

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

TAMMY RIVERO AND HOWARD)	
BENNETT,)	
)	
Individually, and on Behalf of all)	
Others Similarly Situated,)	
)	
Plaintiffs,)	
)	Case No. _____
v.)	
)	
LUNG INSTITUTE, LLC,)	
)	
Defendant.)	
)	
)	
_____)	

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441 & 1446, as amended by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 118 Stat. 4 (“CAFA”), and M.D. Fla. Local Rule 4.02, Defendant Regenerative Medicine Solutions, LLC (“RMS”) states the following grounds for removal to the United States District Court for the Middle District of Florida:

1. On or about August 17, 2016, Plaintiff Tammy Rivero (“Rivero”) commenced this action against Defendant Lung Institute, LLC (“Lung Institute”)¹ by filing a Complaint in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, styled *Tammy Rivero, individually and on behalf of all others similarly situated v. Lung Institute, LLC*, Case Number 16-CV-7765 (“State Court Action”). The original Complaint does not

¹ Defendant Lung Institute is a Delaware limited liability company, with a principal place of business in Tampa, Florida.

mention Lung Institute's parent company, RMS.

2. On August 25, 2016, Rivero filed an Amended Complaint against Lung Institute in the State Court Action. Like the Complaint, the Amended Complaint does not mention RMS.

3. On September 1, 2016, Rivero filed a Second Amended Complaint against Lung Institute in the State Court Action. Like the Complaint and the Amended Complaint, the Second Amended Complaint does not mention RMS.

4. On December 15, 2017, Plaintiffs Rivero and Howard Bennett ("Bennett") filed a Third Amended Complaint ("Third Amended Complaint" or "TAC") in the State Court Action. (*See* TAC (**Exhibit A** hereto).) Although the case caption to the Third Amended Complaint identifies only Lung Institute as a defendant, the pleading itself contains detailed allegations against Lung Institute's parent, RMS. Specifically, the Third Amended Complaint alleges that:

- RMS is the recipient of all of Lung Institute's revenue (TAC ¶¶ 22, 37 ("RMS required proceeds generated by" Lung Institute "to be paid to RMS."))
- Lung Institute "was a mere instrumentality and alter ego of its parent" RMS. (TAC ¶ 35.)
- Lung Institute was "required to adhere to all management, policy, and organizational decisions as dictated to them through RMS, its shareholders, executives, managers, and employees." (TAC ¶ 38.)
- "RMS was part of the leadership team that made decisions regarding: treatments, products, services, marketing strategy, compensation plans, incentives, contests, patient treatment, patient care and other matters." (TAC ¶ 39.)
- "RMS dominated and controlled" Lung Institute "to such an extent that" Lung Institute's "existence w[as] in fact non-existent and the RMS shareholders along with RMS as a whole were in fact alter egos of" Lung Institute. (TAC ¶ 40.)
- "***RMS is a de facto party*** as it controls the litigation brought against Lung Institute, LLC. RMS is paying for Lung Institute, LLC's defense and RMS has designated two corporate representatives, both of whom are not employees or contractors of"

Lung Institute. (TAC ¶ 43.²)

- “Plaintiffs bring[] this suit on behalf of all persons who have received [Lung Institute’s] stem-cell therapy as marketed by [Lung Institute] **and RMS** from its Tampa, Florida principal place of business for the four years prior to the filing of the initial class action complaint.” (TAC ¶ 44.)
- With respect to Count I of the TAC, which is brought under the Florida Deceptive and Unfair Trade Practices Act, “Plaintiffs demand that this Court enter **judgment** against Defendant LUNG INSTITUTE, LLC and **the de facto defendant, its alter ego RMS**, in an amount equal to the actual damages of Plaintiffs and Putative Class Members injured by reason of the violations alleged above, award reasonable attorney’s fees and costs, and any other relief this Court deems proper.” (TAC at page 12.)
- With respect to Count II of the TAC, which is brought under Florida Statute 772.104(1), Plaintiffs demand that “this Court enter **judgment** against Defendant LUNG INSTITUTE, LLC, and **the de facto defendant, its alter ego RMS**, in an amount equal to **treble the actual damages** of Plaintiff[s]and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney’s fees and costs, and any other relief this Court deems proper.” (TAC at page 14.)
- With respect to Count III of the TAC, which alleges breach of fiduciary duty, “Plaintiff demands **damages** against Defendant LUNG INSTITUTE, LLC, and **the de facto defendant, its alter ego RMS** for breach of fiduciary duty and such other relief this Court deems just and proper.” (TAC at page 16.)
- With respect to Court IV of the TAC, which alleged civil conspiracy, Plaintiffs demand “**damages** against Defendant LUNG INSTITUTE, LLC, and **the de facto defendant, its alter ego RMS** for civil Conspiracy and such other relief this Court deems just and proper.” (TAC at page 19.)

5. Because Plaintiffs seek “judgment” and “damages” against “de facto defendant”

RMS in the Third Amended Complaint, RMS is a party defendant that is entitled to exercise its procedural due process rights under 28 U.S.C. §§ 1332, 1441, & 1446, as amended by CAFA.

² All emphasis in this document added, unless otherwise noted.

See Steans v. Combined Ins. Co., 148 F.3d 1266, 1271 (11th Cir. 1998) (district courts do not have authority to “enter a judgment purporting to bind nonparties” not subject to the court’s jurisdiction).

6. Plaintiffs’ decision to forego formally serving the Third Amended Complaint on RMS, and to omit RMS as a defendant in the caption of the Third Amended Complaint, is a transparent attempt by Plaintiffs to try and evade RMS’s removal of the State Court Action to this Court. However, it is unavailing. The removal statute does not restrict removal prior to service: as long as the complaint (in this case, the Third Amended Complaint) is on file with the court—and thus there is a “civil action brought in a State court” within the meaning of 28 U.S.C. § 1441(a)—removal prior to formal service is permissible. *See* 28 U.S.C. § 1446(b)(1) (“The notice of removal of a civil action or proceeding shall be filed within 30 days after the *receipt* by the defendant, through service *or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based”); *Kaspers v. Comcast Corp.*, No. 1:12-CV-01397-SCJ, 2012 WL 12960827, at *1 (N.D. Ga. June 22, 2012) (“Plaintiff’s sole argument is that removal was premature because the Complaint had not yet been served upon Defendant. This premature-removal theory has been *soundly rejected by numerous courts*. . . . Importantly, section 1441 does not require that the complaint be served before an action can be removed; rather, the statute simply requires, *inter alia*, that the action had been ‘brought in a State court’ prior to removal.”); *Ripley v. Eon Labs, Inc.*, 622 F. Supp. 2d 137, 140 (D.N.J. 2007) (“The Court finds that the plain language of 28 U.S.C. § 1441(b) does not bar the Defendants’ removal in this case because at the time that the action was removed, the Defendants had not yet been ‘properly joined and served.’”); *Arthur v. Litton Loan Servicing LP*, 249 F. Supp. 2d 924, 931 (E.D. Tenn. 2002) (“There is nothing in the plain language of § 1446(b) that precludes

Litton and U.S. Bank from filing a notice of removal prior to the plaintiffs effecting service of process upon them. Service of process is not a prerequisite to the defendants exercising their right of removal under 28 U.S.C. § 1446.”); *Perimeter Lighting, Inc. v. Karlton*, 456 F. Supp. 355, 359 (N.D. Ga. 1978) (“The fact that service under state practice has not been perfected does not in and of itself prevent removal. It is ‘receipt’ of the ‘initial pleading’ pursuant to section 1446 which controls removability, whether or not state procedures are properly followed.”). RMS received notice of the Third Amended Complaint on December 15, 2017, the same day that pleading was filed in the State Court Action. RMS also intends to file a motion in this Court to correct the case caption to include RMS as a named defendant, given that Plaintiffs are seeking relief (in the form of “damages” and “judgment”) directly against RMS in the Third Amended Complaint.

7. RMS is a Delaware limited liability company, with a principal place of business at 201 E. Kennedy Boulevard, Suite 700, Tampa, Florida 33602.

8. Under CAFA, a limited liability company is treated as an “unincorporated association,” and “shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.” 28 U.S.C. § 1332(d)(10); *see Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 705 (4th Cir. 2010); *Marquez v. GNS & Assocs., Inc.*, Civ. Act. No. 17-00060-CG-N, 2017 WL 4479365, at *4 (S.D. Ala. June 27, 2017) (For purposes of CAFA jurisdiction, Oasis Legal Finance, LLC is an unincorporated association under § 1332(d)(10), and it is a citizen of Illinois, where its principal place of business is located, and Delaware, where it was organized.). *See also Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1200 n.40 (11th Cir. 2007) (“Section 1332(d)(10) sets forth how the citizenship of unincorporated associations is treated for purposes of CAFA’s jurisdictional and removal purposes”); *Lewis v.*

Seneff, No. 6:07-cv-1245-Orl-22DAB, 2008 WL 3200273, at *5 (M.D. Fla. Aug. 5, 2008) (“For purposes of class action jurisdiction under § 1332(d) only, an unincorporated association is considered to be a citizen of the state in which i[t] has its principal place of business and the state under whose laws it is organized. 28 U.S.C. § 1332(d)(10).”).

9. Pursuant to 28 U.S.C. §§ 1332(a)(1), 1441, 1446 and 1453, RMS has the right to remove the Action from the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida to the United States District Court for the Middle District of Florida, which covers the place where the State Court Action is pending. The Eleventh Circuit follows the “last-served” defendant rule, under which each defendant has thirty days in which to seek removal. *See Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1203, 1205-07 n.7 (11th Cir. 2008) (last-served defendant rule allowed parent company right to remove more than 30 days after service on subsidiaries even where parent and subsidiary companies had same counsel); *In re: Brican Am. LLC Equip. Lease Litig.*, No. 10-md-02183-PAS, 2011 WL 13115472, *4-5 (S.D. Fla. Mar. 10, 2011) (rejecting plaintiffs’ argument that “an alter ego of a previously served defendant is not a ‘defendant’ under § 1446(b) entitled to remove an action”); *see also Laguna v. Coverall N. Am., Inc.*, No. 09cv2131 JM(RBB), 2009 WL 5125606 (S.D. Cal. Dec. 18, 2009) (alter ego of previously served defendant timely removed to federal court following amendment of CAFA complaint adding alter ego as party).

10. Although not required under CAFA (*see* 28 U.S.C. § 1453(b)), Lung Institute consents to RMS’s removal of this action to the United States District Court for the Middle District of Florida.

11. Removal jurisdiction exists under CAFA over (a) a class action complaint where, (b) there are at least 100 class members (§ 1332(d)(5)(b)), (c) any member of the plaintiff class is

diverse from any defendant (§ 1332(d)(2)), and (d) the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs (§ 1332(d)(2), (d)(6)). *Lowery*, 483 F.3d at 1194; *Lewis*, 2008 WL 3200273, at *3. CAFA expressly states that in considering the amount in controversy requirement in a class action, the requested relief of the class is to be aggregated to determine whether the \$5 million threshold is met. *See* 28 U.S.C. § 1332(d)(6). Plaintiffs' Third Amended Complaint, on its face, meets each of these jurisdictional requirements for CAFA removal:

a. Plaintiffs' Third Amended Complaint is a "Class Action" Removable under CAFA. In the Third Amended Complaint, Plaintiffs seek certification of a representative class action under Florida law. (TAC ¶¶ 44-50.) CAFA permits removal where, as here, a complaint initiates a "civil action under . . . *State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.*" 28 U.S.C. § 1332(d)(1)(B).

b. Plaintiffs Seek To Represent a Class in Excess of 100 Class Members.

Plaintiffs purport to represent a proposed class consisting of "[a]ll all persons who have received Defendant's stem-cell therapy as marketed by Defendant *and RMS* from its Tampa, Florida principal place of business for the four years prior to the filing of the initial class action complaint." (TAC ¶ 44.) Plaintiffs estimate the class size to consist of "thousands of persons." (TAC ¶ 46.)

c. The Putative Class Members and RMS are Minimally Diverse. CAFA merely requires "minimal" diversity, which means that any class member is a citizen of a different state than any defendant. 28 U.S.C. § 1332(d)(2), (5). To determine whether minimal diversity exists, the citizenship of all class members (including putative), both named and unnamed, is

considered. 28 U.S.C. § 1332(d)(1)(D); *Lowery*, 483 F.3d at 1194 n.24 (11th Cir. 2007) (“[F]or purposes of establishing jurisdiction [under CAFA], only one member of the plaintiff class—named or unnamed—must be diverse from any one defendant.”). Here, minimal diversity exists between Plaintiff Rivero, who is a citizen of North Carolina (TAC ¶¶ 1, 7),³ and Defendant RMS, which is a citizen of Florida (where its principal place of business is located) and Delaware (where it was organized).

d. The Matter in Controversy Exceeds \$5 Million. While RMS strongly disputes Plaintiffs’ entitlement to recover any damages in this action, and while no class should be certified in this case, the CAFA amount in controversy is easily met.⁴ As the Eleventh Circuit has noted, “[a]ny inquiry into whether [a plaintiff] *would* actually recover these amounts is unnecessary and inappropriate. For the purposes of establishing jurisdiction, it is enough to show that he *could*.” *McDaniel v. Fifth Third Bank*, 568 F. App’x 729, 731-32 (11th Cir. 2014) (emphasis in original). “[U]nless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court.” *Id.* (internal citations omitted).

