

1 Robert H. Marcereau, Esq. (SBN: 211534)
2 MARCEREAU LAW GROUP
3 24681 La Plaza, Suite 370
4 Dana Point, CA 92629
5 Tel: (949) 323-4890
6 Fax: (949) 323-4891
7 rob@themlgteam.com
8 laura@themlgteam.com

9 Attorneys for Plaintiffs BROOKE BERGER, BENNETT HARDY, JANE DOE 1, JOHN DOE 1,
10 JANE DOE 4, JOHN DOE 4, JANE DOE 6, JOHN DOE 6

11 Michelle B. Hemesath, Esq. (SBN: 286168)
12 Benjamin T. Ikuta, Esq. (SBN: 260878)
13 Heather M. Baker Dobbs, Esq. (SBN: 261303)
14 IKUTA HEMESATH LLP
15 1327 North Broadway
16 Santa Ana, CA 92706
17 Tel: (949) 229-5654
18 Fax: (949) 203-2162
19 EService: Service@ih-llp.com

Assigned for All Purposes
Judge Melissa R. McCormick
Dept. CX104

20 Attorneys for Plaintiffs T.S., K.S., JANE DOE 2, JOHN DOE 2, JANE DOE 3, JOHN DOE 3, JANE
21 DOE 5, JOHN DOE 5, JANE DOE 7, JOHN DOE 7

22 SUPERIOR COURT OF THE STATE OF CALIFORNIA
23 FOR THE COUNTY OF ORANGE

24 BROOKE BERGER, BENNETT HARDY,
25 T.S., K.S., JANE DOE 1, JOHN DOE 1, JANE
26 DOE 2, JOHN DOE 2, JANE DOE 3, JOHN
27 DOE 3, JANE DOE 4, JOHN DOE 4, JANE
28 DOE 5, JOHN DOE 5, JANE DOE 6, JOHN
DOE 6, JANE DOE 7, JOHN DOE 7

Plaintiffs,

vs.

OVATION FERTILITY; NEWPORT BEACH
IVF, LLC; FPG LABS, LLC; FPG SERVICES,
LLC; FPG LABS OF NEWPORT LLC; and
DOES 1 through 50, Inclusive,

Defendants.

CASE NO: 30-2024-01395673-CU-PO-CXC

[UNLIMITED CIVIL]

COMPLAINT FOR:

- 1) **NEGLIGENCE;**
- 2) **MEDICAL BATTERY;**
- 3) **CONCEALMENT**
- 4) **INTENTIONAL MISREPRESENTATION**
- 5) **NEGLIGENT MISREPRESENTATION**
- 6) **NEGLIGENT HIRING, RETENTION, AND SUPERVISION**
- 7) **LOSS OF CONSORTIUM**

(DEMAND FOR JURY TRIAL)

1 Plaintiff BROOKE BERGER, BENNETT HARDY, T.S., K.S., JANE DOE 1, JOHN DOE 1,
2 JANE DOE 2, JOHN DOE 2, JANE DOE 3, JOHN DOE 3, JANE DOE 4, JOHN DOE 4, JANE DOE
3 5, JOHN DOE 5, JANE DOE 6, JOHN DOE 6, JANE DOE 7, JOHN DOE 7 allege as follows on
4 information and belief:

5 **GENERAL ALLEGATIONS**

6 **The Incident**

7 1. This is a case about OVATION FERTILITY recklessly and wrongfully exposing embryos
8 to poison, implanting these dead embryos into would-be mothers, and then commencing with an
9 attempted cover-up that intensified the suffering of nine California couples. Between January 18, 2024
10 and January 30, 2024, during the thawing process of over a dozen live embryos that were to be transferred
11 into women hoping to start their families, OVATION FERTILITY exposed these embryos to lethal
12 amounts of hydrogen peroxide (or some other caustic agent), which killed them. OVATION FERTILITY
13 and its providers then implanted these dead embryos into their patients.

14 2. OVATION FERTILITY knew that the embryos had been killed during the pre-
15 implantation thawing process but did not disclose this fact to the couples. As a result, in the days and
16 weeks after learning of their failed pregnancies, the couples blamed themselves and their bodies, some
17 going so far as to endure risky and painful medical procedures, such as hysteroscopies and biopsies, to
18 determine what went wrong. It was not until late February and early March that OVATION FERTILITY
19 started to reveal to the patients' fertility physicians that something had gone wrong in the Newport lab.
20 This disclosure only came after several of the couples' fertility doctors questioned why there was a *100%*
21 *failure rate* for the embryos that had been thawed over that two week period, when the success rate was
22 normally *above 75%*.

