 tanks it designs to hold eggs and embryos are free from defects capable of destroying, damaging, or
14 jeopardizing their contents. Imposing a duty on Defendants to avoid causing emotional distress also
15 furthers the community's interest in ensuring that reliable fertility services are available to those who
16 wish to become parents.

17 200. The burden on Defendants from a duty to avoid causing emotional distress is fair and
18 appropriate, in light of the importance of the eggs and embryos they voluntarily agreed to protect, at
19 considerable cost to Plaintiffs.

20 201. Defendants owed Plaintiffs a non-delegable duty of care with respect to the maintenance
21 and protection of the eggs and embryos entrusted to their care.

22 202. Defendants breached these duties and acted with negligence and gross negligence in at
23 least the following respects:

24 a. failing to adequately design, manufacture, maintain, inspect, monitor, and/or test
25 their liquid nitrogen storage tanks, including through a functional electronic tank monitoring system
26 capable of detecting a rise in temperature or a drop in liquid nitrogen levels and promptly alerting staff
27 to the immediate problem;

- 1 b. permitting a leakage or tank failure to occur with respect to one of their liquid
2 nitrogen storage tanks—Tank 4—containing human eggs and embryos;
- 3 c. failing to inspect and/or adequately inspect Tank 4 on a daily basis;
- 4 d. failing to establish, maintain, and properly activate alarms;
- 5 e. failing to establish, maintain, and properly activate autofill devices and/or
6 generator systems;
- 7 f. failing to disclose that it did not have appropriate processes and systems in place
8 to protect clients’ eggs and embryos;
- 9 g. failing to properly safeguard the eggs and embryos in its care; and
- 10 h. failing to follow reasonable scientific and laboratory procedures for safeguarding
11 the eggs and embryos in their care.

12 203. 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 eggs and embryos.

15 204. Defendants acted willfully, wantonly, and with conscious and reckless disregard for the
16 rights and interests of Plaintiffs. Defendants’ acts and omissions had a great probability of causing
17 significant harm and in fact did.

18 205. Defendants’ failure to appropriately handle and safeguard Plaintiffs’ eggs and embryos
19 has caused severe emotional distress, regardless of whether it is ever determined conclusively that the
20 eggs and embryos in Tank 4 are not viable. Defendants’ misconduct has irreparably breached trust and
21 caused uncertainty, anxiety, and fear among Plaintiffs and other affected families over how to proceed
22 without being informed as to the long-term effects from an egg or embryo’s presence in Tank 4 during
23 the incident.

24 206. As a proximate result of Defendants’ negligence and/or gross negligence, Plaintiffs
25 suffered harm in an amount to be determined at trial, including severe emotional distress consisting of
26 shock, fright, horror, anguish, suffering, grief, anxiety, nervousness, embarrassment, humiliation, and
27 shame. A reasonable person would be unable to cope with the losses suffered by Plaintiffs.

SECOND CAUSE OF ACTION
Breach of Contract
(Against Pacific Fertility and Prelude)

207. Plaintiffs incorporate the above allegations by reference.

208. Defendants entered into contracts with Plaintiffs, under which Defendants agreed to store and preserve their eggs and embryos or those obtained on their behalf, and under which Defendants assumed a non-delegable duty of care to ensure such safekeeping and preservation.

209. A contract involving egg and embryo storage and preservation is highly personal and implicates vital concerns regarding parenthood, procreation, and assisting others in achieving their family plans.

210. In consideration of Defendants' promises, including to keep the eggs and embryos safe and secure by following practices and protocols, including as outlined on their websites and in other marketing materials, Plaintiffs agreed to pay, and did pay, substantial sums for the services rendered.

211. Plaintiffs performed all of the terms and conditions required of them under their contracts with Defendants.

212. Based on the conduct described herein, Defendants breached their contracts with Plaintiffs, including the incorporated contractual covenant of good faith and fair dealing. Defendants' failure to safely store and preserve Plaintiffs' eggs and embryos violated commercial norms, deprived Plaintiffs of the fruits of the contracts, and contravened their objectively reasonable expectations under the contracts.