The \$5 million jurisdictional amount is met.

(1) According to Plaintiffs, the alleged class consists of “thousands of persons” who have been treated at the Lung Institute (TAC ¶ 46), and “[t]he cost of the procedures ranged from \$5,000 to \$12,500.” (TAC ¶ 18.) Plaintiffs allege that Rivero paid \$7,500 for her Lung Institute treatment, and Bennett paid \$6,500 for his treatment. (TAC ¶¶ 27,

³ Other putative class members also are citizens of different states than RMS. For example, Dale Frei, who was deposed on October 11, 2017 in the State Court Action, is a resident and citizen of Michigan.

⁴ RMS reserves all appropriate defenses, including but not limited to opposing the certification of any putative class. RMS also denies any and all liability of any kind and denies that Plaintiffs or any purported putative class member are entitled to any damages or other relief.

32.) Because Plaintiffs are seeking, among other things, “the actual damages of Plaintiffs and Putative Class Members” (TAC at page 12), which Plaintiffs equate with the cost of the procedures,⁵ multiplying the TAC’s lowest end of the cost per procedure range (\$5,000) by the number of alleged class members (“thousands”) would exceed the \$5 million amount in controversy.

(2) In Count II of the Third Amended Complaint, Plaintiffs also seek “an amount equal to treble the actual damages of Plaintiff and Putative Class Members.” (TAC at page 14.) Trebling the most conservative alleged “actual damages” amount discussed in the preceding paragraph would vastly exceed the \$5 million amount.

(3) Plaintiffs also seek their attorney’s fees, which would further exceed the \$5 million jurisdictional amount. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007) (“[W]here an underlying statute authorizes an award of attorneys’ fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy.”) (quoting *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)); *Reilly v. Amy’s Kitchen, Inc.*, 2 F. Supp. 3d 1300, 1305 (S.D. Fla. 2014).

(4) In the State Court Action, on September 6, 2017, Plaintiffs served a “Proposal for Settlement” on Lung Institute, offering to resolve the State Court Action for ***\$10 million***:

⁵ In response to an interrogatory (No. 12), Plaintiff Rivero provided the following itemization of her (and putative class members’) actual damages claim on November 1, 2017:

ANSWER: Ms. Rivero is personally claiming \$7,500. For each and every patient of the Lung Institute . . . Ms. Rivero as putative class representative is claiming actual damages = the amounts spent on “treatments” and any “supplemental treatments” of so sold/performed by the Lung Institute.

(11-1-17 Pl’s Am. Resp. to Def’s Am. Resp. to Second Set of Interrogs. at 1.)

4. Plaintiffs, TAMMY RIVERO, et al., propose settlement to occur upon payment from LUNG INSTITUTE, LLC the total sum of TEN MILLION and 00/100 DOLLARS (\$10,000,000.00) to Plaintiffs. There are no non-monetary terms of this proposal.

(See **Exhibit B** hereto.) Thus, Plaintiffs have no legitimate basis to contest that the CAFA amount in controversy threshold is met.

12. In conjunction with the filing of this Notice of Removal, pursuant to Rule 4.02(b) of the Local Rules of the United States District Court for the Middle District of Florida, RMS is filing a copy of all process, pleadings, orders, and other papers or exhibits of every kind, then on file in the State Court Action.

13. This Notice of Removal is filed within 30 days after RMS received notice of the Third Amended Complaint, filed on December 15, 2017. As such, the Notice of Removal is timely filed within the period prescribed in 28 U.S.C. § 1446(b).

14. Written notice of the filing of this Notice of Removal will be given to Plaintiffs as required by law.

15. Pursuant to 28 U.S.C. § 1446(d), a true and correct copy of this Notice will be filed with the Clerk of the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida as provided by law.

16. This Notice of Removal is filed subject to and with full reservation of rights. No admission of fact, law or liability is intended by this Notice of Removal, and all defenses, motions and pleas are expressly reserved.

WHEREFORE, Defendant RMS requests that this Court accept jurisdiction of the action, and that the action be placed on the docket of this Court for further proceedings, the same as though the action had originally been instituted in this Court.

Dated: December 29, 2017

Respectfully submitted,

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EXHIBIT A

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

TAMMY RIVERO, AND
HOWARD BENNETT

Individually, and On Behalf of All
Others Similarly Situated,

Plaintiffs,

v.

Case Number: 16-CA-7765
Division: F

LUNG INSTITUTE, LLC

CLASS REPRESENTATION

Defendant.

THIRD AMENDED COMPLAINT

Plaintiffs, TAMMY RIVERO and HOWARD BENNETT, individually and on behalf of all others similarly situated (hereinafter “Plaintiffs” and “Putative Class Members”), by and through the undersigned attorneys, bring this action on behalf of herself, himself, and other former and present patients of Defendant LUNG INSTITUTE, LLC (“Lung Institute”), pursuant to the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), and other violations of Florida state law to recover damages, attorney’s fees, and costs, and states as follows:

I.
PARTIES

1. At all times pertinent to this action, Plaintiff TAMMY RIVERO, an individual, was and is a resident of Burke County, North Carolina.

2. At all times pertinent to this action, Plaintiff HOWARD BENNETT, an individual, was and is a resident of 6415 Curtiss Lane, Spring Hill, Hernando County, Florida 34608.

3. At all times pertinent to this action, Defendant, LUNG INSTITUTE, LLC was and is a company incorporated in the State of Delaware and authorized to conduct business in Florida.

Defendant's principal place of business is in Hillsborough County and is located at 201 E. Kennedy Blvd., Ste. 425, Tampa, Florida 33602.

4. Defendant's registered agent for service of process is James St. Louis III ("Jimmy St. Louis III"), 201 E. Kennedy Blvd., Ste. 425, Tampa, Florida, 33602.

5. At all times relevant to this action Defendant engaged in acts or practices in the conduct of "trade or commerce" as defined in Fla. Stat. § 501.203(8).

II.
JURISDICTION & VENUE

6. This is an action for damages in excess of Fifteen Thousand Dollars (\$15,000.00) excluding interest, attorney's fees and costs.

7. Plaintiff Tammy Rivero is a resident of Burke County, North Carolina.

8. Plaintiff Howard Bennett is a resident of Hernando County, Florida.

9. Defendant's breaches of duty, tortious activity, misleading statements, and deceptive scheme emanated from within Hillsborough County, Florida; thus, this cause of action arises within the jurisdiction of this court and venue is proper.

10. Defendant is operating, present, and/or doing systematic and continuous business within this jurisdiction such that its nerve center is located in Tampa, Florida.

III.
GENERAL ALLEGATIONS

11. Defendant is a company that operates medical offices in the State of Florida, as well as throughout the United States.

12. Defendant provides "stem cell" therapy procedures that purport to treat a litany of serious diseases, including chronic obstructive pulmonary disease ("COPD"), Interstitial Lung Disease, Hypersensitivity Pneumonitis, Sarcoidosis, Osteoarthritis, Rheumatoid Arthritis, Lupus, and even Crohn's Disease.

13. Defendant, through its advertising, promotes procedures that promise to “regenerate, repair, or regrow” lung tissue and “heal degenerating organs.”

14. Defendant is essentially a marketing company masquerading as a medical “institute.” Defendant intentionally circumvents FDA regulation by purporting to inject patients’ own “stem cells” back into their bodies. During the course of its operation, Defendant has offered at least three purported “stem cell” treatments to the general public under the representation and auspices that these procedures are effective. Specifically, Defendant has offered “venous” procedures, “bone marrow” procedures, and “adipose” procedures.

(a) In the “venous” procedure, Defendant takes a blood draw from the patient, runs the blood through a centrifuge, and then reinjects the very same blood into the patients’ blood stream. There is no evidence that any stem cells are extracted from the peripheral blood and no evidence that the very same cells extracted from the patient’s body have any beneficial effect on any pulmonary disease.

(b) Similarly, Defendant’s “bone marrow” procedure involves the removal of a small amount of the patient’s bone marrow fluid, along with the patient’s blood, which is then re-injected into the patient’s own body. Defendant solely relies on “anecdotal” evidence in support of the efficacy of its procedures. Not a single double blind, placebo-controlled study and not a single piece of medical literature supports the efficacy of any of Defendant’s “stem cell” procedures.

(c) In the “adipose” procedure, adipose tissue, composed predominately of body fat, is removed from the patient. Defendant purported to isolate “stem cells” from the patient’s adipose tissue, which is then reintroduced into the patient’s body. Defendant no longer administers this procedure and at least one clinic in Florida unrelated to Defendant has been shut down for providing so-called adipose stem cell therapy.

15. From 2013 to the present the Defendant urged prospective patients through their convoluted, deceptive marketing, advertising and targeted sales calls, and through other events hosted throughout the United States, including seminars and webinars, to become patients of the Lung Institute and to pay for and undergo procedures.

16. Defendant employs doctors which are held out as being “medical directors” of various locations; however, they are independent contractors, they are not pulmonologists, they rarely if ever perform the procedures, and are they are paid exorbitant salaries to keep patients from backing out or complaining on the web about the failure of the procedures. They allow their credentials to be used to prop up the legitimacy of this enterprise, and essentially work for the marketing team, which is employed by RMS. They read scripts for marketing videos and contact patients at the behest and direction of “Patient Coordinators” who are bonused and commissioned salespeople.

17. Defendant has caused marketing materials and advertisements of the Lung Institute’s services to be disseminated to consumers in Florida, and throughout the United States.

18. The cost of the procedures ranged from \$5,000 to \$12,500. Defendant additionally markets “supportive therapies,” which are represented to be necessary for the continuing efficacy of the underlying and unproven service. These supportive therapies, such as “Growth Factor” and “Stemtrition,” were and are marketed by Defendant to Plaintiff and the putative class members at costs up to and in excess of \$500.00 per month.

19. Defendant also markets additional “stem cell” procedures to existing patients which are represented as increasing or continuing the efficacy of its sham treatments.

20. Each patient was and is responsible for paying the full cost of any procedure or treatment, as the Lung Institute did not accept health insurance, Medicare, or Medicaid. Moreover, health insurance, Medicare, and Medicaid refuse to provide coverage for these sham services.

21. Defendant urged and assisted prospective patients who could not afford the cost of Defendant's procedures to raise the funds through bake sales, Kickstarter campaigns, cash-out home refinancing and other fund-raising activities.

22. From 2013 to present, the Lung Institute has generated millions of dollars from persons in Florida who have become patients and undergone its advertised procedures. Regenerative Medicine Solutions, LLC, ("RMS"), through the Lung Institute, is currently making approximately \$2,000,000 per month.

23. By and through Defendant's marketing materials and expressions made by representatives of the Lung Institute, the Defendant has made numerous express and implied deceptive and false representations, including, but not limited to, the following:

a) Defendant's "stem cell" and other "supportive therapies," such as "Growth Factor" and "Stemtrition" are effective treatment for COPD, Emphysema, Chronic Bronchitis, Interstitial Lung Disease, Pulmonary Fibrosis, Bronchiectasis, and Pneumoconiosis.

b) Defendant's "stem cell" and other "supportive therapies" will promote and/or cause organ or tissue regeneration or regrowth, specifically of the lungs, thereby treating, slowing, and/or curing patient's underlying pulmonary condition;

24. On or about April 2014, Plaintiff, Ms. Tammy Rivero (Ms. Rivero), presented to the Lung institute's Tampa, Florida office location.

25. On or about April 2014, Ms. Rivero complained of breathing problems and has a previous diagnosis of lung disease.

26. On or about April 2014, Ms. Rivero was evaluated by staff members of the Lung Institute, who concluded that she was a candidate for Defendant's stem cell therapy. Defendant made false and deceptive representations to Ms. Rivero regarding the efficacy of Defendant's procedures.

27. Ms. Rivero paid \$7,500 to the Lung Institute to undergo the “venous” procedure. Plaintiff was encouraged to, and did, take out a home equity loan to pay for the procedure.

28. Defendant further represented to Ms. Rivero that she would be off supplemental oxygen therapy following the procedure.

29. Defendant additionally represented to Ms. Rivero that she would require additional “supplemental therapy” injections, at additional cost.

30. Subsequent to Defendant’s procedure, Ms. Rivero did not and has not had any improvement in her symptoms or condition.

31. On or about January 18, 2016, Plaintiff, Mr. Howard Bennett (Mr. Bennett), presented to the Lung institute’s Tampa, Florida office location.

32. Mr. Bennett paid the \$6,500 to the Lung Institute to undergo the “venous” procedure. Mr. Bennett paid for the remaining \$6000 balance with his credit card on the day of the procedure after previously paying a \$500 deposit.

33. Defendant represented to Mr. Bennett that he would have a “reduced need for supplemental oxygen,” “increased pulmonary function,” “reduced need for additional medications,” and that the procedure would “repair damaged lung tissue,” and “arrest the progression of the disease.”

