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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 Megan Bauer and Jonathan Bauer, individually
 14 and on behalf of all others similarly situated,

15 Plaintiffs,

16 vs.

17 PACIFIC FERTILITY CENTER; PRELUDE
 18 FERTILITY, INC.; DOES 1-10, inclusive,

19 Defendants.

Case No.:

CLASS ACTION COMPLAINT

- (1) BREACH OF CONTRACT
- (2) NEGLIGENCE
- (3) CONVERSION

DEMAND FOR JURY TRIAL

INTRODUCTION

1
2 1. Plaintiffs Megan Bauer and Jonathan Bauer, on behalf of themselves and all
3 other similarly situated individuals, file this action against Defendants Pacific Fertility Center
4 (“Pacific”); Prelude Fertility, Inc. (“Prelude”); and Does 1-10 (collectively, “Defendants”).
5 Plaintiffs were Defendants’ clients for more than three years. During that time, they
6 entrusted Defendants with their dreams of having children, as well as their most sensitive and
7 important property: their frozen embryos.

8 2. This case concerns Defendants’ squashing Plaintiffs’ dreams of becoming
9 parents when Defendants destroyed Plaintiffs’ embryos.

10 3. Defendants promised to safeguard and protect Plaintiffs’ frozen embryos,
11 vouching to maximize Plaintiffs’ chances of becoming pregnant and Plaintiffs’ opportunity
12 to raise as many children as they would like. Despite their agreement to maintain this
13 position of extreme trust and fidelity and despite having charged Plaintiffs for storage of their
14 frozen embryos for three years, Defendants recklessly, negligently, and/or knowingly
15 destroyed Plaintiffs’ embryos by allowing the liquid nitrogen levels in the cryo-storage tank
16 where the embryos were stored to dip below acceptable and necessary levels. As a result,
17 Plaintiffs’ embryos, as well as their dreams of future children, were irrevocably destroyed.

18 4. Plaintiffs bring this action against Defendants for breach of contract,
19 negligence, and conversion. Plaintiffs seek relief on their own behalf, as well as on behalf of
20 the other individuals whose biological material was destroyed without their consent by
21 Defendants’ conduct.

PARTIES

22
23 5. Plaintiffs Megan Bauer and Jonathan Bauer are individuals who are now, and at
24 all relevant times mentioned in this Complaint were, citizens of California.

25 6. At all times relevant herein, Defendant Pacific is a private unincorporated entity
26 located at 55 Francisco Street, Suite 500, San Francisco, California 94133

27 7. At all times relevant herein, Defendant Prelude was a Delaware corporation,
28 organized and existing under the laws of the State of Delaware, with its principal place of

1 business in Florida. Prelude, which began operations in October 2016, runs a nationwide
2 network of fertility clinics, including Defendant Pacific.

3 8. The true names and capacities, whether individual, corporate, associate or
4 otherwise, of Defendants sued herein as DOES 1 through 10, inclusive, are unknown to
5 Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed
6 and believe, and thereon allege, that each of said fictitious Defendants caused injury and
7 damages to Plaintiffs.

8 9. At all times relevant herein, Defendant DOES 1-10, and each of them, were and
9 are Pacific and Prelude agents or employees, including but not limited to administrative
10 personnel, scientists, technicians, and people who worked in reproductive technology to
11 provide services to members of the public, including to Plaintiffs.

12 10. At all times relevant herein, each of the Defendants was the agent or employee
13 of the remaining Defendants.

14 **JURISDICTION AND VENUE**

15 11. This Court has subject matter jurisdiction over this action under the Class
16 Action Fairness Act of 2005, 28 U.S. C. § 1332(d), because (a) Plaintiffs are citizens of a
17 state different from Prelude; (b) the amount in controversy exceeds \$5,000,000, excluding
18 interest and costs; (c) the proposed class consists of more than 100 individuals; and (d) none
19 of the exceptions under the subsection applies in this action.

20 12. This Court has personal jurisdiction over Defendants because Defendants are
21 residents of and/or conduct a substantial amount of business in the District. They have
22 intentionally availed themselves of the laws and markets of this District. A significant
23 portion of the acts and omissions complained of occurred in the District, and Plaintiffs and
24 many class members suffered harm in the District.

25 13. Venue is proper in this Court because a substantial part of the events or
26 omissions giving rise to the claims occurred in San Francisco County.