23 3. DEFENDANTS OVATION FERTILITY; NEWPORT BEACH IVF, LLC; FPG LABS,
24 LLC; FPG SERVICES, LLC; FPG LABS OF NEWPORT LLC and DOES 1 through 50 (collectively
25 "OVATION") are licensed by the State of California to practice their specialty, with offices located
26 within the County of Orange. OVATION is a company that owns and operates a fertility lab in Newport
27 Beach and was responsible for storing and maintaining embryos.

1 4. Between January 18, 2024 and January 30, 2024, in its Newport Beach location,
2 OVATION implanted high-grade embryos into would-be mothers, which should have had over a 75%
3 chance of success.¹

4 5. Instead, for all couples who had their embryos implanted at OVATION between January
5 18, 2024 and January 30, 2024, there was a **zero percent** success rate. The excuses OVATION made to
6 physicians as to the 0% success rate varied, from blaming temperature levels, pH levels, carbon dioxide
7 and other gas levels, and incubator equipment failure. Plaintiffs are informed and believe, however, that
8 OVATION FERTILITY used Hydrogen Peroxide rather than distilled water in conjunction with the
9 incubator. Once the embryos were wrongfully exposed to the Hydrogen Peroxide, they were killed
10 instantly.

11 **Ovation's History of Incompetence and Concealment**

12 6. On its website, OVATION bills itself as one of “America’s leading providers of
13 embryology services,” with “proven experience,” meeting the “highest industry standards,” and “high
14 survival rates,” giving patients “peace of mind that your embryos are in good hands.”²

15 7. OVATION’s motto³ reads as follows:



16
17
18
19
20 Safe. Reliable. Secure. Successful.
21

22 8. OVATION brags to the public about the quality of its staff and facilities, which will
23 supposedly maximize hopeful parents’ chances of having children⁴:

25 ¹ According to publicly available data, including from the Society for Assisted Reproductive Technology (“SART”), the five
26 physicians who treated the Plaintiffs in this action, had a success rate of greater than 70%. Given that these were high-grade
embryos, the success rate was closer to 80%.

27 ² <https://www.ovationfertility.com/embryology-services/>

28 ³ <https://www.ovationfertility.com/network-labs/newport-beach-ivf/>

⁴ <https://www.ovationfertility.com/embryology-services/embryo-warming/>

1 Each of our embryologists and laboratory directors is well-versed in freezing and thawing procedures.
2 They will use the latest, proven techniques in our state-of-the-art IVF laboratories to increase the
3 likelihood of you achieving your dream of parenthood with your frozen embryos.

4 9. While OVATION touted its supposed expertise to the general public, in reality, its
5 operations were riddled with incompetence. Plaintiffs are informed and believe that OVATION hired
6 inexperienced, cheap, unqualified, and untrained employees to cut corners and maximize profits—at the
7 expense of the health and safety of its patients and their embryos.

8 10. Plaintiffs are informed and believe and thereon allege that that its unqualified and
9 inexperienced employee included an embryologist named Ashley Wen. Plaintiffs are informed and
10 believe and thereon allege that Wen and other employees made constant mistakes with embryos, resulting
11 in the death or loss of such embryos. Plaintiffs are informed and believe and thereon allege that, prior to
12 the incident involving Plaintiffs, OVATION knew that Wen and other unqualified and untrained
13 employees had committed blatantly incompetent acts such as:

- 14 a. Freezing the wrong embryos on the wrong device;
- 15 b. Losing embryos during the biopsy process;
- 16 c. Conducting biopsies of embryos incorrectly, leading to harm and/or death of the
17 embryos.

18 11. Plaintiffs are informed and believe and thereon allege OVATION was well-aware that
19 Wen and other unqualified and untrained employees had been making mistakes that caused the loss or
20 destruction of embryos. Instead of hiring appropriate staff or supervising or training their unfit
21 employees, OVATION simply stopped creating any Incident Reports in an effort to reduce any paper
22 trail and to cover their tracks in case patients filed lawsuits. Plaintiffs are informed and believe and
23 thereon allege that OVATION and its managers actively tried to conceal the mistakes that Wen and other
24 unfit employees had been making--both from patients and their fertility physicians.

25 **Ovation's Attempts to Cover-Up the Incubator Disaster**

26 12. Once fertility doctors learned of the incubator disaster at OVATION, they began telling
27 their patients. OVATION responded by trying to sweep the matter under the rug, attempting to trick
28 patients into signing waivers of their claims and non-disparagement agreements. OVATION'S goal was

1 to avoid negative publicity that might affect their ability to keep making money.

