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Attorneys for Class Plaintiffs

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY - NEWARK**

LORIE GARLICK	:	CIVIL ACTION
7557 Kilarney Lane, Apartment 296	:	
Citrus Heights, CA 95610	:	
and	:	NO. 06-cv-6244
TINA L. SCHROEDER	:	
4034 Danbury Street	:	
Wichita, KS 67220	:	
and	:	CLASS ACTION
JOY SCOTT	:	
143 Mayer Drive	:	
Pittsburgh, PA 15237	:	
and	:	JURY TRIAL DEMANDED
BRYAN E. BLEDSOE	:	
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Midlothian, TX 76065	:	
and	:	
WENDY R. BRODY	:	
6207 Lake Ariana Avenue	:	
San Diego, CA 92119	:	
and	:	
KELLY BUCKLEY	:	
1107 NE 4th Street	:	
Washington, IN 47501	:	
and	:	
G. GEOFFREY CRAIG	:	
1920 Rollingstone	:	
Norman, OK 73071	:	
and	:	
GAY CUMMINS	:	
P.O. Box 109	:	
Iuka, KS 67066	:	
and	:	

MARSHA A. DIENELT :
44464 s. El Macero Drive :
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and :
BETH GIBSON :
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Elverson, PA 19520 :
and :
MICHELLE J. GILLUM :
1010 N. Ridge Road #418 :
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and :
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435-B Front Street :
Marysville, PA 17105 :
and :
KRISTIE SMITH :
2405 Sunrise Drive :
Washington, IN 47501 :
and :
JILL WELTON :
36454 Laredo Drive :
Fremont, CA 94536, :
Class Plaintiffs :
vs. :
QUEST DIAGNOSTICS, INC., :
1290 Wall Street West :
Lyndhurst, NJ 07071 :
and :
NATIONAL MEDICAL SERVICES, INC. :
d/b/a NMS LABS :
3701 Welsh Road :
Willow Grove, PA 19090 :
and :
LabCorp, a Subsidiary of Laboratory :
Corporation of America Holdings :
358 South Main Street :
Burlington, NC 27215 :
and :

DTS a/k/a DRUG TEST SYSTEMS :
8 Landing Way :
Dover, NH 03820 :
and :
FirstLab, a Subsidiary of :
FHC HEALTH SYSTEMS, INC. :
Welsh Commons :
1364 Welsh Road, Suite C-2 :
North Wales, PA 19454-1913 :
and :
COMPASS VISION, INC. :
SW Town Center Loop E :
Wilsonville, ORE 97070 :
and :
FIRST ADVANTAGE, Division of :
The First American Corporation :
100 Carillon Parkway :
St. Petersburg, FL 33716 :
and :
“JOHN DOE” CORPORATIONS, :
Class Defendants :

COMPLAINT

PRELIMINARY STATEMENT, JURISDICTION AND VENUE

1. This is a Class Action brought pursuant to Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, and 1711-1715 (“CAFA”), by the Class Plaintiffs on behalf of themselves and all other similarly situated individuals in the United States (hereinafter the “Class”) against the named testing lab Defendants and those other unnamed and unidentified “John Doe” Corporations, for negligent misrepresentation, fraudulent misrepresentation, products liability, ordinary negligence, professional negligence, breach of fiduciary duty and violation of the New Jersey Consumer Fraud Act, related to the promotion, marketing and sale of their EtG drug testing systems, alcohol testing and screening services. It also implicates and asserts the above causes of action,

where applicable, to third party administrators in connection with their own promoting, marketing and contracting for EtG testing with professional licensing boards, through which Class Plaintiffs and others similarly situated were able to practice their professions in the various states where they were licensed. Venue properly lies in the District of New Jersey as one of the lead Defendants has its principal place of business located therein and the remaining Defendants are doing business in the District.

PARTIES

2. Class Plaintiffs bring this national class action, individually and on behalf of all persons similarly situated in the United States. Class Plaintiffs, who are citizens of the states in which they reside as set forth in the Caption, all are or have been licensed in the health care professions, during the relevant time periods set forth hereunder.

3. Class Plaintiffs BRIAN BLEDSOE (“Dr. Bledsoe”) and RICHARD P. PACZYNSKI (“Dr. Paczynski”) are Medical Doctors, who are or have been, during all times material hereto, licensed to practice in their respective states of Texas and Pennsylvania. They represent all those medical and osteopathic physicians who are similarly situated as alleged below.

4. Class Plaintiffs WENDY BRODY (“Dr. Brody”), G. GEOFFREY CRAIG (“Dr. Craig”) and LORIE GARLICK (“Dr. Garlick”) are Doctors of Pharmacy, who are or have been, during all times relevant hereto, licensed to practice in their respective states of California and Oklahoma. They represent all those pharmacists who are similarly situated as alleged below.

5. Class Plaintiffs KELLY BUCKLEY (“Buckley”), GAY CUMMINS (“Cummins”), MARSHA A. DIENELT (“Dienelt”), BETH GIBSON (“Gibson”), ROBIN M. GREEN (“Green”), TINA L. SCHROEDER (“Schroeder”), JOY SCOTT (“Scott”), KRISTIE

SMITH (“Smith”) and JILL WELTON (“Welton”) are nurses, who are or have been, during all times relevant hereto, licensed to practice in their respective states of California, Indiana, Kansas and Pennsylvania. They represent all those nurses who are similarly situated as alleged below.

