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7 *Attorneys for Plaintiffs*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE

10
11 A.B., an individual; and C.D., an individual,

12 Plaintiffs,

13 v.

14 FPG LABS, LLC d/b/a OVATION
FERTILITY; FPG SERVICES, LLC d/b/a
15 OVATION FERTILITY NEWPORT BEACH;
and DOES 1-50, inclusive,

16 Defendants.
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Case No.

COMPLAINT

1. **NEGLIGENT MISREPRESENTATION**
2. **FRAUD / FRAUDULENT CONCEALMENT**
3. **INTENTIONAL MISREPRESENTATION**
4. **BAILMENT**
5. **CONVERSION**
6. **MEDICAL BATTERY**
7. **NEGLIGENT HIRING AND SUPERVISION**
8. **PREMISES LIABILITY**
9. **NEGLIGENCE**

DEMAND FOR JURY TRIAL

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24 Plaintiffs A.B. and C.D. (collectively, "Plaintiffs") respectfully bring this Complaint and
25 Demand for Jury Trial against Defendants OVATION FERTILITY; OVATION FERTILITY
26 NEWPORT BEACH; and DOES 1-50, inclusive (collectively, "Defendants" or "Ovation"), and
27 allege as follows:
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1 **NATURE OF THE ACTION**

2 1. Ovation killed Plaintiffs’ embryo. As a result, Plaintiffs might not be able to have
3 children who are biologically related to them.

4 2. Ovation markets and sells to the public their fertility services, including embryo
5 transfers through in vitro fertilization (“IVF”). Ovation falsely claims that it uses “best practices”
6 and “the highest standards” in its fertility laboratory.

7 3. Comforted by Defendants’ marketing statements and representations, Plaintiffs
8 entrusted their embryos to Ovation’s facility in Newport Beach, California.

9 4. Unbeknownst to Plaintiffs, Ovation wrongfully used hydrogen peroxide in an
10 incubator into which it placed embryos, including Plaintiffs’ precious embryo (“Toxic
11 Incubator”). Ovation’s Toxic Incubator killed Plaintiffs’ embryo.

12 5. Ovation then transferred Plaintiffs’ dead embryo to Plaintiff A.B. Because the
13 embryo was dead prior to transfer, there was no chance that A.B. would become pregnant, and in
14 fact, A.B. did not become pregnant.

15 **PARTIES**

16 6. Plaintiff A.B. is a citizen of Orange County, California.

17 7. Plaintiff C.D. is a citizen of Orange County, California.

18 8. Given the sensitive nature of their claims, Plaintiffs are using pseudonymous
19 initials in this litigation to protect their privacy. If the Court so requires, Plaintiffs will seek
20 permission to proceed under these pseudonyms.

21 9. Defendant FPG LABS, LLC d/b/a OVATION FERTILITY is and at all relative
22 times herein was, upon information and belief, a limited liability company that operates fertility
23 clinics throughout the country, including in Orange County.

24 10. Defendant FPG SERVICES, LLC d/b/a OVATION FERTILITY is and at all
25 relative times herein was, upon information and belief, a limited liability company that operates
26 fertility clinics throughout the country, including in Orange County.

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1 11. Defendant OVATION FERTILITY NEWPORT BEACH (“Ovation Newport”) is,
2 upon information and belief, a facility operating in Newport Beach, California and providing
3 fertility services such as IVF, including to Plaintiffs.

4 12. Plaintiffs are unaware of the true names or capacities, whether they are individuals
5 or business entities, of Defendants DOES 1-50, and therefore sue them by such fictitious names
6 pursuant to California Code of Civil Procedure section 474. Plaintiffs will seek leave of this Court
7 to insert the true names and capacities once they have been ascertained.