34. Subsequent to Defendant’s procedure, Mr. Bennett did not and has not had any improvement in his symptoms or condition.

IV.
ALTER EGO, INSTRUMENTALITY, AND DE FACTO DEFENDANT ALLEGATIONS

35. RMS now has a confederation of nationwide stem cell clinics with satellite locations consisting of LUNG INSTITUTE, LLC, LUNG INSTITUTE SCOTTSDALE, LLC; LUNG INSTITUTE DALLAS, PLLC; LUNG INSTITUTE NASHVILLE, PLLC; and LUNG INSITUTE PITTSBURGH, PLLC (collectively “Lung Institute Facilities”). Lung Institute, LLC, was a mere

instrumentality and alter ego of its parent REGENERATIVE MEDICINE SOLUTIONS, LLC, (“RMS”), the executives, managers, and shareholders of RMS in conjunction with RMS dominated and controlled Lung Institute, LLC, and all other Lung Institute Facilities.

36. RMS, along with the shareholders of RMS, fabricated multiple Lung Institute entities as described above to create a firewall and degree of separation between RMS and the stem cell treatments performed by the Lung Institute Facilities to avoid liability between RMS and the Lung Institute Facilities. RMS operated the multiple Lung Institute Facilities as the medical division of a parent marketing corporation.

37. Jimmy St. Louis, III, along with other RMS shareholders, executives, managers, employees, and agents of RMS, directed and controlled the employees, agents and contractors of all Lung Institute Facilities. RMS required the proceeds generated by the multiple Lung Institute Facilities to be paid to RMS. RMS treated and considered revenue by the Lung Institute Facilities as revenue generated by RMS.

38. The Lung Institute Facilities were required to adhere to all management, policy, and organizational decisions as dictated to them through RMS, its shareholders, executives, managers, and employees.

39. RMS was part of the leadership team that made decisions regarding: treatments, products, services, marketing strategy, compensation plans, incentives, contests, patient treatment, patient care and other matters. In addition, RMS shareholders, executives, managers, and employees were directly and actively involved in decisions to develop, market, and administer so-called “stem cell therapies”.

40. RMS dominated and controlled all Lung Institute Facilities to such an extent that the companies’ existence were in fact non-existent and the RMS shareholders along with RMS as a whole were in fact alter egos of the multiple Lung Institute Facilities.

41. The corporate form was used for an improper purpose, to circumvent liability; and the improper use of the corporate form caused injury to the Plaintiff and Putative Class Members.

42. Additionally, RMS has officiously inserted itself into the litigation of this case through the domination and control as described above. Parties may become de facto party defendants if they have control of the defense in furtherance of their own interest and enjoy all the rights of actual parties.¹

43. RMS is a de facto party as it controls the litigation brought against Lung Institute, LLC. RMS is paying for Lung Institute, LLC's defense and RMS has designated two corporate representatives, both of whom are not employees or contractors of the defendant. One of Defendant's representatives is an employee and executive of RMS and not an employee of the any Lung Institute facility, LLC. The other designated corporate representative is a contractor for Lung Institute Nashville, PLLC. RMS enjoys all of the rights of the actual defendant in this case, Lung Institute, LLC.

V.
CLASS REPRESENTATION ALLEGATIONS

44. Pursuant to Florida Rule of Civil Procedure 1.220(b)(1)(B) and 1.220(b)(3), Plaintiffs TAMMY RIVERO AND HOWARD BENNETT brings this suit on behalf of all persons who have received Defendant's stem-cell therapy as marketed by Defendant and RMS from its Tampa, Florida principal place of business for the four years prior to the filing of the initial class action complaint.

45. This Class shall consist of: All persons who underwent Defendant's venous, adipose and/or bone marrow "stem cell" therapy, and/or supplemental therapies, for the four years prior to the filing of the initial complaint at the Lung Institute facility located in Tampa, Florida and owned in whole or in part by RMS.

¹ *RHPC, Inc. v. Gardner*, 533 So. 2d 312, 314 (Fla. 2d DCA 1988) (citing *Cartwright v. Atlas Chemical Industries, Inc.*, 623 P.2d 606 (Okla.1981)).

46. Plaintiffs allege on information and belief that the number of Class members is so numerous that joinder of all putative class members is impractical. Defendant has been engaged in the aggressive marketing of its “stem cell” therapy for a number of years, emanating from Defendant’s alter ego RMS, and Defendant’s profit from the aggressive marketing of their unproven therapy is believed to generate approximately \$2,000,000.00 each month combined from all Lung Institute Facilities. RMS has circulated marketing materials claiming to have treated at least 3,000 patients since its inception. Based on these facts, Plaintiff believes that Defendant has induced thousands of persons into receiving Defendant’s unproven therapy during the course of Defendant’s operation.

47. The number and identity of this Class is easily ascertained from the records of Defendant and its alter ego RMS upon the commencement of discovery in this matter.

48. These claims raise questions of law and fact that are common to each of the Putative Class Members. Specifically, the central issues raised by this action are the Defendant’s knowing, reckless or negligent, and misleading claims as to the efficacy of their “stem cell” treatments, including: venous, adipose and bone marrow procedures, and supplemental therapies. Defendant, through its alter ego RMS, utilizes a standardized marketing model to convey that its procedures will “repair, regenerate, or regrow” lung tissue to the Putative Class Members, including printed materials, standardized webinar and seminar presentations, and established talking-points.

49. The Class Representatives’ claims are typical of the claim(s) of each member of the Class. The Class Representatives are Florida residents who will fairly and adequately protect and represent the interest of each member of the Class, each is fully cognizant of his or her responsibilities as Class Representatives and has retained experienced counsel fully capable of, and intent upon, the vigorous prosecution of this action.

50. Further, the common questions of law and fact, as alleged more fully below, predominate over any question of law or fact affecting only individual members of the Class and the

prosecution of separate claims by individual Class members would create a risk of multiple and potentially inconsistent judgments and/or verdicts. Class treatment is, therefore, clearly superior to other available methods and the only fair and efficient means by which this controversy may be adjudicated.

COUNT I:
DECEPTIVE AND UNFAIR TRADE PRACTICES

51. Plaintiffs re-allege the allegations set forth in paragraphs (1) through (50) above, as if set forth herein.

52. Florida's Deceptive and Unfair Trade Practices Act, Chapter 501 of the Florida Statutes, is to be liberally construed to protect the consuming public from those who engage in unfair methods of competition, as well as unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce.

53. Plaintiff and Putative Class Members are consumers within the meaning of Fla. Stat. § 501.203(7) and have not been involved in any business giving rise to the unfair or deceptive transaction.

54. Defendant engages in "trade or commerce" within the meaning of Fla. Stat. § 501.203(8).

55. While FDUTPA does not define "deceptive" and "unfair," it incorporates by reference the Federal Trade Commission's ("FTC") interpretations of these terms. Under the federal statute, an unfair or deceptive practice is that which "'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'"²

56. Defendant Lung Institute through its alter ego RMS, targeted the elderly through advertisements to the general public that Defendant's procedures were effective treatment for lung

²*Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001) (citing *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir. 1976)).

diseases, of whom the Plaintiffs and putative class members are members. At the time these claims were made, Defendant had knowledge that no scientifically credible evidence supported Defendant's statements that lung tissue could be "repaired, replaced, or regenerated" through its procedures. Defendant failed to inform Plaintiffs and putative class members that no credible evidence existed to support the effectiveness of the procedures they aggressively marketed.

57. Defendant sold, marketed, and administered stem cell therapy procedures that had no basis in medicine and had no possibility of effectively treating Plaintiff and putative class members' lung diseases.

58. Defendant through its alter ego RMS created a scheme and mechanism of using doctors, commissioned sales people, and existing or former patients to recruit and deceive new patients into undergoing procedures. Once ensnared in Defendant's web, potential patients were encouraged to ask Defendant's doctors and cherry-picked patients for favorable testimonials. Unbeknownst to potential patients, other than the victims of Defendant's conduct, all participants in the Defendant's scheme were financially motivated to see new patients sign up for and undergo treatments.

59. Commissioned sales people known as "Patient Coordinators" are directly paid commissions based on the amount charged for each procedure sold. Existing and former patients are used as shills and rewarded with free and discounted procedures. Defendant's doctors are encouraged to assuage potential patient questions about Defendant's lack of scientific rigor by using deceptive marketing language approved by the marketing department.

60. Defendant has willfully engaged in the acts and practices alleged herein when Defendant knew or should have known that said acts and practices were unfair, deceptive, or prohibited by rule.

61. Through the Defendant's deceptive advertising related to said procedures as alleged herein, Defendant has committed acts and practices in trade or commerce which shock the

conscience, offend public policy, and are immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; acts and practices which are material and are likely to mislead consumers acting reasonably under the circumstances.

62. Deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. The practice employed by Defendant was likely to deceive a consumer acting reasonably in the same circumstances.

63. In engaging in the above conduct, defendant committed an unfair and deceptive trade practice and as a direct and proximate result of Defendant's deceptive trade practices, Plaintiffs and putative class members were deceived into believing that the Lung Institute's procedures were medically sound and effective, causing significant economic damage to Plaintiffs and putative class members.

64. Pursuant to Fla. Stat. §§ 501.211(2) and 501.2105, Plaintiffs and putative class members are entitled to recover from Defendant the reasonable amount of attorney's fees Plaintiffs and putative class members have incurred in representing their interests in this matter.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC and the de facto defendant, its alter ego RMS, in an amount equal to the actual damages of Plaintiffs and Putative Class Members injured by reason of the violations alleged above, award reasonable attorney's fees and costs, and any other relief this Court deems proper.

COUNT II.
CIVIL REMEDIES FOR CRIMINAL PRACTICES, FLORIDA STATUTE 772.104(1)

65. Plaintiffs re-allege the allegations set forth in paragraphs (1) through (50) above, as if set forth herein.

66. Defendant and its employees and/or agents conspired with Regenerative Medicine Solutions LLC, endeavored, and with criminal intent to receive proceeds directly from the pattern of

criminal activity described in predicate acts throughout this Complaint. Specifically, Defendant, its alter ego RMS, violated Florida Statute 825.103 through the exploitation of an elderly person or disabled adult. Defendant and its alter ego RMS stood in a position of trust and confidence with an elderly or disabled person, as alleged under Count III below, and knowingly obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult.

67. As described herein, the Lung Institute's very existence is premised on sham science and deception. In the case of the venous procedure, the Lung Institute knows none of its scientific literature supports any claim that the procedure is effective for treating any disease. The procedure bears no resemblance to any procedure cited by its scientific literature. For all procedures, the Defendant knows its procedures do not work as claimed, a.k.a. the "anecdotal" evidence the Defendant touts.³ It bears repeating that there is no medical literature and no human studies that support Defendant's procedures.⁴ Defendant continues to hyper-aggressively market these techniques for pecuniary gain alone.

68. Lung Institute, LLC in combination with its alter ego Regenerative Medicine Solutions, LLC, ("RMS"), and co-conspirators all Lung Institute Facilities and the employees, agents, or contractors of said facilities including: Burton Feinerman, M.D., in his capacity as former medical director of Lung Institute, LLC; Jack Coleman, M.D. in his capacity as medical director of

³ The venous and bone marrow treatments are the only two procedures the Lung Institute currently offers, as it discontinued its "adipose" procedure when an unaffiliated Florida clinic that offered it was subjected to a government shutdown.

⁴ The only published study Defendant even holds out in support of its procedure was performed on rodents with Mesenchymal Stem Cells, and there is no evidence the stem cell trapped in the lung of the rodent regenerated any tissue. The doctor who performed the study has since expressly disclaimed any use of his study to support stem cell "therapies" such as those the Defendant offers.

LUNG INSTITUTE NASHVILLE, PLLC; Jimmy St. Louis III in his capacity as CEO of RMS and principal manager of Lung Institute, LLC; Michael Perry, M.D. in his capacity as owner of LUNG INSITUTE PITTSBURGH, PLLC, and principal manager of LUNG INSTITUTE SCOTTSDALE, LLC; Mark Flood, D.O. in his capacity as managing member of LUNG INSTITUTE DALLAS, PLLC; James St. Louis Jr. in his former capacity as Chief Medical Officer of RMS and agent of Lung Institute, LLC; and Ann Miller in her capacity as employee of RMS, devised the scheme, and committed the acts alleged herein in the establishment and operation of its enterprise. It enriched and continues to enrich itself with the cash contributions of elderly, suffering victims to the tune of millions monthly. The Defendant was established to provide the procedures and follow-up “treatment” described in paragraphs 1-34, and they constitute Defendant’s entire operation.

69. Defendant’s existence itself is an open-ended, ongoing pattern of illegal activity. Further, the very nature of Defendant’s business is deceptive, and was created to mislead elderly consumers, a group which encompasses Plaintiffs.

70. These acts committed by defendant have a clear relationship to one another, as they are all based on the same scheme and mechanism of misleading elderly and disabled consumers as to the basis and efficacy of Defendant’s procedures.

WHEREFORE, Plaintiff demands that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, and the de facto defendant, its alter ego RMS, in an amount equal to treble the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney’s fees and costs, and any other relief this Court deems proper.