2 13. To effectuate its plan, the president of OVATION, Connor Beardsley, sent Plaintiffs and
3 other patient letters “to confirm the understanding we have reached to provide you with certain
4 accommodations regarding your fertility care.” However, at the time these letters were sent, none of
5 these couples had ever spoken to OVATION or anyone on behalf of OVATION, including Beardsley,
6 about any “accommodations.” There were no discussions regarding possible settlement or resolution and
7 certainly no agreement or “understanding.” Rather, OVATION tried to trick these then-unrepresented
8 couples into signing a release agreement in exchange for a refund of lab fees, which amounted to a little
9 over \$5,000. Nowhere did OVATION take responsibility or even explain what happened, but rather they
10 “apologize[d] for any inconvenience.” A copy of one such letter is below:



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14. After Beardsley sent his letters, Hannalie Adriaanse, the Lab Manager at OVATION, started to call every single patient multiple times, desperate to have them sign a release and non-disparagement agreement. She called up to 7 times a day, per patient. When she did speak to patients, including several of the plaintiffs, she refused to explain what happened or the wrongdoing of OVATION. She informed them that it was only “possible” that a problem at OVATION caused the death of their embryos. She refused to disclose that there was a 0% success rate for all couples involved.

15. Jane Doe 2 and John Doe 2 are medical professionals living in Palos Verdes, California and in the midst of starting their practice. Busy with their practice and unwilling to speak with OVATION, they asked Adriaanse to email them instead of continuing to call multiple times a day. On April 3, 2024, Adriaanse sent an email to Jane Doe 2, stating: “The information we shared with your physician related to laboratory processes was to provide transparency about a *potential* impact to your [frozen embryo transfer].” (emphasis in original). This was a blatant and despicable lie as OVATION and Adriaanse knew at that point that there was a 0% success rate and that the hydrogen peroxide had killed every single embryo before it was transferred, including the embryo of Jane Doe 2 and John Doe 2. Nevertheless, she only referred to a “potential impact” by “laboratory processes,” and there was “no certainty” that Ovation was responsible for the “negative outcome.”

We are very sorry for your unexpected outcome and for your unwillingness to talk with us. The information we shared with your physician related to laboratory processes was to provide transparency about a *potential* impact to your FET, as there can be no certainty as to one specific cause for your negative outcome. At the time of your FET, your embryo appeared viable, or the transfer would not have continued.

If you would like to discuss this issue further or explore how we can help you with future treatment support, we will be happy to do so via video conference or telephone, but we will not continue with further email messaging. Please reach out to schedule a time to talk.

Hannalie Adriaanse, BS, TS (ABB)
Lab Manager
361 Hospital Road, Suite 433
Newport Beach, CA 92663
O: 949.642.5954



1
2
3 16. On April 17, 2024, JANE DOE 1 and JOHN DOE 1 attempted to transfer their last two
4 remaining embryos from OVATION to another lab. JANE DOE 1 and JOHN DOE 1 are a married
5 couple who live in Yorba Linda, California. While there, instead of facilitating and assisting with the
6 transfer, Hannalie Adriaanse pressured JANE DOE 1 and JOHN DOE 1 into signing a release agreement
7 in relation to the past killing of their embryo. Later that day, OVATION’s president Conor Beardsley
8 sent JANE DOE 1/JOHN DOE 1, BROOKE BERGER/BENNETT HARDY, JANE DOE 4/JOHN DOE
9 4, and JANE DOE 6/JOHN DOE 6 a nearly identical release agreement to the one sent 6 weeks earlier to
10 other couples. Again, there had been absolutely no settlement discussions with OVATION, much less
11 any agreement or understanding with OVATION.

12 **The Impact Of Ovation’s Misconduct on Plaintiffs**

13 17. BROOKE BERGER and BENNETT HARDY are a married couple who live in Fullerton,
14 California. They have no children due to fertility issues as Brooke had previously lost a fallopian tube
15 due to an ectopic pregnancy as well as other fertility problems. They only had two viable embryos, and
16 trusted these embryos with Ovation. Both embryos were thawed and implanted on January 25, 2024.
17 However, due to Ovation’s horrific misconduct, both embryos were already dead when they were
18 implanted into Brooke. Brooke and Bennett have no children, and no remaining embryos.

19 18. T.S. and K.S. are a married couple who live on Catalina Island, California. To put it in
20 T.S. and K.S.’s own words: *“We started our IVF journey in 2023, after three unfortunate miscarriages, two*
21 *failed IUI cycles, and at the recommendation of our medical provider. We were determined to grow our family.*
22 *Through months and months of appointments, procedures, injections, and a multitude of medications, we ended up*
23 *retrieving twelve oocytes (eggs). Two out of the twelve were successfully fertilized, passed genetic testing, and*
24 *were thus implantable. Up to this point, the emotional rollercoaster of our IVF journey had taken its toll on us.*
25 *Infertility treatment consumed our entire lives. But we had hope, a lot of hope, as we had one very high-grade,*
26 *high-quality female embryo, plus one low-grade, low-quality male embryo. We took our best chances, and*
27 *transferred our girl - named Kalani Noelle – on January 29, 2024. She was meant to complete our family.*

1 *Unfortunately, Kalani Noelle did not make it despite her great odds. Kalani Noelle, as it was later discovered, had*
2 *no actual chance at all as she was killed in a lab error before she was implanted. Our hearts are broken, and we*
3 *will forever mourn the loss of our girl embryo. T.S. and K.S.”* While the high-grade female embryo,
4 according to their fertility doctor, had a 75% of success, their only remaining embryo has a near 0%
5 chance of success.

