



JUSTIN P. NICHOLS  
ADAM B.J. POOLE  
ATTORNEYS AT LAW

405 N. St. Mary's Street, Suite 1000  
San Antonio, Texas 78205  
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Justin@TheNicholsLawFirm.com

September 19, 2018

VIA HAND DELIVERY

Alex Lopez  
Chief Equity Officer  
City of San Antonio  
c/o San Antonio City Clerk  
100 Military Plaza, 2<sup>nd</sup> Floor  
San Antonio, Texas 78205

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2018 SEP 19 PM 12:01

Re: COMPLAINT OF DISCRIMINATION

Dear Ms. Lopez:

I represent Nicole Throckmorton a/k/a Nicholas Throckmorton. Please direct all correspondence regarding this matter to my attention.

This letter is intended to be a formal complaint of discrimination pursuant to Chapter 2, Article X, San Antonio City Code (the "NDO"). Specifically, this complaint alleges a private business discriminated against my client on the basis of gender identity, in a place of public accommodation, within the incorporated city limits of San Antonio, Texas.

This complaint is against Biotest Pharmaceuticals Corporation ("Biotest"), which can be reached through its vice president and general counsel, Donna A. Quinn, by email to [DQuinn@biotestpharma.com](mailto:DQuinn@biotestpharma.com), or by phone at (561) 569-3160.

The incident of discrimination occurred on August 18, 2018, at approximately 2:00 p.m., at the Biotest plasma donation center located at 618 NW Loop 410, Suite 101, San Antonio, Texas 78216. My client attempted to donate blood plasma at Biotest, and even through passing all screening tests, she was denied the opportunity to donate plasma solely on the basis of being transgender. A Biotest employee explicitly told my client Biotest has a policy against allowing transgender persons to donate plasma. The Biotest employee further told my client she would be "permanently deferred," and placed in a database so she would be unable to donate plasma at any other donation center – Biotest or otherwise.

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Biotest is a place of public accommodation because it provides a service.<sup>1</sup> Recently, the United States government, as *amicus curie*, took the position before the Fifth Circuit Court of Appeals that plasma donation centers are places of public accommodation.<sup>2</sup> The City should take the same position.

Given the conduct above, Biotest has committed a violation of San Antonio City Code, art. X § 2-592, and my client requests your office investigate and prosecute the same.

It also bears mentioning that, in 2015, the U.S. Food and Drug Administration amended rules related to the donation of blood and blood components, removing an outright ban on gay and transgender persons donating, and moving towards a criteria based on whether a presenting male has had sex another man in the preceding 12 months. At no point during the screening process did Nicole ever indicate anything that would disqualify her from donating under the updated FDA policy.

The updated FDA policy further provides a facility should accept a donor's self-reported gender as true. In this case, Ms. Throckmorton identified herself as female, and made no report of any conduct which would disqualify her from donating plasma. She was, in all respects, qualified to donate plasma, and should have been allowed to do so, but for Biotest's discriminatory policy and practice.

For your reference, we gave notice to Biotest in a letter dated August 28, 2018, and Biotest provided a non-substantive response dated September 10, 2018. I replied in an email dated September 12, 2018, and requested Biotest confirm or deny whether it has a policy against transgender persons donating plasma. I received no response. Copies of all correspondence are enclosed.

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<sup>1</sup> See Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227 (10th Cir. 2016) (holding plasma donation centers are places of public accommodation because they are "service establishments" in that they are a place of business which provides assistance and/or benefits to persons wishing to donate plasma – regardless whether the reasons are altruistic or pecuniary). Section 2-593 of the NDO defines a place of public accommodation as "every business within the city... which is open to the general public and offers, for compensation, any product, *service*, or facility" (emphasis added). The ordinance does require that the compensation be paid to or from the business, and like the *Levorsen* court held, it does not matter whether the party is compensating the business or visa versa for the purposes of determining whether the business is a place of public accommodation.

<sup>2</sup> Brief of the United States of America (filed February 6, 2018), Silguero v. CSL Plasma, Inc., No. 17-41206 (5th Cir. filed Nov. 30, 2017).

