
**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION**

PATRICK RUSAW Individually, and as the Personal Representative on behalf of the Estate of MARY MANLEY,	:	Civil Action No.
	:	
Plaintiff,	:	COMPLAINT AND DEMAND FOR JURY TRIAL
	:	
v.	:	
	:	
ASTRAZENECA PHARMACEUTICALS LP and ASTRAZENECA LP.	:	
	:	
Defendants.	:	

COMPLAINT

COMES NOW, PATRICK RUSAW, Individually, and as the Personal Representative on behalf of the Estate of Decedent MARY MANLEY (hereinafter collectively “Plaintiff” or “Plaintiffs”) by and through undersigned counsel, files this Complaint against Defendants, AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively “Defendants) alleges as follows:

NATURE OF THE ACTION

1. This is an action for personal injuries and economic damages suffered by Plaintiff, Mary Manley, as a direct and proximate result of Defendants’ negligent and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling and/or sale of the proton pump inhibiting (“PPI”) drug known as Prilosec (omeprazole) and/or other Prilosec-branded products with the same active ingredient herein collectively referred to as “PRILOSEC”.

PARTIES

2. At all times referenced herein, Plaintiff, PATRICK RUSAW, was and is a citizen of the State of New York.

3. Decedent, MARY MANLEY, was a resident of the State of New York, when she used Defendants' products, when she was diagnosed with multi-organ failure/respiratory arrest, healthcare associated pneumonia, and acute on chronic renal failure, and at the time of her death. PATRICK RUSAW is the personal representative for MARY MANLEY's estate.

AstraZeneca Pharmaceuticals LP

4. Defendant AstraZeneca Pharmaceuticals LP is, and all times relevant to this action was, a Limited Partnership with its principal place of business in Wilmington, Delaware.

5. At all times relevant hereto, Defendant AstraZeneca Pharmaceuticals LP was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling and/or selling Prilosec products.

6. Upon information and belief, at all relevant times, Defendant AstraZeneca Pharmaceuticals LP was present and doing business in Plaintiff's state of residency and the State of New Jersey.

7. At all relevant times, Defendant AstraZeneca Pharmaceuticals LP transacted, solicited and conducted business in Plaintiff's state of residency and the State of New Jersey and derived substantial revenue from such business.

8. At all relevant times, Defendant AstraZeneca Pharmaceuticals LP expected or should have expected that its acts would have consequences throughout the United States of America including the State of New Jersey in particular.

9. Defendant AstraZeneca Pharmaceuticals LP is the holder of approved New Drug Application (“NDA”) for the Prilosec Delayed-Release Capsules (20 mg), with NDA #019810, approved on 9/14/1989.

AstraZeneca LP

10. At all relevant times, Defendant AstraZeneca LP was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling and/or selling Prilosec products.

11. Defendant AstraZeneca LP is, and all times relevant to this action was, a Limited Partnership with its principal place of business in Wilmington, Delaware.

12. Upon information and belief, at all relevant times, Defendant AstraZeneca LP was present and doing business in Plaintiff’s state of residency and the State of New Jersey.

13. At all relevant times, Defendant AstraZeneca LP transacted, solicited and conducted business in Plaintiff’s state of residency and the State of New Jersey and derived substantial revenue from such business.

14. At all relevant times, Defendant AstraZeneca LP expected or should have expected that its acts would have consequences throughout the United State of America, including Plaintiff’s state of residency and the State of New Jersey in particular.

Defendants’ Unity of Interest

15. Upon information and belief, at all relevant times, each of the Defendants and their directors and/or officers acted within the scope of their authority for and on behalf of the other Defendant. During all relevant times, Defendants possessed a unity of interest between themselves and exercised control over their respective subsidiaries and affiliates.

16. Upon information and belief, at all relevant times, each Defendant was the agent and employee of the other Defendant, and in performing the wrongful acts alleged, each Defendant was acting within the course and scope of such agency and employment with each Defendants' actual and implied permission, consent, authorization and approval. As such, each Defendant is individually, as well as jointly and severally, liable to Plaintiff for Plaintiff's injury, losses and damages.

17. Defendants AstraZeneca Pharmaceuticals LP and AstraZeneca LP are thus collectively referred to herein as "Defendants" or "AstraZeneca".

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) because this case is a civil action where the matter in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different States.

19. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) as a substantial part of the events and/or omissions giving rise to the Plaintiff's claims emanated from activities within this jurisdiction and Defendants transact substantial business within this jurisdiction.

