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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

JAMIE FOTI,

Plaintiff,

v.

EZRICARE, LLC; EZRIRX, LLC; and DELSAM PHARMA LLC,

Defendants.

Case No.

**COMPLAINT FOR DAMAGES**

1. Strict Product Liability
2. Strict Liability – Design and/or Manufacturing Defect
3. Negligence / Gross Negligence
4. Products Liability – Negligence – Failure To Warn
5. Products Liability (Negligence – Design/ Manufacturing Defect)
6. Negligence (Negligent Misrepresentation/Omission)
7. Fraud
8. Fraudulent Concealment
9. Breach Of Express Warranty
10. Breach Of Implied Warranty
11. Negligent Failure To Timely Recall
12. Negligence Per Se

**DEMAND FOR JURY TRIAL**

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**COMES NOW**, the Plaintiff, JAMIE FOTI, by and through their undersigned counsel and files this complaint against the Defendants, EzriCare, LLC ("EZRICARE" and/or "EzriCare"), EzriRx, LLC ("EZRI Rx"), and Delsam Pharma LLC ("DELSAM"), , (collectively referred to as "Defendants"), and alleges as follows:

## NATURE OF THE ACTION

1. This action arises out of Plaintiff's purchase and use of EzriCare Artificial Tears (hereinafter, the "Product") that were designed, manufactured, imported, sold, marketed, labeled, and distributed by Defendants. Defendants manufacture, design, import, advertise, label, distribute, market, and sell several over-the-counter pharmaceutical products, including the above-named artificial tears, which contain a solution of Carboxymethylcellulose Sodium 10 MG in 1 ml. Defendants' artificial tears are adulterated and contaminated with "a rare, extensively drug-resistant strain of Pseudomonas aeruginosa bacteria. The presence of the Pseudomonas Aeruginosa bacteria in Defendants' Product is due to Defendants' violation(s) of Current Good Manufacturing Processes (as identified by the Food and Drug Administration), including "lack of appropriate microbial testing, formulation issues (the company manufactures and distributes ophthalmic drugs in multi-use bottles, without an adequate preservative), and lack of proper controls concerning tamper-evident packaging." These violations, along with the presence of this rare and, in some cases, deadly, bacteria pose a significant and severe health risk to consumers, such as Plaintiff, who purchased and used Defendants' EzriCare Artificial Tears. Plaintiff suffered significant personal injury due to Defendants' misconduct (as set forth below) and seeks damages, both non-economic and economic, and any other relief this Court deems just and equitable.

2. Plaintiff purchased the product in the State of California from a Walgreens located at 1301 17th St. Santa Ana, CA 92705.

3. As a result of Plaintiff's use of EzriCare Artificial Tears, Plaintiff was

exposed to the Pseudomonas Aeruginosa bacteria and suffered permanent eye and vision damage.

**JURISDICTION, VENUE AND THE PARTIES**

4. This Court has subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a), because the amount in controversy exceeds $75,000, and Plaintiff and Defendants are residents of different states.

5. At all times material hereto, the Plaintiff, JAMIE FOTI, is and was a natural person, sui juris, residing in Santa Ana, California.

6. At all times material hereto, the Defendant, EZRICARE, is a limited liability registered in the State of New Jersey, with its operational, managerial, marketing headquarters, and principal place of business located at 1525 Prospect Street, Suite 204, Lakewood, NJ 08701. EzriCare is engaged in the business of manufacturing, labeling, packaging, importing, selling, distributing, advertising and/or marketing artificial tears products throughout the United States, including the State of California.

7. At all times material hereto, the Defendant, EZRI Rx is, at all times material hereto, a limited liability company registered in the State of Delaware, with its operational, managerial, marketing headquarters, and place of business located at 1525 Prospect Street, Suite 204, Lakewood, NJ 08701 and 2360 Rt 9, Suite 3, #171 - Toms River, NJ 08755. EZRI Rx is engaged in the business of manufacturing, labeling, packaging, importing, selling, distributing, advertising and /or marketing artificial tears products throughout the United States, including the State of California.

8. At all times material hereto, Defendant, DELSAM is, at all times material hereto, a New York Limited Liability Company with its operational, managerial, marketing headquarters, and principal place of business located in Bronx, New York 10567, and process may be served upon its registered agent, Kuppusamy Arumugam at 925 Protano Lane, Mamaroneck, New York, 10543. DEISAM Pharma LLC markets, advertises, labels, distributes, and sells the artificial tear product(s)



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throughout the United States, including the State of California.