213. A contract whereby a fertility clinic undertakes to store human eggs and embryos is one as to which it is reasonably foreseeable that breach thereof will cause mental anguish to the person or persons who entrusted the clinic with such material.

214. As a direct and proximate result of Defendants' breach of contract, Plaintiffs suffered harm, including mental anguish, in an amount to be determined at trial.

THIRD CAUSE OF ACTION
Bailment
(Against Pacific Fertility and Prelude)

215. Plaintiffs incorporate the above allegations by reference.

1 216. Plaintiffs delivered to Defendants for safekeeping irreplaceable personal property to be
2 safely and securely kept for the benefit of Plaintiffs, and to be redelivered to them upon demand.

3 217. Defendants received eggs and embryos from Plaintiffs on this condition.

4 218. Plaintiffs agreed to pay, and did pay, substantial sums in exchange for Defendants'
5 promise to safeguard their eggs and embryos for the benefit of Plaintiffs.

6 219. Defendants had a duty to exercise care in maintaining, preserving, and protecting
7 Plaintiffs' eggs and embryos that were delivered to Defendants. Further, Defendants had a duty to
8 return the eggs and embryos, undamaged, to Plaintiffs, to whom the eggs and embryos belonged.

9 220. Defendants invited the general public, including Plaintiffs, to entrust eggs and embryos
10 to Defendants' care by holding out Pacific Fertility as a competent, capable, and established
11 reproductive and storage facility able to handle and care for eggs and embryos in a safe and satisfactory
12 manner, and in a manner specified on their websites.

13 221. Because of Defendants' wrongful conduct, as set forth herein, the irreplaceable property
14 of Plaintiffs was irreplaceably damaged, precluding its redelivery to them as provided for under the
15 bailment contract.

16 222. Defendants breached their duty to exercise care in the safekeeping of Plaintiffs' eggs and
17 embryos delivered to Defendants and to return the eggs and embryos, undamaged, to Plaintiffs.

18 223. As a direct and proximate result of Defendants' breach of bailment contract, Plaintiffs
19 have been deprived of the opportunity to use the eggs and embryos they entrusted to Defendants, and
20 have suffered damages in an amount to be determined at trial.

21 **FOURTH CAUSE OF ACTION**
22 **Premises Liability**
23 **(Against Pacific Fertility and Prelude)**

24 224. Plaintiffs incorporate the above allegations by reference.

25 225. At all relevant times, Pacific Fertility and Prelude owned, leased, and/or occupied the
26 property, premises, machinery, and equipment, including Tank 4, on the premises at 55 Francisco
27 Street, Suite 500, San Francisco, California 94133.
28

SIXTH CAUSE OF ACTION

**Violations of the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*
(Against All Defendants)**

235. Plaintiffs incorporate the above allegations by reference.

236. The UCL prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice.”

237. Defendants’ conduct set forth herein is unlawful because it constitutes negligence, gross negligence, breach of contract, bailment, breach of fiduciary duty, deceit, and strict products liability.

238. Defendants’ conduct is unfair because it is immoral, unethical, unscrupulous, oppressive, and substantially injurious. Plaintiffs entrusted Defendants with their eggs and embryos to preserve their options for procreation, parenting, or assisting others experiencing infertility. Defendants breached that trust by, among other things:

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

b. permitting a leakage or tank failure to occur with respect to one of their liquid nitrogen storage tanks—Tank 4—containing human eggs and embryos;

c. failing to inspect and/or adequately inspect Tank 4 on a daily basis;

d. failing to establish, maintain, and properly activate alarms;

e. failing to establish, maintain, and properly activate autofill devices and/or generator systems;

f. failing to disclose that it did not have appropriate processes and systems in place to protect clients’ eggs and embryos;

g. failing to properly safeguard the eggs and embryos in its care; and

h. failing to follow reasonable scientific and laboratory procedures for safeguarding the eggs and embryos in their care.