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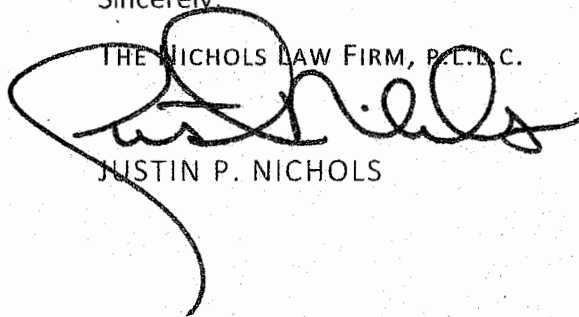
Biotest's refusal or inability to confirm whether it has a policy outright barring transgender persons from donating is a glaring indication it is unwilling to be forthright and transparent about its business practices as it related to discrimination.

I hope your office will take this opportunity to enforce the NDO – which I understand will be the first time in the ordinance's five-year history any complaint involving discrimination on the basis of sexual orientation or gender identity has actually been prosecuted. It is time to show the city is serious about protecting LGBT San Antonians from discrimination.

My client and I stand ready and willing to participate and cooperate with your investigation, and anxiously await your reply. Thank you for your attention to this matter, and I look forward to hearing from you.

Sincerely,

THE NICHOLS LAW FIRM, P.L.L.C.



JUSTIN P. NICHOLS

Enclosures

cc: [Via Email - equity@sanantonio.gov](mailto:equity@sanantonio.gov)

Alex Lopez  
Chief Equity Officer  
City of San Antonio

COPY



JUSTIN P. NICHOLS  
 ADAM B.J. POOLE  
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405 N. St. Mary's Street, Suite 1000  
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 Justin@TheNicholsLawFirm.com

August 28, 2018

VIA USPS PRIORITY MAIL  
 # 9405803699300685384259

Ileana Carlisle, CEO  
 Biotest Pharmaceuticals Corporation  
 5800 Park of Commerce Blvd., NW  
 Boca Raton, Florida 33487

Re: NOTICE OF DISCRIMINATION COMPLAINT

Dear Ms. Carlisle:

I represent Nicole Throckmorton a/k/a Nicholas Irvin Throckmorton, whose date of birth is November 17, 1984. Please direct all correspondence regarding this matter to my attention.

The purpose of this letter is to lodge a formal complaint with your office, and to give you notice of my client's claims against Biotest Pharmaceuticals Corporation ("Biotest").

On August 18, 2018, at approximately 2:00 p.m., Nicole entered the BioTest facility located at 618 NW Loop 410, Suite 101, San Antonio, Texas 78216, where she intended to donate plasma. Nicole met with a female BioTest employee with short, dark hair, pulled into a pony tail, with tanned skin and a white coat. The woman administered the initial physical screening, and took a blood sample from Nicole to test for anemia and iron levels. During the background screening Nicole disclosed to the woman she is transgender.

Nicole was told by the BioTest employee that BioTest has a policy against accepting plasma from transgender persons, and that Nicole would be "permanently deferred," and not allowed to donate plasma at any time in the future, at any other plasma donation center. As you can imagine, this was devastating to Nicole, and she left extremely embarrassed, distressed, and in tears after being turned away – solely on the basis of being transgender.

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I am sure you are aware of the 2015 changes made by the U.S. Food and Drug Administration which updated the national policy for donating blood and blood components, removing an outright ban on gay and transgender persons donating, and moving towards a criteria based on whether a presenting male has had sex another man in the preceding 12 months. At no point during the screening process did Nicole ever indicate anything that would disqualify her from donating under the updated FDA policy. The updated FDA policy provides a facility should accept a donor's self-reported gender as true.

At least one court has confronted this issue, and concluded plasm-donation centers ("PDC"), absent any express law, rule, or regulation allowing them do so, may not refuse to allow a person to donate blood solely because the person is transgender.<sup>1</sup>

In 2016, the Tenth Circuit Court of Appeals held PDCs are service establishes, and therefore considered places of public accommodation for the purposes of the Americans with Disabilities Act,<sup>2</sup> allowing a man who was refused because of a mental disability to sue the PDC.

The Fifth Circuit is primed to answer the same questions soon, and is set to hold oral arguments on the issue on September 5, 2018.<sup>3</sup> In *Silguero*, the United States, appearing as *amicus curie*, has taken the position that PDC's are service establishments and therefore places of public accommodation for the purposes of the Americans with Disabilities Act.<sup>4</sup>

San Antonio City Code, art. X § 2-592 makes it unlawful to discriminate against a person in a place of public accommodation based on the person's sexual orientation or gender identity, and imposes criminal liability for the same.

