

ANONYMOUS 2, and)
ANONYMOUS 3,)
Counter-Defendants/Cross-Defendants,)

**INTERVENOR-DEFENDANT, INDIANA PATIENT COMPENSATION FUND’S,
ANSWER TO FIRST AMENDED COMPLAINT, AFFIRMATIVE DEFENSES,
COUNTERCLAIM AND CROSS-CLAIM FOR DECLARATORY JUDGMENT**

Intervenor-Defendant, Stephen W. Robertson, Commissioner of the Indiana Department of Insurance, as administrator of the Indiana Patient’s Compensation Fund (the “PCF”), by counsel, for its answer, affirmative defenses, counterclaim and cross-claim to Plaintiffs’ Amended Complaint, states:

ANSWER

1. From April to September 2019, Anonymous Healthcare Provider failed to properly sterilize surgical instruments.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 1 of Plaintiffs’ First Amended Complaint, and therefore denies them.

2. These improperly sterilized surgical instruments were used in surgeries on more than 1,000 patients of Anonymous Healthcare Provider, exposing them to numerous infectious diseases, including Without limitation hepatitis B, hepatitis C, and Human Immunodeficiency Virus (“HIV”).

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 2 of Plaintiffs’ First Amended Complaint, and therefore denies them.

3. Plaintiff Linda Gierek had surgery at Anonymous Hospital on June 24, 2019 and, due to Anonymous Healthcare Provider's failure to properly sterilize its surgical instruments, may have been exposed to innumerable infectious diseases, many of which could be incurable and/or fatal.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 3 of Plaintiffs' First Amended Complaint, and therefore denies them.

4. Frank Gierek is the husband of Lisa Gierek.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 4 of Plaintiffs' First Amended Complaint, and therefore denies them.

5. Linda Gierek brings this proposed class action on behalf of herself and proposed Class, defined below, of Anonymous Healthcare Provider patients who underwent surgery at Anonymous Healthcare Provider from April to September 2019, and who were similarly exposed to infectious diseases.

ANSWER: The PCF admits that Linda Gierek brings this proposed class action on behalf of herself and proposed Class, defined below, of Anonymous Healthcare Provider patients who underwent surgery at Anonymous Healthcare Provider from April to September 2019. However, the PCF denies the remaining allegations in Paragraph 5 of Plaintiffs' First Amended Complaint.

6. Frank Gierek brings this action on behalf of himself and a proposed Class, defined below, of persons married to Anonymous Healthcare Provider patients who underwent surgery at Anonymous Healthcare Provider from April to September 2019, and who were similarly exposed to infectious diseases.

ANSWER: The PCF admits Frank Gierek purports to bring this action on behalf of himself and a proposed Class, defined below, of persons married to Anonymous Healthcare Provider patients who underwent surgery at Anonymous Healthcare Provider from April to September 2019, and who were similarly exposed to infectious diseases. However, the PCF denies the remaining allegations in this Paragraph 6 of Plaintiffs' First Amended Complaint.

7. Linda Gierek and Frank Gierek seek certification of two Plaintiff Classes and a judgment in favor of each Class for the emotional trauma, medical expenses, and other injuries and damages that they and each Class have and will suffer as a result of Anonymous Healthcare Provider's negligent acts.

ANSWER: The PCF admits that Linda Gierek and Frank Gierek seek certification of two Plaintiff Classes and a judgment in favor of each Class for the emotional trauma, medical expenses, and other injuries and damages that they and each Class have and will suffer as a result of Anonymous Healthcare Provider's negligent acts. However, the PCF denies the remaining allegations in this Paragraph 7 of Plaintiffs' First Amended Complaint.

Parties

8. Plaintiff Linda Gierek is and was an Indiana resident and citizen at all relevant times.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 8 of Plaintiffs' First Amended Complaint, and therefore denies them.

9. Plaintiff Frank Gierek is and was an Indiana resident and citizen at all relevant times.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 9 of Plaintiffs' First Amended Complaint, and therefore denies them.

10. Defendant Anonymous 1 is an Indiana non-profit corporation.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 10 of Plaintiffs' First Amended Complaint, and therefore denies them.

11. Defendant Anonymous 1's Registered Agent in the State of Indiana is Alan L. Weldy, VP of Human Resources Corporate Compliance, 200 High Park Avenue, Goshen, IN 46526. Anonymous is the parent company of Defendant Anonymous 2.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 11 of Plaintiffs' First Amended Complaint, and therefore denies them.

12. Defendant Anonymous is an Indiana non-profit Corporation.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 12 of Plaintiffs' First Amended Complaint, and therefore denies them.

13. Defendant Anonymous 2's Registered Agent in the State of Indiana is Alan L. Weldy, VP of Human Resources Corporate Compliance, 200 High Park Avenue, Goshen, IN 46526.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 13 of Plaintiffs' First Amended Complaint, and therefore denies them.

14. Defendant Anonymous 3 is an Indiana limited liability company.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 14 of Plaintiffs' First Amended Complaint, and therefore denies them.

15. Defendant Anonymous 3's Registered Agent in the State of Indiana is Alan L. Weldy, VP of Human Resources Corporate Compliance, 200 High Park Avenue, Goshen, IN 46526.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 15 of Plaintiffs' First Amended Complaint, and therefore denies them.

Facts

16. Plaintiff Linda Gieriek underwent surgery at Anonymous Healthcare Provider on June 24, 2019.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 16 of Plaintiffs' First Amended Complaint, and therefore denies them.

17. In November 2019, Linda Gieriek received letter from Anonymous Healthcare Provider notifying her that the surgical instruments used during her surgery may not have been properly sterilized.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 17 of Plaintiffs' First Amended Complaint, and therefore denies them.

18. As result, the surgical instruments used during Linda Gieriek's surgery "may or may not have been completely sterile."

ANSWER: The PCF lacks knowledge or information sufficient to form belief as to the allegations in Paragraph 18 of Plaintiffs' First Amended Complaint, and therefore denies them.

19. According to the letter, due to Anonymous Healthcare Provider's faulty sterilization of the surgical instruments, Linda Gierek may have been exposed to countless infectious diseases, including without limitation Hepatitis B, Hepatitis C, and Human Immunodeficiency Virus ("HIV").

ANSWER: The letter attached to Plaintiff's First Amended Complaint speaks for itself. The PCF lacks knowledge or information sufficient to form a belief as to the other allegations in Paragraph 19, and therefore denies them.