COUNT III.
BREACH OF FIDUCIARY DUTY

71. Plaintiff re-alleges the allegations set forth in paragraphs (1) through (50) above, as if set forth herein.

72. A fiduciary relationship exists where confidence is reposed on one side and there is resulting superiority and influence on the other. The relations and duties involved need not be legal, but may be moral, social, domestic, and merely personal.⁵

73. As an entity posing as a medical facility treating patients, Defendant owed and owes a fiduciary duty to its patients. This duty extends beyond non-concealment, but also requires candor and communication of unbiased factual information.

74. By its failure to disclose the worthlessness of its stem cell “treatments” and the consequent worthlessness of any “supplemental” treatments, Defendant breached that duty.

75. Defendant failed to disclose to patients the existence of any scientific evidence that did not support the Defendant’s claims even though Defendant knew a majority of the scientific literature available on the subject did not support the Defendant’s claims. Defendant selected the only few favorable scientific studies that existed which it could skew to support its claims and only disclosed that seemingly favorable information to patients in a deceptive and misleading manner.⁶

76. Defendant knew or should have known that the overwhelming weight of scientific evidence did not support the claim that Defendant’s procedures “repaired, regenerated, replaced, or slowed the progression” of any diseases claimed as treated by Defendant’s procedures. Defendant never disclosed and actively deceived patients through its failure to state that no human studies showed its “stem cell” procedures were effective in treating any disease claimed treated by Defendant.

77. Defendant failed to inform its patients about the differences in type, or kind, of stem cells that would be used in its procedures. Defendant actively misled patients into believing that the treatments it sold were of the same kind and nature as the procedures used in whatever scientific studies it based its sham treatments, Defendant failed disclose how the type, or kind, of stem cells

⁵ *Jacobs v. Vaillancourt*, 634 So. 2d 667, 670 (Fla. 2d DCA 1994).

⁶ Defendant’s claims about procedure efficacy were based on a single study showing a reduction of inflammation in the lungs of rodents and anecdotal evidenced based on internal surveys.

related to the purported science Defendant claimed supported its procedures. Defendant failed to fully inform patients and disclose unbiased information regarding its procedures.

78. Defendant concealed the commission and payment structure used to incentivize its “patient coordinators.” Patients had no knowledge that Patient Coordinators were commissioned sales people, directly financially incentivized to ensure patients would undergo Defendant’s procedures.

79. Defendant referred new potential patients to Lung Institute patients that previously underwent the Lung Institute stem cell treatments to persuade new patients to undergo the marketed stem cell treatments. Throughout its sales process Defendant never disclosed that existing patients were incentivized through discounts and free procedures to provide testimonials.

80. Due to that breach, Plaintiffs have and continue to expend thousands of dollars on Defendant’s therapies.

WHEREFORE, Plaintiff demands damages against Defendant LUNG INSTITUTE, LLC, and the de facto defendant, its alter ego RMS for breach of fiduciary duty and such other relief this Court deems just and proper.

COUNT IV.
CIVIL CONSPIRACY

81. Plaintiff re-alleges the allegations set forth in paragraphs (1) through (50) above, as if set forth herein.

82. Defendant LUNG INSTITUTE, LLC, Regenerative Medicine Solutions, LLC, (“RMS”), and co-conspirators all Lung Institute Facilities and the employees, agents, or contractors of said facilities including: Burton Feinerman, M.D., in his capacity as former medical director of Lung Institute, LLC; Jack Coleman, M.D. in his capacity as medical director of LUNG INSTITUTE NASHVILLE, PLLC; Jimmy St. Louis III in his capacity as CEO of RMS and principal manager of Lung Institute, LLC; Michael Perry, M.D. in his capacity as owner of LUNG INSITUTE

PITTSBURGH, PLLC, and principal manager of LUNG INSTITUTE SCOTTSDALE, LLC; Mark Flood, D.O. in his capacity as managing member of LUNG INSTITUTE DALLAS, PLLC; James St. Louis Jr. in his former capacity as Chief Medical Officer of Lung Institute, LLC; and Ann Miller in her capacity as employee of RMS, are parties to a civil conspiracy.

83. Defendant conspired to do a lawful act by unlawful means with Co-conspirators by creating a scheme and mechanism to sell its sham treatments with the guise that the treatments were supported by new cutting-edge science. The scheme and mechanism consisted of having RMS find potential patients by targeting the sick and elderly through webinars, google advertisements, email campaigns and other marketing efforts.

84. RMS used all Lung Institute Facilities as a de facto medical arm solely created to sell potential patients its sham treatments. RMS generated leads through its targeted marketing and culled its leads for value by placing them into categories. Potential patients with the ability to pay were considered the highest value. RMS employed Patient Coordinators, which were trained to hyper-aggressively target and sell treatments to these “high value” sick and elderly people. The sick and elderly in this scheme were unwitting victims being deceived into believing the defendant was a medical institute providing treatments supported by sound science.

85. As mentioned throughout this Complaint, there is no science to support Defendant’s claims that its stem cell procedures are effective to treat any of the claimed diseases.

86. The doctors employed at Defendant’s clinics were called Medical Directors, however, these directors were trained, coached, and monitored by the sales and marketing employees of RMS, including, but not limited to, Jimmy St. Louis III and Ann Miller. The Medical Directors, led by Jack Coleman, M.D, do not typically perform procedures, but instead are used to assuage potential patient’s fears about the lack of scientific rigor in Defendant’s treatments. Former Chief Medical Officer James St. Louis, D.O., and the other doctors employed by Defendant both past and present

were/are simply used as marketing tools by RMS, brought in to help close sales and give Defendant a patina of scientific backing.

87. Jimmy St. Louis III is both the CEO of RMS and the principal manager of Lung Institute, LLC. Jimmy St. Louis III is the puppet master pulling the strings behind Defendant and Co-conspirators. Jimmy St. Louis III created RMS and contemporaneously purchased the entity that would become the Lung Institute, LLC from with Burton Feinerman, M.D. Jimmy St. Louis III in combination with Burton Feinerman and other subsequent Medical Directors created the sham treatments sold by Defendant through RMS.

88. Jimmy St. Louis III operates and oversees all the Lung Institute Facilities as CEO of RMS. RMS is an umbrella company that holds itself out as having the same locations as the Lung Institute, with the addition of Peru. RMS and Burton Feinerman, M.D. arranged for “stem cell” treatments that are specifically not allowed in the US to take place abroad, and many of these treatments shock the conscience. As part of Defendants’ collective “movement”, RMS facilitates “stem cell” brain surgery on children.

89. The Defendant and Co-conspirators have subsequently separated themselves from association with Burton Feinerman, M.D. in order to distance the remaining Co-conspirators from the unambiguous quackery emanating from Burton Feinerman regarding the soundness of the procedures he created. The Defendant still uses the procedures created by Burton Feinerman to treat patients.

90. Dr. Michael Perry, who lives in Tampa, was paid to keep his license on the wall at the Lung Institute’s facilities, including in Arizona, to provide Defendant Lung Institute an air of legitimacy. Dr. Mark Flood had the same type of agreement with RMS for the Lung Institute Dallas facility. Upon information and belief, Dr. Flood has disavowed having any knowledge of the operation of the Lung Institute Dallas facility even though he is listed as a the Principal manager of the entity.

91. Defendant owed a duty to plaintiffs to protect the plaintiffs from deception and sham treatments as described in this Complaint.

92. Defendant committed an overt act in furtherance of the conspiracy, by selling sham treatments, including the acts described in paragraphs under Count III above & Count IV herein.

93. Defendant's conspiracy and its respective overt acts caused Plaintiffs to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant LUNG INSTITUTE, LLC, and the de facto defendant, its alter ego RMS for civil Conspiracy and such other relief this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury of all issues so triable.

DATED this 15th day of December 2017.

RESPECTFULLY SUBMITTED:

/s/ Ben Vinson
BEN A. VINSON, JR.
Florida Bar No. 95227
ben@vinsonlawoffice.com

VINSON LAW PL
505 E. Jackson Street, Ste. 305
Tampa, FL 33602
Phone: (813) 839-5708
Fax: (813) 831-5043
Attorney for Plaintiffs

EXHIBIT B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

TAMMY RIVERO,

Individually, and On Behalf of All
Others Similarly Situated,

Plaintiffs,

v.

CASE NO.: 16-CA-7765

Division: F

LUNG INSTITUTE, LLC

PUTATIVE CLASS ACTION

Defendant.

NOTICE OF SERVICE OF PROPOSAL FOR SETTLEMENT

Pursuant to Rule 1.442 of the Florida Rules of Civil Procedure and §768.79 (2016) of the Florida Statutes, Plaintiffs, TAMMY RIVERO, et al., by and through its undersigned counsel, hereby gives notice of serving a proposal for settlement upon the Defendant, Lung Institute, LLC.

Respectfully submitted:

/s/ Ben A. Vinson, Jr.
Ben Vinson, Esq. (FL #95227)
VINSON LAW PL
505 E. Jackson Street, Ste. 305
Tampa, FL 33602
Phone: (813) 839-5708
Fax: (813) 831-5043
Ben@vinsonlawoffice.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court E-Filing Portal, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Ben A. Vinson, Jr.
Ben Vinson, Esq.

IN THE CIRCUIT COURT OF THE
13TH JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

TAMMY RIVERO,

Individually, and On Behalf of All
Others Similarly Situated,

Plaintiffs,

v.

CASE NO.: 16-CA-7765

Division: F

LUNG INSTITUTE, LLC

PUTATIVE CLASS ACTION

Defendant.

PROPOSAL FOR SETTLEMENT

Pursuant to Rule 1.442 of the Florida Rules of Civil Procedure and §768.79 (2016) of the Florida Statutes, Plaintiffs, TAMMY RIVERO, et al., makes this proposal for settlement to Defendant LUNG INSTITUTE, LLC:

1. This proposal is made by Plaintiffs, TAMMY RIVERO, et al., to Defendant LUNG INSTITUTE, LLC.

2. This proposal is intended to resolve any and all claims against LUNG INSTITUTE, LLC that are being made, or may be made, by Plaintiffs, TAMMY RIVERO, et al., in the instant action as alleged by Plaintiffs' Second Amended Complaint, and is intended to resolve all damages that would otherwise be awarded in a final judgment in the action which the proposal is served, subject to subdivision (f) of Rule 1.442 of the Florida Rules of Civil Procedure. This proposal is to include all direct and derivative causes of action that are, or may be, maintainable by Plaintiffs against LUNG INSTITUTE, LLC. Dismissal is with Prejudice.

3. The relevant conditions of this proposal are that Plaintiffs will file a Notice of Voluntary Dismissal with Prejudice. Defendant will deliver a settlement release draft (“Settlement Release”) to Plaintiffs’ counsel within twenty (20) days of receipt of Defendant’s acceptance of this proposal.

4. Plaintiffs, TAMMY RIVERO, et al., propose settlement to occur upon payment from LUNG INSTITUTE, LLC the total sum of TEN MILLION and 00/100 DOLLARS (\$10,000,000.00) to Plaintiffs. There are no non-monetary terms of this proposal.

5. If the motion for class certification is denied, allocation of settlement proceeds will occur as per the terms of the Settlement Release for all named Plaintiffs.

6. If the motion for class certification is granted, class wide allocation of settlement proceeds will occur as per terms of Settlement Release and in compliance with Florida Rule of Civil Procedure 1.220(e), governing dismissal or compromise in class actions.

7. There is currently no pending claim for punitive damages; however, the amount set forth in paragraph 4 is deemed to include consideration for the payment of any potential claim for punitive damages which is to be released.

8. This proposal is to include any and all attorney’s fees and costs of Plaintiffs.

9. Pursuant to Florida Rule of Civil Procedure 1.442(f)(2), this proposal shall be deemed to be rejected unless it is accepted by the delivery of written notice of acceptance within thirty (30) days after the date the order granting or denying class certification is filed.

10. Failure of the Defendant to accept this Proposal may result in appropriate sanctions being imposed upon the Defendant by the Court, including costs, expenses, and reasonable attorneys’ fees as provided for by section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442, in the event that the judgment is at least 25% more than the offer.

Respectfully submitted:

/s/ Ben A. Vinson, Jr.
Ben Vinson, Esq. (FL #95227)
VINSON LAW PL
505 E. Jackson Street, Ste. 305
Tampa, FL 33602
Phone: (813) 839-5708
Fax: (813) 831-5043
Ben@vinsonlawoffice.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court E-Filing Portal, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Ben A. Vinson, Jr.
Ben Vinson, Esq. (FL #95227)

FORM 1.997. CIVIL COVER SHEET

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form shall be filed by the plaintiff or petitioner for the use of the Clerk of the Court for the purpose of reporting judicial workload data pursuant to Florida Statutes section 25.075.

I. CASE STYLE

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
 IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

Case No.: _____
 Judge: _____

Tammy Rivero
 Plaintiff

vs.

