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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

DAVID KINLOCK, on behalf of himself and  
all others similarly situated,

Plaintiff,

v.

HEALTHPLUS SURGERY CENTER, LLC,

Defendant.

Civil Action No.

**NOTICE OF REMOVAL**

TO: William T. Walsh  
Clerk of the Court  
United States District Court  
District of New Jersey  
Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, New Jersey 07101

ON NOTICE TO: Clerk, Superior Court of New Jersey  
Essex County Superior Court  
50 West Market Street  
Newark, New Jersey 07102

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*Attorneys for Plaintiff, David Kinlock*

**PLEASE TAKE NOTICE** that Defendant, HealthPlus Surgery Center, LLC (“HealthPlus”), by and through its attorneys, McElroy, Deutsch, Mulvaney & Carpenter, LLP, hereby removes this action from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-74-19, to the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the Clerk of the Superior Court of New Jersey, Law Division, Essex County, and served on counsel for Plaintiff.

**PLEASE TAKE FURTHER NOTICE** that by effecting removal of this civil action, HealthPlus reserves the rights to raise any and all defenses available under the Federal Rules of Civil Procedure, including, but not limited to Fed. R. Civ. P. 12.

**PLEASE TAKE FURTHER NOTICE** that in support of this Notice of Removal, HealthPlus relies upon the following:

**STATEMENT OF JURISDICTION**

1. This Court has original jurisdiction over this action under the Class Action Fairness Act of 2005 (the “Class Action Fairness Act” or “CAFA”). *See* 28 U.S.C. §§ 1332(d), 1453, and 1711–1715. CAFA provides, in relevant part, that “district courts shall have original jurisdiction” over civil class action lawsuits in which “any member of a class of plaintiffs is a citizen of a State different from any defendant” and where the amount in controversy for the putative class members in the aggregate “exceeds the sum or value of \$5,000,000, exclusive of

interest and costs.” 28 U.S.C. § 1332(d)(2). There must also be at least 100 members “of all proposed plaintiff classes in the aggregate.” 28 U.S.C. § 1332(d)(5)(B). The procedure for the removal of civil actions is delineated in 28 U.S.C. § 1446, and as set forth below, this case satisfies all of CAFA’s requirements for removal, and is timely and properly removed to the United States District Court for the District of New Jersey upon the filing of this Notice of Removal with the clerk of the Essex County Superior Court.

### **PLAINTIFF’S COMPLAINT**

2. On January 3, 2019, Plaintiff, David Kinlock, on behalf of himself and all others similarly situated (“Plaintiff” or “Mr. Kinlock”), filed a “Class Action Complaint” in the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-74-19. A true and accurate copy of the Complaint is annexed hereto as “Exhibit A” in accordance with 28 U.S.C. § 1446(a).

3. On January 16, 2019, an Amended Complaint was filed adding a new representative Plaintiff, Jose Salcedo. A true and accurate copy of the Complaint is annexed hereto as “Exhibit B” in accordance with 28 U.S.C. §1446(a).

4. Other than adding a new plaintiff, the allegations of the Complaint and Amended Complaint are identical and for purposes of this Notice of Removal shall be referred to collectively as “Plaintiffs’ Complaint.”<sup>1</sup>

5. The Plaintiffs’ Complaint alleges that “[t]his is a class action on behalf of over 3,700 New Jersey citizens who received a form notice from Defendant which was identical or

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<sup>1</sup>It appears Plaintiffs attempted to replace David Kinlock with Jose Salcedo by filing a Stipulation of Voluntary Dismissal as to David Kinlock only on January 11, 2019. Thereafter, on January 16, 2019, the Amended Complaint was filed. On that same date, the Court entered an Order granting Plaintiffs’ motion for a hearing to address the preliminary injunctive relief sought by Plaintiffs. Notably, another non-class-action Complaint was filed in the name of David Kinlock by a separate law firm in the New Jersey Superior Court, Bergen County, entitled *David Kinlock and Sharlene Kinlock*, Docket No. BER-L-268-19. As of the filing of this Notice of Removal David Kinlock remains a plaintiff in the matter *Kinlock v. HealthPlus Surgery Center, LLC*, Docket No. ESX-L-74-19.

substantially similar to Attachment A, notifying them of their need to undergo immediate testing for Hepatitis B, Hepatitis C, and HIV, due to lapses in infection control and sterilization of instruments at HealthPlus Surgery Center, LLC between January 1, 2018 and September 7, 2018.” (See Ex. A p. 1, ¶ 1; Ex. B p. 1, ¶ 1.)

6. Plaintiffs’ Complaint contains a total of three Counts: “Injunctive Relief in the Form of a Court Administered Program for Medical Surveillance, Periodic Monitoring & Testing, Education and Warning” (Count One); “Negligence” (Count Two); and “Professional Malpractice Under the Common Knowledge Doctrine and Res Ipsa Loquitur” (Count Three). (See Ex. A pp. 8-11; Ex. B pp. 8-11.)

7. Plaintiffs’ Complaint states that “[o]n or about December 17, 2018, Defendant HealthPlus mailed out form notices to approximately 3,700 former patients who had received surgical procedures at this HealthPlus facility between January 1, 2018 and September 7, 2018[,]” that “notified recipients of their potential exposure to, inter alia, Hepatitis B, Hepatitis C and HIV, and recognized the need for recipients to be tested for these diseases.” (See Ex. A ¶¶ 12, 13; Ex. B ¶¶ 13, 14.)

8. Plaintiff claims that “[w]hether or not a class member will develop these diseases simply cannot be determined by a single [blood] test at the current time and can only be determined by a series of tests over time.” (See Ex. A ¶ 29; Ex. B ¶ 30.)

9. Moreover, Plaintiff contends that “those who have suffered even a potential exposure to Hepatitis B, but have not yet tested positive, should begin immediate prophylactic treatment to prevent HBV infection and subsequent development of chronic infection or liver disease. This would include receiving immediate Hepatitis B vaccine and Hepatitis B immune globulin, even before a positive test result for Hepatitis B.” (See Ex. A ¶ 31; Ex. B ¶ 32.)

10. The Complaint seeks “reasonable and adequate injunctive and equitable relief, including a supervised program of periodic testing on multiple occasions over time as described in the landmark decision Ayers v. Jackson Twp., 106 N.J. 557 (1987), at [HealthPlus’] expense.” (See Ex. A ¶ 34; Ex. B ¶ 35.)

11. The Complaint also seeks attorneys’ fees and costs. (See Ex. A p. 11; Ex. B p. 12.)

**JURISDICTION PURSUANT TO THE CLASS ACTION FAIRNESS ACT**

12. 28 U.S.C. § 1332(d)(2) of the Class Action Fairness Act provides, in pertinent part,<sup>2</sup> that:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant[.]

13. This is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1332(d)(2), and one that may be removed to this Court by HealthPlus pursuant to 28 U.S.C. §§ 1441(a), 1446, and 1453(b).

**A. Purported Class Action Under State Law**

14. This lawsuit has been specifically pled as a “Class Action.” (Ex. A p. 1; Ex. B p. 1.)

15. The putative class that Plaintiff purports to represent consists of more than 100 individuals. (See Ex. A ¶¶ 1, 12; Ex. B ¶¶ 1, 13.) See 28 U.S.C. § 1332(d)(5).

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<sup>2</sup> While there are a number of exceptions to the rule of original jurisdiction contained in 28 U.S.C. § 1332(d)(3)–(5), none of these exceptions are applicable to the instant action.

16. The putative class identified in the Complaint includes all 3,700 plus patients who received notices from HealthPlus advising them that they may have been exposed to certain blood borne pathogens and that an immediate blood test was required. (*See* Exhibit A p. 1, ¶ 1; Ex. B p. 1, ¶ 1.)

**B. Diversity of Citizenship Exists**

17. For CAFA purposes, HealthPlus is a citizen of the State of New Jersey. Indeed, under CAFA, unincorporated associations like limited liability companies are deemed citizens of “the State where it has its principal place of business and the State under whose laws it is organized.” *See* 28 U.S.C. § 1332(d)(10). HealthPlus is a New Jersey limited liability company with its principal place of business in New Jersey.

