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Attorney for Plaintiff

NICHOL M. PIERCE, on behalf of herself  
and all persons similarly situated,

Plaintiff,

v.

TRUMP PLAZA HOTEL & CASINO and  
J. DOES #1 TO #50, jointly, severally and in  
the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
ATLANTIC COUNTY  
DOCKET NO. \_\_\_\_\_  
CIVIL ACTION

COMPLAINT  
(CLASS ACTION)

Nichol M. Pierce ("Plaintiff" or "Pierce"), residing at 131 West Faunce Landing Road,  
Absecon, NJ 08201, County of Atlantic, State of New Jersey, on behalf of herself and all  
persons similarly situated, says:

## NATURE OF ACTION

1. This is a class action lawsuit arising out of the policy and practice of Trump Plaza Hotel & Casino (Plaza) of firing or not offering employment to persons who have had inconclusive tests in Plaza's employee drug testing program.

2. Common sense, fairness and the common law of this State dictate that a person who has had an inconclusive drug test should be given additional tests until a conclusive test result, one way or the other, is obtained. This is particularly true since such tests are inexpensive, are reasonably convenient, have a high probability of reaching a conclusive result and can be completed in two or three days.

3. This policy and practice of firing or not offering employment to persons who had an inconclusive drug test (policy and practice) violates our Supreme Court's holding in Hennessey v. Costal Eagle Point Oil Co., 129 N.J. 81 (1992). Hennessey states that any persons injured by these practices have a common law cause of action for invasion of privacy as well as a cause of action for violation of public policy under the Court's earlier decision in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980) (no relation to plaintiff).

4. To the extent that this policy and practice could be characterized as negligent conduct, the plaintiff has a cause of action for negligent infliction of emotional distress and other damages based on this negligence. Ms. Pierce has had to endure insinuations that she may have added water to her specimen in an attempt to evade the testing procedure, to face the prospect that she would lose the new job she had been promised in the World's Fair Casino, to lose wages which would have been paid to her in the last few weeks and to retain counsel to assure that Plaza would honor her right to a retest.

5. Plaintiff also asserts a cause of action for the tort of outrage based on the above facts.

6. After more than a week of unanswered correspondence pointing out the above flaws in the Plaza's drug testing procedure and demanding that Pierce be retested, counsel was informed on April 1, 1996 that the Plaza had changed its policy and would retest Ms. Pierce. Plaza indicated that this policy change would result in an extremely limited number of retests -- probably only including those persons with inconclusive tests in the past few weeks.

7. Class members seek an expedited declaratory judgment that the Plaza's policy and practice were not in compliance with the common law of this State and that the Plaza has duty to so inform any persons who have been fired or not offered employment based on an inconclusive drug test and offer them an opportunity to take retest(s) until a conclusive result can be obtained.

8. Class members also seek damages and declaratory or injunctive relief to compensate for or ameliorate the illegal results of this flawed policy and practice.

### **THE PARTIES**

9. Trump Plaza Hotel & Casino operates a casino hotel of the same name located at Mississippi & Pacific Avenues, Atlantic City, NJ 08401.

10. J. Does #1 to #50 are persons or entities who may also be responsible for the damages caused to Pierce and other class members who are either unknown or whose legal liability cannot be determined with any degree of certitude. These persons or entities include, but are not limited to, officers, directors, consultants, agents or contractors of the Plaza.

11. Nichol M. Pierce is a 23 year-old resident of Absecon who currently works part-time at Trump Castle Hotel & Casino ("Trump Castle") as a cocktail server. Piece is very athletic, runs about six miles per day and consumes large volumes of water to replace fluid lost while running which is the likely cause of the inconclusive test result in her particular situation.

## FACTS

12. Plaza has over 4,000 employees and operates a large personnel department to fill various positions which become vacant as well as newly created positions on a continuous basis.

13. For an indeterminate time, believed to be many years, Plaza has had a policy and practice of drug testing employees and firing or not offering employment to those who tested positive for drugs (which is presumed to be legal and not at issue in this case) as well as those whose tests were inconclusive.

14. In late 1995 and early 1996, Plaza began advertising various newly created positions available in its new World's Fair Casino which is scheduled to open in May, 1996.

15. Pierce responded to these advertisements and sought full-time employment at the Plaza to increase her income and career potential in the casino industry.

16. Pierce was orally offered employment as a cocktail server a few days before February 27, 1996. She was instructed that a letter memorializing the offer would be forthcoming. She was also instructed to take a drug test.

17. On February 27, 1996, Pierce kept her appointment for the drug test. A nurse asked her a few questions including how much water that she had to drink that day. She responded that she drank large volumes of water that day because she had been running and wanted to be able to provide a urine specimen. No further inquiry was made into the matter. She was given a container and provided the nurse with a urine specimen. She was given a "Chain of Custody" Form ("Custody Form") to memorialize this test. This Custody Form is attached as Exhibit A to this complaint.