9. At all times hereto, Defendants are out-of-state and/or foreign corporation conducting business and engaging in or carrying on business in this State by entering into contract and operating and conducting business in this State. Specifically, these Defendants sold, supplied, distributed, shipped, advertised, marketed, and/or supplied, including the artificial tears that caused harm and damages to Plaintiff. Defendants have sufficient connection with the State of California.

10. At all times hereto, Defendants' Product was sold either directly or indirectly to members of the general public within the State of California.

11. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(a) and (b)(2) and 1391(c)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district, and the Defendants are subject to this Court's personal jurisdiction. Venue is also proper under 18 U.S.C. § 1965 (a) because Defendants transact substantial business in this district.

12. Upon information and belief, at all relevant times, Defendants were present and transacted, solicited, and conducted business in the State California through their employees, agents, and/or sales representatives and derived substantial revenue from such business.

13. At all relevant times, Defendants expected or should have expected that their acts and omissions would have consequences within the United States and the State of California.

## GENERAL ALLEGATIONS TO ALL COUNTS

14. The Plaintiff regularly used and bought EzriCare Artificial Tears from a Walgreens store at the aforedescribed address.

15. On or about March 1, 2023, the Plaintiff's eye started to bother him from the use of the EzriCare Artificial Tears product.

16. Defendants labeled, marketed, sold, advertised, packaged, imported, distributed its product as eye drops intended for (a) use as protectant against further

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irritation or to relieve dryness of the eye (b) the temporary relief of discomfort due to minor irritations of the eye or to exposure to wind or sun.

17. During that time, Plaintiff was unaware that the Defendants' Artificial Tear products were adulterated and contaminated with Pseudomonas Aeruginosa, a dangerous and inherently harmful species of bacteria.

18. Plaintiff utilized the Artificial Tears purchased shortly thereafter and began experiencing grave complications which included, but are not limited to, irritation, swelling, extreme pain and discomfort in the eyes and skull, sensitivity to light, sensitivity to touch, blurred vision.

19. In January 2023, the Centers for Disease Control and Prevention and Food and Drug Administration announced a multi-state outbreak of a rare strain of Pseudomonas Aeruginosa eye infections linked to the use of artificial tears products made by Defendants.

20. Moreover, the FDA recommended a recall due to Defendants' Current Good Manufacturing Practice ("CGMP") violations, including lack of appropriate microbial testing, formulation issues, and lack of proper controls concerning packaging.

## TOLLING THE STATUTE OF LIMITATIONS FRAUDULENT CONCEALMENT, EQUITABLE TOLLING, AND CONTINUING VIOLATIONS

21. Plaintiff did not discover and could not have discovered through the exercise of reasonable diligence, the existence of the claims sued upon herein until immediately prior to commencing this civil action.

22. Any applicable statutes of limitation have been tolled by Defendants' affirmative acts of fraudulent concealment and continuing misrepresentations and/or violations of the CGMPs, as the facts alleged above reveal.

23. Defendants are stopped from relying on any statute of limitations defense because of their unfair, negligent, and deceptive conduct.

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**COUNT I**
**STRICT PRODUCT LIABILITY**
**AGAINST ALL DEFENDANTS**

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

24. Defendants are in the business of manufacturing, packaging, labeling, importing, selling, supplying, distributing, advertising and/or marketing the artificial tears product at issue in this lawsuit.

25. Defendants manufactured, packaged, labeled, imported, sold, supplied, distributed, advertised, and/or marketed the artificial tears product at issue in this lawsuit that caused Plaintiff's catastrophic and continuing infection and injuries that will have a negative impact on him for the rest of his life.

26. Plaintiff was a reasonably foreseeable and intended user of Defendants defective product.

27. Defendants knew or should have known that the EzriCare Artificial Tears were adulterated and/or contaminated with a dangerous and deadly bacterium.

28. The artificial tears manufactured, packaged, labeled, imported, sold, supplied, distributed, advertised, and/or marketed by Defendant was defective and unreasonably dangerous for their reasonably foreseeable uses because they were contaminated with the harmful and deadly bacteria, known as Pseudomonas Aeruginosa.