8 13. Plaintiffs are informed and believe, and on that basis allege, that at all times
9 material hereto: Defendants were, actually or ostensibly, the agents, representatives, and/or
10 employees of each and every other Defendant; Defendants were acting within the course and
11 scope of said alternative personality, capacity, identity, agency, representation, and/or
12 employment; Defendants were the trustees, partners, servants, joint venturers, shareholders, co-
13 conspirators, contractors, and/or employees of each and every other Defendant; the acts and
14 omissions alleged herein, while committed individually, were made by Defendants through such
15 capacity, and within the scope of their authority, and with the permission and consent of each and
16 every other Defendant, as to make Defendants jointly and severally liable to Plaintiffs for the acts
17 and omissions alleged herein.

18 **JURISDICTION AND VENUE**

19 14. This Court has jurisdiction over the entire action by virtue of the fact that this is a
20 civil action wherein the matter in controversy, exclusive of interest and costs, exceeds the
21 jurisdictional minimum of the Court.

22 15. This Court has personal jurisdiction over all Defendants. Each Defendant is, and at
23 all relevant times herein was, a citizen of and/or authorized to conduct business in the State of
24 California and/or conducted such business within the State of California, including the actions,
25 dealings, and/or omissions that caused or contributed to the harm giving rise to this action.

26 16. Jurisdiction is proper pursuant to California Code of Civil Procedure section 410.10
27 because the actions and/or omissions of Defendants that give rise to this legal action occurred in
28 Orange County, California.

1 17. Venue is proper in this Court pursuant to California Code of Civil Procedure
2 section 395.5 because one or more Defendants reside in Orange County and the acts and/or
3 omissions giving rise to the injuries alleged herein occurred in Orange County.

4 **GENERAL FACTUAL ALLEGATIONS**

5 **General Background of Assisted Reproductive Technology (“ART”)**

6 18. ART involves fertility-related treatments in which human eggs or embryos are
7 manipulated. The most common type of ART is IVF.

8 19. During the IVF process, eggs are extracted from a woman and fertilized in a
9 laboratory with sperm to create a viable embryo. Later in the IVF process, the embryo is
10 transplanted into a uterus.

11 20. The process of extracting human eggs from a woman is lengthy, physically and
12 emotionally painful, and expensive. It typically requires significant medication, including
13 injections; frequent bloodwork to monitor hormone levels; monitoring through ultrasound and
14 other scans to check the development of the eggs; and performing a surgical procedure to collect
15 the eggs.

16 21. Following the collection of the eggs, sperm is mixed with the eggs in a laboratory
17 to create embryos, and media is used to cultivate the embryos.

18 22. Many people, including Plaintiffs, elect to have their embryos stored for a period of
19 time before the embryo is transferred to a woman’s uterus.

20 23. There can be many reasons for undergoing these expensive and extensive
21 procedures well in advance of the embryo implantation, including that human eggs are a limited
22 and precious resource. A woman has a limited number of eggs at birth, and this supply diminishes
23 as part of the natural aging process (commonly referred to as a “biological clock”). Moreover, not
24 only does the quantity of a woman’s eggs diminish with time, but so does egg quality, with
25 miscarriages and chromosomal abnormalities occurring more frequently for women who are older.
26 The most determinative factor in IVF success is the woman’s age when her eggs were extracted.

27 **The Importance of IVF Incubators**

28 24. During IVF, it is crucial to maintain appropriate atmospheric conditions for the

1 proper growth, development, and survival of the embryo. Prior to transfer of a formerly frozen
2 embryo, the embryo is placed into an incubator. A properly cleaned and well-functioning
3 incubator provides the necessary conditions for the continued viability of an embryo.

4 25. Incubators, when used properly, provide the correct temperature, humidity, pH
5 levels, and essential gasses for embryos.

6 26. Appropriate levels of temperature, humidity, pH levels, and gases are critical to
7 ensure that embryos are not harmed.

8 **Ovation’s Misrepresentations**

9 27. At all relevant times, Ovation has represented (and continues to represent) to its
10 customers, including Plaintiffs, on its website that it operates a “premier” laboratory” that
11 implements “best practices.”

12 28. At all relevant times, Ovation has represented (and continues to represent) to its
13 customers, including Plaintiffs, on its website that its laboratory operates with “the highest
14 standards.”

15 29. In or about January 2024, Ovation further represented to Plaintiffs in written
16 material that Ovation “use[s] the most advanced technologies available in order to promote a
17 successful outcome.”