1 239. The gravity of the harm resulting from Defendants’ conduct far outweighs any
2 conceivable utility of this conduct. There are reasonably available alternatives that would further
3 Defendants’ legitimate business interests, such as implementing reasonable protocols and procedures,
4 as promised, to prevent a catastrophic failure.

5 240. Plaintiffs could not have reasonably avoided injury from Defendants’ unfair conduct.
6 Plaintiffs did not know, and had no reasonable means of learning, that Defendants were not adequately
7 safeguarding the eggs and embryos in their custody and control.

8 241. Defendants’ conduct also is fraudulent in violation of the UCL because it is likely to
9 deceive a reasonable consumer.

10 242. Defendants knowingly and intentionally concealed from Plaintiffs that their electronic
11 monitoring and alarm and response systems and processes, and other equipment, including the storage
12 tank, were inadequate to protect against damage to Plaintiffs’ eggs and embryos.

13 243. Defendants volunteered specific information to Plaintiffs through advertising, on
14 websites, and in documents that their storage services were high quality, including representing that a
15 tank could go without power or liquid nitrogen for “several days” without damaging the tissue it
16 contained. Plaintiffs viewed and relied upon Defendants’ representations that their storage services
17 were high quality, safe, and reliable.

18 244. Defendants made these specific representations despite knowing their systems were
19 inadequate to protect against damage to Plaintiffs’ eggs and embryos.

20 245. Defendants had ample means and opportunities to alert Plaintiffs to the fact that their
21 electronic monitoring and alarm and response systems and processes were inadequate to protect against
22 damage to Plaintiffs’ eggs and embryos. Defendants failed to disclose such inadequacies to Plaintiffs.
23 Had Defendants disclosed such inadequacies to Plaintiffs, Plaintiffs would not have purchased
24 Defendants’ egg and embryo storage services.

25 246. Defendants were under a duty to disclose that their storage systems and processes were
26 inadequate given their exclusive knowledge of the inadequacies and because they made partial
27 representations about their storage services without disclosing the inadequacies.
28

1 254. Pacific Fertility and Prelude knew that their equipment, systems, and processes,
2 including Defendants' storage tank, electronic monitoring, alarm, and response systems and processes,
3 were inadequate to safely store Plaintiffs' eggs and embryos.

4 255. Pacific Fertility and Prelude were under a duty to disclose that their equipment, systems,
5 and processes were inadequate because they actively concealed this information and because they had
6 exclusive knowledge, not known or reasonably accessible to Plaintiffs, of the inadequacy of their
7 equipment, systems, and processes. They were also subject to a duty to disclose because the
8 information they failed to disclose was contrary to partial representations they made concerning the
9 adequacy of their equipment, systems, and processes.

10 256. Pacific Fertility and Prelude had ample means and opportunities to alert Plaintiffs to the
11 fact that their equipment, systems, and processes were inadequate, including in person when meeting
12 with Plaintiffs before egg and embryo storage. Despite their opportunities to do so, Pacific Fertility and
13 Prelude failed to disclose to Plaintiffs, and actively concealed, that Defendants' equipment, systems,
14 and processes were inadequate to safely store human reproductive tissue.

15 257. Pacific Fertility and Prelude's omissions were material because reasonable consumers
16 would consider important, and would want to be told, information about the inadequacy of Defendants'
17 equipment, systems, or processes connected to their ability to safely store Plaintiffs eggs and embryos

18 258. As a direct and proximate result of this conduct, Plaintiffs have suffered damage. Had
19 Defendants not misrepresented the adequacy of, and concealed the inadequacy of, their equipment,
20 systems, and processes, Plaintiffs would not have purchased Defendants' services and would not have
21 gone through the time and emotional investment to store their reproductive tissue with Defendants. In
22 the meantime, Pacific Fertility and Prelude generated more revenue than they otherwise would have,
23 unjustly enriching themselves.

