IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

JANE AND JOHN DOES 1-4, individually and on behalf of all others similarly situated, Plaintiffs, v. UNIVERSITY HOSPITALS HEALTH SYSTEM, INC., et al., Defendants.	CASE NO. 20P000722 JUDGE CAROLYN J. PASCHKE **UNIVERSITY HOSPITALS DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CIV.R. 12(B)(1) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT**

I. INTRODUCTION

Under Ohio law, compliance with Civ.R. 10(A) is mandatory and noncompliance deprives the court of subject-matter jurisdiction. Plaintiffs do not contest these tenets in their response to the Civ.R. 12(B)(1) Motion to Dismiss filed by the University Hospitals Defendants ("UH Defendants"). Nor do they provide any explanation for *ignoring* Rule 10(A) when they filed their Class Action Complaint. Instead, Plaintiffs belatedly try to fix their error by filing a motion for leave to proceed pseudonymously, even though the UH Defendants have already filed a motion to dismiss identifying the absence of subject-matter jurisdiction. Plaintiffs' motion, filed nearly three months after Plaintiffs' initial Complaint, does not help Plaintiffs evade dismissal.

Plaintiffs cannot cure their error retroactively. Subject-matter jurisdiction "must be determined as of the commencement of the suit." *Fed. Home Loan Mort. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-5017, ¶ 25 ("[I]nvoking the jurisdiction of the court 'depends on the state of things at the time of the action brought"). The Supreme Court of

Ohio has held unequivocally that "in the absence of subject-matter jurisdiction a court lacks the authority *to do anything but announce its lack of jurisdiction and dismiss*." *Pratts v. Hurley*, 102 Ohio St.3d 81, 85-86, 806 N.E.2d 992, 2004-Ohio-1980, ¶ 21 (emphasis added). Plaintiffs' violation of Civ.R. 10(A) deprived this Court of subject-matter jurisdiction from the moment Plaintiffs filed their complaint and, consequently, this Court lacks the power even to consider Plaintiffs' late-filed motion for leave. Dismissal is the only course permitted by Ohio law.

II. LAW AND ARGUMENT

A. Plaintiffs cannot retroactively cure noncompliance with Civ.R. 10(A).

Plaintiffs' error in violating Civ.R. 10(A) raises an issue of subject-matter jurisdiction—a non-negotiable prerequisite without which this Court lacks power to take any action. *Pratts*, 2004-Ohio-1980 at ¶ 21. It is not a technical violation within this Court's power to forgive, but a fundamental flaw that renders any judgment this Court would render void *ab initio*—from the beginning. *See, e.g.*, *State v. Clay*, 108 N.E.3d 642, 2018-Ohio-985, ¶ 39 (7th Dist. 2018). Thus, Ohio's "longstanding 'general policy of relaxing or abandoning restrictive rules which prevent hearing of cases on their merits'" referenced in Plaintiffs' Opposition does not apply. (Pls' Opp. at 2.) The only case on which Plaintiffs rely for this proposition—*MCS Acquisition Corp. v. Gilpin*, 11th Dist. No. 2011-G-3037, 2012-Ohio-2018—did not address a jurisdictional error, but noncompliance with Ohio's procedural rules, *see id.* at ¶ 25 ("This case does not present a question regarding lack of personal jurisdiction over appellants; it is a question of an infirmity related to procedural due process.").

Indeed, the Eleventh District has repeatedly held that errors of subject-matter jurisdiction are incurable after the inception of the case. In a pair of decisions—*Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. No. 2012-L-071, 2013-Ohio-3206, and *Self Help Ventures Fund v.*

Jones, 11th Dist. No. 2012-A-0014, 2013-Ohio-868—the appellate court held that a party's failure to establish standing at the outset of a lawsuit cannot be repaired after the suit has been filed. These cases are analogous to the situation here precisely because the Eleventh District emphasized in both cases that standing is a matter of subject-matter jurisdiction. *Waterfall Victoria Master Fund Ltd.*, 2013-Ohio-3206 at ¶¶ 14-15 (noting that because standing is a matter of subject-matter jurisdiction, "a lack of standing at the outset of litigation *cannot* [subsequently] be cured * * * *); *Self Help Ventures Fund v. Jones*, 11th Dist. No. 2012-A-0014, 2013-Ohio-868, ¶ 24 ("because standing is required to invoke the trial court's jurisdiction, * * * * a mortgage holder cannot rely on events occurring after the complaint is filed to establish standing.") (citing *Schwartzwald*, 2012-Ohio-5017 at ¶ 26).

Plaintiffs offer three arguments against this precedent, none of which allow them to evade dismissal.

First, Plaintiffs point to several decisions involving anonymous parties as evidence that "the practice of proceeding under a pseudonym is well established in Ohio," even though that is not the issue posed by the UH Defendants' motion. (*See* Pls' Opp. at 2-3.) The fact that Ohio courts have allowed parties to proceed under a pseudonym does not mean that *these plaintiffs* have correctly followed the process for doing so. The cases cited by Plaintiff—*Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243, 2000-Ohio-186, *Doe v. George*, 12th Dist. No. CA2011-03-022, 2011-Ohio-6795, and *Doe v. Trumbull Cnty. Children Servs. Bd.*, 11th Dist. No. 2004-T-0034, 2005-Ohio-2260—are therefore irrelevant. Indeed, they are the *same* three cases that the Tenth District distinguished as irrelevant in *Doe v. Bruner*, 10th Dist. No. CA2011-07-013, 2012-Ohio-761, referenced in the UH Defendants' opening brief.

Second, Plaintiffs' citation to a recent federal decision out of the Southern District of Ohio, *Doe v. Mitchell*, No. 2:20-cv-00459, 2020 WL 6882601 (S.D. Ohio Nov. 24, 2020) carries no weight. Plaintiffs present *Mitchell* as standing for the proposition that filing a motion for leave—even after the defendant has moved to dismiss for lack of subject-matter jurisdiction—can cure noncompliance with Fed. R. Civ. P. 10(a), which is analogous to Ohio's Civ.R. 10(A). What Plaintiffs fail to disclose, however, is that *Mitchell* is a non-final Report & Recommendation issued by a Magistrate Judge and currently subject to Objections filed with the district court judge overseeing the case. *See* Docket, *Doe v. Mitchell*, 2:20-CV-00459 (S.D. Ohio), attached as Exhibit A. The applicable statute, 28 U.S.C. § 636(b)(1), provides that the federal district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Thus, the Report & Recommendation in *Mitchell* is entitled to *no* weight.[1] And Plaintiffs have failed to identify any other authority to contradict the rule set forth by the Sixth Circuit in *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 636 (6th Cir. 2005), in which the appellate court held that failure to comply with Rule 10(a) *is* jurisdictional. (*See also* Defs' Mem. in Supp. of Mot. to Dismiss at 9-10.)