20. Consistent with the Due Process Clause of the Fifth and Fourteenth Amendments, the Court has personal jurisdiction over Defendants, because Defendants are present in the State of New Jersey, such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

21. This Court has personal jurisdiction over Defendants pursuant to and consistent with the Constitutional requirements of Due Process because Defendants, acting through their agents or apparent agents, committed one or more of the following: transaction of business within the state of New Jersey; making of contracts within the state; the commission of a tortious

act within this state; and the ownership, use, or possession of any real estate situated within this state as well as registered as foreign partnerships to do business within the state and maintaining a registered agent for service of process.

22. Requiring Defendants to litigate these claims in New Jersey does not offend traditional notions of fair play and substantial justice and is permitted by the United States Constitution. All of Plaintiff's claims arise in part from conduct Defendants purposefully directed to the State of New Jersey. Upon information and belief, Defendants' Prilosec products are sold at hundreds of local and national pharmacies, including, but not limited to Wal-Mart, Target, CVS, and Walgreens throughout the Plaintiff's state of residency and the State of New Jersey.

23. Upon information and belief, Defendants avail themselves of numerous advertising and promotional materials regarding their defective Prilosec products specifically intended to reach consumers in Plaintiff's home state and the State of New Jersey, including but not limited to advertisements on local television programs, advertisements on local radio broadcasts, advertisements on billboards and advertisements in print publications delivered to consumers in Plaintiff's home state of and the State of New Jersey.

24. Plaintiff's claims arise out of Defendants' design, marketing and/or sale of Prilosec products in the State of New Jersey.

25. Defendants regularly conduct or solicit business and derive substantial revenue from goods used or consumed in, inter alia, the State of New Jersey.

26. At all relevant times, Defendants were present and doing business in the State of New Jersey.

27. At all times relevant hereto, Defendants transacted, solicited, and conducted business in the State of New Jersey and derived substantial revenue from such business.

28. At all relevant times, Defendants placed Prilosec products ingested by Plaintiff into the stream of interstate commerce.

29. At all relevant times, Defendants expected or should have expected that their acts and omissions would have consequences within the United States, including Plaintiff's state of residency and the State of New Jersey in particular.

30. Defendants regularly file patent infringement claims against non New Jersey Corporations in New Jersey Federal Court thereby availing themselves of the benefits of New Jersey courts, laws and jurisdiction. *See AstraZeneca Pharmaceuticals LP, et al. v. Teva Pharmaceuticals, Case 1:17-CV-02448-RMB-KMW, filed April 10, 2017.*

31. Defendants have obtained a Certificate of Registration with the New Jersey Department of Health Drug and Medical Devices, Registration No. 5003966; 5003887.

32. Defendants maintain a registered agent in Trenton, New Jersey.

33. Defendants, by and through their actions stated above, have consented to jurisdiction in state of New Jersey.

34. Defendants, by and through their actions stated above, are judicially estopped from challenging jurisdiction in New Jersey State and Federal Courts under the doctrine of Judicial Estoppel.

35. Defendants named herein are conclusively presumed to have been doing business in this state and are subject to New Jersey long arm jurisdiction.

GENERAL FACTUAL ALLEGATIONS

A. Proton Pump Inhibitors Generally

36. Proton pump inhibitors (“PPIs”) are one of the most commonly prescribed medications in the United States. In 2013, more than 15 million Americans used prescription PPIs, costing more than \$10 billion.

37. PPIs are indicated for the treatment of conditions such as: Gastroesophageal reflux disease (“GERD”); dyspepsia; acid peptic disease; Zollinger-Ellison syndrome; acid reflux; and peptic or stomach ulcers.

38. Prilosec (omeprazole) is a PPI that works by inhibiting the secretion of stomach acid. It shuts down acid production of the active acid pumps in the stomach thereby reducing hydrochloric acid in the stomach. The drug binds with the proton pump which inhibits the ability of the gastric parietal cell to secrete gastric acid.

B. Dangers Associated with PPIs

39. During the period in which Prilosec has been sold in the United States, hundreds of reports of injury have been submitted to the FDA regarding the ingestion of Prilosec and other PPIs. Defendants have had notice of serious adverse health outcomes through case reports, clinical studies and post-market surveillance. Specifically, Defendants have received numerous case reports of several types of kidney injuries in patients who ingested Prilosec, including: Acute Interstitial Nephritis (“AIN”); Chronic Kidney Disease (“CKD”); Renal/Kidney Failure; and Acute Kidney Injury (“AKI”).