24 259. Plaintiffs are entitled to equitable relief, reasonable attorneys' fees and costs, declaratory
25 relief, and a permanent injunction enjoining Pacific Fertility and Prelude from their unlawful,
26 fraudulent, and deceitful activity.

27 260. Pursuant to Cal. Civ. Code § 1782(a), Plaintiffs will send letters to Defendants notifying
28 them of their CLRA violations and providing them with the opportunity to correct their business

1 practices. If Pacific Fertility and Prelude do not correct their business practices, Plaintiffs will amend
2 (or seek leave to amend) the complaint to add claims for monetary relief, including for actual,
3 restitutionary, emotional distress, and punitive damages under the CLRA.

4 261. The conduct of Pacific Fertility and Prelude set forth herein was reprehensible and
5 subjected Plaintiffs to cruel and unjust hardship in conscious disregard of their rights, constituting
6 oppression, for which Pacific Fertility and Prelude must be punished by punitive and exemplary
7 damages in an amount according to proof. Pacific Fertility and Prelude's behavior evidences a
8 conscious disregard for the safety of the eggs and embryos entrusted to them, and by extension, those
9 who placed the eggs and embryos in their care, including Plaintiffs. Pacific Fertility and Prelude's
10 conduct was and is despicable conduct and constitutes malice under Section 3294 of the California
11 Civil Code. An officer, director, or managing agent of Pacific Fertility and Prelude personally
12 committed, authorized, and/or ratified the reprehensible conduct set forth herein. Plaintiffs are entitled
13 to an award of punitive damages sufficient to punish and make an example of these Defendants.

14 **EIGHTH CAUSE OF ACTION**
15 **Deceit and Fraudulent Concealment**
16 **(Against Pacific Fertility and Prelude)**

17 262. Plaintiffs incorporate the above allegations by reference.

18 263. Defendants marketed and promoted their services and made representations to the public
19 and to Plaintiffs that they were experts in cryopreservation, had state-of-the-art facilities, and would
20 safely preserve and store Plaintiffs' eggs and embryos in liquid nitrogen according to certain protocols
21 and standards until they were ready to use them.

22 264. Defendants' representations were false, and Defendants either knew the truth or made
23 the representations without regard for the truth.

24 265. Defendants intended for Plaintiffs to rely on their representations and engage
25 Defendants to perform services to preserve Plaintiffs' eggs and embryos, and Plaintiffs reasonably
26 relied on Defendants' representations when availing themselves of Defendants' services for egg and
27 embryo storage.

1 266. Defendants intentionally suppressed and concealed material facts concerning the
2 adequacy of its storage systems and processes. Defendants knew or reasonably should have known
3 their electronic monitoring and alarm storage systems and processes were inadequate to protect against
4 damage to Plaintiffs' eggs and embryos. Though it is standard in the industry to do so, Defendants did
5 not equip Tank 4 with a liquid nitrogen autofilling system sufficient to replenish declining liquid
6 nitrogen levels. Defendants willfully omitted to disclose the inadequate nature of its storage systems
7 and processes to Plaintiffs.

8 267. Plaintiffs had no reasonable means of knowing Defendants' storage systems and
9 processes were inadequate, or that Defendants' representations about such systems were incomplete,
10 false, or misleading in that they failed to disclose such inadequacies. Plaintiffs did not and reasonably
11 could not have discovered Defendants' deception prior to purchasing their storage services.

12 268. Defendants had ample means and opportunities to alert Plaintiffs to the fact that their
13 electronic monitoring and alarm and response systems and processes were inadequate to protect against
14 damage to Plaintiffs' eggs and embryos. Defendants willfully failed to disclose such inadequacies to
15 Plaintiffs. Had Defendants disclosed the inadequacies to Plaintiffs, they would not have purchased
16 Defendants' egg and embryo storage services.

17 269. Defendants were under a duty to disclose that their storage systems and processes were
18 inadequate given their exclusive knowledge of the inadequacies and because they made partial
19 representations about their storage services without disclosing the inadequacies.