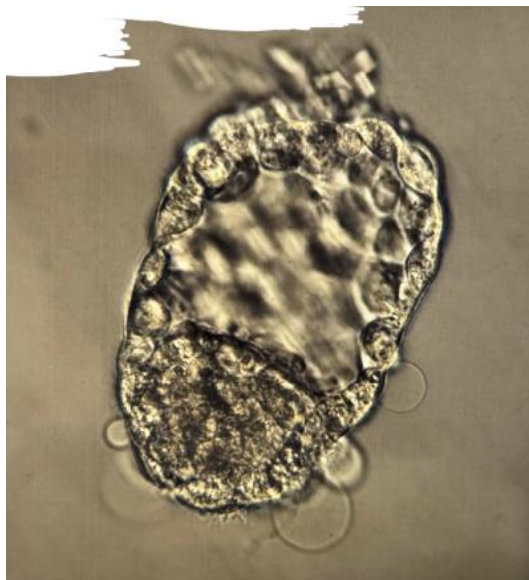
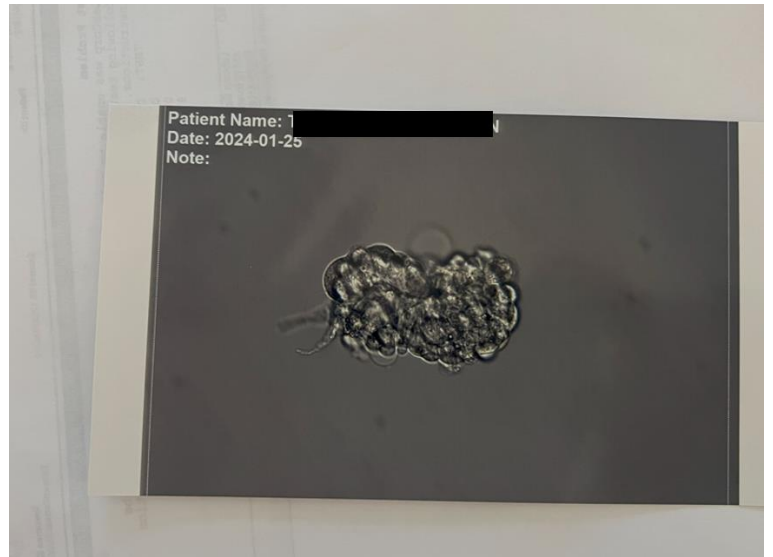
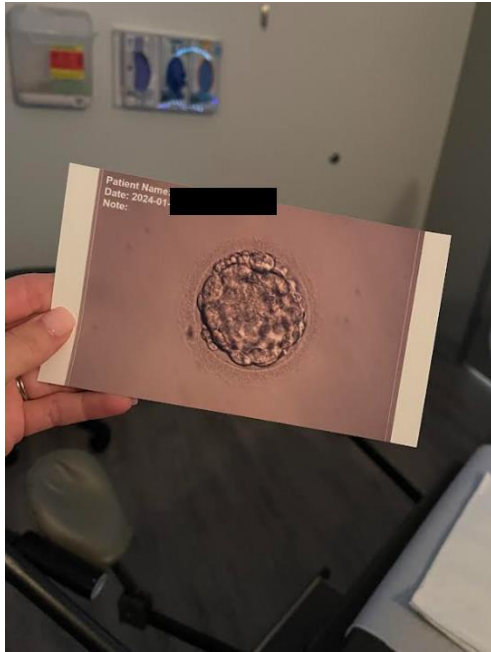
6 19. All of the other PLAINTIFFS have similar stories of heartbreak and look forward to telling
7 their stories at the time of trial. PLAINTIFFS all went through an arduous journey in an attempt to have
8 children and create a family. They all had to endure numerous hormone shots over the course of months,
9 as well invasive and risky medical procedures to retrieve eggs and prepare for implantation. The
10 following are pictures of the shots several of the PLAINTIFFS had to take as part of the process.



11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A

1 20. On their day of transfer, per custom, each PLAINTIFF couple was provided photographs
2 of their thawed embryos. With a greater than 75% chance of success for each PLAINTIFF, it was a
3 joyous and optimistic occasion. Plaintiffs cherished the photos of the tiny lives they hoped to bring into
4 the world. Little did they know that their embryos were already dead due to OVATION's wrongdoing.



1 learning common to practitioners in said community.

