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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

DANIELLE TEUSCHER, an individual;
and DANIELLE TEUSCHER, as mother
and natural guardian of Z.F., a minor,

No. 19-CV-00204

Plaintiffs,

**PLAINTIFFS’ OPPOSITION TO
DEFENDANT’S PARTIAL
MOTION TO DISMISS**

v.

CCB-NWB, LLC, a California limited
liability company, d/b/a, NW CRYO,

1/30/2020
With Oral Argument
1:30 pm

Defendant.



I. INTRODUCTION

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2 Plaintiffs’ Second Amended Complaint details the allegations and harm
3 caused by NW Cryo (“Cryo”) to Plaintiffs. This Court’s Order on Jurisdiction
4 dated October 30, 2019 (the “Order”) gave Plaintiffs the opportunity to file their
5 Second Amended Complaint (“SAC”) to show proof that the amount in
6 controversy exceeded \$75,000. Plaintiffs did so. See, ECF 41 Gen. and ¶134,
7 139, 147, 155, 163, 170, 181, 185, 194, and 198. Under FRCP 12(b)(6) standards,
8 the SAC is sufficient as it pleads factual content that allows the court to draw
9 reasonable inferences that the Cryo is at fault.
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13 Plaintiffs have shown in their SAC that the five vials of donor sperm that
14 Cryo is holding for Ms. Teuscher (the “Gametes”) were specifically valuable to
15 the Plaintiffs in unique ways that could not be appreciated by a customer who did
16 not already have a child with that specifically chosen donor. This is Plaintiffs’
17 unique harm and damages.
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20 Ms. Teuscher never intended to find donor #2744 or destroy his
21 “anonymity”. Ms. Teuscher desired to learn information about her daughter, Z.F.’s
22 genetics and ancestry, Z.F.’s pre-disposition to medical conditions and to discover
23 if there were any relatives interested in mutual contact. The 23andMe
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1 communications between Ms. Teuscher and a relative were sent and received; Ms.
2 Teuscher was only curious whether this relative was also desirous of contact. ECF
3 41 ¶¶87-91, and ECF 10 and 33.

4 **II. Argument**

5 **CPA Claim.** Unlike common law torts, the CPA does not have a duty
6 component, and Cryo has not identified any basis for adding a new element to
7 the statute. *See Trujillo v. Northwest Trustee Servs., Inc.*, 183 Wn. 2d 820, 834-
8 35 (2015)¹ (listing elements). CPA claims frequently arise from contractual
9 breaches. Case law is replete with examples of both contract and CPA claims
10 coexistent and brought by individual plaintiffs. *See, Wash. v. Gov't Employees*
11 *Ins. Co.*, (“*GEICO*”) 200 Wn. App. 455, 467, 473 (2017) (CPA claims allowed
12 *because* breach of the Agreement was an unfair or deceptive act or practice
13 within the meaning of the CPA”) and *Griffith v. Centex Real Estate Corp.*, 93
14 Wn. App. 202, 213-217 (1998) (CPA claims apply a different test than breach of
15 contract claims because a consumer transactions deal with potential economic
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22 ¹ Cryo challenges only the first, fourth, and fifth elements, conceding that the
23 challenged conduct took place in trade or commerce and affects the public
24 interest. *See* ECF 45.
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1 injuries to the public).

2 The CPA protects the consumer above all. *See, Robinson v. Avis Rent A*
3 *Car System, Inc.*, 106 Wn. App. 104, 115-16 (2001) (finding that the failure to
4 disclose fees in their quotes supported a CPA claim. *Also see, Klem v. Wash.*
5 *Mutual Bank*, 176 Wn. 2d 771, 787 (2013) and *Deegan v. Windermere Real*
6 *Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 889-90 (2017) (“the CPA does reject
7 caveat emptor” – the capacity to deceive arises based on an omission of material
8 facts even if they are disclosed elsewhere).).

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10
11 Cryo’s deceptive conduct was manifested not only by its punitive
12 enforcement of vague one-sided and ambiguous contract terms but by taking
13 actions towards Ms. Teuscher that were not permitted by or otherwise disclosed in
14 the Customer Agreement (the “Agreement”) (ECF 41, Exh. A). Ms. Teuscher
15 relied on the Cryo representation that she would be able to use her Gametes for
16 future children, in deciding to do business with Cryo. *See*, ECF 41 ¶¶ 31-36, 39,
17 40, 102, 127.