20 270. Plaintiffs reasonably relied to their detriment upon Defendants' material omissions
21 regarding the adequacy of their storage systems and processes. Plaintiffs were unaware of the omitted
22 material facts and would not have acted as they did had these facts been disclosed. Had Plaintiffs
23 known that Defendants' storage systems and processes were inadequate to protect against damage to
24 their eggs and/or embryos, they would not have purchased such services.

25 271. Plaintiffs sustained damage as a direct and proximate result of Defendants' deceit and
26 fraudulent concealment.

27 272. The foregoing acts and omissions of Defendants were committed maliciously,
28 oppressively, deliberately, with intent to defraud, and in reckless disregard of Plaintiffs' rights,

1 interests, and well-being to enrich Defendants. Defendants' conduct warrants an assessment of
2 punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be
3 determined according to proof.

4 **NINTH CAUSE OF ACTION**
5 **Strict Products Liability – Failure to Warn**
6 **(Against Chart)**

7 273. Plaintiffs incorporate the above allegations by reference.

8 274. Chart manufactured, distributed, and/or sold the cryogenic equipment used at Pacific
9 Fertility, including Tank 4.

10 275. The cryogenic storage tank at issue had potential risks that were known or knowable in
11 light of the scientific and medical knowledge that was generally accepted in the scientific and medical
12 community at the time of the manufacture, distribution, or sale of the cryogenic storage Tank 4.

13 276. The cryogenic storage Tank 4 was defective and unreasonably dangerous when it left
14 Chart's possession because it did not contain adequate warnings, including warnings concerning certain
15 risks, including the risk of defective seals that may result in catastrophic nitrogen loss, the risk of
16 nitrogen loss and prevalence of this occurrence, the risk of a rise in temperature and the fact that the
17 tanks are not equipped with sufficient alarms to notify users of catastrophic nitrogen loss or a rise in
18 temperature that can damage and/or cause destruction of eggs or embryos, the rate of failure of the
19 cryogenic storage tanks in the preservation of eggs or embryos or other human tissue, and the need for
20 maintenance, inspection, and/or replacement of the cryogenic storage tanks.

21 277. The potential risks presented a substantial danger when the cryogenic storage tank at
22 issue was used or misused in an intended or reasonably foreseeable way.

23 278. The ordinary consumer would not have recognized the potential for risks.

24 279. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable
25 care, should have known that the cryogenic storage Tank 4 was dangerous, had risks, and/or was
26 defective in manufacture and/or design, including that it could cause nitrogen loss and would damage
27 and/or cause the destruction of cryopreserved materials, including eggs or embryos.

1 280. Chart failed to adequately warn or instruct concerning the potential risks of the
2 cryogenic storage tank.

3 281. It was foreseeable to Chart that failure to adequately warn about the risks of its
4 cryogenic storage tank would cause irreparable harm to those whose eggs and embryos were
5 cryopreserved therein, including the types of emotional distress suffered by Plaintiffs.

6 282. As a result of Chart's failures to adequately warn, Plaintiffs were harmed as described
7 herein, regardless of whether it is ever determined conclusively that certain eggs and embryos in Tank 4
8 are not viable. The lack of sufficient instructions and warnings was a substantial factor in causing
9 Plaintiffs' harm.

10 **TENTH CAUSE OF ACTION**
11 **Strict Products Liability – Manufacturing Defect**
12 **(Against Chart)**

13 283. Plaintiffs incorporate the above allegations by reference.

14 284. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

15 285. The cryogenic storage tank contained a manufacturing defect when it left Chart's
16 possession.

17 286. Chart had constructive notice or knowledge and knew, or in the exercise of reasonable
18 care, should have known that the cryogenic storage tanks were dangerous, had risks, and/or were
19 defective in manufacture, including that they could cause nitrogen loss and would damage and/or cause
20 the destruction of cryopreserved materials, including eggs or embryos.