6. Class Plaintiff MICHELLE J. GILLUM (“Gillum”) is a physical therapist, who is licensed to practice in her state of Kansas. She represents all those physical therapists who are similarly situated as alleged below.

7. Undersigned counsel has secured and undertaken the representation to-date of forty (40) other health care professionals, who are not named as Class Plaintiffs herein, but who are included in the class identified hereunder, who are or have been, during all times relevant hereto, licensed to practice their respective professions in the states of Texas, Pennsylvania, Kansas, Indiana, Michigan, North Carolina, Florida, Oklahoma and New York.

8. It is believed and averred that there are members of the Class, yet unidentified, who as licensed individuals in the health care professions underwent EtG testing (see Class Action Allegations below) and who have been disciplined, had their licenses suspended, are on probation, are facing hearings by their respective licensing boards and/or are involved in ongoing costly and distressing EtG screening that jeopardizes their licenses and ability to pursue their professions for which they were educated, trained and been employed.

9. Defendant QUEST DIAGNOSTICS, INC. (“Quest”) (and its predecessors Lab One and Northwest Toxicology), is a corporation with its principal place of business in the District of New Jersey at 1290 Wall Street West, Lyndhurst, NJ 07071. Quest also has lab testing facilities and offices throughout the United States.

10. Defendant NATIONAL MEDICAL SERVICES, INC. d/b/a NMS LABS (“NMS”) is a corporation with its principal place of business in Pennsylvania at 3701 Welsh Road, Willow Grove, PA 19090. NMS also has lab testing facilities and offices throughout the United States and is doing business in this District.

11. Defendant LabCorp (“LabCorp”), is a subsidiary of Laboratory Corporation of America Holdings, and is a corporate entity with its principal place of business in North Carolina at 358 South Main Street, Burlington, NC 27215. LabCorp also has lab testing facilities and offices throughout the United States and is doing business in this District.

12. Defendant DTS a/k/a DRUG TEST SYSTEMS (“DTS”) is a corporate entity with its principal place of business in New Hampshire at 8 Landing Way, Dover, NH 03820.

13. Defendants Quest, NMS, LabCorp and DTS, inter alia, engage in alcohol and drug screening programs throughout the United States, and as testing labs analyze and report the results of EtG tests upon health care professionals licensed to practice in their individual states.

14. Defendant, FirstLab, a subsidiary of FHC HEALTH SYSTEMS, INC. (“FirstLab”), is a corporate entity with its principal place of business in the Pennsylvania at Welsh Commons, 1364 Welsh Road, Suite C-2, North Wales, PA 19454-1913, and is doing business in this District.

15. Defendant COMPASS VISION, INC. (“Compass”), is a corporation with its principal place of business in Oregon at SW Town Center Loop E, Wilsonville, ORE 97070.

16. Defendant FIRST ADVANTAGE (“First Advantage”), Division of The First American Corporation, is a corporate entity with its principal place of business in Florida at 100 Carillon Parkway, St. Petersburg, FL 33716.

17. Defendants FirstLab, Compass and First Advantage , inter alia, contract with licensing boards as third party administrators (“TPA’s”), collecting urine samples for EtG analysis by testing labs, providing the services of medical review officers (“MRO”) in alcohol and drug screening programs throughout the United States, reporting to said licensing boards and interpreting the results of EtG tests upon health care professionals licensed to practice in their individual states.

18. Defendants “JOHN DOE” CORPORATIONS are yet unidentified testing labs and third party administrators. Said “John Doe” labs provided EtG testing upon Class Plaintiffs and the other class members throughout the United States. Said “John Doe” TPA’s collected urine samples for EtG analysis by testing labs, interpreted and reported the results of EtG testing to professional licensing boards throughout the United States.

19. Any reference in the allegations set forth hereunder in the Complaint that identify lab testing or TPA services, attribute knowledge or reason to know, identify actionable conduct on the part of the named Defendants, is to be understood as applying to the “John Doe” Defendants until future discovery excludes any or all of them.

CLASS ACTION ALLEGATIONS

20. Class Plaintiffs brings this action as a class action in their own behalf and on behalf of a Class defined as:

All licensed individuals, engaged in the health care professions, throughout the United States, who have been required to submit to EtG testing that were performed, interpreted and/or reported by Defendants to their respective licensing boards. All such class members have been disciplined, had their licenses suspended or under threat of suspension, on probation and/or subjected to ongoing EtG screening as a result of their “positive” test results. This Class only includes those Class Members who have denied any consumption of alcoholic beverages in connection with such “positive” results. This Class does not include any

individual who has or will institute an individual action against these Defendants, unless he or she opts into the Class in the future.

21. Class Plaintiffs and the Class meet the requirements for class certification under the requirements of Rule 23(b).

22. Class Plaintiffs estimate that there are more than 3,000 Class members throughout the United States, and that their identities can be ascertained from their respective licensing boards or from Defendants' books and records. It would be impracticable and unreasonable for every member of the class to individually bring his or her own action or join as a named party to this action.