20. Learning of potential exposure to these and other diseases has caused Linda Gierek extreme emotional distress and trauma, which is and will be ongoing for months and years to come.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 20 of Plaintiffs' First Amended Complaint, and therefore denies them.

21. Linda Gierek will also incur medical testing and other expenses for months or years to come.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 21 of Plaintiffs' First Amended Complaint, and therefore denies them.

22. Frank Gierek is and at all times relevant was married to Linda Gierek.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 22 of Plaintiffs' First Amended Complaint, and therefore denies them.

23. Frank Gierek fears and feared for his spouse's wellbeing as well as his own wellbeing, upon learning that his spouse had undergone surgery by Anonymous Healthcare Provider in which surgical instruments may not have been properly sterilized, thereby potentially exposing both himself and his spouse to countless infectious diseases, including without limitation Hepatitis B, Hepatitis C, and HIV.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 23 of Plaintiffs' First Amended Complaint, and therefore denies them.

Hepatitis B

24. Hepatitis B is a liver infection caused by the hepatitis B virus. Hepatitis B can range from a mild illness with a short lifespan to a serious, lifelong illness. Chronic hepatitis B can cause serious health problems, including but not limited to liver damage, cirrhosis, liver cancer, and even death.

ANSWER: Paragraph 24 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 24 of Plaintiffs' First Amended Complaint, and therefore denies them.

25. The hepatitis B virus is spread when blood, semen, or another type of body fluid infected with the virus enters the body of a person who is not infected. One of the recognized means by which a person can become infected with the virus is through exposure to infected blood or other body fluids due to contact with medical surgical equipment that has been previously used on an infected person and has not been properly sterilized.

ANSWER: Paragraph 25 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 25 of Plaintiffs' First Amended Complaint, and therefore denies them.

26. A non-exhaustive list of symptoms of acute hepatitis B include: fever; fatigue; loss of appetite; nausea; vomiting; abdominal pain; dark urine; clay-colored bowel movements; joint pain; and jaundice.

ANSWER: Paragraph 26 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 26 of Plaintiffs' First Amended Complaint, and therefore denies them.

27. Symptoms of hepatitis B often do not immediately manifest in the infected individual upon exposure. According to the Center for Disease Control, if symptoms occur, they begin an average of 90 days (or approximately three months) after exposure.

ANSWER: Paragraph 27 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 27 of Plaintiffs' First Amended Complaint, and therefore denies them.

28. Many individuals who have acquired a hepatitis B virus infection may not know they are infected, but they may still spread the virus to others.

ANSWER: Paragraph 28 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 28 of Plaintiffs' First Amended Complaint, and therefore denies them.

29. Although some individuals infected with hepatitis B may successfully treat the disease and clear the virus, many others will remain infected for life because they are unable to clear the virus from their bodies.

ANSWER: Paragraph 29 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 29 of Plaintiffs' First Amended Complaint, and therefore denies them.

30. Chronic hepatitis B can develop into serious disease resulting in long-term health problems. In 2016, there were at least 1,698 deaths related to the hepatitis B virus reported to the Center for Disease Control, and this statistic likely underestimates the actual loss of lives.

ANSWER: Paragraph 30 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 30 of Plaintiffs' First Amended Complaint, and therefore denies them.

31. According to the Center for Disease Control, people with chronic hepatitis B should be monitored regularly by a doctor experienced in caring for people with hepatitis B in order to check for signs of liver disease and evaluate for possible treatments, including medication.

ANSWER: Paragraph 31 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 31 of Plaintiffs' First Amended Complaint, and therefore denies them.

32. Although not every person with chronic hepatitis B will need to be on medication, once a person starts treatment, he or she will need to take medication for life.

ANSWER: Paragraph 32 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 32 of Plaintiffs' First Amended Complaint, and therefore denies them.

33. For the wellbeing of the individual as well as the public, it is imperative that any individual who suspects a potential risk of exposure to the hepatitis B virus undergo regular blood testing to determine the presence or absence of the disease.

ANSWER: Paragraph 33 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 33 of Plaintiffs' First Amended Complaint, and therefore denies them.

Hepatitis C

34. Hepatitis C is a liver infection caused by the hepatitis C virus. Hepatitis C can range from a mild illness with a short lifespan to a serious, lifelong illness.

ANSWER: Paragraph 34 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 34 of Plaintiffs' First Amended Complaint, and therefore denies them.

35. The hepatitis C virus is most commonly spread when blood infected with the virus enters the body of a person who is not infected. One of the recognized means by which a person can become infected with the virus is through exposure to infected blood or other body fluids due to contact with medical surgical equipment that has been previously used on an infected person and has not been properly sterilized.

ANSWER: Paragraph 35 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 35 of Plaintiffs' First Amended Complaint, and therefore denies them.

36. Chronic hepatitis C can cause serious health problems in the infected individual, including liver damage, cirrhosis, liver cancer, and even death.

ANSWER: Paragraph 36 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 36 of Plaintiffs' First Amended Complaint, and therefore denies them.

37. A non-exhaustive list of symptoms of acute hepatitis C include: fever; fatigue; loss of appetite; nausea; vomiting; abdominal pain; dark urine; clay-colored bowel movements; joint pain; and jaundice.

ANSWER: Paragraph 37 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the

allegations in Paragraph 37 of Plaintiffs' First Amended Complaint, and therefore denies them.

38. Many individuals who have acquired a hepatitis C virus infection may not know they are infected, but they may still spread the virus to others.

ANSWER: Paragraph 38 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 38 of Plaintiffs' First Amended Complaint, and therefore denies them.

39. Chronic hepatitis C can develop into serious disease resulting in long term health problems. In 2016, there were at least 18,153 deaths related to the hepatitis C virus reported to the Center for Disease Control, and this statistic likely underestimates the actual loss of lives.

ANSWER: Paragraph 39 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 39 of Plaintiffs' First Amended Complaint, and therefore denies them.

40. According to the Center for Disease Control, people with chronic hepatitis B should be monitored regularly by a doctor experienced in caring for people with hepatitis B in order to check for signs of liver disease and evaluate for possible treatments if the infection should progress from acute to chronic in nature.

ANSWER: Paragraph 40 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the

allegations in Paragraph 40 of Plaintiffs' First Amended Complaint, and therefore denies them.

41. For the wellbeing of the individual as well as the public, it is imperative that any individual who suspects a potential risk of exposure to the hepatitis C virus undergo regular blood testing to determine the presence or absence of the disease.