21 287. As a result of Chart's conduct, Plaintiffs were harmed as described herein, regardless of
22 whether it is ever determined conclusively that certain eggs and embryos in Tank 4 are not viable.

23 288. The defective nature of the cryogenic storage tank was a substantial factor in causing
24 Plaintiffs' harm.

25 **ELEVENTH CAUSE OF ACTION**
26 **Strict Products Liability — Design Defect — Consumer Expectations Test**
27 **(Against Chart)**

28 289. Plaintiffs incorporate the above allegations by reference.

29 290. Chart manufactured, distributed, and/or sold the cryogenic storage Tank 4.

1 302. Chart acted negligently by failing to recall, prior to the incident of March 4, 2018, the
2 line of tanks that included Tank 4.

3 303. Chart manufactured, distributed, and/or sold this line of tanks.

4 304. Chart knew or reasonably should have known that, when used as intended, Tank 4
5 presented or was likely to present a danger to eggs and embryos. Chart knew or reasonably should
6 have known that the vacuum seal on Tank 4 was vulnerable to breach, and that upon such breach liquid
7 nitrogen levels would drop, causing the eggs and embryos stored inside the tank to reach dangerously
8 elevated temperatures.

9 305. After Chart sold Tank 4 to Pacific Fertility and before March 4, 2018, Chart knew or
10 reasonably should have known that the tank was susceptible to its vacuum seal breaking. Nevertheless,
11 at no point during this time period did Chart recall, repair, or warn of the danger posed by the tank.

12 306. A reasonable manufacturer, distributor, or seller facing the same or similar
13 circumstances as Chart would have recalled Tank 4 to ensure eggs and embryos were not endangered.

14 307. Chart's failure to timely recall Tank 4 was a substantial factor in causing harm to
15 Plaintiffs. Had Chart recalled Tank 4 before the incident, the other Defendants would not have used it,
16 and it would not have failed while Plaintiffs' eggs and embryos were stored within it.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs, individually and on behalf of the class defined above, respectfully
19 request that the Court:

20 A. Certify the class under Fed. R. Civ. P. 23(a), (b)(1), (b)(2), (b)(3), and/or (c)(4),
21 as appropriate; appoint Plaintiffs as representatives of the class; and appoint the undersigned counsel as
22 class counsel;

23 B. Award Plaintiffs compensatory, restitutionary, rescissory, general, consequential,
24 punitive and/or exemplary damages in an amount to be determined at trial;

25 C. Award prejudgment interest as permitted by law;

26 D. Enter an injunction against Defendants and their officers, agents, successors,
27 employees, representatives, assigns, and any and all persons acting in concert with them, to ensure
28 Defendants' compliance with California Business and Professions Code section 17200 *et seq.*;

1 E. Enter an injunction against Defendants and their officers, agents, successors,
2 employees, representatives, assigns, and any and all persons acting in concert with them, mandating
3 that Defendants cease engaging in unfair competition as set forth above;

4 F. Appoint a monitor to ensure Defendants comply with the injunctive provisions of
5 any decree of this Court;

6 G. Retain jurisdiction over this action to ensure Defendants comply with such a
7 decree;

8 H. Enter other appropriate equitable relief;

9 I. Award reasonable attorneys' fees and costs, as provided for by law; and

10 J. Grant such other and further relief as the Court deems just and proper.

11 **DEMAND FOR JURY TRIAL**

12 Plaintiffs demand a trial by jury on all issues so triable.

13
14 Dated: May 30, 2018

Respectfully submitted,

15
16 By: /s/ Adam E. Polk

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ATTESTATION

I, Adam E. Polk, am the ECF User whose identification and password are being used to file this Consolidated Amended Class Action Complaint. Pursuant to Civil L.R. 5-1(i)(3), I attest under penalty of perjury that concurrence in this filing has been obtained by all counsel listed above.

Dated: May 30, 2018

/s/ Adam E. Polk
Adam E. Polk