18 30. These statements are false. No laboratory that implements “best practices,” operates
19 with “the highest standards,” and “uses the most advanced technologies available” would create
20 the conditions of the Toxic Incubator, use the Toxic Incubator, and place Plaintiffs’ embryo into
21 the Toxic Incubator.

22 **Ovation’s Toxic Incubator**

23 31. Plaintiffs’ embryo was placed in an incubator that was owned, operated, and
24 monitored by Defendants prior to transfer to Plaintiff A.B.

25 32. Defendants introduced into its embryo incubator an extremely unsafe amount of a
26 substance that is toxic to human embryos, hydrogen peroxide. Defendants then placed Plaintiffs’
27 embryo, among other embryos, into the Toxic Incubator before transferring the embryo to Plaintiff
28 A.B.

1 33. Defendants, and each of them, were responsible for ensuring that the Toxic
2 Incubator was properly monitored and that their employees were properly trained on how to
3 operate the incubator to ensure that embryos were not harmed.

4 34. Moreover, Defendants, and each of them, were responsible for adequately training
5 and supervising Defendants' employees and/or agents who monitored, cleaned, repaired, and/or
6 maintained the incubator.

7 **Ovation Lacked Proper Procedures and Protocols to Ensure that the Toxic Incubator**
8 **Would Not Harm Plaintiffs' Embryos**

9 35. Upon information and belief, Defendants did not properly train their employees,
10 agents, and/or persons working at their clinics on how to operate, manage, or maintain the embryo
11 incubator.

12 36. However, Defendants represented to Plaintiffs that they had proper policies and
13 procedures pertaining to usage of their embryo incubator and that such were sufficient to ensure
14 that Defendants' conduct would not harm Plaintiffs' embryos.

15 37. Defendants further warranted that their policies and procedures pertaining to the
16 storage of Plaintiffs' embryos in the incubator were sufficient to ensure that Defendants' conduct
17 would not harm Plaintiffs' embryos.

18 38. In addition, Defendants represented to Plaintiffs at the time of the transfer of
19 Plaintiffs' embryo in January 2024 that the embryo was viable and had not been harmed, despite
20 the fact that Defendants knew or should have known that such was not true.

21 **Plaintiffs' Embryo Was Destroyed by Ovation's Misconduct.**

22 39. Plaintiffs utilized ART to try to fulfill their dream of having biological children. To
23 that end, Plaintiffs entrusted Ovation to assist them with having a child.

24 40. Plaintiff A.B. underwent separate egg retrievals in approximately October 2016 and
25 November 2016. From those retrievals, in approximately April 2023, two high-quality embryos
26 were created using Plaintiff C.D.'s sperm.

27 41. Plaintiffs entrusted their precious embryos into Defendants' possession until
28 Plaintiffs were ready for an embryo transfer and to start their family.

1 42. Tragically, and unbeknownst to Plaintiffs at the time, when their embryo was
2 transferred in late January 2024, Defendants had by that point destroyed their embryo in the Toxic
3 Incubator.

4 43. Plaintiffs are devastated and have suffered irreparable harm. They may no longer
5 be able to have biologically related children as a result of Defendants' conduct.

6 **FIRST CAUSE OF ACTION**

7 **NEGLIGENT MISREPRESENTATION**

8 **(Against All Defendants)**

9 44. Plaintiffs re-allege and incorporate by reference herein each and every allegation
10 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

11 45. Defendants represented to Plaintiffs several material facts that Defendants knew
12 were not true, including but not limited to:

- 13 (a) That Defendants' policies and procedures pertaining to usage of their incubator
14 were sufficient to ensure that no toxic material(s) would come in contact with
15 Plaintiffs' embryo(s);
- 16 (b) That Defendants would use "best practices" in their laboratory to ensure that
17 Plaintiffs' embryo would not encounter unnecessary harm;
- 18 (c) That Defendants would use the "highest standards" in their laboratory to ensure
19 that Plaintiffs' embryo would not encounter unnecessary harm;
- 20 (d) That Defendants would "use the most advanced technologies available" to ensure
21 that Plaintiffs' embryo would not encounter unnecessary harm and "in order to
22 promote a successful outcome" for Plaintiffs;
- 23 (e) That Defendants' policies and procedures pertaining to their incubator were
24 sufficient to ensure that no toxic material(s) would come in contact with Plaintiffs'
25 embryo(s);
- 26 (f) That Defendants would not take actions that would unduly render Plaintiffs'
27 embryo(s) non-viable at the time their embryo was transferred;

28 46. Even if Defendants may have believed that any of these representations were true at

1 the time they were made, Defendants had no reasonable grounds to believe that they were true.

2 47. Defendants knew that these representations were false and made them with the
3 intent that Plaintiffs would rely on them to form their decision to utilize Defendants' fertility
4 services.

5 48. Plaintiffs reasonably relied on Defendants' representations.

6 49. Plaintiffs were significantly harmed, as described herein, and Plaintiffs' reliance on
7 Defendants' misrepresentation(s) was a substantial factor in causing such harm.

8 **SECOND CAUSE OF ACTION**

9 **FRAUD / FRAUDULENT CONCEALMENT**

10 **(Against All Defendants)**

11 50. Plaintiffs re-allege and incorporate by reference herein each and every allegation
12 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

13 51. Defendants' acts and practices constitute fraudulent concealment because
14 Defendants failed to disclose information that was material to the reason Plaintiffs entrusted their
15 embryo in Defendants' possession, including but not limited to, that Defendants represented to
16 Plaintiffs that Defendants employ "best practices," "the highest standards," and "the most
17 advanced technologies available" to ensure the safety of Plaintiffs' embryo.

18 52. Defendants made these representations on their website, among other places,
19 throughout the time Plaintiffs were Defendants' customers.

20 53. Defendants knew that these representations were false and made them with the
21 intent that Plaintiffs would rely on them to form their decision to utilize Defendants' fertility
22 services.

23 54. Plaintiffs reasonably relied on Defendants' (mis)representations.

24 55. Plaintiffs were significantly harmed, as described herein, and Plaintiffs' reliance on
25 Defendants' misrepresentation(s) was a substantial factor in causing such harm.

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1 **THIRD CAUSE OF ACTION**

2 **INTENTIONAL MISREPRESENTATION**

3 **(Against All Defendants)**

4 56. Plaintiffs re-allege and incorporate by reference herein each and every allegation
5 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

6 57. Defendants represented to Plaintiffs several material facts that Defendants knew
7 were not true, including but not limited to the purported (but untrue) facts that Defendants employ
8 “best practices,” “the highest standards,” and “the most advanced technologies available” to
9 ensure the safety of Plaintiffs’ embryos.

10 58. Each of these aforementioned representations was false and Defendants knew they
11 were false at the time Defendants made them and/or made such representation(s) recklessly and
12 without regard for its truth.

13 59. In fact, Defendants made these representations with the intent that Plaintiffs would
14 rely on them and would continue to utilize Defendants’ fertility services.

15 60. Plaintiffs reasonably relied on Defendants’ (mis)representations.

16 61. Plaintiffs were significantly harmed, as described herein, and Plaintiffs’ reliance on
17 Defendants’ misrepresentation(s) was a substantial factor in causing such harm.

18 **FOURTH CAUSE OF ACTION**

19 **BAILMENT**

20 **(Against Ovation Newport Beach)**

21 62. Plaintiffs re-allege and incorporate by reference herein each and every allegation
22 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

23 63. A bailment arises where possession, but not ownership, of property is transferred
24 from one party, a bailor, to another, a bailee. Where the personal property of a bailor is delivered
25 to a bailee, a duty of care is owed.

26 64. Ovation Newport Beach received for safekeeping Plaintiffs’ irreplaceable personal
27 property (their viable embryos), to be safely and securely kept for the benefit of Plaintiffs, and to
28 be redelivered to them upon demand.

1 65. Plaintiffs agreed to pay, and did pay, substantial sums in exchange for the
2 safekeeping of their embryos.