2 26. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned,
3 Defendants DOES 16 through 35, Inclusive, were and now are medical clinics, medical hospitals, health
4 care systems, emergency medical facilities, and industrial medical facilities licensed to provide hospital
5 and medical services in the County of Orange, State of California to which members of the public were
6 and are invited, including Plaintiff.

7 27. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned,
8 Defendants DOES 36 through 50, Inclusive, were and are product providers, manufacturers, or in some
9 way in the stream of commerce relative to a defective and/or unsafe product which caused or contributed
10 to Plaintiff's injuries as alleged more fully below.

11 28. Plaintiff is informed and believes and thereon alleges that, at all relevant times, each
12 Defendants OVATION FERTILITY; NEWPORT BEACH IVF, LLC; FPG LABS, LLC; FPG
13 SERVICES, LLC; FPG LABS OF NEWPORT LLC and DOES 1 through 50, Inclusive, (hereinafter
14 "Defendants") was the agent, servant, representative, partner, or employee of each of their co-Defendants,
15 and in doing the things alleged in this Complaint, was acting within the course and scope of his, her, or
16 its authority as such agent, servant, representative, partner or employee of their co-Defendants.

17 **FIRST CAUSE OF ACTION**

18 **(Negligence by all PLAINTIFFS against all DEFENDANTS)**

19 29. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

20 30. Plaintiffs engaged for compensation the services of Defendants to maintain, secure, and
21 keep safe their embryos. Defendants failed to use reasonable care to prevent harm to Plaintiffs' embryos.
22 This negligence was a substantial factor in causing the death of every embryo that was implanted between
23 January 18 and January 30 of 2024.

24 31. Defendants failed to ensure that they used proper materials in dethawing and handling the
25 embryos. Instead, Defendants used hydrogen peroxide, a literal poison that killed every embryo,
26 including all of Plaintiffs' embryos. This was far below the standard of care.

27 32. As a direct and proximate result of Defendants' wrongdoing described herein, Plaintiffs

1 have suffered damages in excess of jurisdictional minimums in an amount to be proven at trial.

2 **SECOND CAUSE OF ACTION**

3 **(Medical Battery by all PLAINTIFFS against all DEFENDANTS)**

4 33. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

5 34. Instead of utilizing distilled water, Defendants utilized a medical procedure without
6 Plaintiffs' consent. Defendants utilized a procedure using hydrogen peroxide, a literal poison, as part of
7 the thawing process for the embryos.

8 35. Plaintiffs did not consent to Defendants using hydrogen peroxide as part of the thawing
9 process for the embryos. Plaintiffs consented to one medical procedure, which was the safe storing and
10 thawing of embryos. Defendants performed a substantially different procedure by using hydrogen
11 peroxide without *any* consent of Plaintiffs. (See *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610.)

12 36. Defendants performing a substantially different procedure than what was consented to was
13 a substantial factor in causing Plaintiffs' harm.

14 37. As a direct and proximate result of Defendants' wrongdoing described herein, Plaintiffs
15 have suffered damages in excess of jurisdictional minimums in an amount to be proven at trial.

16 **THIRD CAUSE OF ACTION**

17 **(Concealment by all PLAINTIFFS against all DEFENDANTS)**

18 38. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

19 39. Defendants represented to Plaintiffs several material facts that Defendants knew were not
20 true, including but not limited to:

- 21 a. That Plaintiffs' embryos would be safe at OVATION's lab;
- 22 b. That Defendants' policies and procedures pertaining to usage of their incubator were
23 sufficient to ensure that no toxic materials would come in contact with Plaintiffs'
24 embryos;
- 25 c. That Defendants would use "best practices" in their laboratory to ensure that Plaintiffs'
26 embryo would not encounter unnecessary harm;
- 27 d. That Defendants would use the "highest standards" in their laboratory to ensure that

1 Plaintiffs' embryo would not encounter unnecessary harm;

2 e. That Defendants would "use the most advanced technologies available" to ensure that
3 Plaintiffs' embryo would not encounter unnecessary harm and "in order to promote a
4 successful outcome" for Plaintiffs;

5 f. That Defendants' policies and procedures pertaining to their incubator were sufficient
6 to ensure that no toxic material(s) would come in contact with Plaintiffs' embryos;

7 g. That Defendants would not take actions that would unduly render Plaintiffs' embryo(s)
8 non-viable at the time their embryo was transferred;

9 40. OVATION fraudulently concealed from Plaintiffs that it did not follow any safety
10 protocols whatsoever and that literal poison was allowed to kill embryos. OVATION also fraudulently
11 concealed from multiple patients *after* it knew that the dead embryos were not resulting in any viable
12 pregnancies. OVATON allowed the transfers to occur for two weeks between January 18, 2024 through
13 January 30, 2024 despite knowing that the transfers would not be successful as something in its lab was
14 killing every embryo. Plaintiffs reasonably relied on these concealments and would not have stored their
15 embryos with Ovation if they had been aware of these concealments.