It's unclear at this point whether Biotest's policy is based on its belief that transgender people are disabled, if there has just been a misinterpretation of updated FDA guidelines, or if the policy is just meanspirited without any medical purpose or rationale.

Before any demand is made or complaint is filed, I wanted to reach out to Biotest to inform them of this incident, and see if we can work together to resolve it informally. For that to happen, I need to be contacted within 10 days from the date of this letter. Otherwise, we will assume Biotest is not interested in an informal resolution, and will proceed accordingly.

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<sup>1</sup> See Kaiser v. CSL Plasma, Inc., No. 2:2015-cv-00842 (W.D. Wash. filed May 28, 2015).

<sup>2</sup> Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227 (10th Cir. 2016).

<sup>3</sup> Silguero v. CSL Plasma, Inc., No. 17-41206 (5th Cir. filed Nov. 30, 2017).

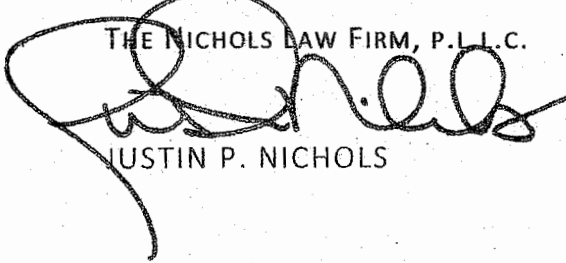
<sup>4</sup> Brief of the United States of America, Siguero (filed February 6, 2018).

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Sincerely,

THE NICHOLS LAW FIRM, P.L.L.C.  
  
JUSTIN P. NICHOLS

cc: Via First Class U.S. Mail  
Biotest Pharmaceuticals Corporation  
c/o Cogeny, Inc., Registered Agent  
1601 Elm Street, Suite 4360  
Dallas, Texas 75201

Via First Class U.S. Mail  
Donna Quinn, Esq.  
Vice President, Legal  
Biotest Pharmaceuticals Corporation  
5800 Park of Commerce Blvd., NW  
Boca Raton, Florida 33487

Via Facsimile - (210) 224-4337  
Biotest Pharmaceuticals Corporation  
618 NW Loop 410, Ste. 101  
San Antonio, Texas 78216

**COPY**



Biotest Pharmaceuticals Corporation · 901 Yamato Road, Suite 101 Boca Raton, FL 33431-4409

DQuinn@biotestpharma.com  
PH: 561.569-3160

September 10, 2018

**VIA FEDEX**

Justin P. Nichols, Esq.  
The Nichols Law Firm, PLLC  
405 N. St. Mary's Street, Suite 1000  
San Antonio, Texas 78205

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**Re:** Nicole Throckmorton a/k/a Nicholas Irvin Throckmorton

Dear Mr. Nichols:

Please be advised that we are in receipt of your letter dated August 28, 2018, regarding the above captioned individual and are currently investigating this matter. Once the investigation is complete we will respond.

Very truly yours,

**BIOTEST PHARMACEUTICALS CORPORATION**

**Donna A. Quinn**  
Vice President and General Counsel

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**SEP 11 2018**

The Nichols Law Firm, PLLC

# COPY

**Justin P. Nichols**

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**From:** Justin P. Nichols <justin@thenicholslawfirm.com>  
**Sent:** Wednesday, September 12, 2018 9:35 AM  
**To:** 'dquinn@biotestpharma.com'  
**Subject:** Nicole Throckmorton v. Biotest

Ms. Quinn:

I'm in receipt of your letter of September 10<sup>th</sup> regarding Nicole Throckmorton, in which you indicated Biotest will be conducting an investigation and will reply when it's completed, although no date is provided, and my client isn't willing to wait indefinitely.

To me, this is relatively simple – either Biotest has a policy precluding transgender people from donating plasma, in which you can simply confirm the same, and we can proceed to contest it, or Biotest does not have such a policy, and should invite Ms. Throckmorton back. Is it a policy or not? It's a simply yes or no question.

If we don't receive a more substantive response/statement today, my client intends on filing a complaint with the San Antonio Office of Equity tomorrow, and a complaint in the appropriate court will be forthcoming.

Thank you for your attention to this matter, and please call with any questions.

Sincerely,

**Justin P. Nichols**  
Attorney at Law  
The Nichols Law Firm, P.L.L.C.  
405 N. Saint Mary's Street, Ste. 1000  
San Antonio, Texas 78205  
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