[1] The *Mitchell* decision, on which Plaintiffs also rely for the proposition that anonymous pleading is appropriate in this case, is also distinguishable on its facts. Not only did *Mitchell* involve an individual plaintiff—not a class action—but the court held that proceeding under a pseudonym was appropriate where the plaintiff alleged multiple specific privacy concerns. In particular, the plaintiff alleged that she was afraid to disclose her identify in light of her allegations of rape and physical abuse by a police officer, and that she feared for her safety and media exposure due to the nature of her allegations. *See Mitchell*, 2020 WL 6882601 at *2-*3.

Marsh—not *Mitchell*—describes the applicable rule, particularly in light of the Tenth District's observation in *Doe v. Bruner* that "we find persuasive and choose to follow the Sixth Circuit's approach" when interpreting Ohio Civ.R. 10(A). *Bruner*, 2012-Ohio-761 at ¶ 4.

Third, Plaintiffs cry foul by stating, "Defendants offer no explanation as to how a party can seek leave to proceed anonymously before an action is commenced." (Pls' Opp. at 1.) It is not the UH Defendants' responsibility to instruct Plaintiffs' counsel in how to comply with rules of civil procedure. It appears, however, that several options were available. The Rules of Superintendence for the Courts of Ohio address public-access issues and set forth procedures by which parties may seek restrictions on public access, including redactions. *See* Sup.R. 45(D) (Omission of Personal Identifiers Prior to Submission or Filing); Sup.R. 45(E) (Restricting Public Access to a Case Document). These rules have been invoked in conjunction with filing under seal to enable parties to proceed under pseudonyms. *See M.R. v. Niesen*, 1st Dist. No. C-200302, 2020-Ohio-4368, ¶¶ 3-4. Plaintiffs also could have complied by concurrently filing their complaint accompanied by a motion for leave to proceed under a pseudonym, allowing this Court to decide the issues at once, as was done in *Doe v. Pontifical College Josephinum*, 87 N.E.3d 891, 2017-Ohio-1172, ¶ 4 (10th Dist.); *see also Marsh*, 123 F. App'x at 636 ("Ordinarily, a plaintiff wishing to proceed anonymously files a protective order that allows him or her to proceed under a pseudonym."). What Plaintiffs *could not* do—and the path they selected—was ignore Civ.R. 10(A) and hope to fix their oversight after the UH Defendants brought their failure to establish subject-matter jurisdiction to this Court's attention.

B. The UH Defendants' litigation decisions not to contest plaintiffs' anonymity in other cases are irrelevant.

Plaintiffs also attempt to evade dismissal by arguing that the UH Defendants' argument here is one "they have never asserted before," even though Plaintiffs offer no legal authority or reasoning for why that matters. Even if the pseudonym issue could be waived—and, because it goes to subject-matter jurisdiction, it can *never* be waived, *Pratts*, 2004-Ohio-1980 at ¶ 11—waiver "in one case does not constitute a waiver in another case," *Bogart v. Blakely*, 2d Dist. No. 2010 CA 13, 2010-Ohio-4526, ¶ 42. Thus, the UH Defendants' actions in other cases filed by Plaintiffs under pseudonyms are irrelevant.

Besides, there are two reasons why the UH Defendants press Plaintiffs' violation of Civ.R. 10(A) in this *specific* case.

First, Plaintiffs allege a class action in which they purport to represent *all* UH patients affected by the cryopreservation tank incident at the Fertility Center. Thus, Plaintiffs' identity is intertwined with the issue of their *adequacy* as class representatives, which is part of the class certification inquiry Plaintiffs will eventually ask this Court to perform under Civ.R. 23(A). The members of the class who Plaintiffs purport to represent are entitled to know who their representatives are as part of determining whether they can adequately protect the alleged class's interests. Significantly, as the UH Defendants pointed out in their opening brief, neither of the class actions previously filed by Plaintiffs' counsel were filed under pseudonyms—a fact which substantially discredits their claim that in-vitro fertilization is the kind of innately private procedure that reaches the "utmost intimacy" threshold for anonymous pleading under *Bruner*.

Second, the UH Defendants' concerns are magnified by the actions taken by Plaintiffs' counsel in the first placeholder class action filed by these same Plaintiffs' counsel, which

precipitated this case and is detailed in the Background section of the UH Defendants' Motion. In that case, filed just before the expiration of the limitations period for claims related to the Fertility Center incident, the UH Defendants learned that one of the alleged plaintiffs and class representatives *never* had any cryopreserved eggs or embryos—an issue Plaintiffs do not even contest in their Opposition. When this fact came to light in the federal action, Plaintiffs attempted to substitute in a new plaintiff and sought consent to do so from the UH Defendants. In response, the UH Defendants asked Plaintiffs to disclose the name of the new proposed class representative so as to confirm whether this new plaintiff was, in fact, an affected patient. Plaintiffs' Counsel *refused* to disclose any identifying information about the new proposed plaintiff, stating only that they would provide the UH Defendants "with a redacted copy of a canceled check (redacting all information that could identify Plaintiffs in any manner)," and only then if the UH Defendants would consent to substitution. *See* Correspondence Between Rita A. Maimbourg and Kenneth Abbarno, filed as Exhibit 1, Doc. 46-1, to Memorandum in Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint to Substitute Named Plaintiffs in *Doe v. University Hospitals Health System, Inc.*, No. 1:20-cv-00482-SO (S.D. Ohio), attached as Exhibit B.[2] After reaching this impasse in the federal action, the UH Defendants did not see any reason to pursue the same futile course in requesting Plaintiffs' names here.

[2] Public filings and judgment entries of another court are among the records appropriate for judicial notice under Ohio Evid.R. 201. *See Bank of New York Mellon v. DePizzo*, 42 N.E.3d 1218, 2015-Ohio-4026, ¶¶ 24-25 (11th Dist.).