LUNG INSTITUTE, LLC
 Defendant

II. TYPE OF CASE

- | | |
|---|--|
| <ul style="list-style-type: none"> <input type="checkbox"/> Condominium <input type="checkbox"/> Contracts and indebtedness <input type="checkbox"/> Eminent domain <input type="checkbox"/> Auto negligence <input type="checkbox"/> Negligence – other <ul style="list-style-type: none"> <input type="checkbox"/> Business governance <input type="checkbox"/> Business torts <input type="checkbox"/> Environmental/Toxic tort <input type="checkbox"/> Third party indemnification <input type="checkbox"/> Construction defect <input type="checkbox"/> Mass tort <input type="checkbox"/> Negligent security <input type="checkbox"/> Nursing home negligence <input type="checkbox"/> Premises liability – commercial <input type="checkbox"/> Premises liability – residential <input type="checkbox"/> Products liability <input type="checkbox"/> Real Property/Mortgage foreclosure <ul style="list-style-type: none"> <input type="checkbox"/> Commercial foreclosure \$0 - \$50,000 <input type="checkbox"/> Commercial foreclosure \$50,001 - \$249,999 <input type="checkbox"/> Commercial foreclosure \$250,000 or more <input type="checkbox"/> Homestead residential foreclosure \$0 – 50,000 <input type="checkbox"/> Homestead residential foreclosure \$50,001 - \$249,999 <input type="checkbox"/> Homestead residential foreclosure \$250,000 or more <input type="checkbox"/> Non-homestead residential foreclosure \$0 - \$50,000 <input type="checkbox"/> Non-homestead residential foreclosure \$50,001 - \$249,999 <input type="checkbox"/> Non-homestead residential foreclosure \$250,00 or more | <ul style="list-style-type: none"> <input type="checkbox"/> Other real property actions \$0 - \$50,000 <input type="checkbox"/> Other real property actions \$50,001 - \$249,999 <input type="checkbox"/> Other real property actions \$250,000 or more <input type="checkbox"/> Professional malpractice <ul style="list-style-type: none"> <input type="checkbox"/> Malpractice – business <input type="checkbox"/> Malpractice – medical <input type="checkbox"/> Malpractice – other professional <input checked="" type="checkbox"/> Other <ul style="list-style-type: none"> <input type="checkbox"/> Antitrust/Trade Regulation <input type="checkbox"/> Business Transaction <input checked="" type="checkbox"/> Circuit Civil - Not Applicable <input type="checkbox"/> Constitutional challenge-statute or ordinance <input type="checkbox"/> Constitutional challenge-proposed amendment <input type="checkbox"/> Corporate Trusts <input type="checkbox"/> Discrimination-employment or other <input type="checkbox"/> Insurance claims <input type="checkbox"/> Intellectual property <input type="checkbox"/> Libel/Slander <input type="checkbox"/> Shareholder derivative action <input type="checkbox"/> Securities litigation <input type="checkbox"/> Trade secrets <input type="checkbox"/> Trust litigation |
|---|--|

COMPLEX BUSINESS COURT

This action is appropriate for assignment to Complex Business Court as delineated and mandated by the Administrative Order. Yes No

III. REMEDIES SOUGHT (check all that apply):

- Monetary;
- Non-monetary
- Non-monetary declaratory or injunctive relief;
- Punitive

IV. NUMBER OF CAUSES OF ACTION: ()
(Specify)

5

V. IS THIS CASE A CLASS ACTION LAWSUIT?

- Yes
- No

VI. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?

- No
- Yes – If “yes” list all related cases by name, case number and court:

VII. IS JURY TRIAL DEMANDED IN COMPLAINT?

- Yes
- No

I CERTIFY that the information I have provided in this cover sheet is accurate to the best of my knowledge and belief.

Signature s/ Ben A Vinson Jr. FL Bar No.: 95227
Attorney or party

(Bar number, if attorney)

Ben A Vinson Jr. 08/17/2016
(Type or print name)

Date

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

TAMMY RIVERO,

Individually, and On Behalf Of All
Others Similarly Situated,

Plaintiffs,

v.

Case Number:
Division:

LUNG INSTITUTE, LLC

CLASS ACTION COMPLAINT

Defendant.

_____ /

COMPLAINT

Plaintiffs, TAMMY RIVERO individually and on behalf of all others similarly situated (hereinafter “Plaintiffs” and “Putative Class Members”), by and through the undersigned attorneys, bring this action on behalf of themselves and other former and present patients of Defendant LUNG INSTITUTE, LLC (“Lung Institute”), pursuant to the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), and other violations of Florida state law to recover damages, attorney’s fees, and costs, and states as follows:

I.
PARTIES

1. At all times pertinent to this action, Plaintiff TAMMY RIVERO, an individual, was and is a resident of Burke County, North Carolina.

2. At all times pertinent to this action, Defendant, LUNG INSTITUTE, LLC was and is a company incorporated in the State of Delaware and authorized to conduct business in Florida. Defendant’s principal place of business is in Hillsborough County and is located at 201 E. Kennedy Blvd., Ste. 425, Tampa, Florida 33602.

3. Defendant's registered agent for service of process is James St. Louis, 201 E. Kennedy Blvd., Ste. 425, Tampa, Florida, 33602.

4. At all times relevant to this action Defendant engaged in acts or practices in the conduct of "trade or commerce" as defined in Fla. Stat. § 501.203(8).

II.
JURISDICTION & VENUE

5. This is an action for damages in excess of Fifteen Thousand Dollars (\$15,000.00) excluding interest, attorney's fees and costs.

6. Plaintiff Tammy Rivero is a resident of Burke County, North Carolina.

7. Defendant's breaches of duty and tortious activity occurred within Hillsborough County, Florida; thus, this cause of action arises within the jurisdiction of this court.

8. Defendant is operating, present, and/or doing business within this jurisdiction.

III.
GENERAL ALLEGATIONS

9. Defendant is a company that operates medical offices in the State of Florida, as well as throughout the United States.

10. Defendant provides "stem cell" therapy treatments for various lung diseases, including COPD, emphysema, and interstitial lung disease.

11. Defendant, through its advertising, promotes procedures that promise to "heal degenerating organs".

12. The Defendant is essentially a marketing company masquerading as a medical "Institute". The Defendant intentionally circumvents FDA regulation by injecting patients' own "stem cells" back into their bodies. In the case of the "venous" procedure, the Defendant is not even injecting stem cells back into the patients' bloodstream. As for the "adipose" procedure, which Defendant no longer administers, at least one clinic in Florida unrelated to Defendant has been shut

down for administering it. In the case of the most expensive of these three, the “bone marrow” procedure, only “anecdotal” evidence in any way supports the efficacy of the procedure. Not a single double blind, placebo-controlled study and not a single piece of medical literature supports the efficacy of any of Defendant’s “stem cell” procedures.

13. From 2013 to the present the Defendant urged prospective patients through their convoluted, deceptive marketing and advertising, and through other events hosted throughout the United States, to become patients of the Lung Institute and to pay for and undergo procedures.

14. Defendants have caused marketing materials and advertisements of the Lung Institute’s services to be disseminated to consumers in Florida, and throughout the United States.

15. The cost of the procedures ranged from \$5,000 to \$12,000. For subsequent “supportive” therapies such as “Growth Factor”, the Plaintiffs often incur monthly costs of \$500 and up. The Lung Institute even has and had the audacity to offer “Veteran Discounts” in order to defraud the men and women who have served our country.

16. Each patient was and is responsible for paying the full cost of the procedure, as the Lung Institute did not accept health insurance, Medicare, or Medicaid.

17. The Defendant urged and assisted prospective patients who could not afford the cost of the procedure to raise the funds through bake sales, Kickstarter campaigns, cash-out home refinancing and other fund-raising activities.

18. Since 2013 to present, the Lung Institute has generated millions of dollars from persons in Florida who have become patients and undergone its advertised procedures. The Lung Institute is currently making at least \$2,000,000 per month.

19. By and through their marketing materials and expressions made by representatives of the Lung Institute, the Defendant has expressly or by implication misrepresented the following:

a) That its “Stem Cell” and “supportive” therapies such as Growth Factor are effective treatment for COPD, Emphysema, Chronic Bronchitis, Interstitial Lung Disease, Pulmonary Fibrosis, Bronchiectasis, and Pneumoconiosis.

b) That its patients will be able to get “off oxygen”, and will see any improvement whatsoever from these alleged therapies.

20. On or about April 2014 Plaintiff, Mrs. Tammy Rivero, presented to the Lung Institute’s Tampa office location.

21. On or about April 2014 she complained of breathing problems and has a previous diagnosis of lung disease.

22. On or about April 2014 Plaintiff was evaluated by staff members of the Lung Institute, who concluded that she was a candidate for stem cell “therapy”.

23. Plaintiff paid \$7,500 to the Lung Institute to undergo the procedure. Mrs. Rivero was encouraged to, and did take out a home equity loan to pay for the procedure.

24. On or about April 2014 Plaintiff gave her authorization and consent to allow the Lung Institute in Tampa to perform the procedure.

25. She was told that she would be off her supplemental oxygen therapy within “a few weeks”. Subsequent to the procedure, Plaintiff did not and has not noticed any improvement in her symptoms.

26. To add insult to injury, Plaintiff was informed that in order to “keep her stem cells working” that she needed to pay an additional \$70 per month for shots to “reboost” them. She could not afford these useless treatments because Defendant told her she would only need to pay \$7,500, so that is the home equity loan amount she withdrew. Because Mrs. Rivero could not afford the additional charges the Defendant essentially blamed her for the ineffectiveness of its procedure.

27. Plaintiff’s condition has now worsened to the point that she cannot work.

COUNT I:
DECEPTIVE AND UNFAIR TRADE PRACTICES

28. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

29. Florida's Deceptive and Unfair Trade Practices Act, Chapter 501 of the Florida Statutes, is to be liberally construed to protect the consuming public from those who engage in unfair methods of competition, as well as unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce.

30. Plaintiffs are consumers within the meaning of Fla. Stat. § 501.203(7).

31. Defendant engages in "trade or commerce" within the meaning of Fla. Stat. § 501.203(8).

32. While FDUTPA does not define "deceptive" and "unfair", it incorporates by reference the Federal Trade Commission's ("FTC") interpretations of these terms. Under the federal statute, an unfair or deceptive practice is that which "'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001) (citing *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir. 1976)).

33. Defendant Lung Institute represented to Plaintiffs that their procedures were effective treatment for lung diseases. They had knowledge that no evidence other than "anecdotal" evidence supported such efficacy. They failed to inform Plaintiffs that no credible evidence existed to support the effectiveness of the procedures they aggressively marketed.

34. Defendant sold, marketed, and administered stem cell therapy procedures that had no basis in medicine and had no possibility of effectively treating Plaintiffs' lung diseases.

35. Defendant has willfully engaged in the acts and practices alleged herein when Defendant knew or should have known that said acts and practices were unfair, deceptive, or prohibited by rule.

36. Through the Defendant's advertising misrepresentations related to said procedures as alleged herein, Defendant has committed acts and practices in trade or commerce which shock the conscience, offend public policy, and are immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; acts and practices which are material and are likely to mislead consumers acting reasonably under the circumstances.

37. As a direct and proximate result of Defendant's deceptive trade practices, Plaintiffs were deceived into believing that the Lung Institute's procedures were medically sound and effective, causing significant economic damage to Plaintiffs.

38. Pursuant to Fla. Stat. §§ 501.211(2) and 501.2105, Plaintiffs are entitled to recover from Defendant the reasonable amount of attorney's fees Plaintiffs have incurred in representing their interests in this matter.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

COUNT II:
FRAUDULENT INDUCEMENT

39. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

40. Defendant, by acts of both omission and commission, made false statements concerning material facts about the capabilities, stability, products, medical capability, and services

of Defendant, which induced Plaintiffs to pay for and undergo stem cell therapy procedures with the Defendant.

41. Defendant knew at the time Plaintiffs underwent the stem cell procedures that the statements and omissions about the capability of the procedures were false.

42. Defendant intended that Plaintiffs be induced by its false statements so that Plaintiffs would deposit funds with the Lung Institute and undergo the procedure.

43. In the course of depositing funds for and entrusting Defendant to perform the stem cell therapy procedures, Plaintiffs reasonably and justifiably relied on statements of fact made to them by Defendant.

44. As a direct and proximate result of Plaintiffs' reliance on the statements and omissions made to them by Defendant, Plaintiffs have suffered damages.

WHEREFORE, Plaintiffs demand judgment for compensatory damages against Defendant LUNG INSTITUTE, LLC, for a sum in excess of Fifteen Thousand Dollars (\$15,000.00), including any interests and costs, and any other relief this Court deems proper.

**COUNT III:
NEGLIGENCE**

45. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

46. Defendant had a duty to its patients to exercise reasonable care consistent with accepted and prevailing professional standards of care and with that level of care, skill, and treatment recognized as acceptable, adequate, and appropriate by similar and reasonably careful care givers and health care providers, in its treatment of Plaintiffs.