40. These reports put Defendants on notice of the excessive risk of kidney injury related to the use of Prilosec. However, Defendants took no action to inform Plaintiff or

Plaintiff's physicians of these risks. Instead, Defendants continued to represent that Prilosec did not pose any risk of kidney injuries.

C. Acute Interstitial Nephritis Dangers Associated with PPIs

41. Acute Interstitial Nephritis ("AIN") is the inflammation of the tubes and tissues of the kidneys. The most common symptoms of AIN are fatigue, nausea and weakness. Symptoms related to AIN can begin as soon as one week following PPI ingestion.

42. The risk of AIN among PPI users was first raised in 1992. Five years later, an additional study again raised concerns about AIN. Between 2004 and 2007, at least three additional studies confirmed AIN related to PPI usage. More recent studies reveal that those using PPIs such as Prilosec are at a three times greater risk than the general population to suffer AIN.

43. By July 2011, the World Health Organization adverse drug reaction report included nearly 500 cases of AIN already reported that year, however Defendants still did not warn the physicians or patients, including Plaintiff, of the risks of AIN associated with use of Prilosec.

44. On or about October 30, 2014, the FDA notified Defendants that it had determined that PPIs, including Prilosec, pose additional risks not previously disclosed by Defendants.

45. On December 19, 2014, labeling for PPIs was updated to include a warning about AIN. The new label added, for the first time, a section about AIN that read, in relevant part, that AIN "may occur at any point during PPI therapy."

46. However, the current warning regarding the risk of AIN is far from adequate, lacking the necessary force and specificity to give patients and their healthcare providers the

proper information needed to make an informed decision about whether to start or continue a drug regimen with the potential for such dire consequences.

D. Chronic Kidney Disease Associated with PPIs

47. Chronic Kidney Disease (“CKD”) is the gradual loss of kidney function. Kidneys filter waste and excess fluid from the blood, which are then excreted. When CKD reaches an advanced stage, dangerous levels of fluid, electrolytes and waste can build up in the body.

48. In the early stages of CKD, patients may have few signs or symptoms. CKD may not become apparent until kidney function is significantly impaired.

49. Treatment for CKD focuses on slowing the progression of kidney damage, usually by attempting to control the underlying cause. CKD can progress to end-stage kidney failure, which can be fatal absent artificial filtering, dialysis or a kidney transplant. Early treatment is often the key to avoiding the most negative outcomes.

50. CKD is associated with a substantially increased risk of death and cardiovascular events.

51. Recent studies have shown the long term use of PPIs was independently associated with a 20% to 50% higher risk of CKD, after adjusting for several potential confounding variables, including demographics, socioeconomic status, clinical measurements, prevalent co-morbidities, and concomitant use of medications.

52. In at least one recent study, the use of PPIs for *any* period of time, was shown to increase the risk of CKD by 10%.

53. A meta-analysis that was recently published in 2017 indicated that there was a significantly increased risk of CKD associated with use of PPI’s in the absence of intervening acute kidney injury.

54. Currently, the Prilosec product labeling does not contain any warning regarding the increased risk of CKD.

E. Acute Kidney Injury Dangers Associated with PPIs

55. Recent studies indicate that those using PPIs such as Prilosec are at a more than 2.5 times greater risk than the general population to suffer Acute Kidney Injury (“AKI”).

56. Recent studies also indicated that those who develop AIN are at a significant risk of AKI even though they may not obviously exhibit kidney dysfunction.

57. Currently, the Prilosec product labeling does not contain any warning regarding the increased risk of AKI.

F. Safer Alternatives to PPIs

58. Despite the fact that Prilosec and other PPIs lead to an increased risk of numerous injuries as outlined herein, several safer alternatives are available, including but not limited to:

59. The use of over-the-counter calcium carbonate remedies tablets that have been available since the 1930s, such as Maalox and Tums; and/or

60. The use of histamine H₂-receptor antagonists (also known as H₂ blockers) that were developed in the late 1960s. H₂ blockers act to prevent the production of stomach acid and work more quickly than PPIs and are prescribed for the same indications as PPI's. Examples of H₂ blockers include Zantac, Pepcid and Tagamet. H₂ receptor antagonists are not associated with an increased risk of renal injuries.