1 **INTRADISTRICT ASSIGNMENT**

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

5 **STATEMENT OF FACTS**

6 15. Plaintiffs are a married couple. Throughout their courtship, they both agreed that
7 having children together was one of their most cherished dreams. To that end, when the couple
8 were married, they began trying to conceive. Sadly, they were not successful. Doctors found no
9 medical reasons for their infertility. After several years of failed attempts at natural conception,
10 Plaintiffs decided to seek medical assistance.

11 16. Many years ago, Plaintiffs began investigating artificial reproductive techniques,
12 ultimately deciding to go through a cycle of in vitro fertilization (IVF).

13 17. IVF is an invasive and technical process, involving multiple surgical procedures,
14 laboratory fertilization and manipulation, and an intense drug regimen. The first step for IVF
15 involves several weeks of drug therapy designed to hyper-stimulate the woman's reproductive
16 system into producing multiple eggs as part of her monthly cycle. These eggs are harvested
17 surgically and then fertilized with sperm in a laboratory. Once the eggs have been fertilized into
18 embryos, they are cultured for 2-6 days in a growth medium. At that point, the embryos are either
19 cryo-preserved for later use, or if a fresh transfer is desired, they are then transferred directly into
20 the woman's uterus.

21 18. IVF is most successful when the eggs used in the egg transfer are extracted from a
22 woman before she is 38 years of age. Rates of successful pregnancies improve dramatically when
23 the eggs used are donated by younger women.

24 19. During the process of cryopreservation, fertilized eggs, or pre-embryos, are
25 preserved for future use. The fertilized eggs are first treated with a solution to protect them
26 from damage during freezing. They are then cooled to a temperature of minus-sixty to minus-
27 eighty degrees centigrade and placed in liquid nitrogen for long-term storage. Defendants use
28 a rapid freezing process called vitrification. Once thawed, the undamaged, fertilized eggs can

1 be transferred into the uterus.

2 20. It is imperative that eggs be extracted while the woman is young enough to have
3 a high probability of producing the greatest possible number of viable eggs. Moreover, eggs
4 from younger women typically have fewer abnormalities and genetic defects than eggs from
5 older women.

6 **A. Prelude and Pacific**

7 21. Defendants Pacific and Prelude market and provide intrauterine insemination (IUI),
8 IVF, genetic testing, and egg and embryo freezing, storage, and donation services. On September
9 25, 2017, Prelude announced its acquisition of Pacific.

10 22. On its website, Prelude emphasizes the safety of its egg-storage services. Prelude
11 directs those who visit its website to Pacific for egg and embryo freezing services, specifying that
12 its “services” are available in San Francisco via Pacific.

13 23. In turn, Pacific promises prospective clients that its egg and embryo freezing
14 services “can increase your chances of conception by 5 to 10 times.” Pacific further represents
15 that its customers’ “[e]ggs remain frozen until you need them” and claims that its techniques result
16 in survival rates after thawing that are consistently above 90%.

17 24. One cycle of freezing and retrieval at Pacific, including storage for a year, costs
18 nearly \$10,000. A second cycle almost as much. Additional costs arise from other of Pacific
19 Fertility’s services, such as new patient consultations, lab work, and continuing tissue storage, as
20 well as from needed medications. Pacific Fertility charges an annual fee of \$600 for storing eggs
21 and embryos.

22 **B. Plaintiffs’ Retrieval and Storage**

23 25. IVF is typically an expensive and arduous process, subjecting prospective parents,
24 including Plaintiffs, to both physical and emotional strain. To prepare for the procedure, Plaintiff
25 Megan Bauer attended numerous doctor appointments over the course of several months. During
26 these visits, she had to undergo multiple ultrasounds and blood tests, so that her doctor could
27 determine when her body was ready to begin hormonal injections, as well as to determine her
28 ovulation cycle.

1 26. In order to increase her egg production, and thereby increase the chances for
2 success, the first phase of the treatment involved the use of drugs to stimulate ovulation. The drugs
3 were administered daily by needle for a little over two weeks, thereby stimulating the ovaries to
4 increase egg production. During this time period, Megan had to go to Pacific's offices quite
5 frequently for follow-up examinations and blood tests, which were used to calibrate her drug
6 regimen.

7 27. Added to this, the physical and emotional side effects of this hormone treatment
8 were horrible. On direction from Pacific, Megan received multiple injections per day, in varying
9 amounts. The shots were painful and caused unnatural stomach bloating and sharp mood swings.
10 Megan felt like she was on an emotional rollercoaster during this time. The medications also
11 subjected Megan to other risks, including the possibility of kidney failure, twisting of the ovary,
12 ovarian rupture, and electrolyte problems that could require hospitalization. The cost of the
13 medications was substantial.