47. Defendant breached its duty of care owed to Plaintiffs, in that it provided negligent diagnosis, care and treatment of Plaintiffs, including, but not limited to:

- a) Implementing policies and procedures, followed by the staff and physicians of the Lung Institute, which provide for therapies that have no credible support in the medical literature.
- b) Preparing documents and implementing policies and procedures, followed by the staff and physicians of the LUNG INSTITUTE, LLC, that were fraudulent, misdealing, and in violation of Florida Law.

48. Defendant failed to use the level of care, skill and treatment, in light of all surrounding circumstances, that is recognized as acceptable and appropriate by similar and reasonably careful health care providers.

49. The treatment and procedures involved in this case were not carried out in accordance with the prevailing professional standard of care recognized as acceptable and appropriate by similar and reasonably careful physicians and health care providers.

50. As a direct and proximate result of Defendant's negligence, Plaintiffs have suffered damages.

WHEREFORE, Plaintiffs demand judgment for compensatory damages against Defendant LUNG INSTITUTE, LLC, for a sum in excess of Fifteen Thousand Dollars (\$15,000.00), including any interests and costs, and any other relief this Court deems proper.

COUNT IV:
GROSS NEGLIGENCE

51. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) and forty-five (45) through fifty (50) above, as if set forth herein.

52. The Defendant and its officers, managers, and/or directors conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of

persons exposed to such conduct. Defendant knew its procedures were unsupported, yet proceeded to perform surgery with all its attendant risks on unwitting patients.

53. Thus, Defendant had actual knowledge of the wrongfulness of its conduct and the high probability that injury or damage to Plaintiffs would result.

54. Despite that knowledge, Defendant's intentionally administered the procedures.

55. Defendant's conduct damaged Plaintiffs. Plaintiffs suffered financially and physically.

56. The Defendant and its officers, managers, and/or directors actively and knowingly condoned, ratified, and/or consented to such conduct. They in fact actively participated in sales efforts when they knew the procedures were medically unsupported.

WHEREFORE, Plaintiffs demand judgment for compensatory damages against Defendant LUNG INSTITUTE, LLC, for a sum in excess of Fifteen Thousand Dollars (\$15,000.00), including any interests and costs, and any other relief this Court deems proper.

**COUNT V:
MISREPRESENTATION**

57. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

58. Defendant fraudulently and/or negligently misrepresented that its "stem cell" "treatment" and supposedly supportive therapies such as "growth factor" were effective therapies for lung disease, and/or negligently supplied false information regarding the success of such procedures, which caused Plaintiffs' harm.

59. Defendant knew that the statements were false when they made them. The Defendants knew that their procedures were unsupported by any medical literature and/or clinical studies. The Defendants were and are making too much money to care.

60. Defendant intended that Plaintiffs would rely on such false statements.

61. Plaintiffs did rely on Defendant's false statements.

62. Plaintiffs assuredly would not have paid for and undergone the Defendant's stem cell therapy procedures but for the Defendant's false statements.

63. As a direct and proximate result of Defendant's misrepresentation of a material fact, Plaintiffs have suffered damages, both pecuniary and physical in nature.

WHEREFORE, Plaintiffs demand judgment for compensatory damages against Defendant LUNG INSTITUTE, LLC, for a sum in excess of Fifteen Thousand Dollars (\$15,000.00), including any interests and costs, and any other relief this Court deems proper.

VI.
JURY TRIAL DEMAND

Plaintiff demands a trial by jury of all issues so triable.

DATED this 17th day of August, 2016.

RESPECTFULLY SUBMITTED:

/s/ Ben Vinson

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Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

TAMMY RIVERO,

Individually, and On Behalf Of All
Others Similarly Situated,

Plaintiffs,

v.

Case Number: 16-CA-7765
Division: F

LUNG INSTITUTE, LLC

CLASS ACTION COMPLAINT

Defendant.

_____ /

AMENDED COMPLAINT

Plaintiffs, TAMMY RIVERO individually and on behalf of all others similarly situated (hereinafter “Plaintiffs” and “Putative Class Members”), by and through the undersigned attorney, bring this action on behalf of themselves and other former and present patients of Defendant LUNG INSTITUTE, LLC (“Lung Institute”), pursuant to the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), and other violations of Florida state law to recover damages, attorney’s fees, and costs, and states as follows:

I.
PARTIES

1. At all times pertinent to this action, Plaintiff TAMMY RIVERO, an individual, was and is a resident of Burke County, North Carolina.

2. At all times pertinent to this action, Defendant, LUNG INSTITUTE, LLC was and is a company incorporated in the State of Delaware and authorized to conduct business in Florida. Defendant’s principal place of business is in Hillsborough County and is located at 201 E. Kennedy Blvd., Ste. 425, Tampa, Florida 33602.

3. Defendant's registered agent for service of process is James St. Louis, 201 E. Kennedy Blvd., Ste. 425, Tampa, Florida, 33602.

4. At all times relevant to this action Defendant engaged in acts or practices in the conduct of "trade or commerce" as defined in Fla. Stat. § 501.203(8).

II.
JURISDICTION & VENUE

5. This is an action for damages in excess of Fifteen Thousand Dollars (\$15,000.00) excluding interest, attorney's fees and costs.

6. Plaintiff Tammy Rivero is a resident of Burke County, North Carolina.

7. Defendant's breaches of duty and tortious activity occurred within Hillsborough County, Florida; thus, this cause of action arises within the jurisdiction of this court.

8. Defendant is operating, present, and/or doing business within this jurisdiction.

III.
GENERAL ALLEGATIONS

9. Defendant is a company that operates medical offices in the State of Florida, as well as throughout the United States.

10. Defendant provides "stem cell" procedures that purport to treat a litany of serious diseases, including COPD, Interstitial Lung Disease, Hypersensitivity Pneumonitis, Sarcoidosis, Osteoarthritis, Rheumatoid Arthritis, Lupus, and even Crohn's Disease.

11. Defendant, through its advertising, promotes procedures that promise to "heal degenerating organs".

12. The Defendant is essentially a marketing company masquerading as a medical "institute". The Defendant intentionally circumvents FDA regulation by injecting patients' own "stem cells" back into their bodies. In the case of the "venous" procedure, the Defendant is not even

injecting stem cells back into the patients' bloodstream.¹ As for the "adipose" procedure, which Defendant no longer administers, at least one clinic in Florida unrelated to Defendant has been shut down for administering it. In the case of the most expensive of these three, the "bone marrow" procedure, only "anecdotal" evidence in any way supports the efficacy of the procedure. Not a single double blind, placebo-controlled study and not a single piece of medical literature supports the efficacy of any of Defendant's "stem cell" procedures.

13. From 2013 to the present the Defendant urged prospective patients through their convoluted, deceptive marketing and advertising, and through other events hosted throughout the United States, to become patients of the Lung Institute and to pay for and undergo procedures.

14. Defendants have caused marketing materials and advertisements of the Lung Institute's services to be disseminated to consumers in Florida, and throughout the United States.

15. The cost of the procedures ranged from \$5,000 to \$12,000. For subsequent "supportive" therapies such as "Growth Factor" and "Stemtrition", the Plaintiffs often incur monthly costs of \$500 and up. The Lung Institute even has and had the audacity to offer "Veteran Discounts" in order to defraud the men and women who have served our country.

16. Each patient was and is responsible for paying the full cost of the procedure, as the Lung Institute did not accept health insurance, Medicare, or Medicaid.

17. The Defendant urged and assisted prospective patients who could not afford the cost of the procedure to raise the funds through bake sales, Kickstarter campaigns, cash-out home refinancing and other fund-raising activities.

18. Since 2013 to present, the Lung Institute has generated millions of dollars from persons in Florida who have become patients and undergone its advertised procedures. The Lung Institute is currently making at least \$2,000,000 per month.

¹ There are no stem cells in the blood. Defendant's employees and/or agents simply withdraw the patients' blood, spin it in a centrifuge, inject it back into the patients' body, and according to the Defendant that somehow cures the serious diseases detailed in paragraph 10.

19. By and through their marketing materials and expressions made by representatives of the Lung Institute, the Defendant has expressly or by implication misrepresented the following:

- a) That its “Stem Cell” and “supportive” therapies such as “Growth Factor” and “Stemtrition” are effective treatment for COPD, Emphysema, Chronic Bronchitis, Interstitial Lung Disease, Pulmonary Fibrosis, Bronchiectasis, and Pneumoconiosis.
- b) That its patients will be able to get “off oxygen”, and will see improvement from these alleged therapies.

20. On or about April 2014 Plaintiff, Mrs. Tammy Rivero, presented to the Lung Institute’s Tampa office location.

21. On or about April 2014 she complained of breathing problems and has a previous diagnosis of lung disease.

22. On or about April 2014 Plaintiff was evaluated by staff members of the Lung Institute, who concluded that she was a candidate for stem cell “therapy”.

23. Plaintiff paid \$7,500 to the Lung Institute to undergo the procedure. Mrs. Rivero was encouraged to, and did take out a home equity loan to pay for the procedure.

24. On or about April 2014 Plaintiff gave her authorization and consent to allow the Lung Institute in Tampa to perform the procedure.

25. She was told that she would be off her supplemental oxygen therapy within “a few weeks”. Subsequent to the procedure, Plaintiff did not and has not noticed any improvement in her symptoms.

26. To add insult to injury, Plaintiff was informed that in order to “keep her stem cells working” that she needed to pay an additional \$70 per month for shots to “reboost” them. She could not afford these useless treatments because Defendant told her she would only need to pay \$7,500, so

that is the home equity loan amount she withdrew. Because Mrs. Rivero could not afford the additional charges the Defendant essentially blamed her for the ineffectiveness of its procedure.

27. Plaintiff's condition has now worsened to the point that she cannot work.

COUNT I:
DECEPTIVE AND UNFAIR TRADE PRACTICES

28. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

29. Florida's Deceptive and Unfair Trade Practices Act, Chapter 501 of the Florida Statutes, is to be liberally construed to protect the consuming public from those who engage in unfair methods of competition, as well as unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce.

30. Plaintiffs are consumers within the meaning of Fla. Stat. § 501.203(7).

31. Defendant engages in "trade or commerce" within the meaning of Fla. Stat. § 501.203(8).

32. While FDUTPA does not define "deceptive" and "unfair", it incorporates by reference the Federal Trade Commission's ("FTC") interpretations of these terms. Under the federal statute, an unfair or deceptive practice is that which "'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001) (citing *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir. 1976)).

33. Defendant Lung Institute represented to Plaintiffs that their procedures were effective treatment for lung diseases. They had knowledge that no evidence other than "anecdotal" evidence supported such efficacy. They failed to inform Plaintiffs that no credible evidence existed to support the effectiveness of the procedures they aggressively marketed.

34. Defendant sold, marketed, and administered stem cell therapy procedures that had no basis in medicine and had no possibility of effectively treating Plaintiffs' lung diseases.

35. Defendant has willfully engaged in the acts and practices alleged herein when Defendant knew or should have known that said acts and practices were unfair, deceptive, or prohibited by rule.

36. Through the Defendant's advertising misrepresentations related to said procedures as alleged herein, Defendant has committed acts and practices in trade or commerce which shock the conscience, offend public policy, and are immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers; acts and practices which are material and are likely to mislead consumers acting reasonably under the circumstances.

37. As a direct and proximate result of Defendant's deceptive trade practices, Plaintiffs were deceived into believing that the Lung Institute's procedures were medically sound and effective, causing significant economic damage to Plaintiffs.

38. Pursuant to Fla. Stat. §§ 501.211(2) and 501.2105, Plaintiffs are entitled to recover from Defendant the reasonable amount of attorney's fees Plaintiffs have incurred in representing their interests in this matter.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

**COUNT II:
FRAUDULENT INDUCEMENT**

39. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

40. Defendant, by acts of both omission and commission, made false statements concerning material facts about the capabilities, stability, products, medical capability, and services of Defendant, which induced Plaintiffs to pay for and undergo stem cell therapy procedures with the Defendant.

41. Defendant knew at the time Plaintiffs underwent the stem cell procedures that the statements and omissions about the capability of the procedures were false.

42. Defendant intended that Plaintiffs be induced by its false statements so that Plaintiffs would deposit funds with the Lung Institute and undergo the procedure.

43. In the course of depositing funds for and entrusting Defendant to perform the stem cell therapy procedures, Plaintiffs reasonably and justifiably relied on statements of fact made to them by Defendant.

44. As a direct and proximate result of Plaintiffs' reliance on the statements and omissions made to them by Defendant, Plaintiffs have suffered damages.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

COUNT III:
MISREPRESENTATION

45. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

46. Defendant fraudulently and/or negligently misrepresented that its "stem cell" "treatment" and supposedly supportive therapies such as "Growth Factor" and "Stemtrition" were effective therapies for lung disease, and/or negligently supplied false information regarding the success of such procedures, which caused Plaintiffs' harm.

47. Defendant knew that the statements were false when they made them. The Defendants knew that their procedures were unsupported by any medical literature and/or clinical studies. The Defendants were and are making too much money to care.

48. Defendant intended that Plaintiffs would rely on such false statements.

49. Plaintiffs did rely on Defendant's false statements.

50. Plaintiffs assuredly would not have paid for and undergone the Defendant's stem cell therapy procedures but for the Defendant's false statements.