G. Allegations Common to All Causes of Action

61. Defendants knew or should have known about the correlation between the use of Prilosec and the significantly increased risks of AIN, CKD, AKI and other renal impairment.

Yet, Defendants failed to adequately warn of these risks from ingestion of Prilosec, including the negative effects on the kidney.

62. In omitting, concealing, and inadequately providing critical safety information regarding the use of Prilosec to Plaintiff and Plaintiff's healthcare providers, Defendants engaged in, and continue to engage in, conduct likely to mislead consumers, including Plaintiff and Plaintiff's healthcare providers. This conduct is fraudulent, unfair and unlawful.

63. Despite clear knowledge that Prilosec causes a significantly increased risk of CKD, AKI and other renal impairment, Defendants continue to market and sell Prilosec without warning consumers or healthcare providers of the significant risks to the kidney.

64. Defendants still do not warn of the potential risks of CKD and AKI associated with the use of Prilosec in the product labeling nor in direct to consumer advertising.

65. Plaintiff was not aware of the potential risks of CKD or AKI associated with the use of Prilosec until recently nor was she aware that her injuries could have been caused by her use of Prilosec.

H. Plaintiff's Use of Prilosec and Resulting Harm

66. Plaintiff, Mary Manley, is and was, at all relevant times, a citizen of the State of New York.

67. Plaintiff was born on January 5, 1942 and died on August 29, 2015.

68. Upon information and belief, Plaintiff was prescribed Prilosec on numerous occasions, beginning as early as 2006, and thereafter through 2015. Plaintiff ingested Prilosec as prescribed by her prescribing physicians.

69. Plaintiff would not have used Prilosec had she been properly warned of the kidney risks associated with its ingestion.

70. As a result of using Defendants' Prilosec, Plaintiff suffers from worsening Chronic Kidney Disease and death from renal failure. Plaintiff sustained severe and permanent personal injuries, pain, suffering, economic loss, and emotional distress, and wrongful death.

71. The aforementioned injuries and damages sustained by Plaintiff were caused by the ingestion of Defendants' Prilosec.

72. Decedent passed away on August 29, 2015.

TOLLING OF THE STATUTE OF LIMITATIONS

73. Defendants negligently represented to the medical and healthcare community, the FDA, to Plaintiff and the public that Prilosec had been tested and was found to be safe and/or effective for its indicated use.

74. Defendants, at all relevant times, knew or should have known of the risks and defects with Prilosec products, however Defendants concealed their knowledge of Prilosec's risks and defects and failed to notify Plaintiff, the FDA, the public and the medical community including Plaintiff's prescribing physicians of the risks of CKD and AKI.

75. Defendant concealed and continue to conceal their knowledge of Prilosec's unreasonably dangerous risks from Plaintiff, the FDA, the public and the medical community including Plaintiff's prescribing physicians. Specifically, Defendants failed to adequately inform consumers and the prescribing medical community about the magnified risk of kidney injuries related to the use of Prilosec.

76. Defendants concealed and continue to conceal their knowledge that Prilosec can cause kidney injuries from Plaintiff, the FDA, the public and the medical community including Plaintiff's prescribing physicians. Specifically, Defendants have failed to adequately inform

consumers and the prescribing medical community against the serious risks associated with Prilosec and completely failed to warn against the risk of Chronic Kidney Disease.

77. To this day, Defendants continue to conceal their knowledge that Prilosec can cause CKD and still do not warn consumers and the prescribing medical community of the serious and potential fatal risks of CKD associated with the use of Prilosec.

78. To this day, Defendants deny that Prilosec can cause CKD and actively conceal their knowledge relating to the true risks of CKD and other kidney injury related to the use of Prilosec.

79. Defendants, through their affirmative misrepresentations and omissions, actively concealed from Plaintiff and Plaintiff's prescribing physicians the true and significant risks associated with the use of Prilosec.

80. Defendants undertook such action with the intent of defrauding and deceiving the public and the medical community at large, including Plaintiff and Plaintiff's prescribing physicians, with the intent of inducing the prescription, dispensing, and/or purchasing of Prilosec for the treatment of GERD, all of which evidenced a callous, reckless, willful indifference to the health, safety and welfare of Plaintiff herein.

81. As a result of Defendants' actions, Plaintiff and Plaintiff's prescribing physicians were unaware, and could not have reasonably known or learned through reasonable diligence, that Plaintiff had been exposed to the risks alleged herein, and that those risks were the direct and proximate result of Defendants' action, omissions, and misrepresentations.