3 66. Ovation Newport Beach had a duty to exercise care in maintaining, preserving, and
4 protecting Plaintiffs’ embryos. Further, Ovation Newport Beach had a duty to return Plaintiffs’
5 embryos to them undamaged.

6 67. Because of Ovation Newport Beach’s wrongful conduct, as set forth herein, the
7 irreplaceable property of Plaintiffs was irreparably damaged, precluding its proper redelivery to
8 them.

9 68. Ovation Newport Beach breached its duties to exercise care in the safekeeping of
10 Plaintiffs’ embryos and to return the embryos, undamaged, to Plaintiffs.

11 69. As a direct and proximate result of Ovation Newport Beach’s breach of the
12 foregoing duties, Plaintiffs have been deprived of the opportunity to use their embryos, and have
13 suffered damages in an amount to be determined at trial.

14 **FIFTH CAUSE OF ACTION**

15 **CONVERSION**

16 **(Against Ovation Newport Beach)**

17 70. Plaintiffs re-allege and incorporate by reference herein each and every allegation
18 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

19 71. Ovation Newport Beach received for safekeeping Plaintiffs’ irreplaceable personal
20 property (their viable embryos), to be safely and securely kept for the benefit of Plaintiffs, and to
21 be redelivered to them—unharmful—upon demand.

22 72. Plaintiffs agreed to pay, and did pay, substantial sums in exchange for the
23 safekeeping of their embryos.

24 73. Ovation Newport Beach had a duty to exercise care in maintaining, preserving, and
25 protecting Plaintiffs’ embryos. Further, Ovation Newport Beach had a duty to return Plaintiffs’
26 embryos to them undamaged.

27 74. Because of Ovation Newport Beach’s wrongful conduct, as set forth herein, the
28 irreplaceable property of Plaintiffs was irreparably damaged, precluding its proper redelivery to

1 them.

2 75. Ovation Newport Beach destroyed Plaintiffs' embryos without Plaintiffs' consent.

3 76. As a direct and proximate result of Ovation Newport Beach's breach of the
4 foregoing duties, Plaintiffs have been deprived of the opportunity to use their embryos, and have
5 suffered damages in an amount to be determined at trial.

6 **SIXTH CAUSE OF ACTION**

7 **MEDICAL BATTERY**

8 **(Against All Defendants)**

9 77. Plaintiffs re-allege and incorporate by reference herein each and every allegation
10 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

11 78. By performing a procedure to which Plaintiff A.B. did not consent—transferring an
12 embryo that Defendants had killed, and thus had no chance of resulting in a pregnancy—
13 Defendants, by and through their employees, intentionally and offensively touched Plaintiff A.B.
14 without her consent.

15 79. As a result of Defendants' battery, Plaintiffs have suffered and will suffer
16 substantial damages and such battery was a substantial factor in causing Plaintiffs' harm and
17 damages.

18 **SEVENTH CAUSE OF ACTION**

19 **NEGLIGENT HIRING AND SUPERVISION OF EMPLOYEES**

20 **(Against All Defendants)**

21 80. Plaintiffs re-allege and incorporate by reference herein each and every allegation
22 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

23 81. Defendants, and each of them, hired the employees and/or agents that caused, by
24 their actions and/or inactions, the Toxic Incubator to destroy Plaintiffs' embryo.

25 82. Defendants knew and/or should have known that their employees and/or agents
26 were unfit, not properly trained, and/or incompetent to monitor or use the embryo incubator.

27 83. Defendants' hiring, supervision, and/or training of employees and/or agents
28 responsible for toxic substances to contact Plaintiffs' embryo was a substantial factor in causing

1 Plaintiffs' harm and damages.

2 **EIGHTH CAUSE OF ACTION**

3 **PREMISES LIABILITY**

4 **(Against Ovation Newport Beach)**

5 84. Plaintiffs re-allege and incorporate by reference herein each and every allegation
6 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

7 85. At all relevant times material to Plaintiffs' claims, Ovation Newport Beach owned,
8 leased, occupied, and/or controlled the fertility clinic operated under its name for which Plaintiffs
9 sought fertility treatment and to whom entrusted their embryos.