18. Pierce did not add water to the container or otherwise sabotage the test specimen as has been subsequently insinuated. Please note that the Custody Form makes note of the fact that the specimen was within the expected temperature range. See Section 2 of Custody Form.

19. A few days later, Pierce received the promised letter memorializing her offer of employment as a cocktail server ("Employment Letter"). This letter is attached to this complaint as Exhibit B. Admittedly, such employment was "subject to ... successful completion of a drug test" which must be completed prior to orientation. See Paragraph 5 of Employment Letter.

20. On March 21, 1996, Pierce was informed that her test result was negative but inconclusive by an employee of Joel Yaffa, M.D ("Yaffa employee").<sup>1</sup> Dr. Yaffa is the Medical Review Officer ("M.R.O") employed by the Plaza to administer and interpret Plaza's drug tests.

21. This Yaffa employee also informed Pierce that the likely cause was that there was more water than would ordinarily be expected in her urine specimen and insinuated that this could have come about as a result of Pierce's having added water to the specimen . Pierce was told not to bother going to the orientation session because her employment offer would be withdrawn based on this result.

22. Despite being extremely distressed by this conversation, Pierce went to the orientation session later in the day to seek redress from a Plaza employee. She talked to Cheryl Brantley in the Plaza's "processing" department about this discrepant test result. Ms. Brantley confirmed that she would not be hired but did state that she could retake the test in six months.

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<sup>1</sup> It is unknown why it took so long for the test results to be reported since results are available after two or three days. In any case, Pierce did not contribute to this delay since the Plaza had her current address and phone number.

23. On March 22, 1996, Pierce contacted current counsel who determined that the Plaza's testing policy and practice was not in conformance with the Supreme Court's opinion in Hennessey v. Costal Eagle Point Oil Co., 129 N.J. 81 (1992).

24. Counsel drafted and faxed a brief letter to Robert Pickus ("Pickus") who is corporate counsel at the Plaza explaining the situation and seeking a retesting for Pierce. Please see Exhibit C.

25. Not having received an answer to this request six days later, counsel reiterated Pierce's position and faxed Pickus the Hennessey opinion for his review on March 28, 1996. Please see Exhibit D.

26. Fearing that litigation was imminent, counsel advised Pierce to submit to a drug test to provide conclusive proof of her drug-free condition. Several phone calls determined that Jodi Abramowitz, D.O. was a nearby M.R.O. and that she could test Pierce the next day.

27. On March 29, 1996, Dr. Abramowitz obtained blood and urine specimens from Pierce. Pierce was given a "Federal Drug Testing Custody and Consent Form" from Roche Biomedical Labs ("Roche Form") to memorialize the taking of the urine specimen. Please see first page of Exhibit E.

28. On April 1, 1996, the results of these tests became available. Please see pages 2 to 4 of Exhibit E. Page 4 shows that this drug test, like the first Plaza test, was also negative.

29. Based on conversations with experts, the item which caused the inconclusive first test was a low creatinine level in the first urine specimen. A low specific gravity in the urine may also have contributed to this result. Still, the drug test was negative. Please see Exhibit F - Results of First Drug Test at Plaza.<sup>2</sup>

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<sup>2</sup> LabCorp was kind enough to fax this test result to counsel for inclusion in this complaint.

30. It is important to note that creatinine is not a drug but is merely indicative of the percentage of water in the urine. Higher than usual water concentrations in urine may also have lower the specific gravity.

31. It is specifically alleged that, based on this second drug test taken at counsel's behest, that Pierce is drug-free now, was drug-free on February 27, 1996 at the time of the Plaza drug test and, to the extent it is relevant, was drug-free some nine months ago when she was drug tested at Trump Castle pursuant to her offer of employment at that establishment.

32. On April 1, 1996, immediately after the test results became available, a final letter was sent to the Plaza with a copy of the second test results. Please see Exhibit G. Someone finally called from the Plaza and stated that Plaza had just changed its policy and Pierce would be given a second drug test. When counsel questioned about several related issues such as Pierce's seniority status and payment of counsel fees, this person refused to discuss these issues.

33. Because of the need to address these and other important issues, Pierce instructed counsel to file suit to protect her rights and seeks damages for the illegal testing policy and practice which caused her extreme emotional distress, had cost her hundreds of dollars and possibly jeopardized her seniority with respect to other people hired to work in Plaza's World's Fair Casino.