23. There are numerous questions of law and fact common to the Class, which are substantially similar and predominate over the questions affecting the individual Class members. Among these common questions of law and fact are:

- (a) Whether the EtG test would unequivocally establish that a positive result indicated that the subject individual had consumed alcoholic beverages;
- (b) Whether the cutoff or reporting limit, above which a "positive" result would occur was scientifically established by Defendants after valid and reliable research;
- (c) Whether the EtG test was the "gold standard" in ferreting out former users of alcoholic beverages and/or controlled substances, who were found to have repeated prohibited use in occupations requiring "zero tolerance";
- (d) Whether employees who voluntarily agreed to random testing could rely on the accuracy of the EtG test in protecting them against false positives;
- (e) Whether Defendants breached their duty to Class Plaintiffs and the other class members to provide reliable screening and reporting services;
- (f) Whether Defendants breached their duty to Class Plaintiffs and the other class members to provide accurate information about their testing services;
- (g) Whether ordinary products that contain ethanol, such as Purell sanitizer, can cause Defendants' testing to result in positive results;

- (h) Whether other factors such as age, sex or medical conditions (e.g., urinary tract infections or bypass gastric surgery), were known to the Defendants as triggers for alleged “positive” results;
- (i) Whether other causes for “positive” results were not explored, reported, ignored or dismissed because of profit motives in the continued use of the EtG test by the applicable licensing boards; and
- (j) Whether Defendants misrepresented material facts about their testing and/or TPA services.

24. The claims of the Class Plaintiffs are typical of the claims of the other members of the class.

25. The Class Plaintiffs are capable of fairly and adequately protecting and asserting the rights of the class in this action.

26. The Class Plaintiffs have no conflict of interest in the maintenance of this class action. The Class Plaintiffs have adequate resources to maintain this class action and the interests of the class will not be harmed.

27. A class action in this matter provides a fair and efficient manner in which to resolve this controversy.

28. Common questions of law and fact predominate over any question which may affect a class member individually.

29. The most efficient way to adjudicate the claims of the class members is through a class action. Any difficulty in maintaining a class of this size pales in comparison to the enormous burden the courts would face if all class members filed suit separately or attempted to join this action individually.

30. Class Plaintiffs’ counsel is experienced in managing large classes of litigants.

31. The prosecution of separate actions by the members of the class would likely result in inconsistent adjudications, even within the same jurisdiction, and confront the Defendants with incompatible standards of conduct.

32. The prosecution of separate actions by individual members of the class could result in some class members being effectively bound by decisions in actions to which they were not a party and their interests were not protected.

33. This forum is an appropriate forum to resolve and redress issues which involve the entire class.

34. The complexities of the issues and the expense of the litigating each claim separately by individual class members makes a class action the superior method of adjudicating these claims.

FACTUAL ALLEGATIONS

35. “EtG” stands for ethylglucuronide, a metabolite of alcohol, and was reported by Gregory Skipper, M.D. (“Dr. Skipper”) and Friedrich Wurst, M.D., in November 2002 at an international meeting of the American Medical Society, to provide proof of alcohol consumption as much as five (5) days after drinking an alcoholic beverage, well after the alcohol itself had been eliminated from the body.

36. In 2003, because of these and other reportedly remarkable results (e.g., positive findings, confirmed by admissions by the tested individuals, after traditional urine tests had registered negative), EtG testing began in the United States.

37. Defendants, including FirstLab, NMS and Quest (through predecessors, Northwest Toxicology and LabOne) became leading proponents of EtG testing, and, starting in 2003, published statements and claims in their promotional materials, websites and articles that

“EtG has emerged as the marker of choice for alcohol” and “that EtG is not detectable in the urine unless an alcoholic beverage has been consumed.” The test was touted as the “gold standard”.

38. Defendants advertised that “our scientists are now able to detect EtG in urine, confirming the consumption of alcohol. Furthermore, EtG can be detected in urine for up to 80 hours after the elimination of alcohol from the body.”

39. Defendant FirstLab advertised that “Other biomarkers of alcohol use can be problematic since they can be influenced by age, gender, a variety of other substances and non-alcohol-associated disease....Since EtG is only created during the metabolism of alcohol, there is no potential for a wrong result due to external contamination.”

40. In addition to such claims, starting in 2003, Defendants reprinted or quoted Dr. Skipper’s warning: “In the future, it will be negligent not to test for EtG when monitoring recovering alcoholics.”

41. Defendants marketed and sold their EtG systems, testing facilities and reporting services to employers, state and municipal agencies and state licensure boards for testing employees or licensees.

42. Defendant TPA’s, including Defendant FirstLab, First Advantage and Compass contract their screening and testing services to various state and municipal agencies, state licensure boards and other employers throughout the United States.

43. Defendant TPA’s also provide a Medical Review Officer (“MRO”) for alleged independent and unbiased review and opinions to the employers, agencies and boards contracting for its services regarding whether the positive results of random alcohol testing upon a given employee be utilized for disciplinary purposes.

44. Defendant testing labs, including Quest, NMS, LabCorp and DTS provide the results of alcohol testing upon health care professionals as contracted through Defendant TPA's.

45. Defendants established differing "reporting limits" or "cutoffs" of 100, 250 and 500 ng/mL respectively, which test results would be reported as "positive".