ANSWER: Paragraph 41 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 41 of Plaintiffs' First Amended Complaint, and therefore denies them.

Human Immunodeficiency Virus (HIV)

42. HIV, the Human Immunodeficiency Virus, is the virus that causes Acquired Immunodeficiency Syndrome ("AIDS").

ANSWER: Paragraph 42 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 42 of Plaintiffs' First Amended Complaint, and therefore denies them.

43. The HIV virus spreads through certain body fluids that attack the human body's immune system—specifically, the CD4 or "T" cells, which the immune system requires to combat infection. Left untreated, HIV reduces the number of CD4 / T-cells in the body.

ANSWER: Paragraph 43 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks

knowledge or information sufficient to form a belief as to the allegations in Paragraph 43 of Plaintiffs' First Amended Complaint, and therefore denies them.

44. Over time, the HIV virus weakens an affected individual's immune system so that the body cannot fight off infection properly, making the individual more vulnerable to the development of various infections or cancers that take advantage of the body's compromised condition.

ANSWER: Paragraph 44 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 44 of Plaintiffs' First Amended Complaint, and therefore denies them.

45. Although HIV is most commonly transmitted from one affected individual to another through sexual contact, there are many other recognized means by which a person can become infected with the virus, including exposure to infected blood due to contact with medical surgical equipment that has been previously used on an infected person and have not been properly sterilized.

ANSWER: Paragraph 45 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 45 of Plaintiffs' First Amended Complaint, and therefore denies them.

46. Unlike many other viruses, an individual affected with HIV cannot completely eliminate the presence of the virus, even though treatment. Once an individual acquires HIV, it remains with that person for life.

ANSWER: Paragraph 46 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 46 of Plaintiffs' First Amended Complaint, and therefore denies them.

47. No effective cure currently exists for HIV. It can only be controlled through proper medical care, which most commonly includes antiretroviral therapy (ART).

ANSWER: Paragraph 47 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 47 of Plaintiffs' First Amended Complaint, and therefore denies them.

48. For the wellbeing of the individual as well as the public, it is imperative that any individual who suspects a potential risk of exposure to the HIV virus undergo immediate and regular blood testing to determine the presence or absence of the disease as well as prevent the potential further transmission of the disease.

ANSWER: Paragraph 48 is comprised of self-serving conclusory allegations and statements of purported fact regarding medical definitions and terminology that do not require response from the PCF. To the extent that any part of that paragraph can be construed as an allegation, without further context and definitional information, the PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 48 of Plaintiffs' First Amended Complaint, and therefore denies them.

***Over 1000 Anonymous Healthcare Provider
Patients Were Exposed to Infectious Diseases***

49. Linda Gierek is among more than 1000 surgical patients of Anonymous Healthcare Provider who were potentially exposed to hepatitis B, hepatitis C, HIV, and other infectious diseases due to Anonymous Healthcare Provider's failure to properly sterilize its surgical instruments.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 49 of Plaintiffs' First Amended Complaint, and therefore denies them.

50. Anonymous Healthcare Provider sent letters to each of these surgical patients that were identical or substantially similar to the letter it sent to Linda Gierek.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 50 of Plaintiffs' First Amended Complaint, and therefore denies them.

51. Multiple print and television news outlets also reported on Anonymous Healthcare Provider's failure to properly sterilize surgical instruments, further notifying the more than 1000 other surgical patients of their potential exposure to infectious diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 51 of Plaintiffs' First Amended Complaint, and therefore denies them.

52. Like Linda Gierek, the other surgical patients have and will undoubtedly suffer extreme emotional distress due to their exposure to infectious diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 52 of Plaintiffs' First Amended Complaint, and therefore denies them.

53. Also, like Linda Gierek, the other surgical patients will incur medical testing and other expenses for months or years to come.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 53 of Plaintiffs' First Amended Complaint, and therefore denies them.

54. Mrs. Gierek's husband, Frank Gierek, and the spouses of other surgical patients, were also potentially exposed to infectious diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 54 of Plaintiffs' First Amended Complaint, and therefore denies them.

55. Frank Gierek and the spouses of other surgical patients have and will undoubtedly suffer extreme emotional distress due to their exposure to infectious diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 55 of Plaintiffs' First Amended Complaint, and therefore denies them.

56. Frank Gierek and the spouses of other surgical patients have and will incur testing and other medical expenses for months and years to come.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 56 of Plaintiffs' First Amended Complaint, and therefore denies them.

57. Anonymous Healthcare Provider's failure to properly sterilize surgical instruments was unreasonable, negligent, careless, reckless, and below the appropriate standard of care.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 57 of Plaintiffs' First Amended Complaint, and therefore denies them.

58. Anonymous Healthcare Provider's wrongful acts are the direct and proximate result, without limitation, of its failures to properly train and monitor its employees, and its failures to establish and implement proper safety and sterilization policies and procedures.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 58 of Plaintiffs' First Amended Complaint, and therefore denies them.

59. The injuries sustained by Linda Gierek and the other surgical patients were the direct and foreseeable consequences of Anonymous Healthcare Provider's negligent acts.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 59 of Plaintiffs' First Amended Complaint, and therefore denies them.

Class Allegations

Class 1

60. Plaintiff Linda Gierek seeks relief pursuant to Rule 23 of the Indiana Rules of Trial Procedure on behalf of Proposed Class of similarly situated persons.

ANSWER: The PCF admits Linda Gierek seeks relief pursuant to Rule 23 of the Indiana Rules of Trial Procedure on behalf of Proposed Class 1 of similarly situated persons but denies that she is entitled to that relief.

61. The "Proposed Class 1" is defined as:

All patients of Anonymous Healthcare Provider to whom Anonymous Healthcare Provider sent letter identical or substantially similar to the letter it sent to Linda Gierek or to Whom Anonymous Healthcare Provider did not send such letter but who underwent surgery or other procedures that involved the use of surgical instruments, during the period of time when one or more employees of Anonymous Healthcare Provider did not complete all steps in the surgical instrument sterilization process (approximately but not necessarily limited to April 1, 2019 to September 30, 2019).

ANSWER: The PCF admits that the Plaintiffs seek to define the Proposed Class 1 as set forth in Paragraph 61 but denies that the Plaintiffs are entitled to class certification and denies any remaining allegations in this paragraph.