51. As a direct and proximate result of Defendant's misrepresentation of a material fact, Plaintiffs have suffered damages.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

COUNT IV.
CIVIL REMEDIES FOR CRIMINAL PRACTICES, FLORIDA STATUTE 772.104(1)

52. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

53. Lung Institute, LLC and its employees and/or agents conspired, endeavored, and with criminal intent received proceeds received directly from the pattern of criminal activity described in paragraphs 1-27.

54. As described therein, the Lung Institute's very existence is predicated upon fraud. In the case of the venous procedure, the Lung Institute knows it is not injecting stem cells into the patients. And in the venous *and* bone marrow procedures, the Defendant knows that the procedures

do not work past the placebo effect, a.k.a. the “anecdotal” evidence the Defendant touts.² It bears repeating that there is no medical literature and no human studies that support Defendant’s procedures.³ Defendant continues to hyper-aggressively market these techniques for pecuniary gain alone.

55. Lung Institute, LLC committed the acts alleged herein in the establishment and operation of its enterprise. It enriched and continues to enrich itself with the cash contributions of elderly, suffering victims to the tune of millions monthly. The entity was established to provide the procedures and follow-up “treatment” described in paragraphs 1-27, and they constitute Defendant’s entire operation.

56. Defendant’s existence itself is an open-ended, ongoing pattern of criminal activity. Further, Defendant’s regular way of doing business is to defraud Plaintiffs.

57. These acts committed by defendant have a clear relationship to one another, as they are all based on the same fraudulent portrayal of their procedures’ efficacy.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to treble the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney’s fees and costs, and any other relief this Court deems proper.

COUNT V.
CONVERSION

58. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

² These two procedures are the only ones the Lung Institute currently offers, as it discontinued its “adipose” procedure when an unaffiliated Florida clinic that offered it was subjected to a government shutdown.

³ The only published study Defendant even holds out in support of its procedure was performed on rodents, and there is no evidence the stem cell trapped in the lung of the rodent regenerated any tissue. The doctor who performed the study has since expressly disclaimed any use of his study to support stem cell “therapies” such as those the Defendant offers.

59. Plaintiffs paid cash for their procedures. Unsurprisingly, neither Medicare nor insurance offer to reimburse any of Defendant's procedures, so Plaintiff and all putative class members paid specific cash monies capable of identification in the thousands.

60. Defendant asserted control over these monies by wrongful act inconsistent with Plaintiffs' ownership of them. Defendant is currently in possession of the monies of Plaintiffs.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

COUNT VI.
COMMUNICATIONS FRAUD ACT, FLORIDA STATUTE 817.034

61. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

62. Defendant engaged and continues to engage in a scheme to defraud Plaintiffs.

63. It has done so by aggressively marketing and/or to Plaintiffs advertising through the Internet, social media, seminars, and sales phone calls with an intent to defraud and collect monies from Plaintiffs.

64. Defendant has and continues to make representations that its placebo-effect procedures can get a majority of Plaintiffs who are on supplemental oxygen "off oxygen", and that they are effective treatment for COPD, interstitial lung disease, and other serious lung diseases.

65. Defendant obtained monies in the thousands from the Plaintiffs through its fraudulent communications.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class

Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

COUNT VII.
MISLEADING ADVERTISING, FLORIDA STATUTES 817.06, 817.41

66. Plaintiffs re-allege the allegations set forth in paragraphs one (1) through twenty-seven (27) above, as if set forth herein.

67. Defendant has and continues to make misleading statements to Plaintiffs.

68. It has done so by aggressively marketing and/or advertising to Plaintiffs through the Internet, social media, seminars, and sales phone calls.

69. Defendant has and continues to make such misleading statements that its placebo-effect procedures can get a majority of Plaintiffs who are on supplemental oxygen "off oxygen", and that they are effective treatment for COPD, interstitial lung disease, and other serious lung diseases.

70. Defendant knowingly and intentionally published and disseminated advertisements containing untrue, deceptive, and misleading statements concerning the efficacy of its procedures.

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant LUNG INSTITUTE, LLC, in an amount equal to the actual damages of Plaintiff and Putative Class Members injured by reason of the violations alleged above, award Plaintiffs reasonable attorney's fees and costs, and any other relief this Court deems proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury of all issues so triable.

DATED this 25th day of August, 2016.

RESPECTFULLY SUBMITTED:

/s/ Ben Vinson
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Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

TAMMY RIVERO,

Individually and On Behalf of All
Others Similarly Situated,

Plaintiffs,

Case No. 16-CA-007765

Division: F

vs.

LUNG INSTITUTE, LLC,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT

Defendant Lung Institute, LLC (“Defendant”), through its undersigned counsel, hereby answers and defends against the Second Amended Complaint (“SAC”) filed by Plaintiffs.

ANSWER

Defendant hereby answers the SAC, by correspondingly numbered paragraphs, as follows:

I. PARTIES

1. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation of this paragraph, and therefore denies the same.
2. Admitted.
3. Admitted.
4. Paragraph 4 is a legal conclusion to which no response is required.

II. JURISDICTION AND VENUE

5. Paragraph 5 sets forth Plaintiffs' characterization of the amount in controversy in this action, to which no response is required. To the extent that it is deemed an allegation of fact, it is hereby denied. Defendant denies specifically that the SAC adequately sets forth any cause of action upon which relief may be granted or that Plaintiffs are entitled to any relief from or against Defendant.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation in paragraph 6 of the SAC, and therefore denies the same.

7. Denied.

8. Admitted.

III. GENERAL ALLEGATIONS

9. Denied, except admitted only that Defendant operates a stem-cell therapy clinic in Tampa, Florida.

10. Denied, except admitted only that Defendant has provided or currently provides stem-cell therapy treatments to patients afflicted with Chronic Obstructive Pulmonary Disease ("COPD"), Interstitial Lung Disease, Hypersensitivity Pneumonitis, Sarcoidosis, Osteoarthritis, Rheumatoid Arthritis,¹ and Crohn's Disease.

11. Denied.

12. The first sentence of paragraph 12 is denied. The second sentence of paragraph 12 is denied. The third sentence of paragraph 12 is admitted to the extent that it alleges that Defendant has, at different times, offered different stem-cell therapy treatments to patients who

¹ Defendant has never offered stem-cell therapy treatments to patients afflicted with Rheumatoid Arthritis unless such patients were also afflicted with COPD.

are candidates for such treatments, but is otherwise denied. The fourth sentence of paragraph 12 is admitted.

(a) The first sentence of paragraph 12(a) is denied. The second sentence of paragraph 12(a) is denied.

(b) The first sentence of paragraph 12(b) is admitted. The second sentence of paragraph 12(b) is admitted. The third sentence of paragraph of 12(b) is denied, except admitted only that Defendant no longer administers the adipose stem-cell therapy procedure.

(c) The first sentence of paragraph 12(c) is denied. The second sentence of paragraph 12(c) is denied. The third sentence of paragraph 12(c) is denied.

13. Denied.

14. Admitted.

15. The first sentence of paragraph 15 is denied, except admitted only that the cost of Defendant's stem-cell therapy treatments range from \$2,500 to \$12,000. The second sentence of paragraph 15 is denied, except admitted only that Defendant previously offered supplemental products and services to certain patients. The third sentence of paragraph 15 is denied, except admitted only that Defendant historically made a case-by-case determination regarding supplements and recommended supplements to certain patients.

16. The first sentence of paragraph 16 is admitted. The second sentence of paragraph 16 is denied.

17. Denied, except admitted only that Defendant suggested various fundraising activities to certain patients.

18. The first sentence of paragraph 18 is admitted. The second sentence of paragraph 18 is denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. The first sentence of paragraph 23 is denied, except admitted only that Defendant received payments from a person who purportedly is Plaintiff's brother, John Martin, payments in the total amount of \$7,500.00. The second sentence of paragraph 23 is denied.

24. The SAC does not include a paragraph 24.

25. Denied.

26. Denied, except admitted only that, after Plaintiff's stem-cell therapy treatment and in connection with Plaintiff's discharge, Defendant recommended certain supplements to Plaintiff in an effort to increase Plaintiff's overall health.

27. Defendant is without knowledge sufficient to form an opinion as to the truth or falsity of the allegation in paragraph 27, and therefore denies the same.

IV. CLASS REPRESENTATION ALLEGATIONS

28. Paragraph 28 is a characterization of the purported action and contains conclusions of law, to which no response is required. To the extent a response is required, paragraph 28 is denied.

29. Paragraph 29 is a legal conclusion to which no response is required. To the extent a response is required, paragraph 29 is denied.

30. The first sentence of paragraph 30 is a legal conclusion to which no response is required. To the extent a response is required, the first sentence of paragraph 30 is denied. The second sentence of paragraph 30 is denied. The third sentence of paragraph 30 is denied.

31. Denied.

32. Denied.

33. The first sentence of paragraph 33 is denied. Defendant is without knowledge or information sufficient to form an opinion as to the truth or falsity of the second sentence of paragraph 33, and therefore denies the same.

34. Denied.

COUNT I: DECEPTIVE AND UNFAIR TRADE PRACTICES

35. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

36. Paragraph 36 is a legal conclusion to which no response is required.

37. Paragraph 37 is a legal conclusion to which no response is required.

38. Paragraph 38 is a legal conclusion to which no response is required.

39. Paragraph 39 contains legal conclusions to which no response is required.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 45, or to any relief whatsoever. Accordingly, the Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b)

award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT II: FRAUDULENT INDUCEMENT

46. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 51, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT III: MISREPRESENTATION

52. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 57, or to any relief whatsoever. Accordingly, the Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

**COUNT IV: CIVIL REMEDIES FOR CRIMINAL PRACTICES,
FLORIDA STATUTE 772.104(1)**

58. Defendant hereby incorporates by references its responses to paragraphs 1 through 27 as set forth above.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 63, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT V: CONVERSION

64. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

65. Denied.

66. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 66, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT VI: COMMUNICATIONS FRAUD ACT, FLORIDA STATUTE 817.034 AND MISLEADING ADVERTISING. FLORIDA STATUTES 817.06, 817.41

67. Defendant hereby incorporates by references its responses to paragraphs 1 through 27 as set forth above.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 71, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

AFFIRMATIVE DEFENSES

1. Plaintiffs' SAC fails to state any claim upon which relief can be granted.
2. Plaintiffs' claims are barred in whole or in part by applicable statutes of limitations.
3. Plaintiffs' fraud-related claims are not pled with the requisite specificity required under Florida Rule of Civil Procedure 1.120(b).

4. Plaintiffs' claims are barred in whole or in part because they were waived.
5. Plaintiffs' claims are barred in whole or in part by the doctrine of release.
6. Plaintiffs' claims are barred in whole or in part by the doctrine of estoppel.
7. Plaintiffs' claims are barred in whole or in part by the doctrine of accord and satisfaction.
8. Plaintiffs' claims are barred in whole or in part by the doctrine of comparative negligence.

Dated this 24th day of October, 2016.

/s/ Nicholas E. Williams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to the following by electronic mail on October 24, 2016:

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Attorney for Plaintiff

/s/ Nicholas E. Williams
Attorney

**IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION**

TAMMY RIVERO,

Individually and On Behalf of All
Others Similarly Situated,

Plaintiffs,

Case No. 16-CA-007765

Division: F

vs.

LUNG INSTITUTE, LLC,

Defendant.

**ANSWER AND AMENDED AFFIRMATIVE DEFENSES
TO SECOND AMENDED COMPLAINT**

Defendant Lung Institute, LLC (“Defendant”), through its undersigned counsel, hereby answers and defends against the Second Amended Complaint (“SAC”) filed by Plaintiffs.

ANSWER

Defendant hereby answers the SAC, by correspondingly numbered paragraphs, as follows:

I. PARTIES

1. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation of this paragraph, and therefore denies the same.

2. Admitted.

3. Admitted.

4. Paragraph 4 is a legal conclusion to which no response is required.

II. JURISDICTION AND VENUE

5. Paragraph 5 sets forth Plaintiffs' characterization of the amount in controversy in this action, to which no response is required. To the extent that it is deemed an allegation of fact, it is hereby denied. Defendant denies specifically that the SAC adequately sets forth any cause of action upon which relief may be granted or that Plaintiffs are entitled to any relief from or against Defendant.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegation in paragraph 6 of the SAC, and therefore denies the same.

7. Denied.

8. Admitted.

III. GENERAL ALLEGATIONS

9. Denied, except admitted only that Defendant operates a stem-cell therapy clinic in Tampa, Florida.

10. Denied, except admitted only that Defendant has provided or currently provides stem-cell therapy treatments to patients afflicted with Chronic Obstructive Pulmonary Disease ("COPD"), Interstitial Lung Disease, Hypersensitivity Pneumonitis, Sarcoidosis, Osteoarthritis, Rheumatoid Arthritis,¹ and Crohn's Disease.

11. Denied.

12. The first sentence of paragraph 12 is denied. The second sentence of paragraph 12 is denied. The third sentence of paragraph 12 is admitted to the extent that it alleges that Defendant has, at different times, offered different stem-cell therapy treatments to patients who

¹ Defendant has never offered stem-cell therapy treatments to patients afflicted with Rheumatoid Arthritis unless such patients were also afflicted with COPD.

are candidates for such treatments, but is otherwise denied. The fourth sentence of paragraph 12 is admitted.