18. Plaintiff’s Complaint presumes that the approximately 3,700 former HealthPlus patients who received a copy of the form notice at issue in Plaintiff’s Complaint are New Jersey citizens. (*See, e.g.*, Ex. A ¶¶ 1, 35; Ex. B ¶¶ 1, 36). This is incorrect. Many of the approximately 3,700 HealthPlus patients who received a copy of the form notice at issue in Plaintiff’s Complaint are citizens of a state different from HealthPlus. (*See* Ex. C [Declaration of Betty McCabe] p. 2 ¶ 6.) Patients from New York, Connecticut, Pennsylvania, Florida, and Maryland are among the more than 3,700 patients identified in Plaintiff’s Complaint. *Ibid.* While describing the putative class as residents of New Jersey who were treated at HealthPlus from January 1, 2018, to September 7, 2018, Plaintiff’s Complaint makes clear that the Complaint is intended to assert a class action on behalf of all 3,700 patients who were treated at HealthPlus during the relevant period of time, which includes many individuals who are not residents of New Jersey. (*See, e.g.*, Ex. A ¶¶ 1, 35; Ex. B ¶¶ 1, 36.)

19. Accordingly, although Plaintiffs' Complaint describes the putative class as "All New Jersey citizens who received a form notice from Defendant which was identical or substantially similar to Attachment A," (*see* Ex. A p. 7, ¶ 35; Ex. B p. 7, ¶ 36), because the members of the putative class of patients actually includes patients from States other than New Jersey, the diversity requirements of CAFA are satisfied. *See generally Frederico v. Home Depot*, 507 F.3d 188, 197 (2007) (noting that the "defendant's removal petition serves the same function as a complaint would if filed in the district court") (citations omitted).

20. Additionally, multiple class action complaints have been filed against HealthPlus in the New Jersey Superior Court and the United States District Court for the Eastern District of New York in addition to Plaintiff's Complaint. *See Marrero v. HealthPlus Surgery Center, LLP*, Docket No. BER-L-9265-18; *C.S. v. HealthPlus Surgery Center, LLC*, Docket No. BER-L-8289-18; and *Winley-Dunk v. HealthPlus Surgery Center, LLC*, Docket No. 1:18-cv-07459 (E.D.N.Y.). Each of the actions filed in the New Jersey Superior Court has been removed to the United States District Court for the District of New Jersey.

21. Diversity is therefore satisfied in this action.

### **C. The Amount in Controversy Exceeds \$5,000,000**

22. When determining the amount in controversy for CAFA purposes, "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds . . . \$5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6).

23. Plaintiff's claims for attorneys' fees (*see* Ex. A p. 11; Ex. B p. 12) may also be considered when determining the amount in controversy. *See, e.g., Frederico v. Home Depot*, 507 F.3d 188, 199 (3d Cir. 2007). This is quite significant, as attorneys' fees "could be as much as thirty percent of the judgment." *Id.* (citing *In re Rite Aid Corp. Securities Litigation*, 396 F.3d

294, 303 (3d Cir.2005) (in which a study conducted by the Federal Judicial Center revealed a median percentage recovery range of 27–30% for all class actions settled or otherwise resolved over a period of four years)).

24. Thus, the amount in controversy is first determined by examining the complaint. *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004).

25. The amount in controversy is easily satisfied in the context of this case.

26. Plaintiff has already identified an initial proposed class of approximately 3,700 patients who may have been exposed to blood borne pathogens between January 1, 2018, and September 7, 2018. (*See* Ex. A ¶¶ 1, 12; Ex. B ¶¶ 1, 13.)

27. In addition to the group of approximately 3,700 patients, the putative class, a subclass is likely to include the spouses of the approximately 3,700 patients, as well as any other individuals with whom a member of the proposed class of approximately 3,700 patients may have had sexual contact.

28. This means that the actual size of the putative class includes far more than 3,700 individuals, and that a conservative estimate is likely to equal or exceed 7,000 individuals. Indeed, this estimate means that each member of the proposed class of approximately 3,700 had sexual contact with less than one person following the alleged exposure.

29. If the jurisdictional amount in controversy requirement of \$5,000,000 is divided by an estimated putative class of 7,000 members, the average claim for each class member would be approximately \$714.

30. If the more limited class size of 3,700 is used to calculate the average damage claim of each putative class member, the average damage award is less than \$1,400.



31. Given the nature of the allegations advanced in the Complaint, the average damage claim of each putative class member vastly exceeds either \$714 or \$1400 per class member, especially when considering the Plaintiffs' claims for personal injuries resulting from the alleged negligence of Defendant and their request for "reasonable and adequate injunctive and equitable relief," "a supervised program of periodic testing on multiple occasions over time" and "a course of prophylactic treatment to protect class members from the dangerous conditions described herein," (*see* Ex. A ¶ 47; Ex. B ¶ 48), plus attorneys' fees and costs. (*See* Ex. A pp. 6, 11; Ex. B pp. 7, 11).

32. The cost of the required blood tests is approximately \$340 per test. (*See* Ex. C ¶ 7.) If each member of the putative class of 3,700 patients were to receive one additional blood test at the cost of \$340 per test, that claim alone would be just under \$1,300,000. Plaintiffs seek "periodic testing on multiple occasions" and "a course of prophylactic treatment to protect class members from the dangerous conditions described herein." (*See* Ex. A ¶ 47; Ex. B ¶ 48.) Moreover, it is expected that Plaintiffs will seek damages on a larger class of plaintiffs that include spouses and sexual partners of the 3,700 patients treated during the relevant time period, which would more than double the aggregate cost of a single additional blood test for each class member.

33. As such, the amount in controversy requirement is easily satisfied for CAFA removal purposes in the context of this action.

#### **D. Timeliness of Removal**

34. A Notice of Removal must be filed "within 30 days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . ." 28 U.S.C. § 1446(b)(1).

35. Here, HealthPlus received a copy of the Complaint on or about January 7, 2019, and the instant Notice of Removal is being filed within thirty days of January 7, 2019. As such, HealthPlus' removal of this action is timely.

**WHEREFORE**, HealthPlus respectfully submits that the above-entitled action be removed from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-74-19, to the United States District Court for the District of New Jersey.

Respectfully submitted,

**MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP**  
Attorneys for Defendant, HealthPlus Surgery Center, LLC

By:                   /s/ Richard J. Williams, Jr.                    
Richard J. Williams, Jr.

Dated: January 23, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Notice of Removal is being filed on this date in the United States District Court for the District of New Jersey, and with the Clerk of the Superior Court of New Jersey, Law Division, Essex County, and served on counsel for Plaintiff via eCourts electronic filing.

Respectfully submitted,

**MCCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP**  
Attorneys for Defendant, HealthPlus Surgery Center, LLC

By:                   /s/ Richard J. Williams, Jr.                    
Richard J. Williams, Jr.

Dated: January 23, 2019

# **EXHIBIT A**

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**(856) 596-4100**

**Attorneys for Plaintiff**

<p>DAVID KINLOCK, on behalf of himself and all others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>HEALTHPLUS SURGERY CENTER, LLC,</p> <p style="text-align: center;">Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY LAW DIVISION</p> <p>DOCKET NO.</p> <p><b>CLASS ACTION COMPLAINT</b></p>
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**INTRODUCTION**

1. This is a class action brought on behalf of the over 3,700 New Jersey citizens who received a form notice from Defendant which was identical or substantially similar to Attachment A, notifying them of their need to undergo immediate testing for Hepatitis B, Hepatitis C and HIV, due to lapses in infection control and sterilization of instruments at HealthPlus Surgery Center, LLC between January 1, 2018 and September 7, 2018.

2. As outlined in greater detail herein, the single “free” blood test currently being offered by Defendant to each class member is wholly inadequate to ensure the health and safety of the class. Certain diseases to which the class has been exposed, such as Hepatitis B, Hepatitis C and HIV, can have an incubation period and/or period of dormancy of several years. Accordingly, a single blood test at the current time will not be sufficient to determine whether or not a class member has contracted or will contract the diseases listed above, since many class

members may only test positive for various diseases many months, or even years, after exposure.

3. In addition, both the CDC and numerous recognized medical experts recommend that those who are even potentially exposed to Hepatitis B – such as the class members – should begin immediate prophylaxis (i.e. preventive, precautionary treatment), even before a positive test, in order to prevent HBV infection and subsequent development of chronic infection or liver disease. This includes receiving the Hepatitis B vaccine and Hepatitis B immune globulin. This is so because the effectiveness of such post exposure treatment is vastly improved the sooner such treatment begins.