62. Plaintiff reserves the right to alter or amend this proposed definition as the lawsuit proceeds.

ANSWER: Paragraph 62 does not state a factual allegation to which a response is necessary. To the extent a response is deemed required, the PCF has insufficient information to either admit or deny the allegations of Paragraph 62 of Plaintiffs' First Amended Complaint.

63. This action is properly maintainable as a class action under Trial Rule 23(A).

ANSWER: The PCF denies the allegations in Paragraph 63 of Plaintiffs' First Amended Complaint.

64. The Proposed Class consists of more than a thousand persons, such that joinder of all Proposed Class members is impracticable.

ANSWER: The PCF denies the allegations in Paragraph 64 of Plaintiffs' First Amended Complaint.

65. There are questions of law and fact that are common to the Proposed Class members.

ANSWER: The PCF denies the allegations in Paragraph 65 of Plaintiffs' First Amended Complaint.

66. Anonymous Healthcare Provider's failure to properly sterilize its surgical instruments was the direct and proximate result of a systematic and common course of conduct.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 66 of Plaintiffs' First Amended Complaint, and therefore denies them.

67. The claims of Linda Gierak are typical of the claims of the Proposed Class 1 because they are based on the same nucleus of operative facts and legal theories, and Plaintiff has no interests that are antagonistic to the interests of the Proposed Class 1 members.

ANSWER: The PCF denies the allegations in Paragraph 67 of Plaintiffs' First Amended Complaint.

68. Linda Gierak is an adequate representative of the Proposed Class 1 and has retained competent legal counsel experienced in class actions and complex litigation.

ANSWER: The PCF denies the allegations in Paragraph 68 of Plaintiffs' First Amended Complaint.

69. This action is properly maintainable as a class action under Trial Rule 23(B)(1), (2) & (3) because questions of law or fact common to the members of the Proposed Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

ANSWER: The PCF denies the allegations in Paragraph 69 of Plaintiffs' First Amended Complaint.

70. The questions of law and fact common to the Proposed Class 1 predominate over any questions affecting only individual Proposed Class 1 members, particularly because the focus of the litigation will be on the conduct of the Anonymous Healthcare Provider. The predominant questions of law and fact in this litigation include, but are not limited to:

- a. Whether Anonymous Healthcare Provider failed to properly sterilize surgical instruments;
- b. Whether Anonymous Healthcare Provider failed to properly train employees on each step of the sterilization procedure;

- c. Whether Anonymous Healthcare Provider failed to properly supervise and monitor employees who were responsible for sterilizing surgical instruments;
- d. Whether Anonymous Healthcare Provider failed to establish and implement appropriate and reliable policies and procedures to sterilize surgical instruments;
- e. Whether Anonymous Healthcare Provider established and implemented quality control procedures regarding the sterilization of its surgical instruments; and
- f. Whether Anonymous Healthcare Provider was negligent with respect to its sterilization of its surgical instruments;
- g. Whether Anonymous Healthcare Provider's actions and the resulting injuries to the Proposed Class 1 constitute negligent infliction of emotional distress;
- h. Whether Anonymous Healthcare Provider's actions and the resulting injuries to the Proposed Class 1 constitute common law negligence;
- i. In the alternative, whether Anonymous Healthcare Provider's actions and the resulting injuries to the Proposed Class 1 constitute medical malpractice; and
- j. The type and amount of relief to which the Plaintiff and Proposed Class 1 members are entitled.

ANSWER: The PCF denies the allegations in Paragraph 70 of Plaintiffs' First Amended Complaint.

71. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, as the pursuit of thousands of individual lawsuits would not be economically feasible for individual Potential Class 1 members and would cause a strain on judicial resources, yet each Proposed Class 1 member would be required to prove an identical set of facts in order to recover damages.

ANSWER: The PCF denies the allegations in Paragraph 71 of Plaintiffs' First Amended Complaint.

72. On information and belief, no other persons who fall within the Potential Class 1 definition set forth above have initiated similar litigation, such that individual Potential Class 1 members do not wish to control the prosecution of separate actions.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 72 of Plaintiffs' First Amended Complaint, and therefore denies them.

73. This class action does not present any unique management difficulties.

ANSWER: The PCF denies the allegations in Paragraph 73 of Plaintiffs' First Amended Complaint.

Class 2

74. Plaintiff Frank Gierек seeks relief pursuant to Rule 23 of the Indiana Rules of Trial Procedure on behalf of Proposed Class 2 of similarly situated persons.

ANSWER: The PCF admits Plaintiff Frank Gierек seeks relief pursuant to Rule 23 of the Indiana Rules of Trial Procedure on behalf of Proposed Class 2 of similarly situated persons but denies that he is entitled to that relief.

75. The “Proposed Class 2” is defined as:

All persons who are currently married to a member of the Proposed Class 1 or who were married to a member of Proposed Class 1 at any time after the corresponding member of Proposed Class 1 underwent surgery or other procedures that involved the use of surgical instruments, during the period of time when one or more employees of Anonymous Healthcare Provider did not complete all steps in the surgical instrument sterilization process (approximately but not necessarily limited to April 1, 2019 to September 30, 2019).

ANSWER: The PCF admits that the Plaintiffs seek to define the Proposed Class 2 as set forth in Paragraph 75 but denies that the Plaintiffs are entitled to class certification and denies any remaining allegations in this paragraph.

76. Plaintiffs reserve the right to alter or amend this proposed definition as the lawsuit proceeds.

ANSWER: Paragraph 76 does not state a factual allegation to which a response is necessary. To the extent a response is deemed required, the PCF has insufficient information to either admit or deny the allegations of Paragraph 76 of Plaintiffs’ First Amended Complaint.

77. This action is properly maintainable as a class action under Trial Rule 23(A).

ANSWER: The PCF denies the allegations in Paragraph 77 of Plaintiffs’ First Amended Complaint.

78. The Proposed Class 2 consists of hundreds of persons, such that joinder of all Proposed Class members is impossible.

ANSWER: The PCF denies the allegations in Paragraph 78 of Plaintiffs’ First Amended Complaint.

79: There are questions of law and fact that are common to the Proposed Class 2 members.

ANSWER: The PCF denies the allegations in Paragraph 79 of Plaintiffs’ First Amended Complaint.

80. Anonymous Healthcare Provider's failure to properly sterilize its surgical instruments was the direct and proximate result of a systematic and common course of conduct.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 80 of Plaintiffs' First Amended Complaint, and therefore denies them.

