SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

DAYSI COLORADO,

Plaintiff,

-against-

DEBORA MOTTAHEDEH, D.O., DAVD KHANAN, M.D. CHRISTINA BONO, R.P.A.-C., ALEXANDRE B. DE MOURA, M.D., ALEXANDRE DE MOURA, M.D., P.C. LEEANN TRICARICO-FLOMAN, R.P.A.-C., and NEW YORK SPINE INSTITUTE,

Defendants.

Index No. 600751/2017

VERIFIED BILL OF PARTICULARS REGARDING AFFIRMATIVE DEFENSES

C O U N S E L:

Defendant, **LEEANN TRICARICO-FLOMAN, R.P.A.-C.**, by her attorneys, **GORDON & SILBER, P.C.**, as and for her Verified Bill of Particulars regarding Affirmative Defenses, and in compliance with and response to plaintiff's demands and the Preliminary Conference Order, sets forth, upon information and belief, as follows:

1. **Culpable Conduct, Contributory Negligence, Assumption of Risk, and Failure to Mitigate**:

The plaintiff's acts of carelessness, negligence, recklessness, culpable conduct, and contributory negligence, which contributed to her injuries, include, but are not limited to, upon information and belief, the following: being non-compliant; failing to follow doctors' and medical care providers' orders, directives, instructions, recommendations and/or advice; failing to advise defendants and medical care providers of a complete and accurate history; failing to advise of medical history and/or family history of kidney/ renal disease or propensities thereto; negligently

utilizing and failing to keep under control a power buffer, at work, proximately causing all of her own injuries; permitting a power buffer to "spin out," thereby striking her head, neck, chest, and torso and causing neck and back pain, injuries, and the need for the medications prescribed; failing to seek medical treatment for injuries from her work-related accident for approximately 10 days; becoming "totally disabled" by her negligent work-related accident before treating with defendants; failing to advise defendants and medical care providers of a complete and accurate list of complaints, signs, and symptoms; failing to keep underlying medical conditions, including but not limited to, carpal tunnel syndrome, herniated and protruding discs with radiculopathy, neck pain radiating bilaterally to her forearms with the latter having cramping and tingling, lumbar pain/ tingling radiating bilaterally to her toes, cervicalgia, brachial neuritis or radiculitis, backaches, thoracic and/ or lumbosacral neuritis or radiculitis, L4-5 disc protrusion with L4 nerve root encroachment, L5-S1 disc protrusion with S1 nerve root encroachment, numbness, paresthesia, dysthesias, hypothesia, displacement of lumbar intervertebral disc, thoracic and/or lumbosacral neuritis and radiculitis, myofascial pain syndrome, migraines, headaches, nausea, status post blunt trauma (from work-related accident), bilateral muscle weakness, cervico-brachial syndrome, L4-5 and L5-S1 lumbosacral radiculopathy, brachial neuritis or radiculitis, hypercalcemia, Epstein Barr, hepatitis A, hepatitis B, GI ulcers, and other pre-existing conditions per the records, under control; failing to keep her underlying medical conditions under control and take her recommended medications for same in the recommended doses at the recommended frequency; insisting on the prescribing of Mobric/ Meloxicam despite being warned of its side-effects; insisting on the

prescribing of Mobric/ Meloxicam despite being advised of alternate medications and treatments; filling and taking prescription of Mobric ostensibly prescribed by **LEEANN TRICARICO-FLOMAN, R.P.A.-C.** on or about 5/23/16 despite knowledge, actual notice, and/or constructive notice that she had been seen on that date by Dr. DeMauro, and not by **LEEANN TRICARICO-FLOMAN, R.P.A.-C.** on the visit of that date; filling and taking prescription of Mobric/ Meloxicam ostensibly prescribed by **LEEANN TRICARICO-FLOMAN, R.P.A.-C.** on or about 6/25/16 despite knowledge, actual notice, and/or constructive notice that that PA no longer worked at New York Spine Institute as of that time; filling and taking prescription of Mobric ostensibly prescribed by **LEEANN TRICARICO-FLOMAN, R.P.A.-C.** on or about 6/25/16 despite knowledge, actual notice, and/or constructive notice that she had not been seen at New York Spine Institute on that date or, in fact, on any date after 5/23/16; failing to advise her physicians and medical care providers of adverse reactions, signs, and symptoms after taking Mobric/ Meloxicam and do so in a timely manner; refilling prescriptions of Mobric/ Meloxicam despite having adverse reactions, signs, and symptoms after taking it; refilling prescriptions of Mobric/ Meloxicam at the pharmacy without first visiting, checking with, or communicating with physicians and medical care providers; failing to cease use of Mobric/ Meloxicam when and as instructed; failing to take recommended breaks in use of Mobric/ Meloxicam as instructed; failing to replace Mobric/ Meloxicam with other medications, including Tramadol, as instructed; failing to stop taking Mobric/ Meloxicam for seven days as and when instructed; negligently seeking no treatment and allowing symptoms, condition, and injuries to worsen over 10 days following the work-related accident;

failing to maintain a proper diet and exercise regimen; being obese (approximately 5'6" tall, weighing around 220 lbs.) and having an excessively high BMI; failing to realize PA **TRICARICO-FLOMAN** had not prescribed Mobric/ Meloxicam to her; failing to use a different NSAID or medication with less side-effects than Mobric/ Meloxicam and instead insisting on the latter despite medical care provider advice and recommendation; failing to use other pain-relievers or anti-inflammatories other than NSAIDS; taking medications which have adverse synergistic effects when taken concurrently with Mobric/ Meloxicam; failing to advise medical care providers of all of the medications she was taking, including ones that should not be taken concurrently with Mobric/ Meloxicam; taking other prescription and/ or over-the-counter NSAIDS, Ibuprofen, aspirin, Naproxen, etc. concurrently with Mobric/ Meloxicam without advising medical care providers or obtaining their approval first; taking other prescription and/ or over-the-counter NSAIDS in excessive dosage and/ or excessive frequency; failing to advise of any allergies and/ or adverse reactions to medications including Mobric/ Meloxicam and/ or other NSAIDS; negligently renewing Mobric/ Meloxicam, including but not limited to on 5/23/16 and 6/25/16, despite the fact that on 4/13/16, Dr. Mottahedeh had prescribed 90 tablets to be taken once a day, whereby that prescription would thus not have run out, if properly followed by the patient, until approximately 7/12/16; failing to take Mobric/ Meloxicam at the dosage and time interval prescribed; taking Mobric/ Meloxicam a greater dosage and/or at greater frequency than prescribed; all of the injuries, of which plaintiff complains were caused by the initial work-related accident where the power buffer "spun out" and struck her; before Meloxicam was ever prescribed (i.e. a pre-existing condition), plaintiff was already totally disabled, in extreme pain to her neck and lower back

radiating pain and numbness to her extremities, and was unable to, e.g., exercise, swim, clean, do laundry, drive, go food shopping, or walk greater than 10 minutes; failing to timely, accurately, truthfully, and fully communicate, articulate, particularize, and specify her specific complaints or symptoms so that they might be heeded and properly acted upon; failing to mitigate damages; failing to seek medical treatment to address complaints earlier; failing to lose 30 pounds so that recommended surgery of circumferential lumbar fusion discectomy could be performed; failing to maintain a proper diet and exercise regimen; permitting self to remain obese and have an excessively high BMI; failing to obtain appropriate subsequent treatment related to her alleged injuries in a timely manner; negligently causing her own injuries; negligently exacerbating her injuries and conditions; failing to diligently seek employment in jobs she is capable of performing; having pre-existing medical conditions that caused the injuries of which plaintiff complains; assuming the risk of complications and sequela of treatment; assuming the ordinary and known risks of treatment; and answering defendant incorporates, by reference, the allegations of plaintiff's carelessness, negligence, recklessness, culpable conduct and contributory negligence, which contributed to her injuries, contained in co-defendants' Bills of Particulars regarding Affirmative Defenses.

2. **Informed Consent and Pub. Health Law § 2805d**:

Objected to as palpably improper, overbroad, and a question of law. The Court will take judicial notice of this matter of law. In any event, and without waiving any objection, responding defendant reserves the right to claim and assert any and all of the subdivisions, factors and defenses listed in § 2805(d), in the event plaintiff is deemed to have a viable cause of action for lack of informed consent. Assuming,

arguendo, that Defendant, **LEEANN TRICARICO-FLOMAN, R.P.A.-C.**, prescribed Mobric/ Meloxicam to plaintiff**, then the nature of the medication treatment, the risks, benefits, and alternatives would have been explained to the patient, by responding defendant and/ or her supervising physician, at or around the time of the prescriptions.

**Note: 1. On 5/23/16, when responding defendant allegedly (and per CVS records) first prescribed Mobric/ Meloxicam, it is noted in the New York Spine Institute chart that Dr. DeMauro, not the responding defendant, saw and treated plaintiff.

2. On 6/25/16, when responding defendant allegedly (and per CVS records) next prescribed Mobric/ Meloxicam, responding defendant was no longer working at the New York Spine Institute and plaintiff had not been seen there at any time since 5/23/16.

3. In view of the fact that on 4/13/16, Dr. Mottahedeh had prescribed 90 tablets of Mobric/ Meloxicam to be taken once a day, that prescription would thus not have run out, if properly followed by the patient, until approximately 7/12/16; and thus there would have been no need to (re-) prescribe it on either 5/23/16 or 6/25/16 and, upon information and belief, Defendant, **LEEANN TRICARICO-FLOMAN, R.P.A.-C.**, did not prescribe it then.

3. Article 16

Article 16 of the CPLR is a matter of law. The Court will take judicial notice regarding the applicability of Article 16.

Defendant, **LEEANN TRICARICO-FLOMAN, R.P.A.-C.**, reserves the right to amend and/or supplement this Bill of Particulars regarding Affirmative Defenses, per the CPLR and up to and including the trial of this matter.

Dated: New York, New York
March 28, 2018

Yours, etc.,

GORDON & SILBER, P.C.

By: _____
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ATTORNEY VERIFICATION

STEVEN H. MUTZ, an attorney duly licensed to practice law in the State of New York, hereby affirms the following under the penalties of perjury:

That he is a member of **GORDON & SILBER, P.C.**, the attorneys for Defendant, **LEEANN TRICARICO-FLOMAN, R.P.A.-C.**, in the annexed entitled action. That he has read the foregoing **BILL OF PARTICULARS REGARDING AFFIRMATIVE DEFENSES** and knows the contents thereof, and upon information and belief deponent believes that matters alleged therein to be true.

The reason this verification is made by Affirmant and not the defendant is that Defendant, **LEEANN TRICARICO-FLOMAN, R.P.A.-C.**, upon information and belief, resides in a County other than the one in which Affirmant maintains an office.

The source of Affirmant's information and the grounds of his belief are communications, papers, reports and investigations contained in the file.

Dated: New York, New York
March 28, 2018

STEVEN H. MUTZ

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Yuliza Ramos, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides in New York County, New York.

That on the 28th day of March, 2018 deponent served the within **VERIFIED BILL OF PARTICULARS REGARDING AFFIRMATIVE DEFENSES** upon:

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at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in the official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Yuliza Ramos

Sworn to before me on this
28th day of March, 2018

Notary Public

Scott Randall Singer
Notary Public, State of New York
No. 02SI6232205
Qualified in Nassau County
Commission Expires in 12/06/20

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