4. Currently, no such prophylactic measures are being offered by Defendant to the class. Indeed, Defendant has offered no remedies or efforts at mitigation beyond the completely inadequate offer of one free blood test discussed above.

5. Through this class action, Plaintiff seeks, inter alia, reasonable and adequate injunctive and equitable relief, including a court supervised program of medical surveillance as described in the landmark decision Ayers v. Jackson Twp., 106 N.J. 557 (1987), at Defendant's expense, to adequately protect the health of the class.

#### VENUE

6. Venue is proper in this county in that Plaintiff resides in Essex County.

#### THE PARTIES

7. Plaintiff David Kinlock is an individual residing in Newark, New Jersey who is a member of the class in that he received the Attachment A form notice from Defendant and underwent a surgical procedure at Defendant's surgical center in Saddle River, New Jersey, between January 1, 2018 and September 7, 2018.

8. Defendant HealthPlus Surgery Center, LLC (hereinafter referred to as

“HealthPlus”) is incorporated in the State of New Jersey and maintains its principal place of business at 190 Midland Avenue, Saddle Brook, New Jersey.

**FACTUAL BASIS FOR THE RELIEF REQUESTED**

9. HealthPlus Surgery Center is an ambulatory surgery center located in Saddle Brook, New Jersey, which offers various surgical procedures.

10. On September 7, 2018, the New Jersey Department of Health ordered this surgery center to close due to the failure to properly clean and disinfect medical hardware and instruments.

11. The New Jersey Department of Health found that Defendant had violated several regulations governing the manner in which instruments and equipment were to be sterilized and cleaned, including N.J.A.C. 8:43A-14.4 and 14.5.

12. On or about December 17, 2018, Defendant HealthPlus mailed out form notices to approximately 3,700 former patients who had received surgical procedures at this HealthPlus facility between January 1, 2018 and September 7, 2018. See Attachment A.

13. This form notice notified recipients of their potential exposure to, inter alia, Hepatitis B, Hepatitis C and HIV, and recognized the need for recipients to be tested for these diseases. See Attachment A.

14. As Defendant admitted in these form notices, such testing was made necessary by what Defendant itself described as “**lapses in infection control in sterilization/cleaning instruments**” at HealthPlus during the period between January 1, 2018 and September 7, 2018. Id.

15. In this notice, Defendant stressed the need for each class member to begin testing as soon as possible, as there are certain treatments available to minimize the chances of infection

and damage due to exposure to the diseases described in the notice. See Attachment A:

**“Knowing if you have hepatitis B, hepatitis C, or HIV is important because there are medicines, treatments, and other things that people with infections can do to protect their health.”**

16. Defendant’s form notice goes on to offer a single “free” blood test to each class member.
17. Defendant has not offered any additional testing to any class member.
18. Nor has Defendant offered to pay for any type of medicines, treatments or other prophylactic measures for any class member.
19. Moreover, despite noting that there are “medicines” and “treatments” that can help protect class members’ health after exposure, Defendant’s notice does not provide any information about such medicines or treatments.
20. The seriousness of the danger faced by the class due to their potential exposure to life-threatening diseases cannot be overstated.
21. Human immunodeficiency virus (HIV) is a retrovirus that over time can cause acquired immunodeficiency syndrome (AIDS). The latency period for HIV can be several years. Without treatment, average survival time after infection with HIV is estimated to be 9 to 11 years. HIV attacks the body’s immune system, making the person more likely to get other infections or infection-related cancers.
22. Hepatitis B is an infectious disease that affects the liver. It can cause both acute and chronic infections. Many people have no symptoms during the initial infection. The incubation period can be longer than 6 months. In up to 25% of those with chronic infection, complications result in death.
23. Hepatitis C is an infectious disease that primarily affects the liver. During the



initial infection people often have mild or no symptoms. The incubation period can be longer than 6 months. The virus persists in the liver in about 75% to 85% of those initially infected. Early on chronic infection typically has no symptoms. Over many years however, it often leads to liver disease and occasionally cirrhosis. In some cases, those with cirrhosis will develop complications such as liver failure, liver cancer, or dilated blood vessels in the esophagus and stomach.

24. Through no fault of their own, the class has been exposed to these diseases and even Defendant admits that this exposure is cause for concern and should result in immediate testing.

25. This situation was created entirely by Defendant, which failed to follow proper procedures regarding the sterilization and cleaning of equipment and instruments and to properly supervise and train their employees in such procedures.

26. Despite its culpability for this exposure, the sole prophylactic and/or remedial action offered by Defendant to date is to offer to pay for a single blood test per class member.

27. This proposal is wholly inadequate given the seriousness of the diseases to which the class has been exposed, the nature of the danger and the standard of medical care for persons potentially exposed to such diseases.

28. The diseases to which the class was exposed include Hepatitis B and Hepatitis C, each of which have an incubation period of greater than six months and HIV, which can have a latency period of several years.

29. Thus, Defendant's offer to pay for a single blood test at the current time for each class member is wholly inadequate. Whether or not a class member will develop these diseases simply cannot be determined by a single test at the current time and can only be determined by a

series of tests over time.

30. Indeed, a “negative” blood test for Hepatitis B, Hepatitis C, or HIV at the current time may actually further endanger a class member’s health because it may promote a false sense of security and safety, when in reality that class member’s may still contract these diseases in the future before the expiration of the latency and/or incubation period. In the meantime, such a class member may unknowingly spread one or more of these diseases to others through close contact, including sexual contact.

31. Moreover, with regard to Hepatitis B, many recognized medical experts, including the CDC, recommend a “better safe than sorry” approach in which those who have suffered even a potential exposure to Hepatitis B, but have not yet tested positive, should begin immediate prophylactic treatment to prevent HBV infection and subsequent development of chronic infection or liver disease. This would include receiving immediate Hepatitis B vaccine and Hepatitis B immune globulin, even before a positive test result for Hepatitis B. This is so because the effectiveness of such post exposure treatment is vastly improved the sooner such treatment begins.

32. Currently, no such prophylactic measures are being offered by Defendant to the class, though Defendant’s notice hints that certain unnamed “medicines” or “treatments” exist which might protect class members.

33. Despite this, Defendant has offered no remedies or efforts at mitigation beyond an inadequate offer of one free blood test per person as discussed above.

34. Through this class action, Plaintiff seeks, inter alia, reasonable and adequate injunctive and equitable relief, including a court supervised program of periodic testing on multiple occasions over time as described in the landmark decision Ayers v. Jackson Twp., 106

N.J. 557 (1987), at Defendant's expense.

### **CLASS ACTION ALLEGATIONS**

35. Plaintiff brings this action as a class action pursuant to R. 4:32, on behalf of a class defined as:

**All New Jersey citizens who received a form notice from Defendant which was identical or substantially similar to Attachment A.**

36. According to a press release made by Defendant, the number of class members exceeds 3,700, each of whom was sent a form notice by Defendant and thus Defendant is fully aware of the name and address of each such person.

37. There are numerous common questions of fact affecting the rights of class members, including inter alia:

- a. whether the class is in need of a court-monitored program of injunctive and equitable relief, including periodic medical monitoring on multiple occasions over time, under the New Jersey Supreme Court holding in Ayers v. Jackson Twp., 106 N.J. 557 (1987);
- b. whether Defendant operated its facility in a manner that it knew, or should have known, would cause injury to Plaintiff and the class;
- c. whether Defendant failed to employ reasonable precautions and safeguards to minimize or eliminate the damage to Plaintiff and the class;
- d. whether Defendant failed to adequately supervise and/or train its employees in the proper manner of cleaning and sterilization of equipment and instruments.

38. Plaintiff is a member of the class he seeks to represent and his claims are typical of all class members in that Plaintiff's claims arise from the same factual and legal basis as those of the class.

39. All members of the class, including Plaintiff, have been damaged in the same manner by the actions complained of herein.

40. Plaintiff will thoroughly and adequately protect the interests of the class, having retained qualified and competent legal counsel to represent himself and the class.

41. Plaintiff's counsel are highly experienced in class actions, some of whom have participated in over 175 certified class actions, including class actions for medical monitoring in New Jersey state court such as Mignano et al v. Kiddie Kollege Daycare & Preschool Inc., et al., Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1309-06 (medical monitoring granted under Ayers v. Jackson after full trial in case involving preschoolers exposed to mercury in former thermometer factory converted to daycare facility).

42. Plaintiff has no interest antagonistic to that of the class.

43. The prosecution of separate actions by individual class members will create a risk of inconsistent or varying adjudications.

44. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

45. Defendant has acted and refused to act on grounds generally applicable to the entire class, thereby making injunctive and equitable relief appropriate for the entire class.

#### COUNT ONE

#### **Injunctive Relief in the Form of a Court Administered Program for Medical Surveillance, Periodic Monitoring & Testing, Education and Warning**

46. Plaintiff and the class incorporate all prior allegations of the class complaint.

47. The class is in need of equitable relief in the form of a program of medical surveillance, periodic testing on multiple occasions, adequate notice and warning, and a course of appropriate prophylactic treatment to protect class members from the dangerous conditions

described herein.

48. Equity demands that neither class members, nor taxpayers, should have to bear the burden of funding such a program, which is made necessary by the conduct of Defendant.

49. Accordingly, the class seeks an order directing that such a program be established, to be administered by the Court under its equitable powers, with Defendant being ordered to pay the costs associated with such a program, for as long as the Court deems necessary.

## COUNT TWO

### Negligence

50. Plaintiff and the class incorporate all prior allegations of the class complaint.

51. It was at all times foreseeable to Defendant that failure to provide adequate and reasonable safeguards to ensure proper sterilization of instruments and equipment would cause exposure to Plaintiff and the class as alleged herein.

52. This includes but is not limited to the failure to properly train and supervise employees.

53. Despite this, Defendant failed to provide such reasonable safeguards and to take other reasonable actions that a prudent person under similar circumstances would have taken to eliminate or minimize such risk of danger to Plaintiff and the class.

54. The conduct of Defendant was both a proximate cause and a cause in fact of the exposure and damages inflicted on Plaintiff and the class and the expenses made necessary by such exposure.

55. As a result of Defendant's conduct, the property of Plaintiff and the class has been injured within the meaning of Ayers v. Jackson Twp., 106 N.J. 557, 592 (1987).

### COUNT THREE

#### **Professional Malpractice Under the Common Knowledge Doctrine and Res Ipsa Loquitur**

56. Plaintiff and the class incorporate all prior allegations of the class complaint

57. At all times mentioned herein, Defendant was engaged in the practice of medicine in accordance with the laws of the State of New Jersey.

58. At all times mentioned herein, the Defendant professed and held itself out of the public and the plaintiff, as being a licensed medical facility and surgical center, which was skilled, careful and diligent in the practice of medicine and its profession. Specifically, Defendant held itself out as specializing in surgical procedures.

59. Between January 1, 2018 and September 7, 2018, Defendant provided medical treatment to Plaintiff and the class.

60. On said dates, Defendant was negligent in its treatment, preoperative, operative and post-operative care, and did personally, and by and through its agents, ostensible agents, servants and/or employees, act negligently with regard to the existing state of knowledge of medicine and surgery, and failed to exercise ordinary care, and otherwise failed to exercise the degree of care commonly exercised by other medical professionals and surgical facilities in the like cases, failed to properly clean and sterilize medical instruments and equipment prior to, during and after surgical procedures.

61. The nature of such failures and negligence would be clear to the average lay person without the need for expert testimony in that the need to clean and/or sterilize surgical instruments and equipment are commonly known to the general public, the danger of performing surgical procedures on patients without such actions is readily apparent to the average person, and the specific standard of care and legal requirements for proper cleaning and sterilization of

surgical instruments and equipment is expressly set forth in written regulations published by the New Jersey Department of Health such as N.J.A.C. 8:43A-14.4 and 14.5. Defendant has already been found to have violated such regulations by the Department of Health. Moreover, Defendant itself has already admitted, in writing in its Attachment A form notice, that Defendant experienced “**lapses in infection control in sterilization/cleaning instruments**” at the HealthPlus surgical facility during the period between January 1, 2018 and September 7, 2018. See Attachment A.

62. As a direct and proximate cause of the carelessness, recklessness and negligence of Defendant as described herein, Plaintiff and the class have suffered, and will in the future, continue to suffer injuries and damages.

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff asks this Court to:

- a. Certify this matter as a class action pursuant to R. 4:32;
- b. Grant declaratory and injunctive relief to the Plaintiff class and establishing, at Defendant’s expense, a court-administered program for periodic medical testing on multiple occasions over time and the offer of appropriate prophylactic treatment to reduce the health risks and other dangers associated with the exposure described herein, at Defendant’s expense;
- c. Award Plaintiff reasonable attorneys’ fees and costs; and
- d. Grant Plaintiff and the class such other and further legal, equitable and declaratory relief as justice requires.



**JURY TRIAL DEMANDED**

Plaintiff demand a trial by jury on all issues so triable.

**DeNITTIS OSEFCHEN PRINCE, P.C.**

Dated: 1/3/19

By: 

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*Attorneys for Plaintiff and the Proposed Class*



**CERTIFICATION PURSUANT TO R. 4:5-1**

I certify that, to the best of my knowledge, this matter is not the subject of any other action pending in any court or of any pending arbitration or administrative proceeding, other than Marrero v. HealthPlus Surgery Center, LLC, Docket No. BER-L-9265-18. There are no other parties known to Plaintiff at this time who should be joined in this action.

**CERTIFICATION PURSUANT TO N.J.S.A. 56:8-1 et seq.**

The undersigned hereby certify that a copy of this complaint has been forwarded to the Attorney General of the State of New Jersey.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Stephen DeNittis and Michael Galpern are designated as trial counsel on this complaint.

**DeNITTIS OSEFCHEN PRINCE, P.C.**

Dated: 1/3/19

By: 

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sdenittis@denittislaw.com

*Attorneys for Plaintiff and the Proposed Class*

# Attachment A



# HEALTHPLUS SURGERY CENTER

Elevating the Level of Outpatient Service

December 17, 2018

Kinlock, David  
203 Mount Vernon Place  
Newark, NJ07106

Dear Kinlock, David

You are receiving this letter because you received a procedure at HealthPlus Surgery Center, LLC ("HealthPlus") between January 1, 2018 and September 7, 2018. An investigation by the New Jersey Department of Health revealed that during this time period, lapses in infection control in sterilization/cleaning instruments and the injection of medications may have exposed patients to bloodborne pathogens (diseases in people's blood), such as hepatitis B, hepatitis C, and human immunodeficiency virus (HIV). To date, there have not been reports of any infections or illness related to the investigation. However, **HealthPlus and the New Jersey Department of Health recommend that you get blood tests for hepatitis B, hepatitis C, and HIV.**

Knowing if you have hepatitis B, hepatitis C, or HIV is important because there are medicines, treatments, and other things that people with these infections can do to protect their health. You can be infected with these diseases and not feel sick at all. It is important that you get tested, even if you do not remember feeling sick. The tests are a simple blood test.

All of us at HealthPlus understand this may be upsetting. We want to assure you that we will assist you during this process, including paying for all medical costs associated with testing at the locations listed below. We recommend that you get tested as soon as possible. To provide you with more information, a fact sheet on these infections has been included with this letter. If you or your family members have questions call NJ Health Hotline at 1-800-962-1253 Monday through Friday from 9am-9pm. The NJ Poison Control Center is assisting with calls for this investigation.

### **How do I get a blood test?**

For your convenience, HealthPlus is paying for patients to receive blood tests at LabCorp or Hudson Regional Hospital at no charge. Patients can go to any New York or New Jersey LabCorp location. If you prefer, HealthPlus can arrange for transportation to and from Hudson Regional Hospital for your convenience and at no cost to you. Please schedule an appointment as soon as you receive this letter. ***On the day of the test, bring this letter with you.*** Please call 1-888-507-0578 Monday through Friday from 9am-9pm to make an appointment at one of the following locations:

- You may have your testing performed at any New York or New Jersey LabCorp location. Your closest location can be found here: <https://www.labcorp.com/> and an appointment

can also be scheduled through this website or by calling the testing site directly. You can also call 1-888-507-0578 between the hours of 9am-9pm Monday through Friday, and an appointment will be scheduled for you. Walk-ins without an appointment are also welcome at any New York or New Jersey LabCorp location.

**OR**

- You may have your testing performed at Hudson Regional Hospital located at 55 Meadowlands Parkway, Secaucus, New Jersey 07094. Appointments for blood tests will be scheduled at Hudson Regional Hospital between the hours of 8:00 a.m. and 8:00 p.m. Monday-Friday and between 10:00 a.m. and 3:00 p.m. on Saturdays. Walk-ins without an appointment are also welcome during these hours. If you prefer to schedule an appointment and/or require assistance with transportation to Hudson Regional Hospital, you can call 1-888-507-0578 between the hours of 9am-9pm Monday through Friday.