81. The claims of Frank Gierек are typical of the claims of the Proposed Class 2 because they are based on the same nucleus of operative facts and legal theories, and Frank Gierек has no interests that are antagonistic to the interests of the Proposed Class 2 members.

ANSWER: The PCF denies the allegations in Paragraph 81 of Plaintiffs' First Amended Complaint.

82. Frank Gierек is an adequate representative of the Proposed Class and has retained competent legal counsel experienced in class actions and complex litigation.

ANSWER: The PCF denies the allegations in Paragraph 82 of Plaintiffs' First Amended Complaint.

83. This action is properly maintainable as a class action under Trial Rule 23(B)(1), (2) & (3) because questions of law or fact common to the members of the Proposed Class 2 predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

ANSWER: The PCF denies the allegations in Paragraph 83 of Plaintiffs' First Amended Complaint.

84. The questions of law and fact common to the Proposed Class 2 predominate over any questions affecting only individual Proposed Class 2 members, particularly because the focus of the litigation will be on the conduct of the Anonymous Healthcare Provider. The predominant questions of law and fact in this litigation include, but are not limited to:

- a. Whether Anonymous Healthcare Provider failed to properly sterilize surgical instruments;
- b. Whether Anonymous Healthcare Provider failed to properly train employees on each step of the sterilization procedure;
- c. Whether Anonymous Healthcare Provider failed to properly supervise and monitor employees who were responsible for sterilizing surgical instruments;
- d. Whether Anonymous Healthcare Provider failed to establish and implement appropriate and reliable policies and procedures to sterilize surgical instruments;
- e. Whether Anonymous Healthcare Provider established and implemented quality control procedures regarding the sterilization of its surgical instruments; and
- f. Whether Anonymous Healthcare Provider was negligent with respect to its sterilization of its surgical instruments;
- g. Whether Anonymous Healthcare Provider's actions and the resulting injuries to the Proposed Class 2 constitute negligent infliction of emotional distress;
- h. Whether Anonymous Healthcare Provider's actions and the resulting injuries to the Proposed Class 2 constitute common law negligence;
- i. Whether Frank Gierak and the Proposed Class 2 members were foreseeable victims of Anonymous Healthcare Provider's tortious conduct; and
- j. The type and amount of relief to which Frank Gierak and Proposed Class 2 members are entitled.

ANSWER: The PCF denies the allegations in Paragraph 84 of Plaintiffs' First Amended Complaint.

85. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, as the pursuit of thousands of individual lawsuits would not be economically feasible for individual Proposed Class 2 members and would cause a strain on judicial resources, yet each Proposed Class 2 member would be required to prove an identical set of facts in order to recover damages.

ANSWER: The PCF denies the allegations in Paragraph 85 of Plaintiffs' First Amended Complaint.

86. On information and belief, no other persons who fall within the Proposed Class definition set forth above have initiated similar litigation, such that individual Proposed Class members do not wish to control the prosecution of separate actions.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 86 of Plaintiffs' First Amended Complaint, and therefore denies them.

87. This class action does not present any unique management difficulties.

ANSWER: The PCF denies the allegations in Paragraph 87 of Plaintiffs' First Amended Complaint.

CAUSES OF ACTION

88. The following is non-exhaustive list of causes of action supported by the facts of this case. *ARC Constr. Mgmt., LLC v. Zelenak*, 962 N.E.2d 692, 697 (Ind. Ct. App. 2012) (“Under Indiana’s notice pleading system, pleading need not adopt specific legal theory of recovery to be adhered to throughout the case.”). These causes of action shall not in any way limit the legal bases for liability or recovery in this case.

ANSWER: Paragraph 88 does not state a factual allegation to which a response is necessary. To the extent a response is deemed required, the PCF denies the same.

**COUNT I
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(On Behalf of Proposed Class 1)**

89. Plaintiffs incorporate the allegations set forth above as though set forth fully here.

ANSWER: The PCF incorporates by reference its responses to the allegations set forth above as though set forth fully here.

90. Anonymous Healthcare Provider performed surgical and possibly other procedures involving surgical instruments on the members of the Proposed Class 1 from the period of approximately April 1, 2019 to September 30, 2019.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 90 of Plaintiffs' First Amended Complaint, and therefore denies them.

91. Anonymous Healthcare Provider had professional and legal duty to perform those procedures in safe, sterile, reasonable, and professional manner.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 91 of Plaintiffs' First Amended Complaint, and therefore denies them.

92. Anonymous Healthcare Provider breached those duties by using surgical instruments that may not have been properly sterilized.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 92 of Plaintiffs' First Amended Complaint, and therefore denies them.

93. Anonymous Healthcare Provider's actions constituted direct physical impacts to Plaintiff and each member of the Proposed Class 1.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 93 of Plaintiffs' First Amended Complaint, and therefore denies them.

94. As direct and proximate result of Anonymous Healthcare Provider's breaches of these duties, the members of the Proposed Class 1 were potentially exposed to innumerable infectious diseases, including potentially incurable and fatal diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 94 of Plaintiffs' First Amended Complaint, and therefore denies them.

95. The members of the Proposed Class 1 each suffered extreme and serious emotional distress and trauma as the result of the negligent conduct of Anonymous Healthcare Provider.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 95 of Plaintiffs' First Amended Complaint, and therefore denies them.

96. The injuries suffered by the members of the Proposed Class 1 were the direct and foreseeable consequences of Anonymous Healthcare Provider's breaches of their professional and legal duties.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 96 of Plaintiffs' First Amended Complaint, and therefore denies them.

**COUNT II
NEGLIGENCE
(On Behalf of Proposed Class 1)**

97. Plaintiff incorporates the allegations set forth above as though set forth fully here.

ANSWER: The PCF incorporates by reference its responses to the allegations set forth above as though set forth fully here.

98. Anonymous Healthcare Provider performed surgical and possibly other procedures involving surgical instruments on the members of the Proposed Class 1 from the period of approximately April 1, 2019 to September 30, 2019.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 98 of Plaintiffs' First Amended Complaint, and therefore denies them.

99. Anonymous Healthcare Provider had a professional and legal duty to perform those procedures in a safe, sterile, reasonable, and professional manner.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 99 of Plaintiffs' First Amended Complaint, and therefore denies them.

100. Anonymous Healthcare Provider breached those duties by using surgical instruments that may not have been properly sterilized.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 100 of Plaintiffs' First Amended Complaint, and therefore denies them.