(a) The first sentence of paragraph 12(a) is denied. The second sentence of paragraph 12(a) is denied.

(b) The first sentence of paragraph 12(b) is admitted. The second sentence of paragraph 12(b) is admitted. The third sentence of paragraph of 12(b) is denied, except admitted only that Defendant no longer administers the adipose stem-cell therapy procedure.

(c) The first sentence of paragraph 12(c) is denied. The second sentence of paragraph 12(c) is denied. The third sentence of paragraph 12(c) is denied.

13. Denied.

14. Admitted.

15. The first sentence of paragraph 15 is denied, except admitted only that the cost of Defendant's stem-cell therapy treatments range from \$2,500 to \$12,000. The second sentence of paragraph 15 is denied, except admitted only that Defendant previously offered supplemental products and services to certain patients. The third sentence of paragraph 15 is denied, except admitted only that Defendant historically made a case-by-case determination regarding supplements and recommended supplements to certain patients.

16. The first sentence of paragraph 16 is admitted. The second sentence of paragraph 16 is denied.

17. Denied, except admitted only that Defendant suggested various fundraising activities to certain patients.

18. The first sentence of paragraph 18 is admitted. The second sentence of paragraph 18 is denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. The first sentence of paragraph 23 is denied, except admitted only that Defendant received payments from a person who purportedly is Plaintiff's brother, John Martin, payments in the total amount of \$7,500.00. The second sentence of paragraph 23 is denied.

24. The SAC does not include a paragraph 24.

25. Denied.

26. Denied, except admitted only that, after Plaintiff's stem-cell therapy treatment and in connection with Plaintiff's discharge, Defendant recommended certain supplements to Plaintiff in order to increase the effectiveness of the stem-cell therapy procedure and Plaintiff's overall health.

27. Defendant is without knowledge sufficient to form an opinion as to the truth or falsity of the allegation in paragraph 27, and therefore denies the same.

IV. CLASS REPRESENTATION ALLEGATIONS

28. Paragraph 28 is a characterization of the purported action and contains conclusions of law, to which no response is required. To the extent a response is required, paragraph 28 is denied.

29. Paragraph 29 is a legal conclusion to which no response is required. To the extent a response is required, paragraph 29 is denied.

30. The first sentence of paragraph 30 is a legal conclusion to which no response is required. To the extent a response is required, the first sentence of paragraph 30 is denied. The second sentence of paragraph 30 is denied. The third sentence of paragraph 30 is denied.

31. Denied.

32. Denied.

33. The first sentence of paragraph 33 is denied. Defendant is without knowledge or information sufficient to form an opinion as to the truth or falsity of the second sentence of paragraph 33, and therefore denies the same.

34. Denied.

COUNT I: DECEPTIVE AND UNFAIR TRADE PRACTICES

35. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

36. Paragraph 36 is a legal conclusion to which no response is required.

37. Paragraph 37 is a legal conclusion to which no response is required.

38. Paragraph 38 is a legal conclusion to which no response is required.

39. Paragraph 39 contains legal conclusions to which no response is required.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 45, or to any relief whatsoever. Accordingly, the Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT II: FRAUDULENT INDUCEMENT

46. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 51, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT III: MISREPRESENTATION

52. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 57, or to any relief whatsoever. Accordingly, the Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

**COUNT IV: CIVIL REMEDIES FOR CRIMINAL PRACTICES,
FLORIDA STATUTE 772.104(1)**

58. Defendant hereby incorporates by references its responses to paragraphs 1 through 27 as set forth above.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 63, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT V: CONVERSION

64. Defendant hereby incorporates by reference its responses to paragraphs 1 through 27 as set forth above.

65. Denied.

66. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 66, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

COUNT VI: COMMUNICATIONS FRAUD ACT, FLORIDA STATUTE 817.034 AND MISLEADING ADVERTISING. FLORIDA STATUTES 817.06, 817.41

67. Defendant hereby incorporates by references its responses to paragraphs 1 through 27 as set forth above.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

WHEREFORE, Defendant denies that Plaintiffs are entitled to the relief requested in its unnumbered *ad damnum* paragraph after paragraph 71, or to any relief whatsoever. Accordingly, Defendant respectfully requests that the Court (a) deny Plaintiffs' claims in their entirety; (b) award Defendant costs and attorneys' fees incurred in defending this action; and (c) grant such other and further relief as the Court deems proper.

AFFIRMATIVE DEFENSES

1. To the extent Plaintiffs purportedly comprise class members whose claims accrued more than two years ago, those claims are barred in whole or in part by the statute of limitations set forth in *Florida Statutes* § 95.11(4)(b), which provides a two-year statute of limitations for “actions for medical malpractice.” An “action for medical malpractice” is “a claim in tort or in contract for damages because of . . . monetary loss to any person arising out of any medical . . . treatment, or care by any provider of health care.” FLA. STAT. § 95.11(4)(b). In this case, Plaintiffs allege that Defendant’s stem-cell therapy treatments were not effective and gave rise to her claims. Although Plaintiffs characterize their tort and contract claims as fraudulent inducement, misrepresentation, and conversion, each claim seeks to recover monetary loss arising out of allegedly ineffective medical treatments. Plaintiffs’ purported claims therefore fall within the ambit of the two-year statute of limitations set forth in *Florida Statutes* § 95.11(4)(b). Because some alleged class members received stem-cell therapy treatment from Defendant more than 2 years prior to the filing of this action, those alleged class members’ claims arising in contract or tort are barred by *Florida Statutes* § 95.11(4)(b) two-year statute of limitations.

2. Plaintiffs’ fraud-related claims are not pled with the specificity required under Florida Rule of Civil Procedure 1.120(b). Plaintiffs allege that Defendant “has made numerous express and implied deceptive and false representations,” (SAC ¶ 19), in support of counts for fraudulent inducement (Count II), misrepresentation (Count III), civil remedies for criminal practices (Count IV), and communications fraud (Count VI). Such claims must be pled with particularity. *See Fla. R. Civ. P. 1.120(b); see also Morgan v. W.R. Grace & Co.-Conn.*, 779 So. 2d 503, 506 (Fla. 2d DCA 2000) (concluding that “the requirement that fraud be pleaded with

specificity also applies to claims for negligent misrepresentation.”). This requires, among other things, that Plaintiffs identify, at a minimum: (a) the precise statements, documents, or misrepresentations made; (b) the time and place of the statements, documents, or misrepresentations; (c) the person or persons who made or prepared the statements, documents, or misrepresentations; (d) the content of the statements, documents, or misrepresentations; (e) the manner in which the statements, documents, or misrepresentations misled the plaintiff; and (f) what Defendant gained as a result of the statements, documents, or misrepresentations. *See, e.g., Batlemento v. Dove Foundation, Inc.*, 593 So. 2d 234, 238 (Fla. 5th DCA 1991); and *Gordon v. Etue, Wardlaw & Co., P.A.*, 511 So. 2d 384, 386 (Fla. 1st DCA 1987) (disagreed with, in part, on other grounds). Plaintiffs have failed to satisfy these requirements and thus have failed to adequately plead their claims under applicable Florida law.

3. “There can be no conversion where a person consents to the possession by another of the assets allegedly converted.” *See, e.g., In re General Plastics Corp.*, 184 B.R. 996, 1004 (S.D. Fla. Bankr. 1995). Here, Plaintiffs’ Count V alleges that Defendant converted money that plaintiffs voluntarily paid to Defendant. Accordingly, Plaintiffs’ claim for conversion fails.

4. Plaintiffs’ claim asserted in Count VI fails to state a claim to the extent it is predicated upon *Florida Statutes* §§ 817.034 and 817.06 because those statutes do not give rise to a private right of action.

5. Plaintiffs’ claims are barred in whole or in part because they were waived. Plaintiffs purportedly comprise a class of “[a]ll persons who underwent Defendant’s venous, adipose and/or bone marrow ‘stem cell’ therapy, and/or supplemental therapies, in the State of Florida for the four years prior to the filing of the initial complaint.” Thus, to the extent the class

includes former patients who entered into agreements thereby knowingly and voluntarily waiving their claims against Defendant, Plaintiffs' claims are barred.

6. Plaintiffs' claims are barred in whole or in part by the doctrine of release. Plaintiffs purportedly comprise a class of "[a]ll persons who underwent Defendant's venous, adipose and/or bone marrow 'stem cell' therapy, and/or supplemental therapies, in the State of Florida for the four years prior to the filing of the initial complaint." Thus, to the extent the class includes former patients who entered into agreements releasing their claims against Defendant, Plaintiffs' claims are barred.

7. Plaintiffs' claims are barred in whole or in part by the doctrine of estoppel.

First, prior to undergoing any stem-cell therapy procedure, each of Defendant's patients, including Plaintiffs, signed an Informed Consent that discussed the potential risks associated with the stem-cell therapy procedure, including the risk that such treatments may not be effective. Thus, Plaintiffs should be estopped from bringing the claims presented in this case. *Cf.* FLA. STAT. § 766.103 (barring certain actions against medical professionals where the patient gave his or her informed consent to the procedure).

Moreover, many putative class members including Plaintiff Rivero did not participate in the entire treatment process that was recommended by Defendant in connection with its stem-cell therapy treatments. To monitor a patient's progress following a stem-cell therapy treatment, Defendant's regular practice is to contact each patient after a certain period of time. Defendant explains to each patient, during pre-treatment consultations, the importance of such post-treatment consultations. During these follow-ups, Defendant reminds patients of certain important activities, such as breathing exercises, and Defendant evaluates the treatment's effect on the patient. Depending on the results of these follow-ups, Defendant sometimes

recommends to the patient additional treatment steps, such as a second stem-cell therapy treatment. Plaintiff Rivero did not participate in any post-treatment consultation and did not provide Defendant with the information necessary to evaluate Plaintiff's post-treatment condition. Any Plaintiff's refusal to participate in the full treatment program as recommended by Defendant should estop Plaintiff's claims, which allege that Plaintiff "did not and has not had any improvement in her symptoms or condition" "[s]ubsequent to Defendant's procedure." (SAC ¶ 27.)

Finally, Plaintiffs purportedly comprise a class of "[a]ll persons who underwent Defendant's venous, adipose and/or bone marrow 'stem cell' therapy, and/or supplemental therapies, in the State of Florida for the four years prior to the filing of the initial complaint." The doctrine of estoppel precludes Plaintiffs from pursuing claims on behalf of such former patients to the extent the alleged class includes former patients who entered into agreements releasing their claims against Defendant.

8. Plaintiffs' claims are barred in whole or in part by the doctrine of accord and satisfaction. Plaintiffs purportedly comprise a class of "[a]ll persons who underwent Defendant's venous, adipose and/or bone marrow 'stem cell' therapy, and/or supplemental therapies, in the State of Florida for the four years prior to the filing of the initial complaint." The doctrine of accord and satisfaction bars Plaintiffs from pursuing claims to the extent those former patients entered into agreements releasing their claims against Defendant.

9. Plaintiffs' claims are barred in whole or in part by the doctrine of comparative negligence. First, Plaintiff Rivero refused to participate in the entire treatment process that was recommended by Defendant in connection with its stem-cell therapy treatments. To monitor a patient's progress following a stem-cell therapy treatment, Defendant's regular practice is to

contact each patient after a certain period of time. Defendant explains to each patient, during pre-treatment consultations, the importance of such post-treatment consultations. During these follow-ups, Defendant reminds patients of certain important activities, such as breathing exercises, and Defendant evaluates the treatment's effect on the patient. Depending on the results of these follow-ups, Defendant sometimes recommends to the patient additional treatment steps, such as a second stem-cell therapy treatment. Plaintiff Rivero did not participate in any post-treatment consultation and did not provide Defendant with the information necessary to evaluate Plaintiff Rivero's post-treatment condition. To the extent that Plaintiffs refused to participate in the full treatment program as recommended by Defendant, those Plaintiffs bear responsibility, in whole or in part, for damages sought by their claims which allege that Plaintiffs "did not and ha[ve] not had any improvement in [their] symptoms or condition" "[s]ubsequent to Defendant's procedure." (SAC ¶ 27.)

Second, prior to undergoing any stem-cell therapy procedure, each of Defendant's patients, including Plaintiffs, signed an Informed Consent that discussed the potential risks associated with the stem-cell therapy procedure, including the risk that such treatments may not be effective. Thus, Plaintiffs assumed the risk that any stem-cell therapy treatment provided by Defendant may not be effective.

Dated this 14th day of December, 2016.

/s/ Nicholas E. Williams
Christopher L. Griffin (FBN 273147)
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Attorneys for Defendant,
Lung Institute, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to the following by electronic mail on December 14, 2016:

BEN A. VINSON, JR.
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505 E. Jackson Street, Suite 207
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Attorney for Plaintiff

/s/ Nicholas E. Williams
Attorney

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Two Patients Sue Lung Institute Over 'Sham' Stem Cell Treatments](#)