Please bring this letter and photo identification with you to the testing site on the day of your tests. If you will be having the blood tests performed by LabCorp, please also bring the LabCorp enclosure with you.

Please be advised that if you elect to have your tests performed by a provider or laboratory other than Hudson Regional Hospital or LabCorp, HealthPlus will not be responsible for any costs associated with the testing you receive and any fees paid by you in connection with such tests will not be reimbursed. To be clear, HealthPlus will only cover costs associated with lab testing performed by Hudson Regional Hospital or LabCorp.

**How will I get my blood test results?**

A copy of the test results will be sent to you and your doctor and you will be contacted by a representative from Hudson Regional Hospital with your results

**What if my blood test is positive?**

If your blood test is positive, a representative from Hudson Regional Hospital will explain the results and provide you with a referral to the appropriate specialist. Additionally, NYC residents can find care through the NYC Health Map found here: <https://a816-healthpsi.nyc.gov/NYCHHealthMap>. We understand that this may be an upsetting situation for you, and that you and your family may have additional questions or concerns about the information you have received.

You may also call the HealthPlus hotline with questions at 1-888-507-0578 Monday through Friday from 9am-9pm. Included with this letter is a fact sheet about hepatitis B, hepatitis C, and HIV. This information explains about the diseases and may answer some of your questions.

Sincerely,  
HealthPlus Surgery Center, LLC



## Bloodborne Pathogens

**What are Bloodborne Pathogens?** Disease producing viruses (germs) carried by the blood. Bloodborne pathogens like Hepatitis B (HBV), Hepatitis C (HCV), and Human Immunodeficiency Virus (HIV) are spread by direct contact with infected blood and/or body fluids. These diseases are NOT spread by casual contact (coughing, sneezing, hugging, etc.) or by food or water. A simple blood test can show if you are infected with HBV, HCV, and HIV.

	Hepatitis B (HBV)	Hepatitis C (HCV)	HIV
<b>What is it?</b>	An infection of the liver caused by the Hepatitis B Virus. HBV can range in severity from a mild illness lasting a few weeks to a chronic lifelong illness.	An infection of the liver caused by the Hepatitis C Virus. HCV can range in severity from a mild illness lasting a few weeks to a chronic lifelong illness.	Human Immunodeficiency Virus (HIV) is the virus that causes Acquired Immune Deficiency Syndrome (AIDS). Having AIDS means that the body has a hard time fighting infections.
<b>How is it spread?</b>	<ul style="list-style-type: none"> <li>• Sharing needles, syringes or other medication-injection items</li> <li>• Exposure to blood from needlesticks or other sharp objects/instruments</li> <li>• Direct contact with the blood or open sores of an infected person</li> <li>• Birth to a mother infected with HBV</li> <li>• Having sexual contact with a person infected with HBV</li> <li>• Sharing personal care items that may have come in contact with another person's blood, such as razors or toothbrushes</li> </ul>	<ul style="list-style-type: none"> <li>• Sharing needles, syringes, or other medication injection items</li> <li>• Exposure to blood from needlesticks or other sharp objects/instruments</li> <li>• Direct contact with the blood or open sores of an infected person</li> </ul> <p>Less commonly, a person can also get hepatitis C through:</p> <ul style="list-style-type: none"> <li>• Having sexual contact with a person infected with HCV</li> <li>• Sharing personal care items that may come into contact with blood or body fluids, such as razors or toothbrushes</li> <li>• Birth to a mother infected with HCV</li> </ul>	<ul style="list-style-type: none"> <li>• Sharing needles, syringes or other medication-injection items</li> <li>• Exposure to blood from needlesticks or other sharp objects/instruments</li> <li>• Direct contact with the blood or open sores of an infected person</li> <li>• Birth to a mother infected with HIV.</li> <li>• Breastmilk from a mother infected with HIV</li> <li>• Having sexual contact with a person infected with HIV</li> <li>• Sharing personal care items that may have come in contact with another person's blood, such as razors or toothbrushes</li> </ul>

<p><b>What are possible symptoms?</b></p>	<ul style="list-style-type: none"><li>• Fever</li><li>• Feeling tired</li><li>• Loss of appetite</li><li>• Nausea/vomiting</li><li>• Belly pain</li><li>• Dark urine</li><li>• Clay-colored bowel movements (stools)</li><li>• Joint pain</li><li>• Yellowing of the skin/eyes</li></ul> <p>Most individuals with chronic HBV remain symptom free for as long as 20 or 30 years.</p>	<ul style="list-style-type: none"><li>• Fever</li><li>• Feeling tired</li><li>• Loss of appetite</li><li>• Nausea/vomiting</li><li>• Belly pain</li><li>• Dark urine</li><li>• Clay-colored bowel movements (stools)</li><li>• Joint pain</li><li>• Yellowing of the skin/eyes</li></ul> <p>Many people with HCV do not know they are infected because they do not look or feel sick.</p>	<p>You cannot rely on symptoms to know whether or not you are infected. Many people who are infected with HIV may not have symptoms for 10 years or more.</p>
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	Hepatitis B (HBV)	Hepatitis C (HCV)	HIV
<b>What are the long term effects?</b>	Some may develop serious liver problems, including liver damage, cirrhosis, liver failure and liver cancer.	Some may develop cirrhosis (scarring) of the liver, liver cancer or liver failure. These can take 10, 20 or even 30 years to develop. Other people may have no long term effects.	AIDS is the late stage of HIV infection, when a person's immune system is severely damaged and has difficulty fighting diseases and certain cancers.
<b>Can it be treated?</b>	<p>There are no specific medications available to treat acute hepatitis B.</p> <p>People with chronic hepatitis B should be seen by a doctor regularly for signs of liver disease and evaluated for possible treatment.</p> <p>Several medications have been approved for hepatitis B treatment, and new drugs are in development. However, not every person with chronic hepatitis B needs to be on medications.</p> <p>There is a vaccine to prevent hepatitis B.</p>	<p>Medications are available to treat chronic hepatitis C infection. With the help of treatment, some people are able to rid their bodies of the hepatitis C virus. For someone with advanced hepatitis C disease, a liver transplant may be an option.</p> <p>There is not a vaccine to prevent hepatitis C.</p>	<p>Current medications can dramatically improve the health of people living with HIV and slow succession from HIV infection to AIDS. At this time, there is no cure for HIV infection.</p> <p>There is not a vaccine to prevent HIV.</p>
<b>Can it be prevented?</b>	<p>The best way to prevent getting a bloodborne disease is to avoid contact with the blood and body fluids of other people.</p> <ul style="list-style-type: none"> <li>• Handwashing is the most important way to prevent the spread of many diseases.</li> <li>• Wear disposable gloves if you have to touch anyone's blood, body fluid or wound.</li> <li>• Don't share razors, toothbrushes or other household items that may be contaminated with blood.</li> <li>• Get vaccinated against hepatitis B.</li> <li>• Practice safer sex by using a latex condom correctly and consistently each time.</li> <li>• Only get tattoos or body piercings from licensed facilities or places that use sterile equipment.</li> </ul>		

**For More Information:**

**Hepatitis B:**

- New Jersey Department of Health: <https://www.state.nj.us/health/cd/topics/hepatitisb.shtml>
- Hepatitis B Frequently Asked Questions (FAQs): [https://www.nj.gov/health/cd/documents/faq/hepb\\_faq.pdf](https://www.nj.gov/health/cd/documents/faq/hepb_faq.pdf)
- Centers for Disease Control and Prevention (CDC) website: <http://www.cdc.gov/hepatitis/index.htm>

**Hepatitis C:**

- New Jersey Department of Health: <https://www.state.nj.us/health/cd/topics/hepatitisc.shtml>
- Hepatitis C Frequently Asked Questions (FAQs): <https://www.state.nj.us/health/cd/documents/Hepatitis%20C-New%20FAQ%20logo-REV05042018..pdf>
- Centers for Disease Control and Prevention (CDC) website: <http://www.cdc.gov/hepatitis/index.htm>

**HIV:**

- New Jersey Department of Health
- HIV Frequently Asked Questions (FAQs) <https://www.nj.gov/health/hivstdtb/hiv-aids/getting-tested/faq.shtml>