82. Defendants are estopped from relying on any statute of limitations defense because of their concealment of the truth, quality and nature of Prilosec. Defendants were under a duty to disclose the true character, quality and nature of Prilosec because this was non-public information that Defendants had and continue to have exclusive control, and because the

Defendants knew that this information was not available to the Plaintiff, the FDA, the public and the medical community including Plaintiff's prescribing physicians.

83. Defendants had the ability to and did spend enormous amounts of money in furtherance of their purpose of marketing and promoting a profitable drug, notwithstanding the known or reasonably known risks. Plaintiff and Plaintiff's prescribing physicians could not have afforded and could not have possibly conducted studies to determine the nature, extent and identity of related health risks, and were forced to rely on Defendants' representations.

84. Plaintiff could not have discovered the still unlabeled risks of kidney injury, including CKD, from using Prilosec through the exercise of reasonable care.

85. Plaintiff did not have the same knowledge as Defendants and no adequate warning or other clinically relevant information and data was communicated to Plaintiff or Plaintiff's physicians.

86. Any applicable statute of limitations has therefore been tolled by Defendants' knowledge, active concealment and denial of the facts alleged herein, which behavior is still ongoing.

87. Plaintiff only recently discovered that Plaintiff's injuries could have been caused by the use of Prilosec.

COUNT I
PRODUCT LIABILITY- DEFECTIVE DESIGN

88. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

89. Prilosec is defective in its design or formulation in that it is not reasonably fit, suitable, or safe for its intended purpose and/or its foreseeable risks exceed the benefits associated with its design and formulation.

90. At all times relevant hereto, Prilosec was expected to reach, and did reach, consumer's in Plaintiff's home state, the State of New Jersey, and throughout the United States, including receipt by Plaintiff, without substantial change in the condition in which it was sold.

91. At all times relevant hereto, Prilosec was designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled, and/or sold by Defendants in a defective and unreasonably dangerous condition at the time it was placed in the stream of commerce in ways which include, but are not limited to, one or more of the following:

92. When placed in the stream of commerce, Prilosec contained unreasonably dangerous design defects and was not reasonably safe as intended to be used, subjecting Plaintiff to risks that exceeded the benefits of the subject product, including, but not limited to, permanent personal injuries including, but not limited to, developing CKD and other serious injuries and side effects;

93. When placed in the stream of commerce, Prilosec was defective in design and formulation, making the use of Prilosec more dangerous than an ordinary consumer would expect, and more dangerous than other risks associated with the other medications and similar drugs on the market to treat GERD and other stomach-acid-related ailments;

94. The design of Prilosec existed before it left the control of Defendants;

95. Prilosec was insufficiently and inadequately tested;

96. Prilosec caused harmful effects that outweighed any potential utility; and

97. Prilosec was not accompanied by adequate instructions and/or warnings to fully apprise consumers, including Plaintiff, of the full nature and extent of the risks and side effects associated with its use, thereby rendering Defendants liable to Plaintiff.

98. In addition, at the time the subject product left the control of Defendants, there were practical and feasible alternative designs that would have prevented and/or significantly

reduced the risk of Plaintiff's injuries without impairing the reasonably anticipated or intended function of the product. These safer alternative designs were economically and technologically feasible – indeed they were already on the market – and would have prevented or significantly reduced the risk of Plaintiff's injuries without substantially impairing the product's utility.

99. As a result of the subject product's defective design, Plaintiff was caused to suffer serious and dangerous side effects including worsening Chronic Kidney Disease and death from renal failure, as well as other severe and personal injuries which are permanent and lasting in nature, physical pain and mental anguish, including diminished enjoyment of life.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees, and all such other further relief as this Court deems just and proper. Plaintiff also demands that the issues contained herein be tried by a jury.

COUNT II
PRODUCT LIABILITY – FAILURE TO WARN

100. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

101. Prilosec was defective and unreasonably dangerous when they left the possession of Defendants in that they contained warnings insufficient to alert consumers, including Plaintiff, of the dangerous risks and reactions associated with the subject product, including but not limited to its propensity to permanent physical injuries including, but not limited to, developing CKD and other serious injuries, side effects, and death; notwithstanding Defendants' knowledge of an increased risk of these injuries and side effects over other forms of treatment for GERD

and other stomach-acid-related ailments. Thus, the subject products were unreasonably dangerous because an adequate warning was not provided.