46. Under the procedures established by many state and federal agencies, licensing boards and employers, a positive finding would, upon the request of the tested professional, be reviewed by the MRO, before any disciplinary action would be taken. This function was performed by Defendant TPA's.

47. It is well known in the industry that many ordinary products, including the omnipresent Purell sanitizer used in hospitals throughout the country, contain ethanol, and that the use or exposure to such products – known collectively as "incidental" or "involuntary" – could result in positive test results, since they all would metabolize as ethylglucuronide.

48. It is well known that other factors such as age, sex and certain medical conditions (e.g., gastric bypass surgery, urinary tract infections and diabetes) may trigger or contribute to alleged "positive" EtG results.

49. The cutoffs of 100, 250 and 500 ng/mL established by Defendants for positive test results were arbitrary standards since incidental exposure to ethanol-containing products could show up at levels as high as 1000 ng/mL and greater.

50. Recently, Dr. Skipper has suggested raising this presumed level to 2000 ng/mL.

51. On August 15, 2005, Dr. Skipper issued an Ethylglucuronide Advisory stating that levels under 1000 were problematic and that "a positive EtG is not necessarily proof of intentional alcoholic beverage consumption. Lower level positive tests are known to occur due to

incidental exposure. The cutoff for possible incidental exposure vs. intentional use has not been accurately established.”

52. This Advisory has not deterred the \$4 billion-a-year industry, and the Defendants do not advise of such warnings, nor have they publicly recognized or admitted that non-arbitrary cutoffs have not been established.

53. On August 12, 2006, The Wall Street Journal published a front-page article, entitled “A Test for Alcohol – And Its Flaws” regarding EtG testing. Class Plaintiffs Garlick and Schroeder (as well as Nancy Clark) were featured in said article.

54. Dr. Skipper is quoted in this article:

“Little advertised, though, is that EtG can detect alcohol even in people who didn’t drink. Any trace of alcohol may register, even that ingested or inhaled through food, medicine, personal-care products or hand sanitizer.

“The test ‘can’t distinguish between beer and Purell’ hand sanitizer, says H. Wesley Clark, director of the federal Substance Abuse and Mental Health Services Administration. . . ‘When you’re looking at loss of job, loss of child, loss of privileges, you want to make sure the test is right”, he says...

“Use of this screen has gotten ahead of the science,’ says Gregory Skipper.”

55. On September 28, 2006, SAMHSA, a federal agency part of the U.S. Department of Health and Human Resources, after hearings in which among others Class Plaintiffs Garlick and Schroeder (as well as Nancy Clark) testified, issued an Advisory, which on the first page contained a “grey box” warning, as follows:

“Currently, the use of an EtG test in determining abstinence lacks sufficient proven specificity for use as primary or sole evidence that an individual prohibited from drinking, in a criminal justice or a regulatory compliance context, has truly been drinking. Legal or disciplinary action based solely on a positive EtG, or other test discussed in this Advisory is inappropriate and scientifically unsupportable at this time. These tests should currently be considered as potential valuable clinical tools, but their use in forensic settings is premature.”

56. Defendants continue to offer their testing and/or TPA services as conclusive evidence of the consumption of alcoholic beverages in violation of testing agreements, based on their arbitrarily set cut-off limits for positive test results.

57. All of the Class Plaintiffs and those class members similarly situated are health care professionals who are or have been licensed to practice in their respective states.

58. All of the Class Plaintiffs and those members similarly situated had an admitted past history of alcoholic beverage or drug use, and had submitted voluntarily to random and ongoing screening programs administered in their respective states by licensing boards or organizations set up by their professional associations to assist in their rehabilitation and subsequent discontinuance of alcoholic beverage or drug use, especially as it concerned the discharge of their professional duties and responsibilities in their workplaces.

59. All of the Class Plaintiffs and those members similarly situated, in connection with such voluntary programs, commencing in 2004 for some and thereafter for others, were subjected, inter alia, to EtG testing.

60. All of the Class Plaintiffs and those members similarly situated obtained results reported as “positive” and interpreted as being as a consequence of alcoholic beverage consumption.

61. All of the Class Plaintiffs and those members similarly situated denied the consumption of alcoholic beverages. In all cases where there were MRO review through the TPA’s, the MRO’s ignored any of the Class Plaintiffs’ (and those members similarly situated) stated supposed reasons for said positive results, especially after 2005 when the published literature identified other possible causes.

62. All of the Class Plaintiffs and those members similarly situated were disciplined or otherwise penalized as a result of their “positive” EtG results. These consequences included suspension or threat of suspension of license, probation, discharge from employment, inability to be gainfully employed in their respective professions, hearings and other proceedings requiring legal representation, ongoing expenses and anxiety associated with EtG testing and screening with multiple or successive “positives”.

63. All of the Class Plaintiffs and those members similarly situated either tested positively for EtG or suffered injury as a result of testing positively for EtG within the statutory limits of the statute of limitations in the state where they tested or reside. In that regard, it is alleged as for each Class Plaintiff that each tested positive and/or suffered subsequent injury on the following dates:

- (a) LORIE GARLICK – 5/2/05.
- (b) TINA L. SCHROEDER – 4/22/05
- (c) JOY SCOTT – 12/29/05
- (d) BRYAN E. BLEDSOE – 12/06/05
- (e) WENDY R. BRODY – 4/1/05
- (f) KELLY BUCKLEY – 1/10/05
- (g) G. GEOFFREY CRAIG – 12/27/05 (a protective state action
has been filed in Oklahoma)
- (h) GAY CUMMINS -- 1/5/05
- (i) MARSHA A. DIENELT – 4/27/05
- (j) BETH GIBSON – 8/5/05
- (k) MICHELLE J. GILLUM -- 5/31/06
- (l) ROBIN M. GREEN – 4/16/05

- (m) RICHARD P. PACZYNSKI – 12/21/05
- (n) KRISTIE SMITH – 4/18/05
- (o) JILL WELTON – 5/10/05

CAUSE OF ACTION ALLEGATIONS

COUNT I – NEGLIGENT MISREPRESENTATION

64. Class Plaintiffs repeat and reallege the allegations contained in paragraphs 1-63 above, as if fully set forth herein.

65. Defendants, their agents, employees and servants did negligently misrepresent material facts regarding their EtG testing including that:

- a. The EtG test would unequivocally establish that a positive result indicated that the subject individual had consumed alcoholic beverages;
- b. The cutoff or reporting limit, above which a “positive” result would occur was scientifically established after valid and reliable research;
- c. The failure to conduct such a test would be negligence on the part of the employer;
- d. The EtG test was the “gold standard” in ferreting out former alcoholics who were resuming prohibited alcoholic consumption in occupations requiring a “zero tolerance”;
- e. Employees who voluntarily agreed to random testing could rely on the accuracy of the EtG test in protecting them against false positives;
- f. EtG is not detectable in the urine unless an alcoholic beverage has been consumed, thereby concealing that incidental or involuntary exposure or consumption of products containing alcohol could result in positive findings;
- g. The continued re-evaluation and re-setting of cutoff limits were scientifically sound and reliable markers for detecting the prohibited activity of alcoholic beverage consumption;
- h. Warnings or cautionary advisories issued by Dr. Skipper, SAMHSA and others -
- that the cutoff levels were unreliable and arbitrary, and that incidental use could

trigger positive results at or above the cutoffs – were insufficient to discredit the EtG test and its cutoff limits.

66. The misrepresentations by Defendants were made by false and misleading statements, oral and written, as well as through the omission of information known to discredit the EtG test to its customers, whose continued business supported a \$4 billion industry.

67. Said misrepresentations were calculated to maintain profitability and a captive market, despite the foreseeable devastating consequences to the Class Plaintiffs and those similarly situated who Defendants knew were to be subjected to EtG testing, and to the occupations and professions of thousands of people who did not confess to drinking and who strenuously denied same.

68. Said misrepresentations and omissions of material facts were made recklessly, ignoring discrediting data, research and advice, and in total disregard of the impact on those positively-tested individuals.

69. In submitting to their voluntary agreements to random testing through their professional licensing boards, the Class Plaintiffs and those members similarly situated, justifiably and reasonably relied that the testing, including the EtG test misrepresented by the Defendants, to which their urine would be subjected, was with valid tests that would not produce “false positives” that could be interpreted to indicate that they had consumed alcoholic beverages in violation of their agreement, and justifiably and reasonably relied that they would not be subjected to professional discipline as a result of an invalid and arbitrary test result when they had in actuality adhered to their promise not to drink alcoholic beverages.

70. As a result of Defendants’ negligent misrepresentations, Class Plaintiffs and the other class members were injured in that their employments were terminated and/or licenses were suspended or are currently threatened with suspension due to alleged breach of consent

agreements to remain drug-free and alcohol-free and other probationary conditions, with consequent loss of earnings and earning capacity, attorney fees, and/or other pecuniary losses flowing directly and consequentially from their positive test results and required costs associated with ongoing EtG testing, as well as non-economic losses including humiliation, damage to reputation and severe emotional and psychological distress.

71. Said misrepresentations and material omissions were calculated to increase their profits, retain the EtG test as the alleged “gold standard” in the detection of alcohol consumption by tested individuals, and to suppress and attempt to refute the mounting scientific, medical and governmental advisories, warnings and published reports, all of which were malicious and in total disregard of Class Plaintiffs and the other class members, all of whom subjected themselves to screening programs, in justifiable reliance on the validity and truthful reporting and interpreting of the administered tests, aimed at supporting their abstinence in order to maintain their professional licenses and occupations.

72. All of the misconduct alleged above constituted acts that were outrageous in nature, entitling Class Plaintiffs and the other class members to both compensatory and punitive damages.

COUNT II – FRAUDULENT MISREPRESENTATION

73. Class Plaintiffs repeat and reallege the allegations contained in paragraphs 1-72 above, as if fully set forth herein.

74. It is believed and averred that, in addition to the allegations set forth in Count I – Negligent Misrepresentation, discovery will establish that the misrepresentations and omissions of material facts were committed knowingly and wantonly in disregard of the lives and livelihoods of Class Plaintiffs and the other class members, through the suppression of

information; the distortion of scientific research and studies; the false and misleading testimony and presentation of support for its EtG test to governmental bodies, professional societies and industrial organizations; false and deceptive advertising; false and deceptive published materials; the presentation of experts called to support their results in licensing hearings; the establishment of arbitrary and capricious cutoff levels; and, continued outdated advertising and sales materials in the face of research discrediting or raising questions into the validity of “positive” EtG results.

75. Said misrepresentations were calculated to maintain profitability and a captive market, despite the foreseeable devastating consequences to the Class Plaintiffs and those similarly situated who Defendants knew were to be subjected to EtG testing, and to the occupations and professions of thousands of people who did not confess to drinking and who strenuously denied same.

76. Said fraudulent and intentional misrepresentations and omissions of material facts were made recklessly, ignoring discrediting data, research and advice, and in total disregard of the impact on those positively-tested individuals. The misrepresentations were calculated to increase their profits, retain the EtG test as the alleged “gold standard” in the detection of alcohol consumption by tested individuals, and to suppress and attempt to refute the mounting scientific, medical and governmental advisories, warnings and published reports, all of which were malicious and in total disregard of Class Plaintiffs and the other class members, all of whom subjected themselves to screening programs, in justifiable reliance on the validity and truthful reporting and interpreting of the administered tests, aimed at supporting their abstinence in order to maintain their professional licenses and occupations.

77. In submitting to their voluntary agreements to random testing through their professional licensing boards, the Class Plaintiffs and those members similarly situated,

justifiably and reasonably relied that the testing, including the EtG test misrepresented by the Defendants, to which their urine would be subjected, was with valid tests that would not produce “false positives” that could be interpreted to indicate that they had consumed alcoholic beverages in violation of their agreement, and justifiably and reasonably relied that they would not be subjected to professional discipline as a result of an invalid and arbitrary test result when they had in actuality adhered to their promise not to drink alcoholic beverages.

78. As a result of Defendants’ fraudulent misrepresentations, Class Plaintiffs and the other class members were injured in that their employments were terminated and/or licenses were suspended or are currently threatened with suspension due to alleged breach of consent agreements to remain drug-free and other probationary conditions, with consequent loss of earnings and earning capacity, attorney fees, and/or other pecuniary losses flowing directly and consequentially from their positive test results and required costs associated with ongoing EtG testing, as well as non-economic losses including humiliation, damage to reputation and severe emotional and psychological distress.

79. Said misrepresentations were, therefore, outrageous in nature, entitling Class Plaintiffs and the other class members to both compensatory and punitive damages.

COUNT III – PRODUCTS LIABILITY

80. Class Plaintiffs repeat and reallege the allegations contained in paragraphs 1-79 above, as if fully set forth herein.

81. The EtG testing systems, developed, promoted, marketed, sold and administered to and for the use of state licensing boards in the stream of commerce, constitute products placed into the stream of interstate commerce.

82. Said products are defective in their establishment of artificial and scientifically unsound cutoff levels and then marketed and advertising as described in the foregoing incorporated paragraphs, so that the licensing boards and the ultimate end users, who purchase the EtG tests and do not obtain the products' intended uses.

83. Defendants are strictly liable for damages to Class Plaintiffs and the other class members for the sale of products, defective in their design, marketing and false advertising.

84. As a proximate cause of Defendants' strict liability for the sale of their defective products, Class Plaintiffs and the other class members, who justifiably relied on same, suffered economic losses, either in termination from employment or their occupations as licensed professionals, in diminution of income and earning capacity, continuing costs associated with ongoing EtG testing, and/or attorneys fees as well as non-economic losses including humiliation, damage to reputation and severe emotional and psychological distress.

COUNT IV – BREACH OF WARRANTY

85. Class Plaintiffs repeat and reallege the allegations contained in paragraphs 1-84 above, as if fully set forth herein.

86. In advertising, marketing, promoting and selling their products, under false promises and representations that they could be used effectively and accurately, without attendant economic and non-economic injuries, Defendants breached the warranty of merchantability and their contractual obligations to sell products for their intended use.

87. This breach is actionable and entitles Class Plaintiffs and the other class members as intended third party beneficiaries who paid for the testing to direct and consequential damages, including but not limited to: past and future out-of-pocket costs, lost

wages or income and loss of earning capacity. Such warranties were either oral or made in writings to the licensing boards and or their agents that are inaccessible to Class Plaintiffs.

COUNT V – NEGLIGENCE

88. Class Plaintiffs repeat and reallege the allegations contained in paragraphs 1-87 above, as if fully set forth herein.

89. Defendants, by promoting, advertising, marketing, selling, contracting with licensing boards and professional associations, collecting the urine samples, and utilizing the EtG test to allegedly establish that the tested individual consumed an alcoholic beverage, created a duty to use a reasonable degree of care to avoid erroneous test results.

90. Class Plaintiffs and the other members of the class were the intended test subjects and Defendants knew or had reason to know that their licenses and occupations would be in jeopardy if they tested positive.

91. Class Plaintiffs and the other members of the class, by entering into voluntary screening programs, both for rehabilitative and occupational reasons, relied on the validity of the tests to which they subjected themselves – with the goal that they could provide laboratory evidence of their abstinence.

92. Because of the serious and devastating consequences of reporting that the results were positive (within cutoffs established by the Defendants), Defendants had to exercise their standard of care to the foreseeable test subjects, i.e., Class Plaintiffs and the other class members, reasonably and appropriately.

93. Instead, Defendants negligently and recklessly:

- a) Marketed their tests without conducting adequate scientific or medical studies;

- b) Established cutoffs over which test results would be reported as “positive” that were arbitrary and scientifically unreliable and invalid;
- c) Promoted the EtG with unsupported and false statements that the EtG test would unequivocally establish that a positive result indicated that the subject individual had consumed alcoholic beverages;
- d) Publishing warnings that the failure to conduct such a test would be negligence on the part of an employer or licensing board;
- e) Falsely asserting that the EtG test was the “gold standard” in ferreting out former alcoholics or drug users who were resuming or beginning to engage in prohibited alcoholic consumption in occupations requiring a “zero tolerance”;
- f) Falsely asserting that EtG is not detectable in the urine unless an alcoholic beverage has been consumed, thereby concealing that incidental or involuntary exposure or consumption of products containing alcohol could result in positive findings;
- g) Failing and refusing to re-evaluate and re-set cutoff limits at levels that were scientifically sound and reliable markers for detecting the prohibited activity of alcoholic beverage consumption, and excluding other causes for their results;
- h) Failing to heed and, instead, denying publicly the warnings or cautionary advisories issued by Dr. Skipper, SAHMSA and others – that the cutoff levels were unreliable and arbitrary, and that incidental use could trigger positive results at levels at or above the cutoffs – were insufficient to discredit the EtG test and its cutoff limits;
- i) Bootstrapping the alleged positive evidence of alcohol consumption with the incompetent, inadequate and cursory review by MRO’s employed by the TPA’s, whose duty to the Class Plaintiffs and other class members was to protect them from false accusations and provide licensing boards and employers with: 1) either a conclusion that cautioned against disciplinary or other punitive action in the face of a “positive” EtG test, or 2) concluding that other factors or causes were identified to account for the positive results; and,
- j) Failing to protect the Class Plaintiffs and other class members from foreseeable substantial harm in the form of disciplinary and punitive measures, when their EtG test systems were employed and relied upon for their accuracy and reliability.

94. As a direct and proximate result of their actionable conduct as alleged in this Count, the Class Plaintiffs and other class members suffered suspension or threat of suspension of their licenses, termination of employment or cessation of occupation, bar to obtaining suitable future employment, loss of earnings and earning capacity, substantial counsel fees in defending themselves before the licensing boards, substantial and draining expenses associated with random EtG tests and other evaluations, other pecuniary losses flowing directly and consequentially from their positive test results and required costs associated with ongoing EtG testing, as well as non-economic losses including humiliation, damage to reputation and severe emotional and psychological distress.

95. The aforesaid negligence on the part of the Defendants, was outrageous in nature and, therefore, entitles the Class Plaintiffs and other class members to both compensatory and punitive damages.

**COUNT VI – PROFESSIONAL NEGLIGENCE
AND/OR BREACH OF FIDUCIARY DUTY
(Class Plaintiffs vs. TPA’s ONLY)**

96. Class Plaintiffs incorporate by reference paragraphs 1-95 as if set forth fully hereunder.

97. At all times material hereto, Defendant TPA’s employed the services of physicians to act as Medical Review Officers (“MRO”).

98. By federal and state law, the test results coming from Quest, NMS, DTS, LabCorp and the “John Doe” testing labs were contracted by the Defendant TPA’s to conduct the EtG tests upon Class Plaintiffs and other class members, through their licensing boards.

99. Implementing regulations require that test results are reviewed by an MRO, a licensed physician having no connection to the testing labs.

100. The TPA's, therefore, acted through their MRO's, administered the screening programs for the various state licensing boards and professional associations.

101. In the case of the Class Plaintiffs and other class members, all of whom were licensed health care professionals, the TPA's through their MRO's, had a fiduciary duty to said professionals, who had voluntarily entered into agreements to undergo random drug and alcohol testing, to insure that they had not resumed drinking alcohol.

102. Class Plaintiffs and the other class members relied on the validity and reliability of the tests and how they would be interpreted by the TPA's, who then reported their findings and conclusions to the licensing boards.

103. The TPA's and their MRO's owed Class Plaintiffs and the other class members a fiduciary duty to discharge their contractual and professional responsibilities with due care, with requisite skill and training, and with the expertise necessary to render competent and reliable opinions to the licensing boards when their licensing privileges were at risk.

104. The TPA's, through their MRO's, were sophisticated intermediaries, purportedly acting in the dual capacity of: (1) protecting patients from health care professionals practicing under the influence of alcohol and (2) insuring that said professionals are not wrongly disciplined when they deny consumption of alcoholic beverages.

105. The licensing boards, the subject health care professionals (Class Plaintiffs and the other class members) and any of their employers, all justifiably and foreseeably rely on the expertise and care by which the TPA's, through their MRO's, discharge their responsibilities in reviewing individual cases.

106. It is the responsibility of the MRO's, when positive EtG test results are rendered, to interview the health care professional, his or her superiors and/or co-workers, family and

counselors; to determine the licensed professional's history of alcohol or substance abuse, abstinence, rehabilitation and work record; and, explore alternative causes for the positive EtG test result.

107. The MRO's failed to discharge their duties and professional responsibilities to Class Plaintiffs and the other class members, in the conduct of their review and their ultimate reports to the licensing boards, through the TPA's.

108. The TPA's permit and encourage their MRO's to participate in formal proceedings and informational seminars in order to promote their financial interests in securing and/or retaining their existing and prospective contracts.

109. The TPA's are liable to Plaintiff, to whom both a fiduciary and professional duty existed, which duties were negligently performed to the injury of the Class Plaintiffs and the other class members.

110. The TPA's knew or should have known that adverse testimony, published data, advertising, sales promotional material, websites, and other oral and written communications, were false, misleading and detrimental, foreseeably causing harm to Class Plaintiffs and other class members.

111. In ignoring reports, advisory warnings, published articles and other communications that discredited its own representations, and in rendering adverse opinions to the licensing boards that Class Plaintiffs and the other class members had been drinking, the TPA's are liable for professional negligence and/or breach of fiduciary duty.

112. As a result of their actionable conduct as alleged in this Count, the Class Plaintiffs and other class members suffered suspension or threat of suspension of their licenses, termination of employment or cessation of occupation, bar to obtaining suitable future

employment, loss of earnings and earning capacity, substantial counsel fees in defending themselves before the licensing boards, substantial and draining expenses associated with random EtG tests and other evaluations, other pecuniary losses flowing directly and consequentially from their positive test results and required costs associated with ongoing EtG testing, as well as non-economic losses including humiliation, damage to reputation and severe emotional and psychological distress.

COUNT VII – VIOLATION OF NEW JERSEY CONSUMER FRAUD ACT

113. Class Plaintiffs incorporate by reference paragraphs 1-112 as if set forth fully hereunder.

114. This case is venued in the District of New Jersey. Although Class Plaintiffs and other class members are citizens of other states, and although Defendants, with the exception of Quest (one of the chief proponents of EtG testing), have their principal offices in other states, there is authority for the application of the forum's substantive law, specifically New Jersey's Consumer Fraud Act (NJCFCA) to all affected class members. This was found to be appropriate by Superior Court Judge Carol B. Higbee in certifying a national Vioxx-related class action in International Union of Operating Engineers Local 68 Welfare Fund vs. Merck & Co. This decision was affirmed unanimously by the New Jersey Appellate Court and that issue is presently before the Supreme Court of New Jersey.

115. The incorporated paragraphs provide an actionable claim for violation of NJCFCA, N.J. Stat. Ann. §56.8-19, in that Defendants:

- a) Falsely promoted, marketed & sold the EtG system and their interpretive services, all of which constituted "merchandise" within the meaning of the NJCFCA, which were sold directly and indirectly to the Class Plaintiffs and other class members;

- b) Engaged in an unconscionable practice, deception, fraud, false pretense, false promise, misrepresentation, and/or knowing concealment, suppression or omission of material facts with the intent that Class Plaintiffs and other class members rely upon same in connection with the sale or advertisement of . . . merchandise; and,
- c) Fraudulently acted in a manner that misled, deceived and damaged Class Plaintiffs and other class members;

116. Statutes similar to the NJCFA exist in all jurisdictions where Class Plaintiffs and other class members reside, and these statutes are aimed at providing, inter alia, private causes of action against entities such as the Defendants herein, whose fraudulent acts and omissions cause monetary harm as a result of the marketing and sale of their products and services.

117. As a result of Defendants' violation of the NJFCA, Class Plaintiffs and other class members are entitled to compensatory damages in the form of reimbursement of all monies directly and indirectly expended by them, relating to EtG testing, reporting and interpreting by Defendants.

118. In addition to actual out-of-pocket damages to be reimbursed to Class Plaintiffs and other class members, each member of the Class is entitled to treble damages under the NJFCA.

REQUEST FOR RELIEF

WHEREFORE, Class Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants as follows:

1. Determining that this action is a proper class action maintainable under Rule 23 of the Federal Rules of Civil Procedure; certifying the Class; certifying Plaintiffs as Class representatives; and appointing Plaintiff's counsel as counsel for the Class;

2. That Defendants be required to make restitution to each Class Plaintiff and Class member similarly situated of any and all money or property paid or owing by that Plaintiff and Class member related to undergoing and opposing the consequences of EtG testing;
3. Awarding compensatory damages for economic losses in the form of lost earnings and diminution of earning capacity for each Class Plaintiff and Class member;
4. Awarding compensatory damages for any non-economic damages suffered by each Class Plaintiff and Class member;
5. Awarding compensatory damages, trebled, for violations of the NJCFA;
6. Awarding Plaintiff and the Class punitive damages in an amount to be determined at trial;
7. For a determination by the Court of the most suitable mode by which Class members are to come forward, identify themselves, and prove their entitlement to share in the total sum awarded by the Court for compensatory and punitive damages;
8. Awarding Class Plaintiffs and the Class their reasonable attorney's fees;
9. Awarding Class Plaintiffs and the class members similarly situated pre-judgment and post-judgment interest as provided by law;
10. Awarding Class Plaintiffs and the class members similarly situated their costs of suit herein incurred; and