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21 Cryo engaged in deceptive marketing promises to induce Ms. Teuscher’s
22 business, specifically, that Cryo (1) would sell “Open ID” donors; (2) hold Ms.
23 Teuscher’s gametes safe and cryopreserved for her sole use; (3) give Ms. Teuscher
24 easy access to on-line donor medical updates; and (4) maintain and support sibling
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1 connections through Cryo's (now defunct) sibling registry. See, ECF 41 ¶¶ 24,
2 26-34, 40,47,49-51. These promises were all negated by Cryo's actions. Cryo's
3 marketing ploys are revealed as deceptive, as Cryo has now changed the donor's
4 designation, refused to release Gametes, taken down the donor's information so
5 that nothing now appears on-line including no donor medical updates, and sibling
6 registry has vanished – all which originate from Cryo's omissions and give rise to
7 a legal presumption of causation in Ms. Teuscher's favor. See *Deegan,*
8 *Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875 (2017) (in reversing
9 dismissal of CPA claims, court recognized legal presumption that defendants'
10 omission of material facts caused the plaintiffs' harm).

14 Despite its promises to Ms. Teuscher and its other customers, Cryo has
15 relied on vague and ambiguous one-sided contract provisions to repudiate its
16 representations. Cryo has created an uproar in the donor conceived community
17 by cutting off access to the only hope of Ms. Teuscher bearing genetic siblings,
18 by depriving Ms. Teuscher and her daughter of vital medical updates, taking
19 down its sibling registry, and forcing customers to sign a new agreement
20 (because it realizes that its liquidated damages provision is unconscionable) that
21 strips customers of their rights. Cryo's official statement that it is harmed in the
22 amount of \$20,000 for the potential loss of future specimens from the now-



1 retired Donor is in and of itself deceptive when Cryo values the gametes at no
2 more than \$100 each vial (Cryo’s estimation of damages). ECF 41-1, VII.

3 Cryo makes a threshold argument that Ms. Teuscher’s claims are no more
4 than a breach of contract claim because they “rely upon and turn on contract”
5 and primarily relies on *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn. 2d 380
6 (2010), which has no bearing on this point. ECF 45:6. As the SAC points out,
7 Ms. Teuscher’s injuries flow from Cryo’s promises outside of the contract: those
8 relating to her right to use the Gametes, the marketing misrepresentations
9 associated with Open ID donors, revocation of access to donor health
10 information and sibling registry —actions that the Agreement did not disclose or
11 otherwise preserve as among Cryo’s rights thereunder.

12 First, *Eastwood* addresses a common law tort, not the statutory claim of
13 the CPA. Second, *Eastwood* opines that a plaintiff can plead a tort, and a
14 contract claim together because it is possible that no *independent duty* precludes
15 the claims, “the fact that an injury is an economic loss or the parties also have a
16 contractual relationship is not an adequate ground, by itself, for holding that a
17 plaintiff is limited to contract remedies.” *Id.*, at 388-89.

18 Cryo cannot justify its seizure of the Gametes and deny the donor’s status
19 as “open” where the contract omits mention of Cryo’s a right to terminate these
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1 rights. *See Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 168 (2007)
2 (subrogation letters sent on behalf of defendants were deceptive because they
3 implied an undisputed right to collect from plaintiffs when in fact it was unclear
4 whether defendants had a right to collect). No basis is asserted for **Cryo's** right
5 to a \$20,000 windfall when the Agreement apportions those damages to the
6 **Donor** and implies that the harm to Cryo is limited to \$100 per lost donation.
7
8 *See* ECF 41-1, VII

