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Attorneys for Plaintiffs

JESSICA MACK, *on her own behalf and on behalf of other similarly situated persons,*

Plaintiffs,

v.

AVERTEST LLC d/b/a Averhealth,  
Defendant.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION

No. 210500356

**JURY TRIAL DEMANDED**

**CLASS ACTION COMPLAINT**

Plaintiff Jessica Mack, on her behalf and on behalf of similarly situated persons, brings this action by her undersigned counsel and says in support:

**I. PARTIES**

1. Plaintiff, Jessica Mack, is an adult individual presently residing at 4249 W. Mountain View Drive, Walnutport PA 18088.

2. Defendant, Avertest LLC d/b/a Averhealth (“Avertest”), is a limited liability corporation licensed to do business in the Commonwealth of Pennsylvania and regularly conducting business in the County of Chester and having a principal place of business located at 512 W. Hamilton Street, Suite 105, Allentown, PA 18101; at all times relevant, acting alone or in concert with others, defendant formulated, directed, controlled, conspired, substantially assisted, enabled and/or participated in the acts and practices set forth in this complaint.

**II. FACTUAL ALLEGATIONS**

1           3. Ms. Mack was on probation. As a condition of her probation, she had to abstain  
2 from alcohol use, which she did. Her problems arose from the testing done by the Defendant  
3 Avertest to monitor her drug and alcohol use.

4           4. Under the probation and sentencing orders, Ms. Mack had to obtain regular  
5 testing for alcohol use as directed. The testing was to be done by Avertest when directed. Ms.  
6 Mack was responsible to pay Avertest for the testing.

7           5. In addition to the testing by Avertest, the Plaintiff was also required to wear an  
8 alcohol monitoring ankle bracelet. The bracelet cannot be removed and is highly accurate in  
9 detecting alcohol use. The bracelet never said she had consumed alcohol.

10          6. On November 21, 2017, Ms. Mack reported to her probation officer as directed.  
11 She then submitted to a breath and urine test administered by Avertest. The breath test was  
12 negative for alcohol use and the urine test result was not readily available.

13          7. On November 22, 2017, she was again ordered to report to her probation officer's  
14 office. After arriving there, she was placed under arrest because the urine test conducted by  
15 Avertest showed she had consumed alcohol.

16          8. Avertest did not conduct a second test to confirm the positive urine test it reported  
17 despite that neither the bracelet or the breath test had ever shown any alcohol use and the  
18 recommendations by a government agency to do so.

19          9. As a result of the arrest, Ms. Mack spent the next 21 days in jail. She was released  
20 on December 12, 2017, because a second test came back negative for alcohol use.

21          10. While in jail, Ms. Mack was fired by her employer. She was later reemployed in  
22 January 2018. She lost income before she was reemployed.

23          11. On December 14, 2017, she was again directed to report to her probation officer,  
24 which she did. She was again given a breath and urine test by Avertest.

25          12. Ms. Mack's breath test again was negative. But again, the urine test came back  
26 positive but this time she was not arrested but instead a second test was requested.

          13. There were as many as 10 subsequent tests administered that returned false  
positives from Avertest.

1 14. Ms. Mack was advised by Avertest after the December 14, 2017 breath and urine  
2 test that it had a more accurate test but it would cost her more for that test. In short, she could  
3 continue to run the risk of false positives that landed her in jail or she could pay extra fees for  
4 a more accurate and reliable test. After she began paying the extra fees for the reliable test, there  
5 were no more false positives.

6 15. Avertest has a system of administering inferior tests at a lesser price which then  
7 allows it to offer a more reliable test for a higher price. The sales system was used on the  
8 Plaintiff and upon information and belief this is Avertest's regular practice and way to sell the  
9 higher priced tests.

10 16. Avertest knows that its testing is used for decision by probation officers and that  
11 a false positive will have serious consequences for the test taker including the loss of their  
12 liberty. This situation provides Avertest fully motivated buyers for it to upsell the more  
13 expensive tests.

14 17. Avertest is paid for its testing by the Plaintiff and the proposed class members.  
15 Avertest owes a duty to Plaintiff and others to make sure that the tests and procedures it charges  
16 for are reliable and suitable for the purpose that they are offered.

17 18. Avertest breaches its duty by selling and charging for unreliable tests that are not  
18 suitable for the purpose they are purchased.

19 19. Avertest owes the same duty to the proposed class members as defined below.

20 20. Avertest breached its duty to the proposed class defined below by selling them  
21 unreliable tests that are not suitable for the purpose they are purchased.

22 21. Avertest's breach of its duties to Plaintiff and the proposed class provides it a  
23 significant reward by allowing it to upsell tests for more fees.

24 22. The damages arising from Avertest's sale of less reliable tests and procedures is  
25 foreseeable since Avertest knows that Plaintiff and the class members are paying for the tests  
26 and that probation officers make decisions on probation based on Avertest's testing.

23. As a result of Avertest's actions and inactions, the Plaintiff and the putative class  
members have been damaged.

**IV. CLASS ACTION ALLEGATIONS**

1 24. The prerequisites of Pennsylvania Rule 1702 can be met by this proposed class  
2 action.