- Centers for Disease Control and Prevention (CDC) website: <http://www.cdc.gov/hiv/>

10/18



## Civil Case Information Statement

### Case Details: ESSEX | Civil Part Docket# L-000074-19

**Case Caption:** KINLOCK DAVID VS HEALTHPLUS SURGERY CENTER, LL  
**Case Initiation Date:** 01/03/2019  
**Attorney Name:** STEPHEN P DE NITTIS  
**Firm Name:** DE NITTIS OSEFCHEN AND PRINCE PC  
**Address:** 5 GREENTREE CENTRE 525 ROUTE 73 NORTH STE 410 MARLTON NJ 08053  
**Phone:**  
**Name of Party:** PLAINTIFF : Kinlock, David  
**Name of Defendant's Primary Insurance Company**  
(if known): Unknown

**Case Type:** TORT-OTHER  
**Document Type:** Complaint with Jury Demand  
**Jury Demand:** YES - 6 JURORS  
**Hurricane Sandy related?** NO  
**Is this a professional malpractice case?** NO  
**Related cases pending:** NO  
**If yes, list docket numbers:**  
**Do you anticipate adding any parties (arising out of same transaction or occurrence)?** NO

### THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

**Do parties have a current, past, or recurrent relationship?** NO

**If yes, is that relationship:**

**Does the statute governing this case provide for payment of fees by the losing party?** YES

**Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:**

**Do you or your client need any disability accommodations?** NO

**If yes, please identify the requested accommodation:**

**Will an interpreter be needed?** NO

**If yes, for what language:**

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

01/03/2019  
Dated

/s/ STEPHEN P DE NITTIS  
Signed

# **EXHIBIT B**

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**Attorneys for Plaintiffs**

<p>JOSE SALCEDO and DAVID KINLOCK, on behalf of themselves and all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>HEALTHPLUS SURGERY CENTER, LLC,</p> <p style="text-align: center;">Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY LAW DIVISION</p> <p>DOCKET NO. ESX-L-74-19</p> <p><b>FIRST AMENDED CLASS ACTION COMPLAINT</b></p>
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**INTRODUCTION**

1. This is a class action brought on behalf of the over 3,700 New Jersey citizens who received a form notice from Defendant which was identical or substantially similar to Attachment A, notifying them of their need to undergo immediate testing for Hepatitis B, Hepatitis C and HIV, due to lapses in infection control and sterilization of instruments at HealthPlus Surgery Center, LLC between January 1, 2018 and September 7, 2018.

2. As outlined in greater detail herein, the single “free” blood test currently being offered by Defendant to each class member is wholly inadequate to ensure the health and safety of the class. Certain diseases to which the class has been exposed, such as Hepatitis B, Hepatitis C and HIV, can have an incubation period and/or period of dormancy of several years. Accordingly, a single blood test at the current time will not be sufficient to determine whether or not a class member has contracted or will contract the diseases listed above, since many class

members may only test positive for various diseases many months, or even years, after exposure.

3. In addition, both the CDC and numerous recognized medical experts recommend that those who are even potentially exposed to Hepatitis B – such as the class members – should begin immediate prophylaxis (i.e., preventive, precautionary treatment), even before a positive test, in order to prevent HBV infection and subsequent development of chronic infection or liver disease. This includes receiving the Hepatitis B vaccine and Hepatitis B immune globulin. This is so because the effectiveness of such post exposure treatment is vastly improved the sooner such treatment begins.

4. Currently, no such prophylactic measures are being offered by Defendant to the class. Indeed, Defendant has offered no remedies or efforts at mitigation beyond the completely inadequate offer of one free blood test discussed above.

5. Through this class action, Plaintiffs seek, inter alia, reasonable and adequate injunctive and equitable relief, including a court supervised program of medical surveillance as described in the landmark decision Ayers v. Jackson Twp., 106 N.J. 557 (1987), at Defendant's expense, to adequately protect the health of the class.

#### VENUE

6. Venue is proper in this county in that Plaintiff Kinlock resides in Essex County and the form notices sent by Defendant referenced herein were mailed, inter alia, to class members who reside in Essex County, New Jersey.

#### THE PARTIES

7. Plaintiff David Kinlock is an individual residing in New Jersey who is a member of the class in that he received the Attachment A form notice from Defendant and underwent a surgical procedure at Defendant's surgical center in Saddle River, New Jersey, between January 1, 2018 and

September 7, 2018.

8. Plaintiff Jose Salcedo is an individual residing in New Jersey who is a member of the class in that he received the Attachment A form notice from Defendant and underwent a surgical procedure at Defendant's surgical center in Saddle River, New Jersey, between January 1, 2018 and September 7, 2018.

9. Defendant HealthPlus Surgery Center, LLC (hereinafter referred to as "HealthPlus") is incorporated in the State of New Jersey and maintains its principal place of business at 190 Midland Avenue, Saddle Brook, New Jersey.

#### **FACTUAL BASIS FOR THE RELIEF REQUESTED**

10. HealthPlus Surgery Center is an ambulatory surgery center located in Saddle Brook, New Jersey, which offers various surgical procedures.

11. On September 7, 2018, the New Jersey Department of Health ordered this surgery center to close due to the failure to properly clean and disinfect medical hardware and instruments.

12. The New Jersey Department of Health found that Defendant had violated several regulations governing the manner in which instruments and equipment were to be sterilized and cleaned, including N.J.A.C. 8:43A-14.4 and 14.5.

13. On or about December 17, 2018, Defendant HealthPlus mailed out form notices to approximately 3,700 former patients who had received surgical procedures at this HealthPlus facility between January 1, 2018 and September 7, 2018. See Attachment A.

14. This form notice notified recipients of their potential exposure to, inter alia, Hepatitis B, Hepatitis C and HIV, and recognized the need for recipients to be tested for these diseases. See Attachment A.

15. As Defendant admitted in these form notices, such testing was made necessary by what Defendant itself described as **“lapses in infection control in sterilization/cleaning instruments”** at HealthPlus during the period between January 1, 2018 and September 7, 2018.  
Id.

16. In this notice, Defendant stressed the need for each class member to begin testing as soon as possible, as there are certain treatments available to minimize the chances of infection and damage due to exposure to the diseases described in the notice. See Attachment A:

**“Knowing if you have hepatitis B, hepatitis C, or HIV is important because there are medicines, treatments, and other things that people with infections can do to protect their health.”**

17. Defendant’s form notice goes on to offer a single “free” blood test to each class member.

18. Defendant has not offered any additional testing to any class member.

19. Nor has Defendant offered to pay for any type of medicines, treatments or other prophylactic measures for any class member.

20. Moreover, despite noting that there are “medicines” and “treatments” that can help protect class members’ health after exposure, Defendant’s notice does not provide any information about such medicines or treatments.

21. The seriousness of the danger faced by the class due to their potential exposure to life-threatening diseases cannot be overstated.

22. Human immunodeficiency virus (HIV) is a retrovirus that over time can cause acquired immunodeficiency syndrome (AIDS). The latency period for HIV can be several years. Without treatment, average survival time after infection with HIV is estimated to be nine (9) to eleven (11) years. HIV attacks the body’s immune system, making the person more likely to get

other infections or infection-related cancers.

23. Hepatitis B is an infectious disease that affects the liver. It can cause both acute and chronic infections. Many people have no symptoms during the initial infection. The incubation period can be longer than 6 months. In up to 25% of those with chronic infection, complications result in death.

24. Hepatitis C is an infectious disease that primarily affects the liver. During the initial infection people often have mild or no symptoms. The incubation period can be longer than six (6) months. The virus persists in the liver in about 75% to 85% of those initially infected. Early on chronic infection typically has no symptoms. Over many years however, it often leads to liver disease and occasionally cirrhosis. In some cases, those with cirrhosis will develop complications such as liver failure, liver cancer, or dilated blood vessels in the esophagus and stomach.

25. Through no fault of their own, the class has been exposed to these diseases and even Defendant admits that this exposure is cause for concern and should result in immediate testing.

26. This situation was created entirely by Defendant, which failed to follow proper procedures regarding the sterilization and cleaning of equipment and instruments and to properly supervise and train their employees in such procedures.

27. Despite its culpability for this exposure, the sole prophylactic and/or remedial action offered by Defendant to date is to offer to pay for a single blood test per class member.

28. This proposal is wholly inadequate given the seriousness of the diseases to which the class has been exposed, the nature of the danger and the standard of medical care for persons potentially exposed to such diseases.