29. Because the Defendants' artificial tears were contaminated with Pseudomonas Aeruginosa, the eye drops that Defendant manufactured, packaged, labeled, imported, sold, supplied, distributed, advertised, and/or marketed, and that Plaintiff purchased and used, as described previously, were in a condition that Plaintiff had not contemplated, and were in a condition that rendered the product unreasonably dangerous for their ordinary and expected use.

30. At all times material hereto, Plaintiff used the products in a manner

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expected and intended to be used.

31. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

32. Defendants are strictly liable to the Plaintiff for the harm proximately caused by the manufacture and sale of an unsafe and defective product

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

**COUNT II**
**STRICT LIABILITY**
**DESIGN AND/OR MANUFACTURING DEFECT**
**AGAINST ALL DEFENDANTS**

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

33. Defendants engaged in the design, development, manufacture, marketing, packaging, labeling, sale, and distribution of EzriCare Artificial Tears in a defective and unreasonably dangerous condition to consumers, including Plaintiff.

34. Defendants caused EzriCare Artificial Tears to enter the stream of commerce and to be sold through various retailers where Plaintiff purchased the EzriCare Artificial Tears, like Amazon.com.

35. EzriCare Artificial Tears were expected to, and did, reach consumers,

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including Plaintiff, without change in the condition in which it was manufactured and sold by Defendants and/or otherwise released into the stream of commerce.

36. Plaintiff used EzriCare Artificial Tears in a manner normally intended, recommended, promoted, and marketed by Defendants.

37. As found by the FDA, Defendants violated CGMPs and failed, among other things, to properly test the Product for microbials before placing the Product into the stream of commerce for consumers, like Plaintiff, to purchase.

38. EzriCare Artificial Tears failed to perform safely when used by Plaintiff in a reasonably foreseeable manner; that is, the presence of the Pseudomonas Aeruginosa bacteria rendered these tears unreasonably dangerous and exposed Plaintiff to a dangerous and deadly bacterium that caused him to suffer eye and vision damage that is possibly permanent.

39. The EzriCare Artificial Tears contained a manufacturing defect when they left the possession of Defendants. Specifically, the EzriCare Artificial Tears differ from Defendants' intended result or from (possibly) other lots of the same product line because they were contaminated with the Pseudomonas Aeruginosa bacteria, and Defendants failed to properly and adequately test the Product for the presence of bacteria before distributing it.

40. Importantly, EzriCare Artificial Tears is an inessential over-the-counter product that does not treat or cure any serious disease. Further, safer alternatives, including artificial tears products that contain preservatives to prevent the growth of bacteria, have been readily available for decades.

41. As a proximate result of Defendants' design, manufacture, packaging, labeling, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

42. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured,

distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

**COUNT III**
**NEGLIGENCE / GROSS NEGLIGENCE**
**AGAINST ALL DEFENDANTS**

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

43. Defendants' owed a duty of reasonable care to Plaintiff and other reasonably foreseeable consumers to not only ensure that the EzriCare Artificial Tears was safe for intended use but that its labeling adequately warned of any and all risks associated with its use.

44. Defendants also owed a duty of reasonable care to Plaintiff and other reasonably foreseeable consumers to not market, design, manufacture, produce, supply, inspect, test, sell, and/or distribute unsafe and dangerous products that they knew or should have known through the exercise of reasonable diligence were unsafe and dangerous due to the presence of the Pseudomonas Aeruginosa bacteria.

45. Defendants breached this duty of care owed to Plaintiff by failing to ensure that EzriCare Artificial Tears were safe for use, as intended, and were properly tested and stored, as well as placing into the stream of commerce an unsafe and

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dangerous/adulterated product.

46. Consequently, it was reasonably foreseeable that Plaintiff—as a reasonable, foreseeable consumer—would purchase and use Defendants' EzriCare Artificial Tears and suffer injury from such use due to the presence of the dangerous and deadly Pseudomonas Aeruginosa bacteria.

47. Plaintiff's injuries are also directly caused by Defendants' breach of the duty of reasonable care owed to Plaintiff, as but for Defendants' failure to appropriately warn of the inherent dangers associated with the presence of the Pseudomonas Aeruginosa bacteria within the bottles and/or packaging of the EzriCare Artificial Tears, Plaintiff would not have purchased and/or used it and would not have suffered serious injury to his eye and to his vision.