3 25. The Plaintiff proposes the following class, subject to amendment:

4 All persons who were provided testing for alcohol by the Defendant Avertest in the  
5 Commonwealth of Pennsylvania in the two (2) year period preceding October 31,  
6 2019 (the date the initial federal complaint was filed) and:

- 7 a) The test that was administered was unreliable or not properly administered  
8 with appropriate confirmation procedures;
- 9 b) Produced a false positive;
- 10 c) As a result of the unreliable test, the person incurred damages including but  
11 not limited to the costs of a more expensive test sold by Avertest.

12 26. Upon information and belief, Avertest is the designated provider of alcohol testing  
13 for a number of probation departments for various jurisdictions in the Commonwealth of  
14 Pennsylvania.

15 27. As a result, there are tens if not hundreds of persons who meet the class definition  
16 and joinder of all class members in a single action is impractical.

17 28. There are common questions of law and fact relating to the claims asserted on  
18 behalf of the plaintiff and the putative class including:

- 19 a) Whether the Defendant owed a duty to the Plaintiff and the putative class;
- 20 b) Whether the Defendant breached that duty by administering a test that was  
21 unreliable or inadequate because, for and among other reasons, required additional  
22 safeguards should have been performed before the test results could be provided;
- 23 c) Whether the Defendant's breach of its duty caused damages to the Plaintiff and the  
24 putative class;
- 25 d) Whether the Defendant's breach caused foreseeable damage to the Plaintiff and the  
26 putative class.

29. Plaintiff's claims against the Defendant are typical if not identical to the claims  
asserted on behalf of the putative class.

1           30. Plaintiff will fairly and adequately protect the interests of the Class and is  
2 committed to seeking relief against the Defendant and she has no interests that are antagonistic  
3 to the putative class or create conflict of interest with the class.

4           31. Plaintiff has also hired attorneys who meet the criteria of Rule 1709 as they can  
5 adequately represent the class since they are experienced attorneys with substantial class action  
6 experience. Plaintiff and counsel have adequate financial resources to assure that the class will  
7 not be harmed.

8           32. The putative class also meets the requirements of Rule 1708 relating to classes  
9 that seek monetary relief as the common issues identified above are also the predominant issues  
10 in this action.

11           33. The class can be managed through trial and there are no difficulties anticipated by  
12 maintaining this action as a class action.

13           34. Allowing multiple separate actions to be filed asserting the same claims asserted  
14 in this action can create the risk of inconsistent decisions with respect to individual class  
15 members raising the possibility of confronting the Defendant with incompatible standards of  
16 conduct.

17           35. There is no other pending litigation against the Defendant for the claims asserted  
18 to Plaintiff's knowledge.

19           36. There is no reason this forum is not appropriate to litigate the claims of the class.

20           37. The individual class members may not have the resources or ability to pursue their  
21 own claims.

22           38. The potential recovery may be too small and the costs too great to sustain  
23 individual actions.

24           39. Membership in the Class can be determined by ministerial inspection of  
25 Defendant's records.

26 **V. CAUSES OF ACTION**

**COUNT I - NEGLIGENCE**

40. Plaintiff realleges the foregoing paragraphs.

1           41. Defendant owed the Plaintiff and the putative class members a duty as they paid  
2 the Defendant to provide testing services.

3           42. Defendant breached the duty owed to the Plaintiff and the putative class members  
4 when it failed to provide sufficiently reliable tests and conveyed the results of those tests to  
5 probation officers when Defendant knew may the results were not reliable or accurate, were  
6 contradicted by other tests and did so without following recommendations that any positive  
7 results be confirmed through a second specimen test to confirm any positive results.

8           43. Defendant had no incentive to take proper actions because the false positive  
9 reporting provided Defendant an opportunity to sell the plaintiff and putative class members a  
10 higher cost test.

11           44. Defendant's breach of its duty caused the Plaintiff and the other class members  
12 damages including paying for inadequate and unreliable testing, being charged more for tests  
13 to overcome the false positives from the inadequate and unreliable testing and other foreseeable  
14 consequences.

15 **VI. REQUEST FOR RELIEF**

16           WHEREFORE, the Plaintiff prays for the following relief and judgment in her favor and  
17 the other members of the putative Class and against Defendant Avertest:

- 18           i. Certifying this action as a Class Action with the Class of persons as defined  
19 herein subject to modification or amendment;
- 20           ii. The Court appoint Plaintiff and her counsel to represent the Class certified;
- 21           iii. The Plaintiff and Class be awarded damages against the Defendant as  
22 determined at trial including but not limited to the fees paid to the Defendant;
- 23           iv. The Plaintiff and the Class be awarded their costs, including attorney fees,  
24 if allowed by law; and
- 25           v. The Plaintiff and Class be awarded such other and further relief as may be  
26 appropriate and proper.

Dated: June 22, 2021

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Respectfully submitted,

/s/ Matthew B. Weisberg  
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**CERTIFICATE OF SERVICE**

I, Matthew B. Weisberg, Esquire, hereby certify that on this 22<sup>nd</sup> day of June, 2021, a true and correct copy of the foregoing Complaint was served via e-filing on all counsel of record and all unrepresented parties as outlined below:

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CIPRIANI & WERNER, P.C.  
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Blue Bell, PA 19422

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Allentown, PA 18101

Christine Darrah  
455 Hamilton Street  
Allentown, PA 18101

Lehigh County  
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/s/ Matthew B. Weisberg

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