C. Plaintiffs' filing of a motion for leave does not "moot" the UH Defendants' motion to dismiss.

Finally, Plaintiffs' filing of a motion for leave to proceed pseudonymously, which seeks in the alternative leave to amend, does not "moot" the UH Defendants' motion to dismiss. As noted above, the Supreme Court of Ohio has emphasized that a court lacking subject-matter jurisdiction also "lacks the authority to do anything but announce its lack of jurisdiction and dismiss." *Pratts*, 2004-Ohio-1980 at ¶ 21. This rule makes the jurisdictional issue necessarily antecedent to the issues of leave and/or amendment. If there is no subject-matter jurisdiction, then this Court lacks authority even to decide Plaintiffs' motion, and the only course can be dismissal.

To be clear, however, the UH Defendants also oppose Plaintiffs' request for leave to proceed under a pseudonym on its own merits. As the Tenth District explained in *Bruner*, permission for leave to proceed under a pseudonym is to be given only in "exceptional circumstances." *Bruner*, 2012-Ohio-761 at ¶ 6. Plaintiffs have not made that showing. Indeed, Plaintiffs have not cited a single case analyzing whether in-vitro fertilization raises concerns of the "utmost intimacy" that satisfy the high standard for proceeding under a pseudonym under Ohio law. Nor have Plaintiffs made any allegation in the Complaint or attached any evidence, such as an affidavit, identifying the bases for their privacy concerns. Plaintiffs' failure to meet this hefty burden is not, however, relevant to the jurisdictional issues at play in the pending motion to dismiss. As such, the UH Defendants will fully address why Plaintiffs should not be permitted to proceed under pseudonyms in their forthcoming response to Plaintiffs' Motion for Leave. As noted above, however, because disposition of the UH Defendants' Motion to Dismiss involves subject-matter jurisdiction, this Court should not consider Plaintiffs' later-filed motion for leave. Indeed,

if this Court grants the UH Defendants' Motion to Dismiss, it need not consider Plaintiffs' motion and should deny it as moot.

III. CONCLUSION

Plaintiffs do not dispute the fact they violated Civ.R. 10(A). Nor do they offer any excuse. Rather, Plaintiffs appear to have remained unaware of the jurisdictional problem they created until *after* the UH Defendants filed their Rule 12(B)(1) motion to dismiss. It is too late now to cure that error because errors of subject-matter jurisdiction deprive a court of the power to do "anything but announce its lack of jurisdiction and dismiss." *Pratts*, 2004-Ohio-1980 at ¶ 21. Accordingly, the UH Defendants respectfully request that this Court grant the Motion to Dismiss.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing was filed electronically on February 17, 2021. Service of this filing will be made pursuant to Civ.R. 5(B)(2)(f) and Civ.R. 5(B)(3) by operation of the Court's electronic filing system upon:

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EXHIBIT A

This docket is current through 02/04/2021

Current Date: 2/15/2021
Source: U.S. District Court, Southern District of Ohio (Columbus)

Court: U.S. District Court, Southern District of Ohio (Columbus)
Case Title: Doe v. Mitchell et al
Case: 2:20-CV-00459
Judge: Judge James L. Graham
Date Filed: 01/27/2020

SYNOPSIS INFORMATION

Allegations: Defendant deprived Plaintiff by using excessive force in course and conducted unreasonable search and seizure in violation of Fourth and Fourteenth Amendment rights.
Damages: Compensatory and punitive damages, interest, fees and costs.
COMPLAINT (MANUALLY RETRIEVED) Original Image of this Document (PDF)

CASE INFORMATION

Case Number: 2:20CV00459
Referred To: Magistrate Judge Karen L. Litkovitz
Jury Demand: Both
Nature of Suit: Civil Rights: Other Civil Rights (440)
Key Nature of Suit: Civil Rights; Other Federal Civil Rights (110.45)
Jurisdiction: Federal Question
Cause: 42 USC 1983 Civil Rights Act

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1-10 Does

Type:	Defendant

CALENDAR INFORMATION

View Calendar Information

DOCKET PROCEEDINGS (32)

Entry #:	Date:	Description:	
31	02/01/2021	NOTATION ORDER GRANTING the parties 30 JOINT MOTION to extend the primary expert deadline: (Primary Expert deadline extended to 2/12/2021). Signed by Magistrate Judge Karen L. Litkovitz on 2/1/2021. (art) (Entered: 02/01/2021)	View Add to request
30	01/31/2021	Joint MOTION for Extension of Time New date requested 3/15/2021. by Plaintiff Jane Doe. (Goldstein, David) (Entered: 01/31/2021)	View Add to request
29	01/05/2021	Response re 27 Objection (non motion), 28 Objection to Report and Recommendations by Plaintiff Jane Doe. (Valentine, Sara) (Entered: 01/05/2021)	View Add to request
28	12/22/2020	OBJECTION to 24 Report and Recommendations by Defendant City of Columbus. (Arbogast, Janet) (Entered: 12/22/2020)	View Add to request
27	12/22/2020	Objection re 24 REPORT AND RECOMMENDATIONS re 18 MOTION for Judgment on the Pleadings filed by Andrew K Mitchell, 16 MOTION for Judgment on the Pleadings filed by City of Columbus, 19 First MOTION for Leave to File pseudonymously, or by Defendant Andrew K Mitchell. (Walker, Scott) (Entered: 12/22/2020)	View Add to request
	12/09/2020	Set/Reset Deadlines per 26 Order filed 12/08/2020: Objections to R&R due by 12/22/2020 (mdr) (Entered: 12/09/2020)	Send Runner to Court
26	12/08/2020	ORDER granting 25 Motion for Extension of Time. Signed by Judge James L. Graham on 12/8/2020. (jlg6) (Entered: 12/08/2020)	View Add to request
25	12/07/2020	MOTION for Extension of Time New date requested 12/22/2020. by Defendant Andrew K Mitchell. (Walker, Scott) (Entered: 12/07/2020)	View Add to request
24	11/24/2020	REPORT AND RECOMMENDATION that Plaintiff Jane Does Motion to Proceed Pseudonymously 19 be	View Add to request