48. Defendants' negligence and extreme carelessness includes, but is not limited to their marketing, designing, manufacturing, producing, supplying, inspecting, testing, selling, and/or distributing the EzriCare Artificial Tears in one or more of the following respects:

a. In failing to comply with Current Good Manufacturing Practices, as described by the FDA and as discussed above;

b. In failing to manufacture the Product with a preservative to decrease the risk of bacterial growth in the Product;

c. In failing to manufacture and package the Product in single use containers, thus reducing the risk of bacterial growth in the Product from multiple uses;

d. In failing to warn Plaintiff of the hazards associated with the use of the product;

e. In failing to properly test their products for microbials, as well as to determine adequacy and effectiveness or safety measures, if any, prior to releasing EzriCare Artificial Tears on the market for consumer use;

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f. In failing to inform product users, such as Plaintiff, as to the safe and proper methods of handling and using the EzriCare Artificial Tears;

g. In failing to remove EzriCare Artificial Tears from the market when Defendants knew or should have known this product was defective and/or contaminated;

h. In failing to instruct the product user, such as Plaintiff, as to the methods for reducing the type of exposure to the Pseudomonas aeruginosa bacteria which caused increased risk of vison loss;

i. In failing to inform the public in general and Plaintiff, in particular, of the known dangers of using EzriCare Artificial Tears—a preservative-free and multi-use bottle product;

j. In marketing and labeling EzriCare Artificial Tears as safe for all uses despite knowledge to the contrary;

k. In failing to act like a reasonably prudent actor under similar circumstances;

l. In failing to accurately disclose in its labeling and advertising that the EzriCare Artificial Tears were contaminated with a dangerous and deadly bacterium.

49. Each and all of these acts and omissions, taken singularly or in combination, were a proximate cause of the injuries and damages sustained by Plaintiff and constitute gross negligence.

50. At all pertinent times, Defendants knew or should have known that the EzriCare Artificial Tears were unreasonably dangerous and defective (i.e., contaminated) when put to their reasonably anticipated use.

51. Defendants' acts and/or omissions constitute gross negligence because they constitute a total lack of care and an extreme departure from what a reasonably careful actor would do in the same situation to prevent foreseeable harm to Plaintiff.

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52. Defendants acted and/or failed to act willfully, and with a conscious and reckless disregard for the rights and interests of Plaintiff; their acts and omissions had a great probability of causing significant harm and in fact resulted in such harm to Plaintiff.

53. Plaintiff was injured as a direct and proximate result of negligence and/or gross negligence as described herein.

54. Defendants' negligence and/or gross negligence was a substantial factor in causing and/or contributing to Plaintiff's harms.

55. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

## COUNT IV
## PRODUCTS LIABILITY - NEGLIGENCE – FAILURE TO WARN (AGAINST ALL DEFENDANTS)

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

56. At all relevant times, Defendants engaged in the design, development, manufacture, marketing, sale, and distribution of the EzriCare Artificial Tears that

were in in a defective and unreasonably dangerous condition and were nonetheless marketed and sold to consumers, including Plaintiff.

57. Defendants knew, or by the exercise of reasonable care should have known, use of EzriCare Artificial Tears was dangerous, harmful, and injurious when used by Plaintiff in a reasonably foreseeable manner.

58. Defendants knew, or by the exercise of reasonable care, should have known that ordinary consumers, such as Plaintiff, would not have realized the potential risks and dangers of EzriCare Artificial Tears, and that EzriCare Artificial Tears were likely to increase the risks of vision loss and/or significant damage to the eye, which renders it unreasonably dangerous when used in the manner it was intended and to an extent beyond what would be contemplated by the ordinary consumer.

59. Defendants owed a duty to all reasonably foreseeable consumers to disclose the risks associated with the use of EzriCare Artificial Tears.

60. Defendants breached their duty of care by failing to use reasonable care in providing adequate warnings on EzriCare Artificial Tears, including that EzriCare Artificial Tears were likely to increase the risks of vision loss and/or significant damage to the eye, which when used in the manner it was intended and to an extent beyond that would be contemplated by the ordinary consumer.

61. The failure of Defendants to adequately warn about their defective EzriCare Artificial Tears, and their efforts to misleadingly advertise through conventional avenues, created a danger of injuries that were reasonably foreseeable at the time of design and/or manufacture and distribution.