101. As a direct and proximate result of Anonymous Healthcare Provider's breaches of these duties, the members of the Proposed Class 1 were potentially exposed to innumerable infectious diseases, including potentially incurable and fatal diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 101 of Plaintiffs' First Amended Complaint, and therefore denies them.

102. The members of the Proposed Class 1 each suffered extreme and serious emotional distress and trauma and will incur medical testing and other expenses as the result of the negligent conduct of Anonymous Healthcare Provider.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 102 of Plaintiffs' First Amended Complaint, and therefore denies them.

103. The injuries suffered by the members of the Proposed Class 1 were the direct and foreseeable consequences of Anonymous Healthcare Provider's breaches of their professional and legal duties. Plaintiffs incorporate the preceding paragraphs as though fully stated herein.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 103 of Plaintiffs' First Amended Complaint, and therefore denies them.

**COUNT III
(Pleaded in the Alternative)
MEDICAL MALPRACTICE
(On Behalf of Proposed Class 1)**

104. Plaintiffs incorporate the allegations set forth above as though set forth fully here.

ANSWER: The PCF incorporates by reference its responses to the allegations set forth above as though set forth fully here.

105. Anonymous Healthcare Provider performed surgical and possibly other procedures involving surgical instruments on the members of the Proposed Class 1 from the period of approximately April 1, 2019 to September 30, 2019.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 105 of Plaintiffs' First Amended Complaint, and therefore denies them.

106. Anonymous Healthcare Provider had a legal duty to perform such procedures in a manner that met or exceeded the applicable medical standard of care.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 106 of Plaintiffs' First Amended Complaint, and therefore denies them.

107. By performing these procedures with surgical instruments that were not properly sterilized, Anonymous Healthcare Provider failed to meet the applicable standard of medical care.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 107 of Plaintiffs' First Amended Complaint, and therefore denies them.

108. Anonymous Healthcare Provider's breaches of the standard of care constitute medical malpractice.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 108 of Plaintiffs' First Amended Complaint, and therefore denies them.

109. As direct and proximate result of Anonymous Healthcare Provider's medical malpractice, the members of the Proposed Class 1 suffered and will continue to suffer extreme emotional distress and will incur medical testing and other expenses.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 109 of Plaintiffs' First Amended Complaint, and therefore denies them.

110. As the spouses of members of Proposed Class 1, each member of Proposed Class 2 was potentially exposed to the same innumerable infectious diseases, including potentially incurable and fatal diseases to which the members of Proposed Class 1 were exposed.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 110 of Plaintiffs' First Amended Complaint, and therefore denies them.

111. The members of the Proposed Class 2 each suffered extreme and serious emotional distress and trauma and have/will incur medical testing and other expenses as the result of the negligent conduct of Anonymous Healthcare Provider.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 111 of Plaintiffs' First Amended Complaint, and therefore denies them.

112. As spouses of the members of Proposed Class 1, each member of Proposed Class 2 was a foreseeable victim of Anonymous Healthcare Provider's medical malpractice.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 112 of Plaintiffs' First Amended Complaint, and therefore denies them.

113. The injuries suffered by the members of the Proposed Class 2 were the direct and foreseeable consequences of Anonymous Healthcare Provider's breaches of their professional and legal duties.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 113 of Plaintiffs' First Amended Complaint, and therefore denies them.

**COUNT IV
NEGLIGENCE
(On Behalf of Proposed Class 2)**

114. Plaintiffs incorporate the allegations set forth above as though set forth fully here.

ANSWER: The PCF incorporates by reference its responses to the allegations set forth above as though set forth fully here.

115. Anonymous Healthcare Provider performed surgical and possibly other procedures involving surgical instruments on the members of the Proposed Class 1 from the period of approximately April 1, 2019 to September 30, 2019.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 115 of Plaintiffs' First Amended Complaint, and therefore denies them.

116. Anonymous Healthcare Provider had a professional and legal duty to perform those procedures in a safe, sterile, reasonable, and professional manner.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 116 of Plaintiffs' First Amended Complaint, and therefore denies them.

117. Anonymous Healthcare Provider breached those duties by using surgical instruments that may not have been properly sterilized.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 117 of Plaintiffs' First Amended Complaint, and therefore denies them.

118. As a direct and proximate result of Anonymous Healthcare Provider's breaches of these duties, the members of the Proposed Class 1 were potentially exposed to innumerable infectious diseases, including potentially incurable and fatal diseases.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 118 of Plaintiffs' First Amended Complaint, and therefore denies them.

119. As the spouses of members of Proposed Class 1, each member of Proposed Class 2 was potentially exposed to the same innumerable infectious diseases, including potentially incurable and fatal diseases to which the members of Proposed Class 1 were exposed.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 119 of Plaintiffs' First Amended Complaint, and therefore denies them.

120. The members of the Proposed Class 2 each suffered extreme and serious emotional distress and trauma and have/will incur medical testing and other expenses as the result of the negligent conduct of Anonymous Healthcare Provider.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 120 of Plaintiffs' First Amended Complaint, and therefore denies them.

121. As spouses of the members of Proposed Class 1, each member of Proposed Class 2 was a foreseeable victim of Anonymous Healthcare Provider's negligence.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 121 of Plaintiffs' First Amended Complaint, and therefore denies them.

122. The injuries suffered by the members of the Proposed Class 2 were the direct and foreseeable consequences of Anonymous Healthcare Provider's breaches of their professional and legal duties.

ANSWER: The PCF lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 122 of Plaintiffs' First Amended Complaint, and therefore denies them.

AFFIRMATIVE AND OTHER DEFENSES

Without prejudice to its statements, denials, or other affirmative matters set forth in its Answer, and without conceding, waiving, or changing the parties' respective burdens of proof for its Affirmative and Other Defenses to Plaintiffs' Amended Complaint, the PCF states in defense to the Amended Complaint:

1. Any recovery by Plaintiffs is subject to and limited by payment received from other sources and/or collateral sources, including, but not limited to, insurance coverage, Medicaid, and evidence of any such payments are admissible at trial. Plaintiffs are precluded from double recovery for payments received from other sources.

2. Plaintiffs' claim should be barred or reduced as a result of their own comparative fault, including but not limited to failure to mitigate damages.

3. Some or all of Plaintiffs' alleged personal injuries may have been pre-existing or caused by another accident or traumatic event.