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The poor quality of the fax makes it necessary to repeat the relevant parts of the test results in this footnote as follows:

DRUG ABUSE SCREEN

RESULT	LISTED DRUGS NOT DETECTED	
CREATININE	10	NORMAL > 20 MG/DL
LOW CREATININE AND LOW SPECIFIC GRAVITY LEVELS MAY INDICATE SPECIMEN DILUTION PRIOR TO OR AFTER SPECIMEN COLLECTION SPECIMEN RECOLLECTION MAY BE WARRANTED IF CREATININE LEVEL IS LESS THAN 8 MG/DL FOR FEMALE DONORS OR LESS THAN 10 MG/DL FOR MALE DONORS		
SPECIFIC GRAVITY	1.001	NORMAL 1.003 - 1.035

34. Finally, Pierce's employment at the Plaza has been jeopardized and she has been subjected to severe emotional distress because of the Plaza's arbitrary, ludicrous, nonsensical and illegal policy and practice of firing or not offering employment to persons who have inconclusive drug tests; the Plaza's failure to inform drug testing candidates of this "one shot only" policy before the test; the Plaza's failure to inform testing candidates of likely causes of inconclusive tests (such as drinking large volumes of water before the test); and the Plaza's failure to reschedule candidates who are likely to have inconclusive tests through adequate screening.

### **CLASS ACTION ALLEGATIONS**

35. The plaintiff brings this action on behalf of herself and, pursuant to R. 4:32-1 of the Rules of Governing the Courts of the State of New Jersey, as a representative of a class (the "Inconclusive Drug Test Class" or "class members") defined as:

All persons, other than persons directly involved in instituting and carrying out the flawed and illegal drug testing policy and practice described in this complaint, who were fired or not offered employment due to an inconclusive drug test administered pursuant to the Plaza's employee drug testing program.

36. The Inconclusive Drug Test Class is so numerous that joinder of all Inconclusive Drug Test Class members would be impracticable. Although the exact number of Inconclusive Drug Test Class members is presently unknown to plaintiff, it is believed that the Inconclusive Drug Test Class will exceed 100 persons.<sup>3</sup> All Inconclusive Drug Test Class members are readily identifiable from information and records in the possession of the Plaza or its agents.

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<sup>3</sup> Very conservatively, if the Plaza hires about 1000 employees per year and 2% of them have inconclusive results, this would result in 20 class members per year. The statutory period is believed to be six years on at least one of the causes of action asserted by the class, without regard to an extension of the statute of limitations by the "discovery rule," resulting in at least

37. Plaintiff's claims are typical of the claims of the members of the Inconclusive Drug Test Class, because plaintiff and all Inconclusive Drug Test Class members were damaged by the same wrongful conduct of the defendant alleged herein.

38. Plaintiff will fairly and adequately protect the interests of the Inconclusive Drug Test Class. The interests of plaintiff are coincident with, and not antagonistic to, those of the Inconclusive Drug Test Class. In addition, plaintiff is represented by counsel who are experienced and competent in the prosecution of complex class action litigation.

39. Questions of law and fact common to the members of the Inconclusive Drug Test Class predominate over questions which may affect only individual members, if any, in that defendants have acted on grounds generally applicable to the entire Inconclusive Drug Test Class. Among the questions of law and fact common to the Inconclusive Drug Test Class are:

(a) whether the Plaza's policy and practice described in this complaint violates the common law or constitutional right to privacy in this State;

(b) whether the Class members have a viable Pierce claim for violation of public policy;

(c) whether the class members have a viable claim based on negligence;

(d) whether the Plaza's actions establish a cause of action for outrage;

(e) whether the class members are entitled to a declaratory judgment that the Plaza has a duty to inform class members of its illegal testing policies and practices and offer them an opportunity to take retest(s) until a conclusive result can be obtained;

(f) the length of the applicable statute of limitations for the causes of action in (a), (b), (c) and (d) above and for determining the members of the class.

40. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy alleged herein, because such treatment will permit a large

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120 class members.

number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would engender. Class treatment will also permit the adjudication of relatively small claims by certain Inconclusive Drug Test Class members, who could not afford to individually litigate a claim against a large corporate defendant such as Plaza.

41. Plaintiff knows of no difficulty likely to be encountered in the management of this action that would preclude its maintenance as a class action.

## **CAUSES OF ACTION**

### **First Count**

#### **Common Law Action For Violation Of Right Of Privacy**

42. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs above as though they were fully and completely set forth herein.

43. In the Hennessey decision and other precedents, the Supreme Court of New Jersey has held that there is a cause of action for invasion of privacy. Such right has its basis in article I, paragraph 1 of the New Jersey Constitution as well as the common law of this State. The Court has held that such right is not absolute. The employee's right to privacy must be weighed against other public policies such as the health, safety, rights and privileges of others.

44. In this case, the countervailing public policies are almost non-existent. Few casino jobs involve risks to the health, safety, rights and privileges of others. As such, the drug tests in question violate the right to privacy.