62. At all relevant times, Defendants could have provided adequate warnings and instructions to prevent the harms and injuries set forth herein, such as providing full and accurate information about EzriCare Artificial Tears in advertising.

63. A reasonable actor under the same or similar circumstances would have warned and instructed of the dangers associated with the presence and contamination

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of the Pseudomonas Aeruginosa bacteria.

64. Plaintiff was injured as a direct and proximate result of Defendants' failure to warn and instruct, because he would not have used the EzriCare Artificial Tears had he received adequate warnings and instructions that EzriCare Artificial Tears could increase the risks of vision loss and/or significant damage to the eye, which renders it unreasonably dangerous when used in the manner it was intended and to an extent beyond what would be contemplated by the ordinary consumer.

65. Defendants' lack of adequate and sufficient warnings and instructions, and their inadequate and misleading advertising, was a substantial contributing factor in causing harm to Plaintiff.

66. As a proximate result of Defendants' design, manufacture, marketing, packaging, labeling, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

67. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

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**COUNT V – PRODUCTS LIABILITY**
**(NEGLIGENCE – DESIGN/MANUFACTURING DEFECT)**
**(AGAINST ALL DEFENDANTS)**

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

68. At all relevant times, Defendants engaged in the design, development, manufacture, packaging, labeling, marketing, sale, and distribution of EzriCare Artificial Tears in a defective and unreasonably dangerous condition to consumers, including Plaintiff.

69. Defendants caused EzriCare Artificial Tears to enter the stream of commerce and to be sold through various retailers, such as Amazon.com, where Plaintiff purchased it.

70. EzriCare Artificial Tears were expected to, and did, reach consumers, including Plaintiff, without change in the condition in which it was manufactured and sold by Defendants and/or otherwise released into the stream of commerce.

71. Plaintiff used EzriCare Artificial Tears in a manner normally intended, recommended, promoted, and marketed by Defendants.

72. EzriCare Artificial Tears failed to perform safely when used by Plaintiff in a reasonably foreseeable manner, specifically increasing his risk of developing infection and resulting corneal injury, significant damage to the eye, and/or vision loss.

73. The propensity to the exposure of Pseudomonas Aeruginosa bacteria from use of EzriCare Artificial Tears that can cause vision loss and/or significant damage to the eye renders EzriCare Artificial Tears unreasonably dangerous when used in the manner it was intended and to an extent beyond what would be contemplated by the ordinary consumer.

74. Safer alternatives, including products that contain a preservative to prevent contamination with bacteria, such as the Pseudomonas Aeruginosa bacteria,

have been readily available for decades.

75. Defendants knew, or by the exercise of reasonably care should have known, that EzriCare Artificial Tears were unreasonably dangerous but have continued to design, manufacture, package, label, sell, distribute, market, promote, and supply EzriCare Artificial Tears so as to maximize sales and profits at the expense of public health and safety in conscious disregard of the foreseeable harm to the consuming public, including Plaintiff.

76. Defendants owed a duty to all reasonably foreseeable users to design a safe product.

77. Defendants breached their duty by failing to use reasonable care in the design and/or manufacturing of EzriCare Artificial Tears because it was unreasonably dangerous in that it increased the risks of vison loss and thus renders EzriCare Artificial Tears unreasonably dangerous when used in the manner it was intended and to an extent beyond what would be contemplated by the ordinary consumer.

78. Defendants also breached their duty by failing to use reasonable care by failing to use cost-effective, reasonably feasible alternative deigns in the design and/or manufacturing of EzriCare Artificial Tears.

79. A reasonable actor under the same or similar circumstances would have designed a safer product.

80. A reasonable actor under the same or similar circumstances would have not allowed EzriCare Artificial Tears to become contaminated with Pseudomonas Aeruginosa bacteria.

81. As a proximate result of Defendants' design, manufacture, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

82. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured,

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distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

**COUNT VI**
**NEGLIGENCE (NEGLIGENT MISREPRESENTATION/OMISSION)**
**(AGAINST ALL DEFENDANTS)**

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

83. Through their labeling and advertising and the course of their regular business, Defendants made representations to Plaintiff concerning the active and inactive ingredients (as well as the alleged uncontaminated nature) in the EzriCare Artificial Tears.