4. The PCF intends to rely upon such defenses as may become legally available hereafter or become apparent during discovery, including, without limitation, those defenses that are specific to the statutory law and common law of Indiana, or any other applicable law, which were available at the time the action was commenced or became available during the pendency of this action, and hereby reserves the right to Amend its Answer to assert any such defenses.

5. The PCF hereby gives notice that it intends to rely upon and incorporate by reference any affirmative defenses that may be asserted by any co-defendant in this lawsuit.

6. Plaintiffs' claims may include increased risk of harm damages.

7. Plaintiffs may have failed to mitigate their damages.

8. Any recovery by Plaintiffs are subject to, and limited by, the monies or payments received from collateral sources (set-off), including, but not limited to, any other party, former party, or nonparty.

9. Plaintiffs may have failed to mitigate damages by not enrolling in State or Federally mandated health insurance programs.

10. Pursuant to *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009) and *Patchett v. Lee*, 66 N.E.3d 1025 (Ind. 2016), Plaintiffs' damages should be reduced consistent with the reasonable value of the medical services provided.

11. Plaintiffs' claims arising out of and in connection with an alleged failure to properly sterilize surgical instruments resulting in the potential exposure to infections, arise out of ordinary negligence and therefore, are not covered by the Indiana Medical Malpractice Act ("MMA").

WHEREFORE, the PCF requests that Plaintiffs take nothing by this action, for the costs of this action and for all other just and proper relief in the premises.

/s/ A. Richard Blaiklock
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INTERVENOR-DEFENDANT, INDIANA
PATIENT COMPENSATION FUND’S, COUNTERCLAIM AND CROSS-CLAIM
FOR DECLARATORY JUDGMENT

Intervenor-Defendant, Stephen W. Robertson, Commissioner of the Indiana Department of Insurance, as Administrator of the Indiana Patient’s Compensation Fund (the “PCF”), by counsel, asserts the following Complaint for Declaratory Judgment against Plaintiffs, Linda Gierek (“Ms. Gierek”) and Frank Gierek (“Mr. Gierek”)¹ on behalf of themselves and all others similarly situated, Intervenor-Plaintiffs, K. W., G. S., L. P., L. W., S. B., S. J., C. D., S. S., E. M. (“Intervening Plaintiffs”), and Defendants, Anonymous 1, Anonymous 2, and Anonymous 3 as follows:

¹ On May 11, 2020, Plaintiff filed Plaintiffs' Unopposed Motion to Correct Misnomer to correct Plaintiff's name from “Frank Gierek” to “Stephen Gierek”. Any reference to “Frank Gierek” or “Mr. Gierek” is to the Plaintiff in this case.

NATURE OF ACTION AND RELIEF SOUGHT

1. The PCF brings this Counterclaim and Cross-Claim for a declaratory judgment regarding its rights and obligations, if any, regarding all claims asserted by Plaintiffs and Intervenor-Plaintiffs against Defendants, Anonymous 1, Anonymous 2, and Anonymous 3 (“Healthcare Providers”), for and deriving out of an alleged failure to properly sterilize surgical instruments resulting in the potential exposure to infections, such as the hepatitis C virus, hepatitis B virus and human immunodeficiency virus (HIV).

2. An actual, immediate controversy exists among the parties regarding whether said negligence claims arise out of ordinary negligence under common law or professional medical malpractice subject to the Indiana Medical Malpractice Act, Ind. Code § 34-18-1-1 et seq (the “MMA”).

3. The PCF seeks a declaration that said claims arise out of ordinary negligence under common law, and therefore, the MMA does not apply to said claims.

Parties

4. Stephen W. Robertson is Commissioner of the Indiana Department of Insurance, and Administrator of the Indiana Patient’s Compensation Fund.

5. Counterclaim-Defendant Ms. Gierak is and was an Indiana resident and citizen at all relevant times.

6. Counterclaim-Defendants in Proposed Class 1 (“Proposed Class 1”), represented by Ms. Gierak, are defined as:

“all patients of Healthcare Providers to whom Healthcare Providers sent a letter identical or substantially similar to the letter it sent to Linda Gierak or to whom Healthcare Providers did not send such a letter but who underwent surgery or other procedure that involved the use of surgical instruments, during the period of time when one or more employees of Healthcare Providers did not complete all steps in

the surgical instrument sterilization process (approximately but not necessarily limited to April 1, 2019 to September 30, 2019).”

7. Counterclaim-Defendant Mr. Gierek is and was an Indiana resident and citizen at all relevant times.

8. Counterclaim-Defendants in Proposed Class 2 (“Proposed Class 2”), represented by Mr. Gierek, are defined as:

“all persons who are currently married to a member of Proposed Class 1 or who were married to a member of the Proposed Class 1 at any time after the corresponding member of Proposed Class 1 underwent surgery or other procedures that involved the use of surgical instruments, during the period of time when one or more employees of Healthcare Providers did not complete all steps in the surgical instrument sterilization process (approximately but not necessarily limited to April 1, 2019 to September 30, 2019).”

9. Counterclaim-Defendants, Intervening Plaintiffs², represented by the law firm of Pfeifer, Morgan and Stesiak, are residents of Indiana at all relevant times.

10. Cross-Claim-Defendant Anonymous Healthcare Provider 1 is an Indiana non-profit corporation.

11. Cross-Claim-Defendant Anonymous Healthcare Provider 2 is an Indiana non-profit corporation.

12. Cross-Claim-Defendant Anonymous Healthcare Provider 3 is an Indiana limited liability com

13. Anonymous Healthcare Providers are Healthcare Providers pursuant to the requirements of the Indiana MMA.

² On May 14, 2020, the PCF, by counsel, was informed that counsel for the Intervening Plaintiffs plan to file a Supplemental Motion to Intervene and, therefore the PCF will amend its Counterclaim and Crossclaim for Declaratory Judgment to include any new intervening parties on the Supplemental Motion once it is approved by the Court.

Jurisdiction/Venue

14. This Court has jurisdiction over this matter pursuant to Ind. Code §34-14-1-1 and Indiana Rules of Trial Procedure 13 as a compulsory counterclaim and cross-claim. Venue is proper pursuant to Rule 75 of the Indiana Rules of Trial Procedure. Preferred venue lies in Elkhart County pursuant to 75(A)(4) and 75(A)(5) because Healthcare Providers' principal offices are in Elkhart County and the majority of the Counterclaim-Defendants reside in Elkhart County.