10 ***Injury and Causation.*** The injury element of the CPA is satisfied where a
11 plaintiff alleges any injury to business or property. *Handlin v. On-Site Manager*
12 *Inc.*, 187 Wn. App. 841, 849 (2015). While Cryo argues that Ms. Teuscher's
13 alleged damages are not compensable under the CPA, it confuses her damages
14 with the injury element. *See Geier v. M-Qube Inc.*, 314 F.R.D. 692 (W.D. Wash.
15 2016) (a CPA claim requires only an injury, not damages); *see Handlin*, 187 Wn.
16 App. at 844, 849-50 (a sufficient property injury is pleaded if a plaintiff alleges
17 that she was deprived of the use of her property for even a short amount of time).
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21 Ms. Teuscher has alleged a pattern of misrepresentations that Cryo made
22 outside of its contract, which she relied upon when the Agreement was executed.
23 All the while using vague and ambiguous language in an attempt to hide its own
24 false marketing. It then engaged in punitive tactics against Ms. Teuscher that
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1 harm not only her but also other Cryo customers. Cryo cannot skate past these
2 well-pleaded allegations by pretending this is a mere contract action and by
3 offering contrary facts and conclusory assertions in a motion to dismiss. *See*,
4 ECF 45 at 7 (alleging that the 2015 Agreement is modeled after the *new*
5 Washington Parentage Act).
6

7 **IIED Claim.** Cryo wrongly argues that the IIED claim has already been
8 dismissed, while it did not even move to dismiss this claim before this instant
9 Motion.² *See*, ECF 34. Ms. Teuscher alleges that Cryo engaged in (1) extreme and
10 outrageous conduct, which was (2) intentional or reckless infliction of emotional
11 distress and (3) actually resulted in plaintiff's severe emotional distress. *Kloepfel*
12 *v. Bokor*, 110 Wn. App. 1059 (2002).
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15 The SAC alleges specifically that Ms. Teuscher was shocked and Cryo
16 confiscated the Gametes by sending her a letter, that the hindrance of establishing
17 family bonds and connections between Z.F.'s half siblings, the shock of being the
18 victim of Cryo's retaliation³, and the long lasting impact of Z.F. possibly not having
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22 ² The Order of October 30, 2019 did not dismiss Ms. Teuscher's IIED claim.