		GRANTED and that the parties be ordered to file all documents in this case with plaintiff Jane Does true name redacted. In the alternative, plaintiff should be granted leave to amend the complaint to identify plaintiff Jane Doe by her true name. The motions for judgment on the pleadings filed by defendants City of Columbus 16 and Andrew Mitchell 18 be DENIED as moot. Objections to R&R due by 12/8/2020. Signed by Magistrate Judge Karen L. Litkovitz on 11/24/2020. (art) (Entered: 11/24/2020)	
23	10/14/2020	RESPONSE to Motion re 19 First MOTION for Leave to File pseudonymously, or, in the alternative, leave to amend her Complaint filed by Defendant City of Columbus. (Arbogast, Janet) (Entered: 10/14/2020)	View Add to request
22	10/14/2020	REPLY to Response to Motion re 16 MOTION for Judgment on the Pleadings filed by Defendant City of Columbus. (Arbogast, Janet) (Entered: 10/14/2020)	View Add to request
21	10/14/2020	REPLY to Response to Motion re 19 First MOTION for Leave to File pseudonymously, or, in the alternative, leave to amend her Complaint filed by Defendant Andrew K Mitchell. (Walker, Scott) (Entered: 10/14/2020)	View Add to request
20	09/29/2020	RESPONSE in Opposition re 18 MOTION for Judgment on the Pleadings , 16 MOTION for Judgment on the Pleadings filed by Plaintiff Jane Doe. (Goldstein, David) (Entered: 09/29/2020)	View Add to request
19	09/29/2020	First MOTION for Leave to File pseudonymously, or, in the alternative, leave to amend her Complaint by Plaintiff Jane Doe. (Goldstein, David) (Entered: 09/29/2020)	View Add to request
18	09/09/2020	MOTION for Judgment on the Pleadings by Defendant Andrew K Mitchell. (Walker, Scott) (Entered: 09/09/2020)	View Add to request
17	09/09/2020	ORDER following 9/8/2020 Status Conference: Deadline for defendant Mitchell's motion for judgment on the pleadings set for September 9, 2020.Deadline	View Add to request

		for plaintiff's response to the motions for judgment on the pleadings September 30, 2020. Deadline for reply memoranda in support of the motions for judgment on the pleadings set for October 14, 2020. Signed by Magistrate Judge Karen L. Litkovitz on 9/8/2020. (art) (Entered: 09/09/2020)	
16	09/08/2020	MOTION for Judgment on the Pleadings by Defendant City of Columbus. (Arbogast, Janet) (Entered: 09/08/2020)	View Add to request
	09/08/2020	Minute Entry: Case called this date before Magistrate Judge Karen L. Litkovitz for a Status Conference held via telephone on 9/8/2020. Counsel for plaintiff and for defendants present. Matters discussed. (Court Reporter: None present) (art) (Entered: 09/08/2020)	Send Runner to Court
15	05/27/2020	PRELIMINARY PRETRIAL ORDER: Joinder of Parties due by 8/3/2020. Motions to Amend due by 8/3/2020. Initial Disclosures due by 7/14/2020. Discovery due by 5/21/2021. Dispositive motions due by 6/16/2021. Primary Expert(s) due by 2/12/2021. Rebuttal Expert(s) due by 3/29/2021. Settlement Demand due by 8/11/2021. Response to Settlement Demand due by 9/10/2021. Signed by Magistrate Judge Karen L. Litkovitz on 5/27/2020. (art) (Entered: 05/27/2020)	View Add to request
	05/27/2020	Minute Entry: Case called this date before Magistrate Judge Karen L. Litkovitz for a Scheduling Conference held via telephone on 5/27/2020. Counsel for plaintiff, and counsel for defendant City of Columbus present. Counsel for defendant Mitchell not present. Matters discussed. Case calendar established. Order of the Court to follow. Case set for follow-up status conference before MJ Litkovitz via telephone on Tues., 9/8/2020 at 3:00 pm. (Court Reporter: None present) (art) (Entered: 05/27/2020)	Send Runner to Court

13	05/14/2020	RULE 26(f) REPORT by Plaintiff Jane Doe. (Valentine, Sara) (Entered: 05/14/2020)	View Add to request
11	04/21/2020	PRELIMINARY PRETRIAL CONFERENCE ORDER: The parties Rule 26(f) Meeting Report due to be filed with the Court by 5/20/2020. Signed by Magistrate Judge Karen L. Litkovitz on 4/21/2020. (art) (Entered: 04/21/2020)	View Add to request
10	04/20/2020	ANSWER to 1 Complaint with Jury Demand filed by Andrew K Mitchell. (Walker, Scott) (Entered: 04/20/2020)	View Add to request
9	04/06/2020	ORDER OF RECUSAL. Magistrate Judge Chelsey M. Vascura recused. Case reassigned to Magistrate Judge Karen L. Litkovitz for all further proceedings. Signed by Magistrate Judge Chelsey M. Vascura on 4/6/2020. (agm) (Entered: 04/06/2020)	View Add to request
8	03/31/2020	ORDER OF RECUSAL. Magistrate Judge Elizabeth Preston Deavers recused. Case reassigned to Magistrate Judge Chelsey M. Vascura for all further proceedings. Signed by Magistrate Judge Elizabeth Preston Deavers on 3/31/2020. (sln) (Entered: 03/31/2020)	View Add to request
7	03/30/2020	ORDER OF RECUSAL. Magistrate Judge Kimberly A. Jolson recused. Case reassigned to Magistrate Judge Elizabeth Preston Deavers for all further proceedings. Signed by Magistrate Judge Kimberly A. Jolson on 3/30/20. (jr) (Entered: 03/30/2020)	View Add to request
6	03/27/2020	ANSWER to 1 Complaint with Jury Demand filed by City of Columbus. (Arbogast, Janet) (Entered: 03/27/2020)	View Add to request
5	02/24/2020	WAIVER OF SERVICE Returned Executed. Waiver sent to City of Columbus on 2/20/2020, answer due 4/20/2020. (Goldstein, David) (Entered: 02/24/2020)	View Add to request
4	02/24/2020	WAIVER OF SERVICE Returned Executed. Waiver sent to Andrew K Mitchell on 2/19/2020, answer due 4/20/2020. (Goldstein, David) (Entered: 02/24/2020)	View Add to request

3	01/28/2020	NOTICE by Plaintiff Jane Doe re 1 Complaint Civil Cover Sheet (Valentine, Sara) (Entered: 01/28/2020)	View Add to request
2	01/27/2020	NOTICE of Appearance by Sara Marie Valentine for Plaintiff Jane Doe (Valentine, Sara) (Entered: 01/27/2020)	View Add to request
1	01/27/2020	COMPLAINT with JURY DEMAND against All Defendants (Filing fee $ 400 paid - receipt number: 0648-7299568), filed by Jane Doe. (Goldstein, David) (Entered: 01/27/2020)	View Add to request