84. Defendants intended that the Plaintiff rely on their representations.

85. Defendants' representations were material to Plaintiff's decision to purchase and use the EzriCare Artificial Tears.

86. Defendants have a duty to provide accurate information to consumers with respect to the ingredients and/or contaminants identified in the EzriCare Artificial Tears, as detailed above.

87. Defendants failed to fulfill its duty to accurately disclose in its labeling and advertising that the EzriCare Artificial Tears were contaminated with a dangerous

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and deadly bacterium.

88. Additionally, Defendants have a duty to not make false representations with respect to the EzriCare Artificial Tears.

89. Defendants failed to fulfill their duty or use ordinary care when they made false representations regarding the quality and safety of the EzriCare Artificial Tears, as detailed above.

90. Such failures to disclose on the part of Defendants amount to negligent omission, and the representations regarding the quality and safety of the product amount to negligent misrepresentation.

91. Plaintiff reasonably relied upon such representations and omissions to his detriment.

92. As a proximate result of Defendants' design, manufacture, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

93. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.



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**COUNT VII – FRAUD**
**(AGAINST ALL DEFENDANTS)**

Plaintiff incorporates and realleges paragraphs one (1) through twenty-three (23) as though fully set forth herein and further alleges:

94. Defendants engaged in the development, manufacture, design, packaging, labeling, marketing, sale, and distribution of certain products, including EzriCare Artificial Tears, owed a duty to provide accurate and complete information regarding said products.

95. Defendants fraudulently misrepresented the use of EzriCare Artificial Tears as "safe" and "sterile."

96. Defendants knew that these misrepresentations and omissions were material, false, incomplete, misleading, deceptive, and deceitful when they were made. Alternatively, Defendants concealed information and made the representations with such reckless disregard for the truth that knowledge of the falsity can be imputed to them.

97. Defendants made the misrepresentations and omissions for the purpose of deceiving and defrauding consumers, including Plaintiff, with the intention of having them act and rely on such misrepresentations and/or omissions.

98. Plaintiff relied, with reasonable justification, on the misrepresentations by Defendants, which induced him to purchase and use EzriCare Artificial Tears to his detriment.

99. Defendants profited significantly from their unethical and illegal conduct that fraudulently induced Plaintiff, other consumers, to purchase and use a dangerous and defective product.

100. Defendants' actions, and Plaintiff's justifiable reliance thereon, were substantial contributing factors in causing injury and incurrence of substantial damages.

101. As a proximate result of Defendants' design, manufacture, marketing,

sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

102. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

**COUNT VIII**
**FRAUDULENT CONCEALMENT**
**(AGAINST ALL DEFENDANTS)**

Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

103. Defendants owed consumers, including Plaintiff, a duty to fully and accurately disclose all material facts regarding EzriCare Artificial Tears, not to conceal material defects related thereto, not to place this defective product into the stream of commerce, and to fully and accurately label product packaging. To the contrary, Defendants explicitly and/or implicitly represented that EzriCare Artificial Tears were safe and sterile.

104. Defendants actively and intentionally concealed and/or suppressed

material facts, in whole or in part, to induce Plaintiff to purchase and use EzriCare Artificial Tears. Defendants did so at his expense. Specifically, Defendants knew or should have known through the exercise of reasonable diligence, that the use of EzriCare Artificial Tears may expose a consumer to Pseudomonas Aeruginosa bacteria.

105. Defendants know or should have known that use of EzriCare Artificial Tears may expose a consumer to Pseudomonas Aeruginosa bacteria.

106. Defendants made the misrepresentations and omissions for the purpose of deceiving and defrauding Plaintiff and with the intention of having him act and rely on such misrepresentations and/or omissions.

107. Defendants knew that their concealments, misrepresentations, and omissions were material, false, incomplete, misleading, deceptive, and deceitful when they were made. Alternatively, Defendants concealed information and made the representations with such reckless disregard for the truth that knowledge of the falsity can be imputed to them.

108. Defendants profited significantly from their unethical and illegal conduct that caused Plaintiff to purchase and use a dangerous and defective (i.e., contaminated) product.

109. Defendants' actions and representations, and Plaintiff's justifiable reliance thereon, were substantial contributing factors in causing injury and incurrence of substantial damages.

110. As a proximate result of Defendants' design, manufacture, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

111. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain

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and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

## COUNT IX
## BREACH OF EXPRESS WARRANTY
## (AGAINST ALL DEFENDANTS)

Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

112. As detailed above, Defendants, through its advertising, marketing, packaging, and labeling, expressly warranted that the EzriCare Artificial Tears were safe and fit for the purposes intended, that they were of merchantable quality, and that they did not pose dangerous health risks.

113. Moreover, the labeling for the EzriCare Artificial Tears represents that the use of these artificial tears serves to protect the eye from dryness and/or irritation, and that these artificial tears are safe for use in the eye. Such statements constitute an affirmation of fact or promise or a description of the product as being safe and not posing a dangerous health risk.

114. Defendants breached this express warranty because the EzriCare Artificial Tears are not safe. To the contrary, these artificial tears pose a serious and dangerous health risk because they are contaminated with the Pseudomonas Aeruginosa bacteria—a dangerous and deadly bacterium.

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115. Plaintiff read and relied on these express warranties provided by Defendants in the labeling, packaging, and advertisements.

116. Defendants breached their express warranties because the artificial tears at issue are adulterated/contaminated and not reasonably safe for their intended use.

117. Defendants knew or should have known that the EzriCare Artificial tears did not conform to their express warranties and representations and that, in fact, they are not safe and pose serious health risks because they are contaminated with a dangerous and deadly bacterium.

118. Defendants' representations were made to induce Plaintiff to purchase the artificial tears at issue and were material factors in Plaintiff's decision to purchase this product.

119. As a proximate result of Defendants' design, manufacture, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

120. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

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**COUNT X**
**BREACH OF IMPLIED WARRANTY**
**(AGAINST ALL DEFENDANTS)**

Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

121. Because the EzriCare Artificial Tears are contaminated with the Pseudomonas Aeruginosa bacteria, they were not of the same quality as those generally acceptable in the trade and were not fit for the ordinary purposes for which such artificial tears are used.

122. Plaintiff purchased the EzriCare Artificial Tears in reliance upon Defendants' skill and judgment and the implied warranties of fitness for the purpose.

123. The EzriCare Artificial Tears were not altered by Plaintiff.

124. Plaintiff was a foreseeable users of the EzriCare Artificial Tears.

125. Plaintiff used the EzriCare Artificial Tears in the manner intended.

126. As alleged, Defendants' artificial tears were not adequately labeled and did not disclose that they were contaminated with Pseudomonas Aeruginosa bacteria.

127. The EzriCare Artificial Tears did not measure up to the promises or facts stated in the marketing, packaging, labeling, advertisement, and communications by and from Defendants.

128. Defendants impliedly warranted that the EzriCare Artificial Tears were merchantable, fit, and safe for ordinary use.

129. Defendants further impliedly warranted that the EzriCare Artificial Tears were fit for the particular purposes for which they were intended and sold.

130. Contrary to these implied warranties, Defendants' artificial tears were defective, unmerchantable, and unfit for their ordinary use when sold and unfit for the particular purpose for which they were sold.

131. As a proximate result of Defendants' design, manufacture, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured

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catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

132. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

## COUNT XI
## NEGLIGENT FAILURE TO TIMELY RECALL
## (AGAINST ALL DEFENDANTS)

Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

133. At all relevant times, Defendants designed, developed, managed, operated, inspected, marketed, advertised, promoted, disseminated, made publicly available, and/or benefited from the EzriCare Artificial Tears and, therefore, owed a duty of reasonable care to avoid causing harm to those who used EzriCare Artificial Tears, such as Plaintiff.

134. Defendants knew or should have known through the exercise of reasonable care, the risks to consumers posed by EzriCare Artificial Tears.

135. Defendants knew or, by the exercise of reasonable care, should have

known use of EzriCare Artificial Tears was harmful and had the potential to increase the risks vision loss and/or significant damage to the eye, which renders it unreasonably dangerous when used in the manner it was intended and to an extent beyond what would be contemplated by the ordinary consumer.

136. Defendants owed a duty to Plaintiff to exercise reasonable care in conducting their business to properly and reasonably design, research, develop, manufacture, produce, process, assemble, inspect, supply, distribute, deliver, broker, market, warn, maintain, repair, modify, recall, retrofit, engineer, test, recommend, advertise, and/or make available EzriCare Artificial Tears.

137. Defendants also owed a continuing duty to Plaintiff to remove, recall, or retrofit unsafe and defective products, such as EzriCare Artificial Tears, across the United States (including in Plaintiff's state).

138. Defendants knew or reasonably should have known that EzriCare Artificial Tears were dangerous and not safe for use.

139. Defendants knew or, in the exercise of reasonable and ordinary care, should have known that EzriCare Artificial Tears were defective and unsafe for Plaintiff, who is a person likely to use EzriCare Artificial Tears for the purpose and in the manner for which it was intended to be used and for purposes reasonably foreseeable to Defendants.

140. At all times, Defendants negligently breached said duties and unreasonably and negligently allowed EzriCare Artificial Tears to be used by Plaintiff without proper recall, retrofit, or warning.

141. Defendants failed to properly and timely remove, retrofit, or warn of the serious safety risk posed by EzriCare Artificial Tears to consumers.

142. In failing to properly and timely recall, retrofit, or warn of the serious safety risks the Products pose to consumers and the public, Defendants have failed to act as a reasonable manufacturer, designer, or distributer would under the same or similar circumstances and failed to exercise reasonable care.

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143. As a proximate result of Defendants' design, manufacture, marketing, sale, and distribution of EzriCare Artificial Tears, Plaintiff was injured catastrophically and was caused severe pain, suffering, disability, impairment, loss of enjoyment of life, loss of care, comfort, and economic damages.

144. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in Plaintiff's favor for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and all such other and further relief as this Court deems just and proper. ***Plaintiff further demands a trial by jury as to all issues so triable as a matter of right***.

## COUNT XII
## NEGLIGENCE PER SE
## (AGAINST ALL DEFENDANTS)

Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

145. Defendants had a duty to comply with all applicable state and federal regulations intended to ensure the purity and safety of their products, including, but not limited to, the requirements of the Federal Food, Drug and Cosmetics Act.

146. Defendants failed to comply with the provisions of the health and safety acts identified above and, as a result, were negligent per se in their manufacture, distribution, and/or sale of products adulterated with Pseudomonas aeruginosa, a

dangerous and deadly pathogen.

147. Defendants violated federal, state, and local safety regulations by its manufacture, distribution, and sale of adulterated products.

148. The federal, state, and local product safety regulations applicable here, and as set forth above, establish a positive and definite standard of care in the manufacture, distribution, and sale of products, and the violation of these regulations constitutes negligence per se.

149. Plaintiff was in the class of persons intended to be protected by these statutes and regulations and was injured as the direct and proximate result of Defendants' violation of applicable federal, state, and local safety regulations.

150. Plaintiff's injuries proximately and directly resulted from the negligence of Defendants, and from Defendants' violations of statutes, laws, regulations, and safety codes pertaining to the manufacture, production, supply, distribution, storage, and sale of products.

151. As a direct and proximate result of conduct by Defendants that was negligent per se, Plaintiff was harmed and sustained damages.

152. As a direct result, the Plaintiff, JAMIE FOTI, suffered significant permanent injuries of his use of the contaminated, defective products manufactured, distributed and sold by Defendant including permanent bodily injury resulting in pain and suffering, disability, disfigurement, aggravation of a pre-existing condition, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss wages, loss of ability to earn money in the future and other economic damages. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

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

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***triable as a matter of right***.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against Defendants as to each and every count, including:

A. Awarding compensatory damages including but not limited to pain, suffering, emotional distress, loss of enjoyment of life, and other noneconomic damages in an amount to be determined at trial of this action;

B. Awarding economic damages in the form of medical expenses, out of pocket expenses, lost earnings, and other economic damages in an amount to be determined at trial of this action;

C. Punitive and/or exemplary damages for the wanton, willful, fraudulent, and/or reckless acts of the Defendants who demonstrated a complete disregard and reckless indifference for the safety and welfare of the general public and Plaintiff in an amount sufficient to punish Defendants and deter future similar conduct;

D. Pre-judgment interest;

E. Post-judgment interest;

F. Awarding Plaintiff's reasonable attorneys' fees;

G. Awarding Plaintiff the costs of these proceedings; and

H. Such other and further relief as this Court deems just and proper.

DATED: May 3, 2023

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By: 

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**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all issues so triable and against all Defendants.

DATED: May 3, 2023

**KIESEL LAW LLP**

By: _____

Paul R. Kiesel
Melanie Meneses Palmer

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