102. Prilosec was under the exclusive control of Defendants and was unaccompanied by appropriate warnings regarding all of the risks associated with its use. The warnings given did not accurately reflect the risk, symptoms, scope or severity of such injuries to the consumer or physicians. The promotional activities of Defendants further diluted or minimized the warnings given with the product.

103. The subject products manufactured and supplied by Defendants were defective and unreasonably dangerous when they left the possession of Defendant due to inadequate post-marketing warnings or instructions because, after Defendants knew or should have known of the risk of serious bodily harm for the use of the subject product, Defendants failed to provide an adequate warning to consumers and/or their healthcare providers of the defects of the product, and/or alternatively failed to conform to federal and/or state requirements for labeling, warnings and instruction, or recall, while knowing that the product could cause serious injury and/or death.

104. Plaintiff was prescribed and used the subject products for its intended purpose.

105. Plaintiff could not have discovered any defect in the subject product through the exercise of reasonable care.

106. Defendants, as manufacturers and/or distributors of the subject prescription product, are held to the level of knowledge of an expert in the field.

107. Defendants, the manufacturers and/or distributors of the subject prescription product, are held to a level of knowledge of an expert in the field as the Reference Listed Drug Company and the New Drug Application Holder.

108. Plaintiff did not have the same knowledge as Defendants and no adequate warnings were communicated to Plaintiff and Plaintiff's physicians.

109. The warnings that were given by Defendants were not accurate, clear, and/or were ambiguous.

110. The warnings that were given by Defendants failed to properly warn physicians of the increased risks of permanent physical injuries including, but not limited to, Acute Interstitial Nephritis (AIN), Chronic Kidney Disease (CKD), Renal/Kidney Failure, Acute Kidney Injury (AKI), and Clostridium difficile.

111. Plaintiff, individually and through Plaintiff's prescribing physician, reasonably relied upon the skill, superior knowledge, and judgment of Defendants.

112. Defendants had a continuing duty to warn Plaintiff of the dangers associated with Prilosec and by negligently and/or wantonly failing to adequately warn of the dangers associated with its use, Defendants breached its duty.

113. Had Plaintiff received adequate warnings regarding the risks of Prilosec, Plaintiff would not have used it and/or chosen a different course of treatment.

114. As a direct and proximate result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects including worsening Chronic Kidney Disease and death from renal failure, as well as other severe and personal injuries which are permanent and lasting in nature, physical pain and mental anguish, including diminished enjoyment of life.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees, and all such other further relief as this Court deems just and proper. Plaintiff also demands that the issues contained herein be tried by a jury.

COUNT III
BREACH OF EXPRESS WARRANTY

115. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

116. Defendants expressly represented to the medical and healthcare community, Plaintiff, Plaintiff's prescribing physicians, the general public, and/or the FDA, that Prilosec was safe and fit for its intended purposes, was of merchantable quality, did not produce any dangerous side effects, and had been adequately tested.

117. Prilosec does not conform to Defendants' express representations because it is not safe, has numerous and serious side effects, and causes severe and permanent injuries, including, but not limited to, developing CKD and other serious injuries and side effects.

118. At the time of making of the express warranties, to the medical and healthcare community, Plaintiff, Plaintiff's prescribing physicians, the general public, and/or the FDA, Defendants knew, or in the exercise of reasonable care should have known, of the purpose for which the subject product was to be used and warranted the same to be, in all respects, fit, safe, and effective and proper for such purpose. The subject product was unreasonably dangerous because it failed to conform to an express warranty of Defendants.

119. At the time of the making of the express warranties, to the medical and healthcare community, Plaintiff, Plaintiff's prescribing physicians, the general public, and/or the FDA, Defendants knew or should have known that, in fact, said representations and warranties were false, misleading, and untrue in that the subject product was not safe and fit for its intended use and, in fact, produces serious injuries to the user.

120. At all relevant times Prilosec did not perform as safely as an ordinary consumer would expect, when used as intended or in a reasonably foreseeable manner.

121. Plaintiff, Plaintiff's prescribing physicians, other consumers, and the medical community relied upon Defendants' express warranties.

122. Contrary to the express warranty for the subject product, Prilosec was not of merchantable quality, and was not safe or fit for intended uses and purposes, as alleged herein.