16 41. PLAINTIFFS reasonably relied on these concealments, blaming themselves and their
17 bodies for the failed transfers and undergoing painful and risky procedures after the failures, including
18 hysteroscopies and biopsies, to figure out went wrong.

19 42. As a direct and proximate result of Defendants' wrongdoing described herein, Plaintiffs
20 have suffered damages in excess of jurisdictional minimums in an amount to be proven at trial.

21 **FOURTH CAUSE OF ACTION**

22 **(Intentional Misrepresentation by all PLAINTIFFS against all DEFENDANTS)**

23 43. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

24 44. Defendants represented to Plaintiffs several material facts that Defendants knew were not
25 true, including but not limited to:

26 a. That Plaintiffs' embryos would be safe at OVATION's lab;

27 b. That Defendants' policies and procedures pertaining to usage of their incubator were

1 sufficient to ensure that no toxic materials would come in contact with Plaintiffs'
2 embryos;

3 c. That Defendants would use “best practices” in their laboratory to ensure that Plaintiffs’
4 embryo would not encounter unnecessary harm;

5 d. That Defendants would use the “highest standards” in their laboratory to ensure that
6 Plaintiffs’ embryo would not encounter unnecessary harm;

7 e. That Defendants would “use the most advanced technologies available” to ensure that
8 Plaintiffs’ embryo would not encounter unnecessary harm and “in order to promote a
9 successful outcome” for Plaintiffs;

10 f. That Defendants’ policies and procedures pertaining to their incubator were sufficient
11 to ensure that no toxic material(s) would come in contact with Plaintiffs’ embryos;

12 g. That Defendants would not take actions that would unduly render Plaintiffs’ embryo(s)
13 non-viable at the time their embryo was transferred;

14 45. OVATION fraudulently misrepresented the above facts as it did not follow any safety
15 protocols whatsoever and that literal poison was allowed to kill embryos. OVATION also fraudulently
16 misrepresented to multiple patients and physicians *after* it knew that the dead embryos were not resulting
17 in any viable pregnancies. OVATON allowed the transfers to occur for two weeks between January 18,
18 2024 through January 30, 2024 despite knowing that the transfers would not be successful as something
19 in its lab was killing every embryo. Plaintiffs reasonably relied on these misrepresentations and would
20 not have stored their embryos with ovation if they had been aware of these misrepresentations.

21 46. PLAINTIFFS reasonably relied on these misrepresentations, blaming themselves and their
22 bodies for the failed transfers and undergoing painful and risky procedures after the failures, including
23 hysteroscopies and biopsies, to figure out went wrong.

24 47. Plaintiffs are informed and believe and thereupon allege that OVATION had
25 inexperienced, unqualified, and untrained employees handle embryos and the incubators. These
26 employees did not know how to properly handle the incubators, including both the cleaning and
27 disinfectant process. OVATION hired inexperienced, cheap, unqualified, and untrained employees to

1 maximize profits and cut corners at the expense of the health and safety of embryos. Specifically,
2 Plaintiffs are informed and believe and thereupon allege that OVATION hired an unqualified and
3 inexperienced embryologist named Ashley Wen amongst other unqualified and inexperienced
4 employees. Plaintiffs are informed and believe and thereupon allege that Wen and other employees made
5 constant mistakes with embryos, resulting in the death or losses of embryos. Plaintiffs are informed and
6 believe and thereupon allege that OVATION previously knew that Ashley Wen and other unqualified
7 and untrained employees had frozen the wrong embryos on the wrong device multiple times in the past.
8 Plaintiffs are informed and believe and thereupon allege that OVATION previously knew that Ashley
9 Wen and other unqualified and untrained employees had lost embryos during the biopsy process.
10 Plaintiffs are informed and believe and thereupon allege that OVATION previously knew that Ashley
11 Wen and other unqualified and untrained employees biopsied the embryos incorrectly, leading to harm
12 and/or death of the embryos. Plaintiffs are informed and believe and thereupon allege OVATION was
13 well-aware that Ashley Wen and other unqualified and untrained employees has been making other
14 mistakes resulting in the loss or destruction of embryos. Plaintiffs are informed and believe and thereupon
15 allege OVATION decided that instead of properly hiring appropriate staff or supervising or training
16 Ashley Wen and other unqualified and untrained employees, that instead they would simply stop doing
17 any Incident Reports to reduce any paper trail for the expected future lawsuits. Plaintiffs are informed
18 and believe and thereupon allege that OVATION and its managers even hid from couples the mistakes
19 that Ashley Wen and other unqualified and untrained employees has been making from patients and those
20 patients' fertility physicians. Had Plaintiffs known that OVATION not only had unqualified, untrained
21 employees handle the incubators and had numerous prior instances of avoidable and reckless embryo
22 destruction PLAINTIFFS would have not agreed to store their embryos with ovation.