45. This action seeks no damages for the invasion of privacy caused by the urine test itself. Damages are sought, however, for the invasion of privacy present in using an inconclusive test as a reason for firing or not offering employment to someone.

46. As a result of this invasion of privacy of using private irrelevant inconclusive information to fire or not offer employment to class members, class members have suffered damages including, but not limited to, severe emotional distress, loss of reputation, lost wages, loss of workplace seniority and counsel fees.

## **Second Count**

### **Common Law Action For Violation Of Public Policy**

47. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs above as though they were fully and completely set forth herein.

48. In the Pierce decision and other precedents, the Supreme Court of New Jersey has held that there is a cause of action for discharge in violation of public policy. Such right exists where an employer has discharged the employee contrary to a clear mandate of public policy.

49. There is a strong public policy in this State in favor of accurate, fair and sensible policies in the interpretation of employee drug tests. Conversely, there is strong public policy against inaccurate, wanton and ludicrous policies in the interpretation of employee drug tests.

50. Firing or not hiring people based on an inconclusive drug test is contrary to the public policy of New Jersey: It is inaccurate, unfair, ridiculous, wanton, ludicrous and illegal.

51. As a result of this violation of public policy against using irrelevant inconclusive information to fire or not offer employment to class members, class members have suffered

damages including, but not limited to, severe emotional distress, loss of reputation, lost wages, loss of workplace seniority and counsel fees.

### **Third Count**

#### **Negligence**

52. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs above as though they were fully and completely set forth herein.

53. Instituting the policy and practice of firing and not hiring persons who had inconclusive drug tests was an act of extreme negligence on the part of the Plaza.

54. By engaging in the offensive conduct described above, the Plaza knew or should have known that class members would be likely to suffer the various damages alleged below. As a proximate result of this conduct, class members, including Pierce, did suffer severe emotional distress and other damages which the Plaza intentionally or negligently inflicted on her.

55. As a result of this conduct of negligently using irrelevant inconclusive information to fire or not offer employment to class members, class members have suffered damages including, but not limited to, severe emotional distress, loss of reputation, lost wages, loss of workplace seniority and counsel fees.

**Fourth Count**

**Tort Of Outrage**

56. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs above as though they were fully and completely set forth herein.

57. Instituting the policy and practice of firing and not hiring persons who had inconclusive drug tests was outrageous and contrary to the conduct expected in a civilized society.

58. As a result of this outrageous conduct of using irrelevant inconclusive information to fire or not offer employment to class members, class members have suffered damages including, but not limited to, severe emotional distress, loss of reputation, lost wages, loss of workplace seniority and counsel fees.

**Wherefore**, the plaintiff and class members demand judgment against Plaza, with respect to the First through Fourth Counts, in an amount sufficient to compensate for their injuries including, but not limited to, severe emotional distress, loss of reputation, lost wages, loss of workplace seniority and counsel fees; plus punitive damages, attorney's fees, both pre- and post-judgment interest and costs to the maximum extent allowed by law or Court Rule, and such other relief as the Court may deem just.

## Fifth Count

### Declaratory Judgment As To Illegality Of Plaza Drug Testing Policy & Practice

59. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs above as though they were fully and completely set forth herein.

60. A controversy exists between the parties concerning the Plaza's drug testing policy and practice of firing or not hiring persons with inconclusive drug tests. The plaintiff petitions the Court to determine the respective rights and duties of the parties as follows:

(a) whether the Plaza's policy and practice violated the privacy of the class members or the public policy of this State, was negligent or was outrageous as alleged in the forgoing counts of this complaint;

(b) if the policy and practice violated the law of this State, whether Plaza has an obligation to so inform all persons who have been fired or not hired due to inconclusive drug test and to offer them as opportunity to take additional drug test(s) until a conclusive result is obtained.

61. By reason of the foregoing, a declaratory judgment is both necessary and proper in order to set forth and determine the rights and obligations of the parties given the various allegations that exist between the parties in connection with the questioned policy and practice.

WHEREFORE, plaintiff and class members respectfully request that the Court enter judgment, with respect to the Fifth Count, as follows:

1. Declaring that the Plaza's policy and practice violated the privacy of the class members or the public policy of this State, was negligent or was outrageous as alleged in the forgoing counts of this complaint;
2. Declaring that Plaza has an obligation to so inform all persons who have been fired or not hired due to inconclusive drug test and to offer them as opportunity to take additional drug test(s) until a conclusive result is obtained, assuming such policy and practice is determined to be illegal;

3. Issuing an appropriate order or injunction, if necessary, against Plaza to enforce the above determinations;
4. Enjoining, if necessary, Plaza from continuing or reinstating the policy and practice which is the subject of this complaint;
5. Awarding plaintiff and class members the costs and reasonable attorney's fees incurred;
6. Awarding such other and further relief as the Court deems just and proper under the circumstances.