Factual Allegations

15. The Plaintiffs in this case allege that during November 2019, the Healthcare Providers sent a letter ("Letter") that informed potentially affected surgery patients that a technician had failed to adhere to the sterilization process for surgical equipment from April to September 2019 ("Incidents").

16. According to the Plaintiff, the Healthcare Providers notified its recipients that they might have been exposed to infections such as the hepatitis C virus, hepatitis B virus and human immunodeficiency virus (HIV).

LINDA AND FRANK GIEREK

17. In June 2019, Healthcare Providers allegedly performed medical treatment on Ms. Gierek.

18. In November 2019, Healthcare Providers allegedly notified Ms. Gierek that one of their surgical instrument sterilization technicians did not complete a step in a multistep sterilization process.

19. On November 22, 2019, Ms. Gierek, on behalf of herself and all others similarly situated, filed a Class Action Complaint ("Ms. Gierek's Complaint") in Cause No. 20D02-1911-CT-000243 in Elkhart County Superior Court 2, against the Healthcare Providers.

20. On November 22, 2019, Ms. Gierek filed with the Indiana Department of Insurance a Proposed Complaint (“Ms. Gierek’s Proposed Complaint”). Ms. Gierek’s Proposed Complaint contains the same operative facts, circumstances, and allegations of negligence that Ms. Gierek asserted in her civil Complaint filed in Elkhart County.

21. On November 26, 2019, Ms. Gierek filed Plaintiff’s Motion for Class Certification requesting the Court certify a class to include approximately 1,182 alleged surgical patients that received a Letter from Healthcare Providers.

22. On February 3, 2020, Ms. Gierek and Mr. Gierek filed with the Indiana Department of Insurance an Amended Proposed Complaint. Mr. and Ms. Gierek’s Amended Proposed Complaint contains the same operative facts, circumstances, and allegations of negligence that the Gierek’s assert in their civil Amended Complaint filed in Elkhart County.

23. On February 7, 2020, Mr. Gierek, on behalf of himself and all others similarly situated, and Ms. Gierek, on behalf of herself and all others similarly situated, filed an Amended Class Action Complaint (“Amended Complaint”) in Cause No. 20D02-1911-CT-000243 in Elkhart County Superior Court 2, against the Healthcare Providers.

24. In the Amended Complaint, Ms. Gierek alleges that she suffered ongoing and future extreme emotional distress and trauma after learning of potential exposure to these diseases. Ms. Gierek also alleges that she will incur medical testing and other expenses for months or years to come. (Amended Complaint, ¶¶ 20-21).

25. In the Amended Complaint, Mr. Gierek alleges that he fears and feared for his spouse’s wellbeing as well as his own wellbeing, upon learning that his spouse had undergone a surgery by Healthcare Providers in which the surgical instruments may not have been properly sterilized. (Amended Complaint, ¶ 23).

INTERVENING PLAINTIFFS

26. On February 18, 2020, Counterclaim Defendants, the Intervening Plaintiffs filed a Motion to Intervene (“Petition”) in Elkhart County Superior Court in Cause No. 20D02-1911-CT-000243.

27. The Intervening Plaintiffs claim an interest relating to the Gierек Complaint. Specifically, the Intervening Plaintiffs allege to have undergone various surgical procedures by Healthcare Providers which may have exposed them to infections such as hepatitis C Virus, hepatitis B Virus and HIV. (Petition, ¶¶ 3-4).

Claim for Relief – Declaratory Judgment

28. Plaintiff is the Commissioner of the Indiana Department of Insurance, which is a state governmental entity doing business throughout the State of Indiana with its principal place of business in Marion County, Indiana.

29. The Commissioner is the statutorily appointed Administrator of the PCF.

30. The PCF is a dedicated fund responsible for the payment of excess damages in medical malpractice liability claims involving qualified health care providers, as more completely set out in the MMA.

31. Recovery for damages against the PCF is not an available remedy in general liability negligence claims that fall outside the scope of the MMA.

32. The Commissioner has the sole responsibility for administering the PCF, including the statutory right to protect the PCF against claims for excess damages. Ind. Code §34-18-6-2.

33. A legal dispute exists concerning whether the claims of Ms. Gierек and all others similarly situated, Mr. Gierек and all others similarly situated, and the Intervening Plaintiffs

against Healthcare Providers sound in ordinary negligence under common law, or medical malpractice subject to the MMA.

34. The question of whether Ms. Gierek and all others similarly situated, Mr. Gierek and all others similarly situated, and the Intervening Plaintiffs' claims falls within the provisions of the MMA is an important question of law that will dictate both the procedural and substantive remedies applicable to these claims.

35. This issue should be decided at the outset of this litigation because the determination impacts both substantive and procedural law that governs the entire case.

36. The applicability of the MMA to the circumstances alleged in Ms. Gierek and all others similarly situated, Mr. Gierek and all others similarly situated, and the Intervening Plaintiffs' claims is a question of law, whose early resolution is necessary to avoid the delay and expense of proceeding under inapplicable procedural and substantive rules.

37. If Ms. Gierek and all others similarly situated, Mr. Gierek and all others similarly situated, and the Intervening Plaintiffs' claims sound in medical malpractice, the determination of healthcare liability and damage caps will be controlled by provisions of the MMA. Conversely, if the claims are not covered under the MMA there are no statutory damage caps and the claim will be treated as a claim of ordinary negligence.

38. A declaratory judgment by which a court of law determines the appropriate procedural and substantive remedy is necessary in order to resolve an existing dispute and to establish the rights and responsibilities of all parties to this action.

39. Substantial differences exist, both procedurally and substantively, between the dispute resolution provisions and remedies of the MMA, and the common law.

40. The parties will suffer substantial expense and will be severely prejudiced if this action is pursued under procedural and substantive rules that are later determined to be inapplicable.

WHEREFORE, the PCF respectfully requests the Court find:

1. The claims of the Intervening Plaintiffs, Ms. Gierek and all others similarly situated, and Mr. Gierek and all others similarly situated set forth in their respective claims and putative claims in this cause do not fall within the scope of the MMA; and

2. The MMA does not have application to the putative classes' claims, to the extent that the Proposed Class 1 and Proposed Class 2 become certified classes.

Respectfully submitted,

LEWIS WAGNER, LLP

/s/A. Richard Blaiklock

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CERTIFICATE OF SERVICE

I certify that on the 14th day of May, 2020, I electronically filed the foregoing document using the Indiana E-Filing System and that the foregoing document was served upon the following counsel via Indiana E-Filing System:

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