23 48. As a direct and proximate result of Defendants' wrongdoing described herein, Plaintiffs
24 have suffered damages in excess of jurisdictional minimums in an amount to be proven at trial.

25 **FIFTH CAUSE OF ACTION**

26 **(Negligent Misrepresentation by all PLAINTIFFS against all DEFENDANTS)**

27 49. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

1 50. Defendants represented to Plaintiffs several material facts that Defendants knew were not
2 true, including but not limited to:

- 3 a. That Plaintiffs' embryos would be safe at OVATION's lab;
- 4 b. That Defendants' policies and procedures pertaining to usage of their incubator were
5 sufficient to ensure that no toxic materials would come in contact with Plaintiffs'
6 embryos;
- 7 c. That Defendants would use "best practices" in their laboratory to ensure that Plaintiffs'
8 embryo would not encounter unnecessary harm;
- 9 d. That Defendants would use the "highest standards" in their laboratory to ensure that
10 Plaintiffs' embryo would not encounter unnecessary harm;
- 11 e. That Defendants would "use the most advanced technologies available" to ensure that
12 Plaintiffs' embryo would not encounter unnecessary harm and "in order to promote a
13 successful outcome" for Plaintiffs;
- 14 f. That Defendants' policies and procedures pertaining to their incubator were sufficient
15 to ensure that no toxic material(s) would come in contact with Plaintiffs' embryos;
- 16 g. That Defendants would not take actions that would unduly render Plaintiffs' embryo(s)
17 non-viable at the time their embryo was transferred;

18 51. OVATION negligently misrepresented the above facts as it did not follow any safety
19 protocols whatsoever and that literal poison was allowed to kill embryos. OVATION also negligently
20 misrepresented to multiple patients and physicians *after* it knew or should have known that the dead
21 embryos were not resulting in any viable pregnancies. OVATON allowed the transfers to occur for two
22 weeks between January 18, 2024 through January 30, 2024 despite the fact that it should have known that
23 the transfers would not be successful as something in its lab was killing every embryo. Plaintiffs
24 reasonably relied on these misrepresentations and would not have stored their embryos with ovation if
25 they had been aware of these misrepresentations.

26 52. PLAINTIFFS reasonably relied on these misrepresentations,, blaming themselves and
27 their bodies for the failed transfers and undergoing painful and risky procedures after the failures,

1 including hysteroscopies and biopsies, to figure out went wrong.

2 53. As a direct and proximate result of Defendants' wrongdoing described herein, Plaintiffs
3 have suffered damages in excess of jurisdictional minimums in an amount to be proven at trial.

4 **SIXTH CAUSE OF ACTION**

5 **(Negligent Hiring, Retention, and Supervision by all PLAINTIFFS against all DEFENDANTS)**

6 54. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

7 55. Defendants, and each of them, hired the employees and/or agents that caused, by their
8 actions and/or inactions, the Toxic Incubator to destroy Plaintiffs' embryos.

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

11 57. Plaintiffs are informed and believe and thereupon allege that OVATION had
12 inexperienced, unqualified, and untrained employees handle embryos and the incubators. These
13 employees did not know how to properly handle the incubators, including both the cleaning and
14 disinfectant process. OVATION hired inexperienced, cheap, unqualified, and untrained employees to
15 maximize profits and cut corners at the expense of the health and safety of embryos. Specifically,
16 Plaintiffs are informed and believe and thereupon allege that OVATION hired an unqualified and
17 inexperienced embryologist named Ashley Wen amongst other unqualified and inexperienced
18 employees. Plaintiffs are informed and believe and thereupon allege that Wen and other employees made
19 constant mistakes with embryos, resulting in the death or losses of embryos. Plaintiffs are informed and
20 believe and thereupon allege that OVATION previously knew that Ashley Wen and other unqualified
21 and untrained employees had frozen the wrong embryos on the wrong device multiple times in the past.
22 Plaintiffs are informed and believe and thereupon allege that OVATION previously knew that Ashley
23 Wen and other unqualified and untrained employees had lost embryos during the biopsy process.
24 Plaintiffs are informed and believe and thereupon allege that OVATION previously knew that Ashley
25 Wen and other unqualified and untrained employees biopsied the embryos incorrectly, leading to harm
26 and/or death of the embryos. Plaintiffs are informed and believe and thereupon allege OVATION was
27 well-aware that Ashley Wen and other unqualified and untrained employees has been making other

1 mistakes resulting in the loss or destruction of embryos. Plaintiffs are informed and believe and thereupon
2 allege OVATION decided that instead of properly hiring appropriate staff or supervising or training
3 Ashley Wen and other unqualified and untrained employees, that instead they would simply stop doing
4 any Incident Reports to reduce any paper trail for the expected future lawsuits. Plaintiffs are informed
5 and believe and thereupon allege that OVATION and its managers even hid from couples the mistakes
6 that Ashley Wen and other unqualified and untrained employees has been making from patients and those
7 patients' fertility physicians. Had Plaintiffs known that OVATION not only had unqualified, untrained
8 employees handle the incubators and had numerous prior instances of avoidable and reckless embryo
9 destruction PLAINTIFFS would have not agreed to store their embryos with ovation.