TO ORDER COPIES OF ANY DOCUMENTS LISTED ABOVE, CALL WESTLAW COURTEXPRESS 1-877-DOC-RETR (1-877-362-7387) (Additional Charges Apply)

End of Document

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JANE AND JOHN DOE 1-4, individually and on behalf of all others similarly situated, Plaintiffs, v. UNIVERSITY HOSPITALS HEALTH SYSTEM, INC., *et al*., Defendants.	CASE NO.: 1:20-cv-00482-SO JUDGE SOLOMON OLIVER, JR.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT TO SUBSTITUTE NAMED PLAINTIFFS

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I. INTRODUCTION

Plaintiffs Jane and John Doe 1 and 2 commenced this class action lawsuit on March 2, 2020, seeking to represent a class of "patients and/or other family members" affected by the loss of, or damage to, eggs or embryos caused by the March 2018 cryopreservation tank failure at University Hospitals' Fertility Center. Two days later, Jane and John Doe 3 and 4 joined as Plaintiffs in the First Amended Complaint. Today, Jane and John Doe 1 and 2 are no longer parties, as they resolved their claims with Defendants. (Notice of Stipulated Dismissal, Doc. 42.) That leaves Jane and John Doe 3 and 4 as the only alleged class representatives—shoes they cannot fill because they *had no* eggs or embryos in the affected cryopreservation tank in March 2018. (*See* Mot. for Summary Judgment, Doc. 36). Their claims based on the March 2018 tank failure—let alone their attempt to fabricate a class action—are barred.

Seeing their last-gasp chance at a class action in jeopardy, Plaintiffs' lawyers have come forward with two new plaintiffs—who they refuse to identify—to "substitute" for Jane and John Doe 3 and 4 as part of a new Second Amended Class Action Complaint. They rely on the Rule 15 standard for amendment, but the Rule 15 guidance that leave to amend should be "freely given" does not extend to this kind of obvious gamesmanship. Binding precedent dictates both that a court must not permit amendment when it lacks subject-matter jurisdiction, and that a Rule 15 amendment cannot cure the absence of subject-matter jurisdiction. *See, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 527 (6th Cir. 2002).

This case is in federal court *only* because Plaintiffs invoked the Class Action Fairness Act ("CAFA") as a basis for subject-matter jurisdiction. The UH Defendants have challenged that jurisdiction in two separate briefed and pending motions: a Motion to Dismiss challenging the

applicability of CAFA jurisdiction (Doc. 26); and a Motion for Summary Judgment demonstrating that Jane and John Doe 3 and 4 lack standing to sue as class representatives because they were not affected by the March 2018 tank failure (Doc. 36). Because dismissal for lack of jurisdiction is required if the Court grants either motion, this Court must resolve those motions *before* it may even consider whether amendment is appropriate under Rule 15. If the Court finds subject-matter jurisdiction lacking, then dismissal is the only course.

If this Court does conclude that it has subject-matter jurisdiction, it should still reject Plaintiffs' attempt to use a Rule 15 amendment to save their class action. Plaintiffs' counsel have been on notice for nearly three months that Jane and John Doe 3 and 4 did not have cryopreserved eggs or embryos, yet still refused to dismiss. Now, Plaintiffs' counsel seek to save this class action by amending to "substitute" in a new pair of anonymous plaintiffs, this time refusing to tell the UH Defendants' counsel their names. Their refusal highlights the prejudice that amendment would cause to the UH Defendants; without names, the UH Defendants cannot determine whether the new Jane and John Doe 3 and 4 are any more appropriate as class representatives than the last pair. Worse, allowing amendment would also violate Rule 10(a), which requires the title of a complaint to name all parties. If "a plaintiff wish[es] to proceed anonymously" in the face of Rule 10(a), he or she must seek entry of "a protective order that allows him or her to proceed under a pseudonym." *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 636-37 (6th Cir. 2005). Indeed, "[f]ailure to seek permission to proceed under a pseudonym *is fatal to* an anonymous plaintiff's case." *Id.* (emphasis added).

This class action lawsuit therefore fails on multiple levels. Plaintiffs' initial invocation of CAFA jurisdiction was unfounded and the only remaining Plaintiffs lack standing to sue. Consequently, this Court should dismiss Plaintiffs' case for lack of jurisdiction before it ever

reaches this Motion. If it does not, however, then this Court should reject this attempt to amend by substituting anonymous plaintiffs, which is itself improper.

II. LAW AND ARGUMENT

A. This Court cannot grant leave to amend under Rule 15 when there are pending challenges to the Court's subject-matter jurisdiction.

Subject-matter jurisdiction is *the* threshold requirement without which "the court cannot proceed at all in any cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). When "it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Id.* Consequently, before this Court can act—including granting leave to amend under Rule 15—it must *first* determine whether it has jurisdiction. If jurisdiction does *not* exist, then it may not reach the motion to amend because "when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (citing 16 J. Moore et al., Moore's Federal Practice § 106.66, pp. 106-88 to 106-89 (3d ed. 2005)).

This means that this Court must resolve two of the pending motions filed by the UH Defendants before it may take up Plaintiffs' Motion.[1] First is the UH Defendants' Motion to Dismiss (Doc. 26), which demonstrates that this Court must decline jurisdiction under the Class Action Fairness Act's ("CAFA") home-state exception because greater than two-thirds of the putative class members and all of the primary defendants are Ohio residents. If this Court concludes that the home-state exception requires that it decline jurisdiction under CAFA, then its *only* recourse is "announcing the fact and dismissing the case." *Steel Co.*, 523 U.S. at 94. Second

[1] The UH Defendants also filed a Motion to Strike Plaintiffs' Class Allegations in combination with the Motion to Dismiss. (*See* Doc. 26.) The issues raised in the Motion to Strike would be moot if the Court were to conclude that jurisdiction does not exist and need not be addressed until after the Court has made its jurisdictional determination.

is the UH Defendants' Motion for Summary Judgment (Doc. 36) on the claims of the only remaining Plaintiffs—the current Jane and John Doe 3 and 4—based on the absence of Article III standing. Undisputed evidence confirms that these Plaintiffs had no cryopreserved eggs or embryos in the affected tank at the UH Fertility Center, so they experienced no "injury in fact" that is "fairly traceable" to the March 2018 cryopreservation tank failure as a matter of law.[2] If the Court concludes that Plaintiffs lack standing, then the Court must dismiss their claims. *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996) ("In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue."); *Metz v. Supreme Court of Ohio*, 46 F. App'x 228, 232 (6th Cir. 2002) ("A plaintiff's standing under Article III is a component of a federal court's subject-matter jurisdiction.").