23 ³ Cryo acknowledges that the Cease and Desist letter was sent in retaliation for
24 Ms. Teuscher's testing her daughter's DNA and signing onto and communicating
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1 the opportunity to be in contact with her donor if she wants, coupled with the
2 offense of learning that it was her case that caused the elimination of Cryo's donor
3 sibling community group on-line which has uprooted the connections established
4 and future connections and prevented the exchange of crucial health and other
5 information within the donor conceived community. *See*, ECF 41 ¶ 1, 23, 24, 25,
6 40, 50, 51, 70, 103, 104-107, 116, 127, 133, 178, ECF 46:1-3.
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9 Ms. Teuscher relied upon Cryo's promises that she could have the family
10 that she wanted despite the fact that she faced infertility issues and has suffered a
11 variety of autoimmune diseases. She was told by Cryo to buy as many gametes as
12 she could find of her desired donor. Her plans came to a dead stop when she
13 received the Cease and Desist letter notifying her of Cryo's taking of her Gametes.
14 She was horrified that Cryo would be able to assert so much power over her and
15 her family, essentially stripping her of her dominion and authority over how her
16 family would be formed, without any notice to her. Ms. Teuscher's severe loss of
17 the opportunity to bond with another child who would be a genetic sibling to Z.F.
18 and the benefit of lifetime connections that are attendant to these bonds.
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23 with a relative of Z.F.'s., which caused Ms. Teuscher to lose all hope for her
24 future family. ECF 45 ¶20:25.
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1 Where there is willful taking of a person's property causing outrage and *such*
2 *outrage should have been foreseen to cause a reasonable person serious*
3 *emotional trauma*, IIED is found. In the seminal case of *Wright v. Beardsley*, 46
4 Wash. 16 (1908), the court recognized the claim of intentional infliction of
5 emotional distress where a mother has been denied the right to bury her child.
6 However, Washington State requires much less than the facts of *Beardsley* in IIED
7 claims.
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10 "Outrage" is examined by asking the question: would a rational person
11 could have endured the actions *without* suffering severe emotional distress.
12 *Grimsby v. Samson*, 85 Wn.2d 52 (1975) (Reversing the 12(b)(6) dismissal on
13 grounds of IIED, the court found outrage where decedent's husband witnessed the
14 pain and suffering of his wife dying in front of him while he was prevented from
15 obtaining medical care for her.) *Grimsby* changed the foreseeability rationale
16 under *Beardsley* to stop the expansion of IIED claims to *third parties* who are
17 foreseeably injured by a defendant's conduct. The court set forth a case-by-case
18 approach which is preferred by the Restatement (Second) of Torts §46, factors
19 include: (a) the position occupied by the defendant; (b) plaintiff's peculiar
20 susceptibility to emotional distress; (c) the defendant's knowledge of this; and (d)
21 whether defendant's conduct may have been privileged under the circumstances.
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1 *Id.*, at 59. *See also, Montgomery v. SOMA Fin. Corp.*, 2014 U.S. Dist. LEXIS
2 68603 (W.D. Wash. May 19, 2014) (element of outrage found where financial
3 institution improperly attempt to bring a foreclosure action) and *Reid v. Pierce*
4 *County*, 136 Wn.2d 195 (1998) (Court found that Defendant’s actions of using and
5 displaying photographs of corpses of Plaintiffs’ deceased relatives that would
6 cause a reasonable person to exclaim, outrageous”) at 204.
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9 Here, Cryo knew of Ms. Teuscher’s susceptibility to emotional distress by
10 virtue of knowing its general consumer base eg: women who face infertility and
11 cannot conceive naturally. Even had it not been sensitive to this, denying access
12 to Ms. Teuscher of her daughter’s genetic information when she herself is
13 predisposed to medical infirmities, is conduct alone deserving of sustaining the
14 IIED claim. *See, Kaspers v. Howmedica Osteonics Corp.*, 2015 U.S. Dist.
15 LEXIS 189267, *32 (IIED allegations regarding medical company’s
16 misrepresentations about medical risks to susceptible persons was sufficient).
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19 To guide the Court, there is ample law in other jurisdictions on similar
20 facts. *See, Del Zio v. Presbyterian Hospital in New York*, 1978 U.S. Dist. LEXIS
21 14450 (S.D.N.Y. 1978) (Plaintiffs’ doctor intentionally destroyed gametes
22 consisting of ova and semen, proper jury conclusion surrounding the claim of
23 IIED that the hospital’s destruction of the genetic material and not informing its
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1 owner of their intention to destroy it was deliberate, shocking, and reckless
2 conduct, showing utter disregard toward the owners of the genetic material, who
3 needed *that material* in order to bear a child; *Witt v. Yale-New Haven Hospital*,
4 51 Conn.Supp. 155 (New Haven, Super. Ct., 2008) (Plaintiff mother’s claim for
5 IIED was sustained, destruction of unique genetic material was outrageous and
6 likely cause the plaintiffs’ severe emotional distress); and, *Frisina v. Women &*
7 *Infants Hosp. of R.I.*, 2002 R.I. Super. LEXIS 73 (Super. Ct., 2002) (IIED claim
8 survived summary judgment for loss and destruction of pre-embryos).

11 **Declaratory Judgment** - This court is empowered by the Federal
12 Declaratory Judgment Act 28 USC §2201 to decide if provisions of contracts are
13 of “questionable legality”, or unenforceable. *See, United Food & Commercial*
14 *Workers Local Union Nos. v. Food Employers Council, Inc.*, 827 F.2d 519, 525
15 (9th Cir. 1987).

18 Cryo understates the extent of the disparity between the parties and the lack
19 of choice and understanding confronting Ms. Teuscher when Cryo presented her
20 with a confusing and immutable form as a condition of pursuing her only
21 opportunity to obtain the last few vials of gametes that could allow her to have a
22 genetic sibling to Z.F.