123. As a direct and proximate result of Defendants' breach of express warranty, Plaintiff was caused to suffer serious and dangerous side effects including worsening Chronic Kidney Disease and death from renal failure, as well as other severe and personal injuries which are permanent and lasting in nature, physical pain and mental anguish, including diminished enjoyment of life.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, cost herein incurred, attorneys' fees, and all such other and further relief as this Court deems just and proper. Plaintiff also demands that the issues contained herein be tried by a jury.

COUNT IV
WRONGFUL DEATH

124. Plaintiff hereby incorporates by reference each of the preceding paragraphs as if fully set forth herein.

125. As a result of the negligence, carelessness, and recklessness of the defendants, their servants, agents, and/or employees, in connection with the products at issue and lack of informed consent of Decedent, Decedent sustained grievous personal injuries which resulted in her death.

126. Decedent is survived by Plaintiff PATRICK RUSAW.

127. In connection with the injuries sustained by the decedent, and her resulting death, decedent's next of kin and decedent's estate have necessarily incurred, or become obligated to

pay various medical and funeral and related expenses in connection with the medical treatment and the funeral of the decedent, and have and will necessarily incur expenses in the settlement of the estate of decedent, in various amounts.

128. As a result of the negligent acts of the defendants resulting in the wrongful death of the decedent, decedent's next of kin have been deprived of the support, maintenance, services, guidance, communion, protection, and intellectual, moral, spiritual, and physical training of decedent, among other losses.

129. Plaintiff demands Judgment on this Count against Defendants and in the alternative for the damages resulting from the death of Decedent's death including, without limitation, Decedent's pecuniary injury, together with all hospital, medical and funeral expenses as specifically provided for under the New Jersey Wrongful Death Act, N.J.S.A. 31-1 et seq., as well as compensatory damages, treble damages, exemplary damages, attorneys' fees, interest and costs of suit, included without, punitive damages as provided for under New Jersey's Survivor Act, N.J.S.A. 2A:15-3 et seq., and all such other relief as the Court deems just.

130. That by reason of the foregoing, the decedent's next of kin have been damaged in an amount to be determined.

COUNT V
PUNITIVE DAMAGES ALLEGATIONS
(N.J.S.A. 2A:58C-5c)

131. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

132. Despite the holding of *McDarby v. Merck & Co.*, 949 A.2d 223 (N.J. Super. Ct. App. Div. 2008), numerous courts around the country, and in this District specifically, have found that punitive damages are appropriate under N.J. Stat. Ann. § 2A:58C-5c subsequent to

Wyeth v. Levine, 555 U.S. 555 (2009). See, e.g., Sullivan v. Novartis Pharms. Corp., 602 F. Supp. 2d 527, 534 n.8 (D.N.J. 2009) (“The validity of *McDarby* was subsequently cast into some doubt by the Supreme Court’s decision in *Wyeth*.”).

133. The wrongs done by Defendants were aggravated by malice, fraud, and grossly negligent disregard for the rights of others, the public, and Plaintiff, in that Defendants’ conduct was specifically intended to cause substantial injury to Plaintiff. When viewed objectively from Defendants’ standpoint at the time of the conduct, considering the probability and magnitude of the potential harm to others, Defendants’ conduct involved an extreme degree of risk. Defendants were actually, subjectively aware of the risk involved, but nevertheless proceeded with complete indifference to or a conscious disregard for the rights, safety, or welfare of others. Moreover, Defendants made material representations that were false, with actual knowledge of or reckless disregard for their falsity, with the intent that the representations be acted on by Plaintiff and Plaintiff’s healthcare providers.

134. Plaintiff relied on Defendant’s representations and suffered injuries as a proximate result of this reliance.

135. Plaintiff therefore asserts claims for exemplary damages.

136. Plaintiff also alleges that the acts and omissions of Defendants, whether taken singularly or in combination with others, constitute gross negligence that proximately caused the injuries to Plaintiff.

137. Plaintiff is entitled to an award of punitive and exemplary damages based upon Defendants’ intentional, willful, knowing, fraudulent, and malicious acts, omissions, and conduct, and Defendants’ reckless disregard for the public safety and welfare. Defendants intentionally and fraudulently misrepresented facts and information to both the medical community and the general public, including Plaintiff, by making intentionally false and

fraudulent misrepresentations about the safety of Prilosec. Defendants intentionally concealed the true facts and information regarding the serious risks of harm associated with the ingestion of Prilosec, and intentionally downplayed the type, nature, and extent of the adverse side effects of ingesting Prilosec, despite their knowledge and awareness of these serious side effects and risks.