14 28. On the day of the egg retrieval surgery, Megan's physician extracted eggs from
15 Megan. The eggs were fertilized with Jonathan's sperm in Pacific's laboratory. After fertilization
16 and maturation to blastocyst, numerous viable embryos remained.

17 29. Plaintiffs incurred substantial costs as a result of their fertility treatments at Pacific.

18 **C. The Loss**

19 30. Plaintiffs were planning to schedule a transfer of one or more of their embryos in
20 April 2018. In the meantime, Defendants stored Plaintiffs' embryos—along with thousands of
21 other embryos and eggs—in a cryo-storage tank, Tank No. 4, at Pacific's laboratory. Plaintiffs
22 paid \$600 a year for the storage of their 8 embryos.

23 31. However, in March 2018, Plaintiffs received devastating news. Pacific emailed
24 them a notice informing them that their stored tissue "*may* have been impacted" when the liquid
25 nitrogen in Tank No. 4 fell below necessary levels (the "Loss"). The e-mail continued: "We are
26 incredibly sorry that this happened and for the anxiety that this will surely cause. We are
27 heartbroken by this situation and our thoughts are with each of you who may have been touched
28 by this event." Plaintiffs are informed and believe that several hundred other Pacific clients

1 received the same email.

2 32. When Plaintiffs read this notice, they were in shock. They then reached out to
3 Pacific, who confirmed that Plaintiffs' embryos were indeed impacted during the Loss. Plaintiffs
4 were overwhelmed with grief when the truth sunk in that their embryos were gone.

5 33. On information and belief, there was a leak in the seal on Tank No. 4. Regardless
6 of what caused the drop in the liquid nitrogen levels, the resulting rise in temperature in Tank No.
7 4 destroyed Plaintiffs' embryos. If Pacific had had an adequately-operating monitoring system to
8 catch the rising temperature, that system would have alerted Pacific's staff to address the problem
9 before the embryos and eggs in storage were irrevocably destroyed. That did not happen.

10 34. Plaintiffs are deeply distraught and traumatized over their loss. They feel like their
11 dreams of having children together in the near future have been stolen from them.

12 35. Plaintiffs are informed and believe that the destruction of their embryos was due
13 to the reckless, negligent, and/or knowing conduct of Defendants. They furthermore are
14 informed and believe and thereupon allege that Defendants' preservation procedures were
15 obviously insufficient to guard against the risk of improper loss and destruction of cryo-
16 preserved materials in violation of their express wishes.

17 36. Plaintiffs complain herein regarding Defendants' misconduct associated with
18 Defendants' preservation of their embryos—more specifically, the unauthorized destruction of
19 their embryos. They do not complain about the egg harvesting, fertilization, or any other
20 potentially medical—or health-related—activity, which are separate procedures and distinct
21 from Defendants' storage of Plaintiffs' fertilized eggs.

22 37. As a result of Defendants' destruction of Plaintiffs' embryos, they have lost
23 irreplaceable and highly valuable property. Their damages stem from this loss of precious
24 property. Plaintiffs viewed the embryos as their future children. They have suffered extreme
25 emotional distress and grief regarding the loss of their embryos, the prospect of suffering the
26 extreme pain and extreme emotional distress from undergoing the process again (if they could
27 afford it), and the fact that they may now not be able to have children in the future.

28 38. Plaintiffs' understandable and severe distress has impacted all facets of their

1 lives. Although they continue to try and come to terms with their grief, they struggle with the
2 immense pain of their loss.

3 39. Megan is now many years older than she was when Plaintiffs began the IVF
4 process. The literature indicates that her chances for producing viable and strong eggs have
5 substantially decreased over the intervening time. Moreover, the financial and emotional costs
6 of undergoing another painful and drawn-out IVF procedure, during which there is no
7 guarantee that Megan will be able to produce strong and viable eggs for fertilization and
8 transfer, are daunting.

9 **CLASS ACTION ALLEGATIONS**

10 40. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs seek
11 certification of a class defined as follows: “All individuals whose biological tissue stored in Pacific
12 Fertility Center’s laboratory was destroyed or potentially destroyed without the individuals’
13 consent in March 2018.”

14 41. This class excludes the following: Defendants, their affiliates and subsidiaries, and
15 their officers, directors, partners, employees, and agents; class counsel, their immediate family
16 members and employees of their firms; counsel for Defendants, their immediate family members,
17 and employees of their firms; and judicial officers assigned to this case and their staffs and
18 immediate family members.

19 42. Numerosity. The members of the class are so numerous that their individual
20 joinder is impracticable. There are hundreds of class members, whose names and addresses are
21 readily available from Defendants’ records.