25 **Procedural Unconscionability** Plaintiffs’ allegations of procedural



1 unconscionability suffice in light of the totality of factors. “[C]onsidering all the
2 circumstances surrounding the transaction” including (1) “[t]he manner in which
3 the contract was entered,” (2) “whether each party had ‘a reasonable opportunity
4 to understand the terms of the contract,’” and (3) whether “the important terms
5 [were] hidden in a maze of fine print,” it is clear under the Agreement that, Ms.
6 Teuscher lacked “meaningful choice”—the litmus test for procedural
7 unconscionability. *Nelson v. McGoldrick*, 127 Wn. 2d 124, 131 (1995) (citations
8 omitted). In addition to these factors, that the agreement is a contract of adhesion
9 “supports a finding that the agreement is procedurally unconscionable.” *Steven
10 Burnett v. Pagliacci Pizza, Inc.*, 442 P.3d 1267, 1272 (Wash. Ct. App. 2019).

14 Specifically, courts look at the manner in which the contract was entered
15 into “the indemnification and liquidated damages clauses are procedurally
16 unconscionable because they involved blatant unfairness in the bargaining
17 process and a lack of meaningful choice.” *Canada v. Meracord, LLC*, No. C12-
18 5657 BHS, 2013 WL 392492, at *5 (W.D. Wash. Jan. 31, 2013). In general, the
19 decision of whether unconscionable terms in an agreement should be stricken,
20 contemplates issues beyond the scope of a motion to dismiss. *See, Cazares v.
21 Pac. Shore Funding*, No. 04-2548, 2006 U.S. Dist. LEXIS 1081, *34, n.4 (C.D.
22 Cal. Jan. 3, 2006) and *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn. 2d
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1 598, 606, 293 P.3d 1197, 1201 (2013) (“Because the ‘loser pays’ provision
2 serves to benefit only [the defendant]... it is one-sided and overly harsh.”).

3 Similarly, Ms. Teuscher was not required to “click the box” after every
4 section of the Agreement, there was no opportunity to “click the box” after
5 “Section VIII of the Agreement containing the liquidated damages provisions”
6 ECF 41 ¶ 56, 41-1. Ms. Teuscher was not digitally prompted to “click here” to
7 give consent and an indication of understanding. Moreover, the liquidated
8 damages clause is buried near the end of its four-page click-wrap Agreement
9 steeped in legalese, none of the vital provisions were bolded, underlined, or set in
10 a larger typeface setoff from the other text. ECF 41 Ex. A. *See Mayne v.*
11 *Monaco Enters. Inc.*, 191 Wn. App. 113, 121-22 (2015) (apparent requirement
12 that employee sign arbitration agreement as a condition of continued
13 employment deprived plaintiff of a meaningful choice). *See also, Kwan v.*
14 *Clearwire Corp.*, 2011 U.S. Dist. LEXIS 150145 (W.D. Wash. 2012), where
15 defendant corporation’s motion against its customers to compel arbitration was
16 denied because the court found that the customers agreements were not fully
17 assented to because sections of a click wrap agreement were not “clicked”.

18 **Substantive Unconscionability.** Liquidated damages provisions that
19 function as a penalty or are not reasonably related to anticipated harm will not be
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1 upheld. Cryo has suffered no damage from the consensual contact between Ms.
2 Teuscher and a presumed relative of Z.F.⁴ *See Walter Implement, Inc. v. Focht*.
3 107 Wn. 2d. 553, 559 (1987) (“A provision in a contract which bears no
4 reasonable relation to actual damages will be construed as a penalty.”). Cryo
5 seeks to gain \$20,000.00 or at least seeks to use this as a threat to punish Ms.
6 Teuscher.
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9 In reality, after Ms. Teuscher had a child with the Donor’s gametes, she
10 had no choice but to sign this “take it or leave it” contract if she wished for Z.F.
11 to have a genetic sibling(s). *See Mayne*, 191 Wash. App. at 120-21
12 (distinguishing agreements at beginning of employment from those presented as
13 a condition of continued employment and failure to sign the agreement could end
14 in termination). Ms. Teuscher has alleged that Cryo marketed gametes from the
15 same Donor using this retired donor’s scarcity and the possibility that no other
16 gametes would be available if Ms. Teuscher did not act fast (*ECF* 41 ¶ 35), she
17 effectively had no option but to sign the Agreement. *See id.*
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21 Ms. Teuscher lacked a reasonable opportunity to understand the
22 Agreement’s terms. The very provision under which she is threatened to be
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1 sued—the liquidated damages provision—is rife with ambiguities and
2 grammatical confusion, and Ms. Teuscher was not offered any real opportunity
3 to speak with anyone from Cryo before entering into this serious contract. *See*
4 *Johnson v. Cash Store*, 116 Wn. App. 833, 845-46 (Wash. App. 2003)
5
6 (procedural unconscionability established where plaintiff did not understand the
7 true ramifications of the agreement’s interest terms).
8

9 Specifically, Cryo cannot submit a defensible argument as to why its’
10 ambiguous phrase, “never to contact *directly or indirectly the Donor*” should be
11 applied punitively against Ms. Teuscher and Z.F. A reasonable interpretation
12 would be that Ms. Teuscher would agree not to contact the donor directly or
13 through an agent, or, in other words, indirectly. *See Asarco, LLC v. Union Pac.*
14 *R.R. Co.*, 765 F.3d 999, 1009 (9th Cir. 2014) (a motion to dismiss should not
15 decide cases of contract interpretation).
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18 In addition, because the Agreement repeatedly uses the phrase “Donor
19 and/or NWCryo,” the provision is wholly ambiguous about why and under what
20 circumstances liquidated damages apply to Cryo as opposed to the donor.
21 *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 670 (Wash. App. 1994) (“An
22 ambiguity exists in a provision when, reading the contract as a whole, two
23 reasonable and fair interpretations are possible.”). To the extent the contract
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1 purports that damages to Cryo are difficult or impossible to estimate, this is
2 entirely inconsistent with the preceding provision that places the value of lost or
3 destroyed gametes at \$100 or the price paid by the customer. See ECF 41 Ex. A
4 at 4. Even if damages to an anonymous donor are difficult to estimate, *Cryo's*
5 sole damages are limited to its loss of additional donated gametes from the
6 Donor, of which in this case are none, because Donor #2744 is retired and Cryo
7 will not lose any money from his future donations. See, *Wallace Real Estate Inv.*
8 *Inc. v. Groves*, 124 Wn. 2d 881, 893 (1994) (actual damages may be considered
9 in assessing the reasonableness of the estimate of liquidated damages when they
10 are so disproportionate as to be unconscionable).
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14 Cryo argues that the contract is “unambiguous” because it reads that “all
15 donors provided through this program are anonymous donors.” ECF 45:7-8. But
16 this position only belies the deceit in promoting “Open ID” or “Open to
17 Communication” donors to its customers as an alternative to truly “Anonymous”
18 donors. However, Ms. Teuscher plainly alleges that she chose the Donor in
19 reliance on the fact that he was “Open ID” as opposed to “Anonymous.” ECF 41
20 ¶¶ 24, 29, 36.
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23 Lastly, two lines in the Agreement at Section VIII provide that, Cryo is
24 entitled to *equitable relief including temporary restraining order, preliminary*
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1 *injunction, and permanent injunction* for Ms. Teuscher’s violation of any *covenant*
2 in the Agreement. ECF 41-1. These italicized terms are undefined and as such,
3 are given their plain meaning. *See, Reliable Credit Assn. v. Progressive Direct Ins.*
4 *Co.* 171 Wn.App. 630, 640 (2012). Equitable means: “having or
5 exhibiting equity : dealing fairly and equally with all concerned.” *Merriam-*
6 *Webster Dictionary*. Equity is the opposite of imposing forfeiture.
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9 **Public Policy** - Washington has a strong policy of refusing to enforce
10 unconscionable consumer contracts. *McKee v. AT&T Corp.*, 164 Wn.2d 372
11 (Wash. 2008) (finding that a consumer services agreement is a contract of
12 adhesion, substantively unconscionable and was unenforceable as to the
13 customers waiver of certain rights under the CPA). The court in *Zuver v.*
14 *Airtouch Communications*, 153 Wn.2d 293 (2004) held that a remedies limitation
15 that “blatantly and excessively favors the employer in that it allows the employer
16 alone access to a significant legal recourse” was one-sided and harsh, and,
17 therefore, substantively unconscionable. *Id.* at 318-19. *See also Torgerson v. One*
18 *Lincoln Tower, LLC*, 166 Wn. 2d 510, 520 (2009) (“[R]emedies provisions in
19 employment contracts are substantively unconscionable when they excessively
20 favored the employer and allowed only the employer significant legal
21 recourse.”).
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1 Donor conceived offspring, who did not contract for their rights, arguably
2 have the most rights at stake in this sperm brokerage transaction.⁵ These
3 children are the carriers of the donor’s genetic inheritances; they have the most
4 connections to gain from their half siblings, to their genetic relatives who they
5 may wish to know. The donor conceived offspring’s rights are part of the
6 donor’s consideration whether he will be anonymous or “Open Id”. See, ECF 41
7 ¶24, 26-34 and 41-4. Z.F. had statutory rights under RCW §26.26.750, which
8 was in effect at the time Z.F. was conceived. Z.F.’s rights to her background
9 medical information has been further supported in RCW §26.26.800–820 which
10 continues to codify her right to seek information about her donor. Cryobanks on
11 the West Coast, like Seattle Sperm Bank and The Sperm Bank of California now
12 report and market that they will only accept “Open ID” - donors be known to
13 their offspring when their offspring turns 18, as opposed to permanently
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22 ⁵ At the 30th anniversary of the United Nations Convention on the Rights of
23 Children, the donor conceived person’s rights to know their identity and their
24 family and their right not to be bought and sold were discussed.
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1 anonymous.⁶ Donor conceived children's rights are legitimized and respected in
2 Washington and their voices are being heard worldwide. *See, infra*.

3 Cryo argues that the public's interest in an adequate sperm supply would
4 be directly depleted by a legal ruling against it in this case and that should
5 outweigh any interest of Plaintiffs. ECF 45 at 18. But the **Washington**
6 **Supreme Court has rejected** the same public policy argument advanced by the
7 defendant in *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772 (1991)
8 that, the donor blood donor pool will be dramatically reduced by the identity of
9 one donor being disclosed. Washington has not accepted a public policy based
10 upon fear and conclusory unfound statements about donors' amenability to
11 donate.
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15 Washington has a strong policy of refusing to enforce unconscionable
16 consumer contracts. *McKee v. AT&T Corp.*, 164 Wn.2d 372 (Wash. 2008)
17 (finding that a consumer services agreement is a contract of adhesion,
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23 European Sperm Bank and Xytex claim to only sell
24 "open" donors. Either way, selling "Open ID" donors is deceptive marketing.
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1 substantively unconscionable and was unenforceable as to the customers waiver
2 of certain rights under the CPA) and *Dix v. ICT Group, Inc.*, 160 Wn.2d 826 (Wash
3 2007) (acknowledging the importance of private actions under the CPA).
4

5 Washington law abhors punitive damages, they are against public policy.
6 *Wuth v. Lab Corp. of America*, 189 Wn. App. 660, 706 (2015). The liquidated
7 damages provision in the Agreement is punitive. “A provision in a contract which
8 bears no reasonable relation to actual damages will be construed as a penalty.”
9 *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 559 (1987) (quoting *Northwest*
10 *Collectors, Inc. v. Enders*, 74 Wn.2d 585, 594 (1968)).
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13 CONCLUSION

14 Cryo’s business should be held accountable for its promises to Plaintiffs.
15 As broker in this transaction, it is incumbent upon Cryo, to clearly spell out the
16 obligations and responsibilities as bailee of the Gametes. Cryo is, therefore,
17 accountable to its consumers in tort and contract for all promises it makes. The
18 Court should deny NW Cryo’s partial motion to dismiss. Should the Court be
19 inclined to dismiss any of the Plaintiffs’ claims, Plaintiffs request leave to amend
20 their pleading to address any deficiencies. Plaintiffs do not require oral argument
21 on this Motion.
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DATED: December 17, 2019.

LAW OFFICES OF JILL H. TEITEL, PLLC

Jill H. Teitel, NY Bar No. 2775138
(*Pro Hac Vice* admission)

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By: s/ Carmen E. Bremer
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Plaintiffs’ Opposition to Defendant’s Partial Motion to Dismiss through the Court’s CM/ECF system on December 17, 2019.

/s/ Carmen E. Bremer
Carmen E. Bremer, WSBA # 47565
Attorney for Plaintiff