29. The diseases to which the class was exposed include Hepatitis B and Hepatitis C, each of which have an incubation period of greater than six months and HIV, which can have a latency period of several years.

30. Thus, Defendant's offer to pay for a single blood test at the current time for each class member is wholly inadequate. Whether or not a class member will develop these diseases simply cannot be determined by a single test at the current time and can only be determined by a series of tests over time.

31. Indeed, a "negative" blood test for Hepatitis B, Hepatitis C, or HIV at the current time may actually further endanger a class member's health because it may promote a false sense of security and safety, when in reality that class member's may still contract these diseases in the future before the expiration of the latency and/or incubation period. In the meantime, such a class member may unknowingly spread one or more of these diseases to others through close contact, including sexual contact.

32. Moreover, with regard to Hepatitis B, many recognized medical experts, including the CDC, recommend a "better safe than sorry" approach in which those who have suffered even a potential exposure to Hepatitis B, but have not yet tested positive, should begin immediate prophylactic treatment to prevent HBV infection and subsequent development of chronic infection or liver disease. This would include receiving immediate Hepatitis B vaccine and Hepatitis B immune globulin, even before a positive test result for Hepatitis B. This is so because the effectiveness of such post exposure treatment is vastly improved the sooner such treatment begins.

33. Currently, no such prophylactic measures are being offered by Defendant to the class, though Defendant's notice hints that certain unnamed "medicines" or "treatments" exist



which might protect class members.

34. Despite this, Defendant has offered no remedies or efforts at mitigation beyond an inadequate offer of one free blood test per person as discussed above.

35. Through this class action, Plaintiff seeks, inter alia, reasonable and adequate injunctive and equitable relief, including a court supervised program of periodic testing on multiple occasions over time as described in the landmark decision Ayers v. Jackson Twp., 106 N.J. 557 (1987), at Defendant's expense.

### **CLASS ACTION ALLEGATIONS**

36. Plaintiffs bring this action as a class action pursuant to R. 4:32, on behalf of a class defined as:

**All New Jersey citizens who received a form notice from Defendant which was identical or substantially similar to Attachment A.**

37. According to a press release made by Defendant, the number of class members exceeds 3,700, each of whom was sent a form notice by Defendant and thus Defendant is fully aware of the name and address of each such person.

38. There are numerous common questions of fact affecting the rights of class members, including inter alia:

- a. whether the class is in need of a court-monitored program of injunctive and equitable relief, including periodic medical monitoring on multiple occasions over time, under the New Jersey Supreme Court holding in Ayers v. Jackson Twp., 106 N.J. 557 (1987);
- b. whether Defendant operated its facility in a manner that it knew, or should have known, would cause injury to Plaintiffs and the class;
- c. whether Defendant failed to employ reasonable precautions and safeguards to

minimize or eliminate the damage to Plaintiff and the class; and

- d. whether Defendant failed to adequately supervise and/or train its employees in the proper manner of cleaning and sterilization of equipment and instruments.

39. Plaintiffs members of the class they seek to represent and their claims are typical of all class members in that Plaintiffs' claims arise from the same factual and legal basis as those of the class.

40. All members of the class, including Plaintiffs, have been damaged in the same manner by the actions complained of herein.

41. Plaintiffs will thoroughly and adequately protect the interests of the class, having retained qualified and competent legal counsel to represent himself and the class.

42. Plaintiffs' counsel are highly experienced in class actions, some of whom have participated in over 175 certified class actions, including class actions for medical monitoring in New Jersey state court such as Mignano, et al. v. Kiddie Kollege Daycare & Preschool Inc., et al., Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1309-06 (medical monitoring granted under Ayers v. Jackson after full trial in case involving preschoolers exposed to mercury in former thermometer factory converted to daycare facility).

43. Plaintiffs have no interest antagonistic to that of the class.

44. The prosecution of separate actions by individual class members will create a risk of inconsistent or varying adjudications.

45. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

46. Defendant has acted and refused to act on grounds generally applicable to the entire class, thereby making injunctive and equitable relief appropriate for the entire class.

## COUNT ONE

### **Injunctive Relief in the Form of a Court Administered Program for Medical Surveillance, Periodic Monitoring & Testing, Education and Warning**

47. Plaintiffs and the class incorporate all prior allegations of the class complaint.

48. The class is in need of equitable relief in the form of a program of medical surveillance, periodic testing on multiple occasions, adequate notice and warning, and a course of appropriate prophylactic treatment to protect class members from the dangerous conditions described herein.

49. Equity demands that neither class members, nor taxpayers, should have to bear the burden of funding such a program, which is made necessary by the conduct of Defendant.

50. Accordingly, the class seeks an order directing that such a program be established, to be administered by the Court under its equitable powers, with Defendant being ordered to pay the costs associated with such a program, for as long as the Court deems necessary.

## COUNT TWO

### **Negligence**

51. Plaintiffs and the class incorporate all prior allegations of the class complaint.

52. It was at all times foreseeable to Defendant that failure to provide adequate and reasonable safeguards to ensure proper sterilization of instruments and equipment would cause exposure to Plaintiffs and the class as alleged herein.

53. This includes but is not limited to the failure to properly train and supervise employees.

54. Despite this, Defendant failed to provide such reasonable safeguards and to take other reasonable actions that a prudent person under similar circumstances would have taken to eliminate or minimize such risk of danger to Plaintiffs and the class.

55. The conduct of Defendant was both a proximate cause and a cause in fact of the exposure and damages inflicted on Plaintiffs and the class and the expenses made necessary by such exposure.

56. As a result of Defendant's conduct, the property of Plaintiffs and the class has been injured within the meaning of Ayers v. Jackson Twp., 106 N.J. 557, 592 (1987).

### COUNT THREE

#### Professional Malpractice Under the Common Knowledge Doctrine and Res Ipsa Loquitor

57. Plaintiffs and the class incorporate all prior allegations of the class complaint.

58. At all times mentioned herein, Defendant was engaged in the practice of medicine in accordance with the laws of the State of New Jersey.

59. At all times mentioned herein, the Defendant professed and held itself out of the public and the plaintiff, as being a licensed medical facility and surgical center, which was skilled, careful and diligent in the practice of medicine and its profession. Specifically, Defendant held itself out as specializing in surgical procedures.

60. Between January 1, 2018 and September 7, 2018, Defendant provided medical treatment to Plaintiffs and the class.

61. On said dates, Defendant was negligent in its treatment, preoperative, operative and post-operative care, and did personally, and by and through its agents, ostensible agents, servants and/or employees, act negligently with regard to the existing state of knowledge of medicine and surgery, and failed to exercise ordinary care, and otherwise failed to exercise the degree of care commonly exercised by other medical professionals and surgical facilities in the like cases, failed to properly clean and sterilize medical instruments and equipment prior to, during and after surgical procedures.

62. The nature of such failures and negligence would be clear to the average lay person without the need for expert testimony in that the need to clean and/or sterilize surgical instruments and equipment are commonly known to the general public, the danger of performing surgical procedures on patients without such actions is readily apparent to the average person, and the specific standard of care and legal requirements for proper cleaning and sterilization of surgical instruments and equipment is expressly set forth in written regulations published by the New Jersey Department of Health such as N.J.A.C. 8:43A-14.4 and 14.5. Defendant has already been found to have violated such regulations by the Department of Health. Moreover, Defendant itself has already admitted, in writing in its Attachment A form notice, that Defendant experienced **“lapses in infection control in sterilization/cleaning instruments”** at the HealthPlus surgical facility during the period between January 1, 2018 and September 7, 2018. See Attachment A.

63. As a direct and proximate cause of the carelessness, recklessness and negligence of Defendant as described herein, Plaintiff and the class have suffered, and will in the future, continue to suffer injuries and damages.

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiffs ask this Court to:

- a. Certify this matter as a class action pursuant to R. 4:32;
- b. Grant declaratory and injunctive relief to the Plaintiff class and establishing, at Defendant's expense, a court-administered program for periodic medical testing on multiple occasions over time and the offer of appropriate prophylactic treatment to reduce the health risks and other dangers associated with the exposure described herein, at Defendant's expense;

- c. Award Plaintiffs reasonable attorneys' fees and costs; and
- d. Grant Plaintiffs and the class such other and further legal, equitable and declaratory relief as justice requires.

**JURY TRIAL DEMANDED**

Plaintiffs demand a trial by jury on all issues so triable.