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

- 25 a. Whether the March 2018 loss of liquid nitrogen in Pacific’s cryo-storage
26 tank resulted from Defendants’ negligence or other wrongful conduct;
27 b. Whether Defendants failed to take adequate steps to monitor the levels of
28 liquid nitrogen and temperatures in Pacific’s cryo-storage tank;

- c. Whether Defendants failed to take adequate steps to ensure that the temperature in Pacific's cryo-storage tank stayed below a certain level;
- d. Whether Defendants, and each of them, owed Plaintiffs and other class members a duty of care to protect and safeguard their biological material;
- e. Whether Defendants, and each of them, breached their duties of care to Plaintiffs and other class members to protect and safeguard that biological material;
- f. Whether any of Defendants' breaches of duty were willful or knowing;
- g. Whether Defendants with supervisory responsibilities failed to supervise subordinate Defendants to ensure that these duties were not breached;
- h. Whether Defendants owed contractual duties to Plaintiffs and other class members;
- i. Whether Defendants breached those contractual duties by allowing the temperature to rise in Tank No. 4 in March 2018 and/or by failing to have adequate systems in place to catch the rise in temperature before it harmed Plaintiffs' and other class members' biological material; and
- j. Whether Plaintiffs and class members were harmed by Defendants' breaches.

44. Typicality. Plaintiffs' claims are typical of the other class members' claims because Plaintiffs and class members were subjected to the same wrongful conduct and damaged in the same way by having their biological material destroyed without their consent.

45. Adequacy of Representation. Plaintiffs are adequate class representatives. Their interests do not conflict with the interests of the other class members they seek to represent. They have retained counsel competent and experienced in embryo-related legal disputes, as well as in complex class action litigation, and they intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately pursue and protect the interests of the class.

46. Superiority. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by

1 Plaintiff and the other class members are relatively small compared to the burden and expense that
2 would be required to litigate these claims individually. As a result, it would be impracticable for
3 class members to seek redress individually. Individualized litigation would also create a potential
4 for inconsistent or contradictory judgments and increase the delay and expense to all parties and
5 the court system. By contrast, the class action device presents far fewer management difficulties
6 and provides the benefits of single adjudication, economy of scale, and comprehensive supervision
7 by a single court.

8 **FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

9 47. Plaintiffs incorporate all paragraphs by reference.

10 48. Defendants entered into contracts with Plaintiffs and other class members,
11 whereby Defendants promised to cryopreserve, store, and safeguard Plaintiffs’ and other class
12 members’ biological material.

13 49. Defendants’ form contract provided, in relevant part, that “[e]ggs are stored in
14 a tank of liquid nitrogen and maintained at low temperatures until utilized.” Further, “[a]t a
15 later date, when pregnancy using the cryopreserved eggs is desired, the eggs are thawed and
16 the remaining steps in IVF are resumed.”

17 50. Plaintiffs and other class members provided consideration for these services and
18 upheld their end of the bargain by promptly paying all bills, including their annual storage
19 fees. Plaintiffs and class members performed all the terms and conditions required of them
20 under the contracts.

21 51. Based on the conduct described herein, included but not limited to the
22 destruction of Plaintiffs’ and class members’ biological material and the failure to institute
23 appropriate systems to avoid such destruction, Defendants breached their obligations under the
24 contracts with Plaintiffs and class members.

1 52. As a direct and proximate result of Defendants’ breach of contract, Plaintiffs
2 suffered severe emotional, physical, property, and economic damages in an amount to be
3 proven at trial. Megan underwent significant and traumatic physical privation in the pursuit
4 of preserving her ability to have children. The process of egg stimulation and retrieval—since
5 rendered useless by Defendants—is painful, traumatic, and scary. It involves weeks of
6 injections, mood swings from hormone changes, uncomfortable bloating, weight gain, and
7 submission to anesthesia during the actual procedure. When Defendants destroyed Plaintiffs’
8 embryos, it rendered completely needless all of this pain that Megan went through. It must
9 compensate her for that pain and suffering, as well as for the Plaintiffs’ property, economic,
10 and other emotional damages.

11 53. Plaintiffs and class members are entitled to recover all such damages as a result
12 of Defendants’ breach of contract.

13 **SECOND CAUSE OF ACTION –**

14 **NEGLIGENCE and/or GROSS NEGLIGENCE**

15 54. Plaintiffs incorporate all paragraphs by reference.