10 58. Defendants' hiring, supervision, and/or training of employees and/or agents responsible
11 for toxic substances to contact Plaintiffs' embryo was a substantial factor in causing Plaintiffs' harm and
12 damages.

13 59. As a direct and proximate result of Defendants' wrongdoing described herein, Plaintiffs
14 have suffered damages in excess of jurisdictional minimums in an amount to be proven at trial.

15 **SEVENTH CAUSE OF ACTION**

16 **(Loss of Consortium against all Defendants by Plaintiff SPOUSE)**

17 60. Plaintiffs re-allege and incorporate by reference all previous paragraphs.

18 61. At all times relevant to this action, all Plaintiffs were residing with their spouse in a marital
19 relationship.

20 62. Prior to the injuries and damages alleged above, Plaintiffs were able to and did perform
21 duties as a spouse. However, subsequent to the injuries and the killing of their embryos, the marital
22 relationship of each Plaintiff couple has been severely disrupted. Thus, each Plaintiff has been deprived
23 of the consortium of his or her spouse.

24
25 **RELIEF SOUGHT**

26 Plaintiff and SPOUSE seeks the following judgment against each Defendant as follows:

27 1. For past, present, and future non-economic damages in an amount to be determined at the
28

1 time of trial. For the second, third, fourth, and fifth cause of action, Plaintiffs are seeking an amount far
2 greater than that available by Civil Code section 3333.2(b). (See *Burchell v. Faculty Physicians & Surgeons*
3 of *Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515.)

4 2. Medical and other special damages, past, present, and future, according to proof;

5 3. Damages for loss of earnings and other monetary benefits according to proof;

6 4. Costs of suit incurred herein; and

7 5. For such other and further relief as the court may deem just and proper.

8 6. Please be advised that Plaintiffs will also likely seek punitive damages due to the
9 despicable conduct, malice, oppression, and fraud of OVATION, but will do so after complying with
10 Code of Civil Procedures section 425.13.

11
12
13 Dated: April 22, 2024

IKUTA HEMESATH LLP



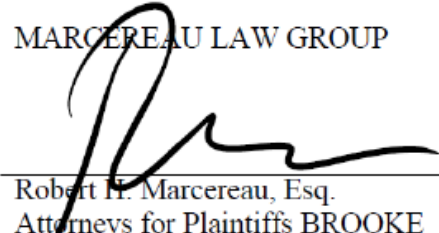
14
15
16 By: _____

Michelle B. Hemesath, Esq.
Attorneys for Plaintiffs T.S., K.S.,
JANE DOE 2, JOHN DOE 2, JANE
DOE 3, JOHN DOE 3, JANE DOE 5,
JOHN DOE 5, JANE DOE 7, JOHN
DOE 7

17
18
19
20 Dated: April 22, 2024

MARCEREAU LAW GROUP

21
22
23 By: _____



Robert H. Marcereau, Esq.
Attorneys for Plaintiffs BROOKE
BERGER, BENNETT HARDY, JANE
DOE 1, JOHN DOE 1, JANE DOE 4,
JOHN DOE 4, JANE DOE 6, JOHN
DOE 6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury in this matter on all issues so triable.

Dated: April 22, 2024

IKUTA HEMESATH LLP



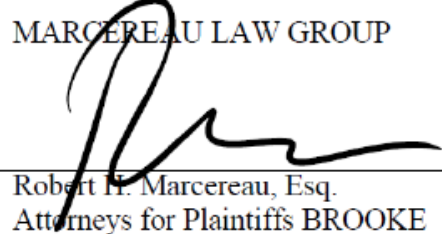
By:

Michelle B. Hemesath, Esq.
Attorneys for Plaintiffs T.S., K.S., JANE
DOE 2, JOHN DOE 2, JANE DOE 3,
JOHN DOE 3, JANE DOE 5, JOHN DOE
5, JANE DOE 7, JOHN DOE 7

Dated: April 22, 2024

MARCEREAU LAW GROUP

By:



Robert H. Marcereau, Esq.
Attorneys for Plaintiffs BROOKE
BERGER, BENNETT HARDY, JANE
DOE 1, JOHN DOE 1, JANE DOE 4,
JOHN DOE 4, JANE DOE 6, JOHN
DOE 6