B. Rule 15 may not be used as a mechanism for curing the absence of subject-matter jurisdiction.

If this Court concludes that subject-matter jurisdiction is lacking, that ends the case because this Court may not permit Plaintiffs' counsel to fix jurisdictional flaws by amendment. *See, e.g.*, *National Association for the Advancement of Colored People—Special Contribution Fund*, 732 F. Supp. 791, 796 (N.D. Ohio 1990) ("Although SCF has requested leave to amend the Complaint, the Court has no authority to allow SCF to amend the Complaint to substitute another party, the NAACP, Inc., as the Plaintiff. Since . . . subject matter jurisdiction has never existed, the Court lacks the power to allow substitution of a diverse Plaintiff as a surrogate for the non-diverse original Plaintiff."); *Commercial Warehouse Leasing, LLC v. Kentucky Transportation Cabinet*,

[2] This undisputed evidence includes the complete University Hospitals Fertility Center medical and laboratory records for Jane and John Doe 3 and 4, which unequivocally show that these plaintiffs *never had* any cryopreserved eggs or embryos. These complete medical and laboratory records were all produced to Plaintiffs' counsel by May 8, 2020. (*See* University Hospitals Defendants' Motion for Partial Summary Judgment, Exhibits A-1 and A-2, DOC #36, PAGE ID # 426, 429.)

Dept. of Highways, No. 4:18-CV-00045-JHM, 2018 WL 3747466, at *2 (W.D. Ky. Aug. 7, 2018) ("The Court cannot 'assume subject matter jurisdiction' will exist after it considers and possibly grants the motion to amend the complaint, as the Court must presently possess subject matter jurisdiction over the dispute to have the authority to even consider the merits of the motion to amend.") (quoting *Broad v. DKP Corp.*, No. 97 Civ.2029 (LAP), 1998 WL 516113, at *4 (S.D.N.Y. Aug. 19, 1998)).

In particular, the Sixth Circuit has prohibited the practice of using a Rule 15 amendment to moot the issue of a named plaintiff's lack of standing. In *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 527 (6th Cir. 2002), the Sixth Circuit held unequivocally that when a named plaintiff "has not suffered injury in fact by the defendants," then it has "no standing to bring this action and no standing to make a motion to substitute the real party in interest," *id.* at 531. And courts within the Northern District of Ohio have applied the Sixth Circuit's *Zurich Insurance* reasoning to the very issue here—motions for leave to amend to substitute class representatives. In *Zangara v. Travelers Indemnity Company of America*, No. 1:05CV731, 2006 WL 825231 (N.D. Ohio Mar. 30, 2006), the court concluded that the named plaintiff's lack of standing was fatal to that same plaintiff's motion for leave to file a second amended class action complaint because his "lack of standing precludes him from amending the complaint to substitute new plaintiffs." *Id.* at *3. "More precisely," the court went on, "his lack of standing divests this Court of subject matter jurisdiction necessary even to consider such a motion." *Id.* More recently, the court came to the same conclusion in *Barnes v. First American Title Ins. Co.*, 473 F. Supp. 2d 798 (2007), when it cited to both *Zangara* and *Zurich Insurance* for the proposition that "[r]ecent Sixth Circuit law expressly holds that substitution is improper when the original named plaintiff lacks standing to assert

claims." *Barnes*, 473 F. Supp. 2d at 800 (denying motion for leave to file a second amended complaint to substitute class representatives).

Put simply, if this Court concludes that either of the UH Defendants' two pending challenges to subject matter jurisdiction has merit, then it must dismiss Plaintiffs' case and deny leave to amend.

C. Even if this Court retained subject-matter jurisdiction, amendment is improper under Rule 15 and Rule 10(a).

Even if this Court were to conclude that Plaintiffs clear the obstacles to subject matter jurisdiction, Plaintiffs' motion for leave to amend should still be denied because it is legally improper. Leave to amend is to be "freely given" only when it has been sought "[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The proposed amendment falls short of the Rule 15 standard for amendment in multiple ways. On May 8, 2020, Plaintiffs' counsel received copies of Jane Doe 3's medical records showing on their face that she had no embryos frozen at the time of her IVF treatment in 1992. (*See* 5/8/2020 Letter from R. Maimbourg to L. Floyd, attached as Ex. 2 to the Declaration of Rita A. Maimbourg, Doc. 36-1.) Refusing to dismiss class representatives after receiving conclusive evidence that Jane and John Doe 3 and 4 did not share the same alleged injury as the class members they purport to represent is itself evidence of "bad faith" precluding amendment under Rule 15. The COVID-19 pandemic and associated court slow-downs to which Plaintiffs point provide little cover considering that Plaintiffs *still* refuse to dismiss the claims of the current Jane and John Doe

3 and 4 as they seek to use them as placeholders for the class, even though they know they are inappropriate class representatives.[3]

Plaintiffs also suggest that prejudice to Defendants would be minimal because "discovery has not yet commenced." (Pls' Mem., Doc. 41-1 at 3.) This is not true. Litigation arising from the event at the UH Fertility Center has been going on since March 9, 2018, and discovery of the UH Defendants was extensive. In fact, the same lawyers representing Jane and John Doe 3 and 4 in this case took a lead role in document discovery from UH and deposing multiple UH witnesses. The UH Defendants produced thousands of pages of non-patient-specific documents, answered wave upon wave of interrogatories and requests for production of documents, plus multiple sets of initial disclosures, and produced 10 witnesses for over 90 hours of deposition testimony—all to these same plaintiffs' counsel. And for this case, the UH Defendants have already produced all of the case-specific medical and laboratory records for Jane and John Doe 3 and 4.