16 55. Defendants had a duty to exercise the highest degree of care in the storage and
17 maintenance of the Plaintiffs’ cryopreserved embryos, including the maintenance, inspection,
18 monitoring, and testing of the liquid nitrogen in the cryo-preservation storage tanks used in
19 Defendants’ facilities. Defendants furthermore had a duty to impose reasonable policies and
20 procedures to ensure that Plaintiffs’ and class members’ biological material was properly
21 stored and maintained.

22 56. Defendants furthermore have a duty of care based on the fact that they
23 voluntarily undertook to render cryopreservation and storage services to the Plaintiffs, and
24 therefore had a duty to perform these services with a reasonable degree of care. Defendants
25 furthermore knew or should have known that failure to exercise such care increased the risk of
26 harm to Plaintiffs. Moreover, to the extent that Pacific’s undertaking to store the material
27 constitutes a bailment for hire, which is hereby alleged, Defendants had a duty of care with
28 respect to the bailed property.

1 57. Defendants Pacific and Prelude had a basic duty and a duty based on voluntarily
2 undertaking to oversee and render cryopreservation and storage services to the Plaintiffs, and
3 therefore had a duty to perform these services with the appropriate degree of care. These
4 defendants furthermore knew or should have known that failure to exercise such care increased
5 the risk of harm to the Plaintiffs.

6 58. Under the doctrine of voluntary undertaking, Does 1-10 similarly had a duty to
7 render cryo-preservation and storage services to the Plaintiffs, on Defendant Pacific and
8 Defendant Prelude's behalf, in a competent manner with an appropriate degree of care. Does
9 1-10 furthermore knew or should have known that failure to exercise such care increased the
10 risk of harm to the Plaintiffs.

11 59. Plaintiffs relied on all of Defendants' aforementioned duties of care in placing
12 their fertilized eggs in Defendants' care.

13 60. Defendants breached these duties and acted with negligence and gross
14 negligence in at least the following ways:

- 15 a. Failing to adequately maintain, inspect, monitor, and/or test the liquid
16 nitrogen levels in storage Tank No. 4, in accordance with industry
17 standards, including through a functional electronic tank monitoring
18 system capable of detecting a rise in temperature or a drop in the liquid
19 nitrogen level and promptly alerting staff to the problem;
- 20 b. Permitting a leakage or other failure to occur from one of their storage
21 tanks containing human biological material;
- 22 c. Failing to properly safeguard the human biological material in their care;
23 and
- 24 d. Failing to follow accepted scientific and laboratory procedures for
25 safeguarding the human biological material in their care.

26 61. Defendants' acts and omissions constitute gross negligence because they
27 constitute an extreme departure from what a reasonably careful person would do in the same
28 situation to prevent foreseeable loss of human biological material.

1 62. Defendants acted willfully, wantonly, and with conscious and reckless disregard
2 for the rights and interests of Plaintiffs and class members. Defendants' acts and omissions
3 had a great probability of causing significant harm and did cause such harm.

4 63. As a direct and proximate result of Defendants' negligence, Plaintiffs and class
5 members suffered, as a direct victim, extreme emotional, physical, property, and economic
6 damages in an amount to be proven at trial.

7 64. Plaintiffs and class members are entitled to recover all such damages as a result
8 of Defendants' negligence.

9 **THIRD CAUSE OF ACTION – CONVERSION**

10 65. Plaintiffs incorporate all paragraphs by reference.

11 66. Plaintiffs and class members owned their biological material, which were placed
12 in Defendants' care for the express purpose of safekeeping and storage until such a time as
13 Plaintiffs directed otherwise.

14 67. As described above, Defendants converted the material by assuming control
15 over them and knowingly destroying or otherwise improperly disposing of them irrevocably,
16 thereby depriving Plaintiffs of their ownership rights over the property.

17 68. As a direct and proximate result of Defendants' misconduct, Plaintiffs and class
18 members suffered severe emotional, physical, property, and economic damages in an amount
19 to be proven at trial.

20 69. Plaintiffs and class members are entitled to recover all such damages as a result
21 of Defendants' conversion.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiffs respectfully pray for relief and judgment as follows:

- 24 (a) Compensatory, rescissory, general, consequential, punitive, exemplary, and property
25 damages in an amount to be proven at trial;
26 (b) Emotional damages in an amount to be proven at trial;
27 (c) Appropriate equitable relief;
28 (d) Pre-judgement interest as permitted by law;

- 1 (e) Costs of suit; and
- 2 (f) Such further relief as this Court deems equitable, just, and proper.

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Date: March 15, 2018

Respectfully submitted,

s/ Adam B. Wolf
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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial of all causes of action so triable.

Date: March 15, 2018

Respectfully submitted,

s/ Adam B. Wolf

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