**DeNITTIS OSEFCHEN PRINCE, P.C.**

Dated: January 16, 2019

By: 

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*Attorneys for Plaintiffs and the Proposed Class*

**CERTIFICATION PURSUANT TO R. 4:5-1**

I certify that, to the best of my knowledge, this matter is not the subject of any other action pending in any court or of any pending arbitration or administrative proceeding, other than Marrero v. HealthPlus Surgery Center, LLC, Docket No. BER-L-9265-18; C.S. v. HealthPlus Surgery Center, LLC, et al., Docket No. BER-L-9289-18; DeBenedictis v. HealthPlus Surgery Center, LLC, et al., Docket No. BER-L-28-19; and Kinlock v. HealthPlus Surgery Center, LLC, et al., Docket No. BER-L-268-19. There are no other parties known to Plaintiff at this time who should be joined in this action.

**CERTIFICATION PURSUANT TO N.J.S.A. 56:8-1 et seq.**

The undersigned hereby certify that a copy of this complaint has been forwarded to the Attorney General of the State of New Jersey.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Stephen DeNittis and Michael Galpern are designated as trial counsel on this complaint.

**DeNITTIS OSEFCHEN PRINCE, P.C.**

Dated: January 16, 2019

By: 

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*Attorneys for Plaintiffs and the Proposed Class*

# Attachment A





# HEALTHPLUS SURGERY CENTER

Elevating the Level of Outpatient Service

Date

Patient Name

Patient Address

Patient City, State Zip

Dear [Title Last Name],

You are receiving this letter because you received a procedure at HealthPlus Surgery Center, LLC ("HealthPlus") between January 1, 2018 and September 7, 2018. An investigation by the New Jersey Department of Health revealed that during this time period, lapses in infection control in sterilization/cleaning instruments and the injection of medications may have exposed patients to bloodborne pathogens (diseases in people's blood), such as hepatitis B, hepatitis C, and human immunodeficiency virus (HIV). To date, there have not been reports of any infections or illness related to the investigation. However, **HealthPlus and the New Jersey Department of Health recommend that you get blood tests for hepatitis B, hepatitis C, and HIV.**

Knowing if you have hepatitis B, hepatitis C, or HIV is important because there are medicines, treatments, and other things that people with these infections can do to protect their health. You can be infected with these diseases, and not feel sick at all. It is important that you get tested, even if you do not remember feeling sick. The tests are a simple blood test.

All of us at HealthPlus understand this may be upsetting. We want to assure you that we will assist you during this process, including paying for all medical costs associated with testing. We recommend that you get tested as soon as possible. To provide you with more information, a fact sheet on these infections has been included with this letter.

### **How do I get a blood test?**

For your convenience, HealthPlus is paying for patients to receive blood tests at no charge. Please schedule an appointment as soon as you receive this letter. ***On the day of the test, bring this letter with you.*** Please call 1-888-507-0578 Monday through Friday between the hours of 9:00 a.m. and 9:00 p.m. to make an appointment at one of the following locations:

- New Jersey patients will receive testing at Hudson Regional Hospital located at 55 Meadowlands Parkway, Secaucus, New Jersey 07094. Appointments for blood tests will be scheduled between the hours of 8:00 a.m. and 8:00 p.m. Monday-Friday and between 10:00 a.m. and 3:00 p.m. on Saturdays. Walk-ins during these hours are also welcome.

Please bring a copy of this letter with you to Hudson Regional Hospital on the day you choose to have your tests performed.

- New York patients will receive testing at any LabCorp location. Your closest location can be found here: <https://www.labcorp.com/> and an appointment can also be scheduled through this website or by calling the testing site directly. You can also call 1-888-507-0578 between the hours of 9am-9pm Monday through Friday, and an appointment will be scheduled for you. Walk-ins without an appointment are also welcome at any LabCorp location.

If you will be having the blood tests performed by LabCorp, please bring this letter, the LabCorp enclosure and photo identification to the testing site on the day of your appointment.

If you wish to have the tests performed through your personal doctor, please make an appointment with him or her as soon as you receive this letter. At your appointment, show your doctor the “Dear Doctor” letter that was included with this letter, so that he/she can run the correct blood tests.

If you are charged a copay or a deductible fee at your doctor’s office for the testing, you will need to pay this fee. Send a copy of the receipt to HealthPlus, and you will be reimbursed the fees (co-pay or deductible) that you paid to your doctor for testing. Send the receipts to:

HealthPlus Surgery Center  
190 Midland Ave, Saddlebrook, NJ 07663  
Attn: Amanda Cologne

**How will I get my blood test results?**

A copy of the test results will be sent to you and your doctor and you will be contacted by a representative from Hudson Regional Hospital with your results

**What if my blood test is positive?**

If your blood test is positive, a representative from Hudson Regional Hospital will explain the results and provide you with a referral to the appropriate specialist. We understand that this may be an upsetting situation for you, and that you and your family may have additional questions or concerns about the information you have received. If you or your family members have questions call the numbers below Monday through Friday from 9am-9pm:

- In New Jersey: 1-866-448-2432
- Outside of New Jersey: 1-800-962-1253

You can also call the hotline established by HealthPlus with questions at 1-888-507-0578 Monday through Friday between the hours of 9am and 9pm.

We’ve included a fact sheet about hepatitis B, hepatitis C, and HIV. This information explains about the diseases and may answer some of your questions.

Sincerely,

HealthPlus Surgery Center, LLC

# **EXHIBIT C**

Richard J. Williams, Jr., Esq.  
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*Attorneys for Defendant, HealthPlus Surgery Center, LLC*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

DAVID KINLOCK, on behalf of himself and  
all others similarly situated,

Plaintiff,

v.

HEALTHPLUS SURGERY CENTER, LLC,

Defendant.

Civil Action No.

**DECLARATION OF BETTY McCABE OF  
HEALTHPLUS SURGERY CENTER, LLC**

I, Betty McCabe, in accordance with 28 U.S.C. § 1746, hereby declare under penalty of perjury that the following is true and correct.

1. I am the Administrator of Defendant, HealthPlus Surgery Center, LLC (“HealthPlus”) and I have personal knowledge of the facts set forth in this declaration.

2. Following a 2018 investigation of HealthPlus by the New Jersey Department of Health, HealthPlus Surgery Center, LLC, was directed by the Department of Health to notify all patients who were treated at HealthPlus Surgery Center, LLC between January 1, 2018, and September 7, 2018, that they may have been exposed to blood borne pathogens such as hepatitis B, hepatitis C, and human immunodeficiency virus.

3. To date, there have not been any reports of infections or illness related to the New Jersey Department of Health investigation.

4. Pursuant to the New Jersey Department of Health's directive HealthPlus reviewed the patient files of all individuals who received treatment at HealthPlus between January 1, 2018, and September 7, 2018.

5. Based on that review, HealthPlus identified each patient that received treatment at HealthPlus during the designated time period and each patient's address. This information was used to issue the notices mandated by the New Jersey Department of Health. This information was compiled at my direction and I am personally familiar with the information collected.

6. Based on the information collected from the patient files for each of the 3,779 individual patients that received treatment at HealthPlus Surgery Center between January 1, 2018, and September 7, 2018, it has been determined that 3,779 individuals received treatment at HealthPlus Surgery Center from the following States: New Jersey, New York, Pennsylvania, Connecticut, Florida, and Maryland. While the majority of patients were from New Jersey and New York, multiple patients from Connecticut, Pennsylvania and Florida received treatment at HealthPlus during the time period designated by the New Jersey Department of Health.

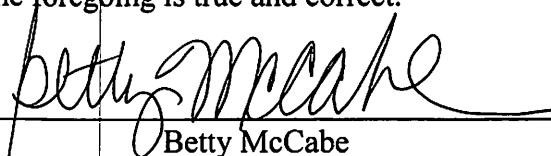
7. Pursuant to the Laboratory Services Agreement between HealthPlus and Laboratory Corporation of America Holdings, a copy of which is attached hereto as "Exhibit A," the cost of one blood test and panel for hepatitis B, hepatitis C, and human immunodeficiency virus is approximately \$340.

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

Dated:

1/21/19

By: \_\_\_\_\_



Betty McCabe  
HealthPlus Surgery Center, LLC

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [NJ's HealthPlus Surgery Center Sued by Former Patients for Treatment, Testing Costs After Hepatitis, HIV Exposure](#)

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