10 86. Ovation Newport Beach created a dangerous and hazardous environment in that it
11 did not properly maintain its clinic, including but not limited to its Toxic Incubator that was
12 located on Ovation's premises.

13 87. Ovation Newport Beach, as Plaintiffs' fertility clinic, owed a duty of care to
14 Plaintiffs to ensure that Plaintiffs' embryos were properly stored and cared for such that an
15 embryo was viable when Plaintiffs elected to transfer such.

16 88. Ovation Newport Beach also owed Plaintiffs a duty of care to exercise ordinary
17 care in its management of its IVF facility to avoid damage or destruction of embryos, including
18 but not limited to management and maintenance of its incubators.

19 89. Defendants breach these foregoing duties and destroyed Plaintiffs' embryo(s).

20 90. As a direct and proximate result of Ovation Newport Beach's conduct, Plaintiffs
21 have suffered and will suffer substantial damages, and Ovation Newport Beach's acts and/or
22 omissions were a substantial factor in causing such harm.

23 **NINTH CAUSE OF ACTION**

24 **NEGLIGENCE**

25 **(Against All Defendants)**

26 91. Plaintiffs re-allege and incorporate by reference herein each and every allegation
27 contained in all other paragraphs in this Complaint as though fully set forth in this cause of action.

28 92. At all relevant times, Defendants and their agents and/or employees undertook to

1 treat, monitor, and care for Plaintiffs and their embryos. Defendants, and each of them, had a duty
2 to render the treatment necessary to achieve Plaintiffs' treatment goals using the same level of
3 skill, prudence, and diligence that other members of their profession commonly possess and
4 exercise.

5 93. Defendants breached their professional duties and the standard of care in all of the
6 following respects:

7 a. Failing to monitor, maintain, and/or repair their incubators, such that toxic
8 substances contacted and killed Plaintiffs' embryo;

9 b. Failing to have in place and/or compel compliance with protocols and procedures
10 to ensure that placing Plaintiffs' embryo in Defendants' incubator would not cause its destruction;

11 c. Failing to properly or adequately train, hire, and/or supervise their employees
12 and/or agents to ensure that said agents and/or employees were adequately using, monitoring,
13 and/or cleaning the embryo incubator and would not pose harm to Plaintiffs' embryos;

14 d. Failing to secure Plaintiffs' informed consent to the transfer procedure, i.e. of a
15 non-viable embryo;

16 e. Transferring an embryo that Defendants had killed, in derogation of Plaintiffs'
17 limited consent; and

18 f. Transferring an embryo that Defendants knew or should have known was not
19 viable.

20 94. This conduct fell far below the applicable standard of care for a fertility clinic.

21 95. As a direct and proximate result of Defendants' misconduct, Plaintiffs have
22 suffered and will suffer substantial damages.

23 **PRAYER FOR RELIEF**

24 **WHEREFORE**, Plaintiffs pray for judgment against Defendants, and each of them, as
25 follows:

26 1) For past, present, and future non-economic damages in an amount to be determined
27 at the time of trial;

28 2) For past, present, and future economic damages in an amount to be determined at

1 the time of trial;

2 3) For punitive damages in an amount to be determined at the time of trial;

3 4) For costs of suit herein;

4 5) For pre- and post-judgement interest as allowed by law; and

5 6) For such other and further relief as the Court may deem just and proper.

6 DATED: April 18, 2024

PEIFFER WOLF CARR KANE CONWAY &
WISE, LLP

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By: 

ADAM B. WOLF
MELISA A. ROSADINI-KNOTT

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Attorneys for Plaintiffs

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DEMAND FOR JURY TRIAL

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Plaintiffs hereby demand a trial by jury on all claims so triable.

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DATED: April 18, 2024

PEIFFER WOLF CARR KANE CONWAY &
WISE, LLP

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By: 

ADAM B. WOLF
MELISA A. ROSADINI-KNOTT

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Attorneys for Plaintiffs

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