138. Defendants had knowledge of, and were in possession of evidence demonstrating that Prilosec caused serious side effects. Notwithstanding Defendants' knowledge, Defendants continued to market the drug by providing false and misleading information with regard to the product's safety to regulatory agencies, the medical community, and consumers of Prilosec.

139. Although Defendants knew or recklessly disregarded the fact that Prilosec causes debilitating and potentially lethal side effects, Defendants continued to market, promote, and distribute Prilosec to consumers, including Plaintiff, without disclosing these side effects when there were safer alternative methods for treating GERD.

140. Defendants failed to provide adequate warnings that would have dissuaded healthcare professionals from prescribing Prilosec and consumers from purchasing and ingesting Prilosec, thus depriving both from weighing the true risks against the benefits of prescribing, purchasing, or consuming Prilosec.

141. Defendants knew of Prilosec's defective natures as set forth herein, but continued to design, manufacture, market, distribute, sell, and/or promote the drug to maximize sales and profits at the expense of the health and safety of the public, including Plaintiff, in a conscious, reckless, or negligent disregard of the foreseeable harm caused by Prilosec.

142. Defendants' acts, conduct, and omissions were willful and malicious. Defendants committed these acts with knowing, conscious, and deliberate disregard for the rights, health, and safety of Plaintiff and other Prilosec users and for the primary purpose of increasing Defendants' profits from the sale and distribution of Prilosec. Defendants' outrageous and

unconscionable conduct warrants an award of exemplary and punitive damages against Defendants in an amount appropriate to punish and make an example out of Defendants.

143. Prior to the manufacture, sale, and distribution of Prilosec, Defendants knew that the drug was in a defective condition and knew that those who were prescribed the medication would experience and did experience severe physical, mental, and emotional injuries. Further, Defendants, through their officers, directors, managers, and agents, knew that the drug presented a substantial and unreasonable risk of harm to the public, including Plaintiff. As such, Defendants unreasonably subjected consumers of Prilosec to risk of injury or death.

144. Despite this knowledge, Defendants, acting through their officers, directors and managing agents, for the purposes of enhancing Defendants' profits, knowingly and deliberately failed to remedy the known defects in Prilosec and failed to adequately warn the public, including Plaintiff, of the extreme risk of injury occasioned by said defects. Defendants and their agents, officers, and directors intentionally proceeded with the manufacturing, sale, distribution, and marketing of Prilosec knowing these actions would expose person to serious danger in order to advance Defendants' pecuniary interest and monetary profits.

145. Defendants' conduct was committed with willful and conscious disregard for the safety of Plaintiff, entitling Plaintiff to exemplary damages.

146. As a result of the foregoing acts and omissions, Plaintiff was caused to suffer serious and dangerous side effects including worsening Chronic Kidney Disease and death from renal failure, as well as other severe and personal injuries which are permanent and lasting in nature, physical pain and mental anguish, including diminished enjoyment of life.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, cost herein incurred,

attorneys' fees, and all such other and further relief as this Court deems just and proper. Plaintiff also demands that the issues contained herein be tried by a jury.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for judgment against all Defendants and award additional relief as follows:

1. Economic and non-economic damages, special damages and general damages, including pain and suffering, in an amount to be supported by the evidence at trial;
2. For compensatory damages for the acts complained of herein in an amount to be determined by a jury;
3. For disgorgement of profits for the acts complained of herein in an amount to be determined by a jury;
4. Punitive damages for the acts complained of herein in an amount to be determined by a jury;
5. For an award of attorneys' fees and costs;
6. For prejudgment interest;
7. For the costs of suit;
8. For post-judgment interest; and
9. For such other and further relief as this Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiff demands a jury as to all claims and issues triable of right by a jury.

Respectfully submitted,

/s/ Shayna E. Sacks

Shayna E. Sacks, Esq.
(New Jersey Bar No: 043172002)

NAPOLI SHKOLNIK PLLC
400 Broadhollow Rd., Suite 305
Melville, NY 11747

T: (212) 397-1000

F: (646) 927-1676

SSacks@NapoliLaw.com

/s/ Joseph J. Zonies

Joseph J. Zonies (*pro hac vice* to be filed)
ZONIES LAW LLC

1900 Wazee Street, Ste. 203
Denver, CO 80202

T: (720) 464-5300

F: (720) 961-9252

jzonies@zonieslaw.com

Attorneys for Plaintiff

Dated: August 22, 2017

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, PERSONAL INJURY, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE