GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
Attorney for Defendant
By: ALLISON M. ROVNER
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: 212.637.2691
Fax: 212.637.2750
Email: allison.rovner@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN COHODES,

Plaintiff,

v.

UNITED STATES OF AMERICA, CALLEN-LORDE COMMUNITY HEALTH CENTER, MEERA SHAH, M.D., JAMES BRAUN, D.O., WENDY STARK, and JANE DOE 1, JANE DOE 2, and JANE DOE 3 (CALLEN-LORDE NURSES OR ASSISTANTS),

Defendants.

ANSWER

17 Civ. 8307 (KBF)

Defendants, the United States of America ("United States"), Callen-Lorde Community Health Center ("Callen-Lorde"), Meera Shah, M.D. ("Shah"), James Braun, D.O. ("Braun"), and Wendy Stark ("Stark"), (collectively "Defendants"),[1] by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, answer Plaintiff's Complaint on information and belief as follows:

[1] Defendants Callen-Lorde, Shah, Braun, and Stark are not appropriate defendants pursuant to 28 U.S.C. §§ 1346(b), 2679(a).

1. Paragraph 1 of the Complaint constitutes Plaintiff's characterization of his action to which no response is required. To the extent that a response is required, deny that Callen-Lorde, Shah, Braun, and Stark are appropriate defendants pursuant to 28 U.S.C. §§ 1346(b), 2679(a). Further deny all allegations of liability contained in Paragraph 1 and that Stark provided Plaintiff with medical care.

2. Paragraph 2 of the Complaint constitutes Plaintiff's characterization of his action to which no response is required. To the extent that a response is required, admit that the claims were brought pursuant to the Federal Tort Claims Act ("FTCA"), and deny all allegations of liability contained in Paragraph 2.

3. Paragraph 3 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

4. Whether Plaintiff timely filed the action constitutes Plaintiff's legal argument to which no response is required. Admit that the action was filed and that Plaintiff served his Notice of Claim on Callen-Lorde less than two years after the incident forming the basis of this action. Deny that service on Callen-Lorde constituted timely service of the claim or timely filing of the action. Aver that filing of the claim occurred with delivery of the claim to the U.S. Department of Health and Human Services Office of the General Counsel on March 13, 2017.

5. Admit that the United States denied Plaintiff's claim on October 11, 2017, and that this action was started within two and a half years of the date of the alleged malpractice. Deny that two and a half years from the date of the alleged malpractice is a measure of time relevant to this filing. Deny that Defendants "admitted medical malpractice."

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding where Plaintiff resides. The remainder of Paragraph 6 of the Complaint

constitutes Plaintiff's legal argument to which no response is required.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Complaint.

8. Deny that Callen-Lorde is an agency of the United States. Aver that Callen-Lorde is a grantee of the Health Resources and Services Administration ("HRSA"), and at all times relevant to this litigation, HRSA deemed Callen-Lorde to be eligible for FTCA coverage pursuant to the Federally Supported Health Centers Assistance Act, 42 U.S.C. § 233(g)-(n). Admit that Callen-Lorde operated a health center located at 356 West 18th Street, County of New York and State of New York.

9. Deny that the United States had directors, officers, operators, administrators, employees, nurses, agents, and staff at Callen-Lorde, but aver that HRSA deemed Callen-Lorde to be eligible for FTCA coverage pursuant to the Federally Supported Health Centers Assistance Act, 42 U.S.C. § 233(g)-(n).

10. Admit.

11. Admit.

12. Deny.

13. Admit.

14. Admit.

15. Deny.

16. Admit.

17. Admit.

18. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint.

20. Paragraph 20 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

21. The first sentence of Paragraph 21 constitutes Plaintiff's characterization of his action to which no response is required. To the extent that a response is deemed required, deny, including the allegations of negligence. Admit the remaining allegations contained in Paragraph 21.

22. The Complaint includes two paragraphs numbered as 22. As to the first Paragraph 22, admit that Shah performed the procedure and that Braun supervised. Deny that Shah personally informed Plaintiff that she was proficient in the procedure. As to the second Paragraph 22, admit.

23. Admit.

24. Based on information currently available, deny that Shah swabbed Plaintiff with Trichloroacetic Acid ("TCA"). Admit that TCA can be used to perform facial peels and chemically burn off genital warts. Admit that acetic acid, or vinegar, is normally used for the procedure at issue in the case. Deny that Plaintiff reported experiencing "intense pain and burning throughout the duration of the twenty minute procedure." Deny knowledge or information sufficient to form a belief as to whether the procedure had taken under five minutes the previous times it was performed on Plaintiff. Deny that Plaintiff complained of "extreme pain," experienced intense pain throughout the duration of the procedure, and that Shah "advised that this pain was normal and would lessen with time."

25. Deny knowledge or information sufficient to form a belief as to the truth of the

allegations contained in the first and second sentences of Paragraph 25 of the Complaint. Deny the allegations contained in the third sentence of Paragraph 25 of the Complaint.

26. Deny.

27. Deny the allegations of negligence contained in Paragraph 27 of the Complaint. Admit that Shah, Braun, and the nurses at Callen-Lorde did not admit to Plaintiff that they were negligent.

28. Admit that Shah, Braun, and the nurses at Callen-Lorde did not attempt to wash the acid off of Plaintiff after the procedure. Deny that Shah, Braun, and the nurses at Callen-Lorde were aware on the date of the procedure that Plaintiff had been burned.

29. Deny the factual allegations contained in Paragraph 29 of the Complaint and the allegations of negligence.

30. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 30 of the Complaint. Deny the allegations contained in the second sentence of Paragraph 30.

31. Deny the allegations contained in the first sentence of Paragraph 31 of the Complaint. Regarding the second sentence of Paragraph 31, admit that at the time of the procedure, Callen-Lorde did not itself label the containers containing the chemicals relevant to this action, but deny that the containers were not labeled, and aver that the containers were labeled by the manufacturer and/or distributor of the chemicals. Deny the allegation that Callen-Lorde did not use different containers to identify different chemicals, and aver that this allegation is vague. Admit that, with respect to the chemicals relevant to this action, Callen-Lorde had no log of chemicals used, had no sign-out sheet for use of the chemicals, did not maintain records of who prepared the chemical solutions, and had no log regarding the chemical solutions' disposal.

Deny Plaintiff's characterization that Callen-Lorde "had no way to determine who had been responsible for the solution's preparation after the fact."

32. Admit that Callen-Lorde never determined who was responsible for mixing the solution. Deny knowledge or information sufficient to form a belief as to whether Callen-Lorde ever determined who was responsible for disposing of the solution.

33. Admit that Plaintiff spoke with Callen-Lorde, Braun, and Shah by phone on November 18, 2016, complaining of pain, and that Braun instructed Plaintiff to immediately return to Callen-Lorde. Admit that Braun told Plaintiff that he thought TCA had been used and that he had wanted to examine the solution, but that it was disposed of before he could check it. Admit that Dr. Braun examined Plaintiff and the description of Dr. Braun's examination findings contained in Paragraph 33. Deny that Braun "confirmed" that TCA had been used instead of acetic acid. Deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 33 of the Complaint.

34. Admit that Shah and Braun apologized to Plaintiff, and that Callen-Lorde offered to pay the costs for Plaintiff to see an outside Callen-Lorde specialist, prescriptions, and medical products resulting from the burns Plaintiff had sustained as a result of the November 17, 2016 procedure at issue in this action. Deny the allegations of negligence contained in Paragraph 34 of the Complaint, and deny that Callen-Lorde, Shah, or Braun recognized or admitted negligence.

35. Admit that on January 18, 2017, Dr. Andrew Goodman, Associate Director of Medicine at Callen-Lorde, called Plaintiff to inform him that reimbursement checks were being mailed for outside treatment of Plaintiff's burns and to inform Plaintiff that Callen-Lorde had made changes to its procedures. Admit that Dr. Goodman informed Plaintiff that: the bottles

containing the chemicals would be more clearly labeled so that they did not appear similar; the bottles were changed to more clearly indicate the chemical that they contained; the chemical that burned Plaintiff would no longer be kept in the rooms in which the procedure was performed; there would be a sign-out sheet indicating who mixed or used the chemical; Callen-Lorde did not know who mixed the solution; and Plaintiff should return to repeat the procedure and take additional biopsies. Deny that it was an acid that injured Plaintiff and that the bottles containing different chemicals were exactly the same. Deny that Dr. Goodman told Plaintiff that disposal of the chemicals would be logged and traced or that TCA was the chemical used. Deny knowledge or information sufficient to form a belief as to whether Dr. Goodman informed Plaintiff that Callen-Lorde did not know who was responsible for disposing of the solution. Deny all allegations of negligence in Paragraph 35 of the Complaint, and deny the allegations that Callen-Lorde admitted negligence.

36. Admit the allegations contained in Paragraph 36 of the Complaint, except deny knowledge or information sufficient to form a belief as to the truth of Plaintiff's characterizations of the pain as "intense" and "excruciating."

37. Admit that Callen-Lorde was unable to fill the prescription for lidocaine ointment at the prescribed strength, and aver that this was because Plaintiff's insurance would not cover the prescribed strength.

38. Admit that Plaintiff received treatment from Dr. Goodman at Callen-Lorde on November 19, 2016 and that Dr. Goodman performed the examination described in the last sentence of Paragraph 38. Deny that Dr. Goodman told Plaintiff that he had second and third degree burns and the allegations regarding "causing Plaintiff great pain." Deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 38

of the Complaint.

39. Admit the allegations contained in the first sentence of Paragraph 39. Deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 39 of the Complaint.

40. Admit that Plaintiff's biopsy needed to be repeated after he healed. Deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 40 of the Complaint, except deny the allegation regarding "a potentially life threatening delay."

41. Admit that Plaintiff sought treatment from Dr. Stephen Goldstone, Dr. Joseph Terlizzi, and Dr. Vincent Laudone, and that Dr. Laudone performed the procedure identified in the last sentence of Paragraph 41 of the Complaint. Deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 41 of the Complaint.

42. Based on information currently available, deny that TCA was used in the procedure on November 17, 2016. Deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 42 of the Complaint.

43. Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 42 of the Complaint as though fully set forth herein.

44. Paragraph 44 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

45. Deny.

46. Deny.

47. Deny.

48. Deny.

49. Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 48 of the Complaint as though fully set forth herein.

50. Paragraph 50 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

51. Deny.

52. Deny.

53. Deny.

54. Deny.

55. Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 54 of the Complaint as though fully set forth herein.

56. Paragraph 56 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

57. Deny.

58. Deny.

59. Deny.

60. Deny.

61. Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 60 of the Complaint as though fully set forth herein.

62. Paragraph 62 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

63. Deny.

64. Deny.

65. Deny.

66. Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 65 of the Complaint as though fully set forth herein.

67. Lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 67 of the Complaint.

68. Deny.

69. Deny.

70. Deny.

71. Deny.

72. Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 71 of the Complaint as though fully set forth herein.

73. Based on the definition of Callen-Lorde contained in Paragraph 9 of the Complaint, deny.

74. Deny.

75. Deny.

76. Deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding the policies in place at Callen-Lorde pertaining to informing a patient of use of TCA or immediate cleaning to reduce burns. Deny the remaining allegations contained in Paragraph 76, including negligent supervision, that TCA was used, and that it was known at the time of the procedure that Plaintiff had been burned.

77. Deny.

78. Deny.

79. Regarding the unnumbered paragraph preceding Paragraph 79, Defendants repeat and reallege each and every response to the allegations contained in Paragraphs 1 through 78 of

the Complaint as though fully set forth herein. Paragraph 79 of the Complaint constitutes Plaintiff's legal argument to which no response is required.

80. Deny.

81. Deny.

82. Deny.

83. The remainder of the Complaint consists of Plaintiff's prayer for relief, to which no response is required. To the extent that a response is deemed required, deny that Plaintiff is entitled to the relief he seeks or to any relief.

DEFENSES

84. All of Plaintiff's claims are subject to, and limited by, the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. §§ 1346(b), 2401(b), 2671 *et seq.*

85. Defendants Callen-Lorde, Shah, Braun, and Stark are not appropriate defendants pursuant to 28 U.S.C. §§ 1346(b), 2679(a), and the Court lacks subject matter jurisdiction over any claim against those Defendants.

86. Defendants acted at all relevant times with due care and diligence, and did not breach any actionable duty owed to Plaintiff.

86. Defendants' actions were not the proximate cause of the alleged damages suffered by Plaintiff.

87. Plaintiff's damages may not exceed the amount of the administrative claim presented to the Department of Health and Human Services. *See* 28 U.S.C. § 2675.

88. Defendants are not liable for pre-judgment interest or for punitive damages. *See* 28 U.S.C. § 2674.

89. The Complaint fails in whole or in part to state a claim upon which relief can be granted.

90. Plaintiff's claims pertaining to negligent supervision and notification regarding the use of an improper chemical are barred to the extent that they are based on conduct subject to the discretionary function exception to the FTCA.

91. Plaintiff may only recover to the extent allowed by New York and federal law.

92. In the event a judgment is awarded to Plaintiff, such judgment must be reduced by those amounts which have been or will with reasonable certainty be reimbursed or indemnified, in whole or in part, from any collateral source, pursuant to N.Y. C.P.L.R. § 4545 and any other applicable New York State law.

93. In the event that Defendants are found to be negligent, the negligence of third parties were the proximate cause of and contributed to any alleged injuries or damages sustained.

94. The liability of Defendants, if any, with respect to any claim by Plaintiff for noneconomic loss, may be limited to an equitable share determined in accordance with the relative culpability of all persons or entities causing or contributing to the total liability for noneconomic loss, including persons or entities over whom Plaintiff could have obtained jurisdiction with due diligence.

95. Plaintiff failed to mitigate his damages.

96. To the extent that Plaintiff's own culpable conduct or negligence was the sole and/or contributory cause of the occurrence set forth in the Complaint, Plaintiff is either barred from recovery entirely or else his recovery must be reduced proportionately.

97. Plaintiff and/or his counsel may not recover costs or attorney's fees in excess of those permitted by 28 U.S.C. §§ 2412, 2678.

98. Any recovery by Plaintiff is subject to the availability of appropriated funds. 42 U.S.C. § 233(k).

99. Plaintiff is not entitled to a jury trial for the claims against Defendants pursuant to 28 U.S.C. §§ 1346, 2402.

100. Defendants assert that they may have additional affirmative defenses that are not known to Defendants at this time, but which may be ascertained through discovery. Defendants specifically preserve such affirmative defenses as they are ascertained through discovery.

WHEREFORE Defendants respectfully request that the Court: (1) dismiss the complaint with prejudice; (2) enter judgment in favor of Defendants; and (3) grant such further relief as the Court deems just and proper.

Dated: New York, New York
February 5, 2018

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/ Allison M. Rovner

ALLISON M. ROVNER
Assistant United States Attorney
86 Chambers Street, 3rd floor
New York, New York 10007
Telephone: (212) 637-2691
Fax: (212) 637-2750
Email: allison.rovner@usdoj.gov

To: Andrew Hamelsky, Esq.
White and Williams LLP
7 Times Square, Suite 2900
New York, NY 10036