Amendment is also improper because Plaintiffs' gamesmanship over the amendment process, particularly in refusing to identify the new proposed class representatives, directly prejudices the UH Defendants. Plaintiffs willingly provided names for the previous Jane and John Doe Plaintiffs, which allowed the UH Defendants to identify and share the proposed class representatives' medical records with Plaintiffs' counsel. This was how the UH Defendants discovered that the current Jane and John Doe 3 and 4 had no cryopreserved eggs or embryos to begin with. After Plaintiffs filed this Motion for Leave, counsel for the UH Defendants asked

[3] With knowledge that Jane and John Doe 1 and 2 had signed a release of their claims, Plaintiffs' counsel filed this Motion on behalf of all Plaintiffs the day *before* Jane and John Doe 1 and 2 filed their Notice of Stipulated Dismissal With Prejudice (Doc. 42). This timing was not accidental, but does not change the fact that the current Motion is now being pursued only by Plaintiffs who have no standing to bring their claims.

Plaintiffs' counsel to name the new proposed class representatives. This time, Plaintiffs' counsel refused. Instead, Plaintiffs' counsel indicated that they would merely provide "a redacted copy of a canceled check (redacting all information that could identify Plaintiffs in any manner)", and then *only* if the UH Defendants agreed to not oppose the Motion for Leave. (*See* June 17, 2020 Email from K. Abbarno to R. Maimbourg, Exhibit 1 to the Declaration of Rita A. Maimbourg ("Maimbourg Decl."), attached as Exhibit A.) By failing to provide names for the new proposed class representatives, Plaintiffs' counsel are keeping the UH Defendants blind to any threshold jurisdictional problems that may affect the new proposed class representatives.

The prejudice is further underscored by Plaintiffs' counsel's snubbing of Rule 10(a), which enshrines the "general rule that a complaint *must* state the names of the parties." *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 636 (6th Cir. 2005) (citing Fed. R. Civ. P. 10(a)). Plaintiffs may be "permitted to proceed under pseudonyms only under certain circumstances that justify an exception to this rule." *Id.* (citing *Doe v. Porte*, 370 F.3d 558, 560 (6th Cir. 2004)). But to do so, "a plaintiff wishing to proceed anonymously" ordinarily "files a protective order that allows him or her to proceed under a pseudonym." *Id.* If he or she does not, then "[f]ailure to seek permission to proceed under a pseudonym *is fatal to* an anonymous plaintiff's case because . . . 'the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them.'" *Id.* (quoting *Nat'l Commodity & Barter Ass'n, Nat'l Commodity Exch. v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989)) (emphasis added); *see also Anonymous v. City of Hubbard*, No. 4:09CV1306, 2010 WL 148081, at *1 (N.D. Ohio Jan. 11, 2010) (same).

This final point—that "federal courts lack jurisdiction over" unnamed parties—also shows that amendment would be futile, which is another basis for denying leave to amend under Rule 15. *Foman*, 371 U.S. at 182; *Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div.*, 987

F.2d 376, 383 (6th Cir. 1993) ("This Circuit has addressed the issue of 'futility' in the context of motions to amend, holding that where a proposed amendment would not survive a motion to dismiss, the court need not permit the amendment."). The current case brought by Jane and John Doe 3 and 4 is already riddled with jurisdictional holes. Substituting in two new unnamed parties over whom the Court lacks jurisdiction in their place would merely swap one set of jurisdictional deficiencies for another.

III. CONCLUSION

Plaintiffs' attempt to save this class action by substituting in anonymous new class representatives fails to remedy the multiple jurisdictional problems already facing this case. This Court should not even reach the instant motion unless it first decides in Plaintiffs' favor on the jurisdictional challenges raised in the UH Defendants' Motion to Dismiss (Doc. 26) and the challenge to the named Plaintiffs' standing in the UH Defendants' Motion for Summary Judgment (Doc. 36.) Even if it does, Sixth Circuit precedent precludes substitution as a "cure" to class representatives' inadequacy. Moreover, the "liberal" amendment standard on which Plaintiffs rely never comes into play in a case, like this one, where the proposed amendment is characterized by bad faith, delay, and futility highlighted by Plaintiffs' refusal to identify the new named plaintiffs, which is itself a violation of Rule 10(a). Therefore, this Court should deny Plaintiffs' Motion for Leave.

Respectfully submitted,

/s/ Rita A. Maimbourg
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Attorneys for Defendants University Hospitals Health System, Inc., University Hospitals Cleveland Medical Center, and University Hospitals Ahuja Medical Center, Inc.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

I hereby certify that this brief complies with the track and page-number limitations required by Local Rule 7.1(f) for cases that have not yet been assigned to a track.

/s/ Rita A. Maimbourg
One of the Attorneys for Defendants University Hospitals Health System, Inc., University Hospitals Cleveland Medical Center, and University Hospitals Ahuja Medical Center, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, a copy of the foregoing ***Memorandum in Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint to Substitute Named Plaintiffs*** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Rita A. Maimbourg
One of the Attorneys for Defendants University Hospitals Health System, Inc., University Hospitals Cleveland Medical Center, and University Hospitals Ahuja Medical Center, Inc.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JANE AND JOHN DOE 1-4, individually and on behalf of all others similarly situated, Plaintiffs, v. UNIVERSITY HOSPITALS HEALTH SYSTEM, INC., *et al.*, Defendants.	CASE NO. 1:20-CV-00482-SO JUDGE SOLOMON OLIVER, JR.

DECLARATION OF RITA A. MAIMBOURG

I, RITA A. MAIMBOURG, declare as follows:

1. I am an attorney admitted to practice law in the State of Ohio and admitted to practice in the United States District Court for the Northern District of Ohio. I am an attorney at the law firm of Tucker Ellis LLP and counsel for Defendants University Hospitals Health System, Inc., University Hospitals Cleveland Medical Center, and University Hospitals Ahuja Medical Center, Inc. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify to the matters contained in this Declaration.

2. Attached as Exhibit 1 is a true and accurate redacted copy of email correspondence dated June 16-17, 2020, between myself and counsel for Plaintiffs, Kenneth Abbarno.

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VERIFICATION

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 25th day of June, 2020, in Orange Village, Ohio.

Rita A Maimbourg

Rita A. Maimbourg

EXHIBIT 1

Latch, Rae

From: Kenneth Abbarno <kabbarno@dicellolevitt.com>
Sent: Wednesday, June 17, 2020 8:32 PM
To: Maimbourg, Rita
Cc: Mark Abramowitz; awolf; jpeiffer; lfloyd; jbooker; Taber, Edward; Ruttinger, Michael J
Subject: RE: Doe v. UHHS

Rita,

This email responds to your email request of earlier today.

Given the current status of the litigation, we are prepared to proceed with the partial identification of our proposed substitute Jane and John Doe plaintiffs ("Plaintiffs"). In light of your stated concern (with which we strongly disagree, but on which we do not need to join issue in order to satisfy your actual concerns), we will provide you with a redacted copy of a canceled check (redacting all information that could identify Plaintiffs in any manner), demonstrating that UH sent Plaintiffs a storage fee reimbursement check, if Defendants: (a) will stipulate to our Rule 15(a) motion upon receipt of the image of that check; and (b) will extend the deadlines for all pending motions. This would have the added benefit to your client of not needing to spend litigation money on these motions, which will be mooted, post-stipulation. Please let us know if that is acceptable to you.

Next, the [redacted] reasonably believe—based on UH's statements at the time and the billing records—that their embryos were preserved and stored at UH. They have a right to test the veracity of the records upon which UH relies, to take depositions of the witnesses that UH has proffered, and the like. Regardless, even if UH is presently factually correct in its assertion that the [redacted] embryos were actually subject to earlier misconduct by UH, rather than the present misconduct, at least some of their claims are still valid. That being said, we would prefer not to fight about this, which is why we filed the motion to substitute new class representatives in the first place. We reiterate our offer for you to stipulate to the Rule 15(a) motion, so that we need not argue over the [redacted] any further.

Kenneth P. Abbarno
DICELLO LEVITT GUTZLER
440.953.8888

From: Maimbourg, Rita <Rita.Maimbourg@TuckerEllis.com>
Sent: Wednesday, June 17, 2020 9:24 AM
To: Kenneth Abbarno <kabbarno@dicellolevitt.com>
Cc: Mark Abramowitz <mabramowitz@dicellolevitt.com>; awolf <awolf@pwcklegal.com>; jpeiffer <jpeiffer@pwcklegal.com>; lfloyd <lfloyd@pwcklegal.com>; jbooker <jbooker@pwcklegal.com>; Taber, Edward <Edward.Taber@TuckerEllis.com>; Ruttinger, Michael J <Michael.Ruttinger@tuckerellis.com>
Subject: RE: Doe v. UHHS

Dear Ken
In response to your question below as to why we seek to know the identities of the new Jane and John Doe, you have sought to substitute them as plaintiffs and class reps for the [redacted] who are not impacted patients. We are entitled to know the identity of your new clients to determine how to respond to your motion and if they were impacted patients. Clearly, we cannot take your word that they were impacted patients given that the First Amended Complaint contained false statements when it alleged that the [redacted] had embryos stored in the affected cryotank when they did not.

And to confirm, despite your statement below that your firm represents these clients, you told me yesterday on the phone that you did not know their identity. Also, on June 15, when Abe called to ask if UH would consent to a substitution, he could give me no details about the client other than that the retention agreement was with another firm.

I would like an answer to my question today. If the answer is that you refuse to identify them, I would like to know the reason.

Also, I would note that your firm and the Peiffer Wolf firm have always disclosed the identity of your Doe clients who have sued UH related to the events of March 3-4, 2018. There is no reason why that should change now.

Finally, since you state below that your firm represents the [redacted] I am requesting that you promptly dismiss their claims with prejudice as they have been shown to be based on untrue allegations.

Rita A. Maimbourg | Partner | Tucker Ellis LLP
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Direct: 216-696-3219 | Fax: 216-592-5009 | Cell: 216-496-1229
rita.maimbourg@tuckerellis.com Online biography - Rita Maimbourg
tuckerellis.com

From: Kenneth Abbarno <kabbarno@dicellolevitt.com>
Sent: Tuesday, June 16, 2020 4:23 PM
To: Maimbourg, Rita <Rita.Maimbourg@TuckerEllis.com>; Taber, Edward <Edward.Taber@TuckerEllis.com>; Ruttinger, Michael J <Michael.Ruttinger@tuckerellis.com>
Cc: Mark Abramowitz <mabramowitz@dicellolevitt.com>; awolf <awolf@pwcklegal.com>; jpeiffer <jpeiffer@pwcklegal.com>; lfloyd <lfloyd@pwcklegal.com>; jbooker <jbooker@pwcklegal.com>
Subject: RE: Doe v. UHHS

<<< EXTERNAL EMAIL >>>

Dear Rita,

The firms of Dicello Levitt and Peiffer Wolf are counsel for the new class representatives. We also are co-counsel for the [redacted].

Can you please let us know the basis for wanting to know the identities of the new class representatives at this point?

Thanks

Kenneth P. Abbarno
DICELLO LEVITT GUTZLER
440.953.8888

From: Maimbourg, Rita <Rita.Maimbourg@TuckerEllis.com>
Sent: Tuesday, June 16, 2020 4:12 PM
To: Kenneth Abbarno <kabbarno@dicellolevitt.com>; Mark Abramowitz <mabramowitz@dicellolevitt.com>; awolf <awolf@pwcklegal.com>; jpeiffer <jpeiffer@pwcklegal.com>; lfloyd <lfloyd@pwcklegal.com>; jbooker <jbooker@pwcklegal.com>
Cc: Taber, Edward <Edward.Taber@TuckerEllis.com>; Ruttinger, Michael J <Michael.Ruttinger@tuckerellis.com>
Subject: RE: Doe v. UHHS

Dear Counsel
Out of professional courtesy, please respond to this email.
Thank you

Rita A. Maimbourg | Partner | Tucker Ellis LLP
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Direct: 216-696-3219 | Fax: 216-592-5009 | Cell: 216-496-1229
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From: Maimbourg, Rita
Sent: Tuesday, June 16, 2020 7:45 AM
To: Kenneth Abbarno <kabbarno@dicellolevitt.com>; Mark Abramowitz <mabramowitz@dicellolevitt.com>; Adam Wolf (awolf@pwcklegal.com) <awolf@pwcklegal.com>; Joe Peiffer <jpeiffer@pwcklegal.com>; lfloyd <lfloyd@pwcklegal.com>; James Booker (jbooker@pwcklegal.com) <jbooker@pwcklegal.com>
Cc: Taber, Edward <Edward.Taber@TuckerEllis.com>; Ruttinger, Michael J <Michael.Ruttinger@tuckerellis.com>
Subject: Doe v. UHHS

Dear Counsel
Please immediately identify the new Jane and John Doe who you are moving to substitute in for Jane and John Doe 3 and 4. Since all of your names appear on the motion as Counsel for

Plaintiffs and the Proposed Class, I am directing this to all of you and presume you all know their identity.

Also, please identify counsel for these proposed Plaintiffs.

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