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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
SOUTHERN DIVISION

12 CHRISTIAN LEMUS, individually
13 and on behalf of all others similarly
14 situated,

15 *Plaintiff,*

16 v.

17 RITE AID CORPORATION,
18

19 *Defendant.*

Case No. 8:22-cv-00253

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

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1 **I. Introduction.**

2 1. Defendant makes, sells, and markets “Rite Aid” over-the-counter cough,
3 cold and flu medicine (the “Non-Drowsy Rite Aid Products” or “Products”),
4 including generic Rite Aid versions of brands like DayQuil and Robitussin.¹ Like
5 the branded versions, these medicines contain the active ingredient
6 Dextromethorphan Hydrobromide (“DXM”), an ingredient that causes drowsiness.

7 2. Defendant’s Non-Drowsy Rite Aid Products state prominently on the
8 front of their label that they are “Non-Drowsy” products. By prominently labeling
9 these products as “Non-Drowsy,” Defendant led Plaintiff and other consumers to
10 believe that the Non-Drowsy Rite Aid Products do not cause drowsiness, and that
11 drowsiness is not a side effect of those products. Defendant also led Plaintiff and
12 other consumers to believe that those products are for use during the day, and can be
13 safely and satisfactorily consumed during waking hours, at work, and while driving
14 and operating machinery.

15 3. But the truth is that products containing DXM—and thus the Non-
16 Drowsy Rite Aid Products—do cause drowsiness, and that drowsiness is a known
17 side effect of DXM (a fact not known by the average consumer).

18 4. In this way, Defendant misled Plaintiff and other consumers about the
19 effects of the Non-Drowsy Rite Aid Products. This was a material misrepresentation
20 that Plaintiff—and other reasonable consumers—relied on when deciding to buy the
21 products. Had Defendant been truthful, Plaintiff and other consumers would not have
22 purchased the products or would have paid less for them.

23 5. Plaintiff brings this case for himself and for millions of other consumers
24 who purchased Non-Drowsy Rite Aid Products.

25 **II. Parties.**

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¹ The Non-Drowsy Rite Aid Products include all Rite Aid products sold by Defendant that are labeled “Non-Drowsy” and that contain Dextromethorphan Hydrobromide.

1 6. Plaintiff Christian Lemus is a citizen of California (domiciled in Santa
2 Ana). The proposed class (identified below) includes citizens of every state within
3 the United States.

4 7. Defendant Rite Aid Corporation is a Delaware corporation with its
5 principal place of business in Camp Hill, Pennsylvania and has been doing business
6 in the State of California during all relevant times. Directly and through its agents,
7 Rite Aid Corporation has substantial contacts with, and receives substantial benefits
8 and income from, the State of California.

9 **III. Jurisdiction and Venue.**

10 8. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2).
11 The amount in controversy exceeds the sum or value of \$5,000,000, exclusive of
12 interest and costs, and the matter is a class action in which one or more members of
13 the proposed class are citizens of a state different from the Defendant.

14 9. The Court has personal jurisdiction over Defendant because it sold the
15 Non-Drowsy Rite Aid Products to consumers in California, including Mr. Lemus.

16 10. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part
17 of Defendant’s conduct giving rise to the claims occurred in this District, including
18 selling the Non-Drowsy Rite Aid Products to Mr. Lemus.

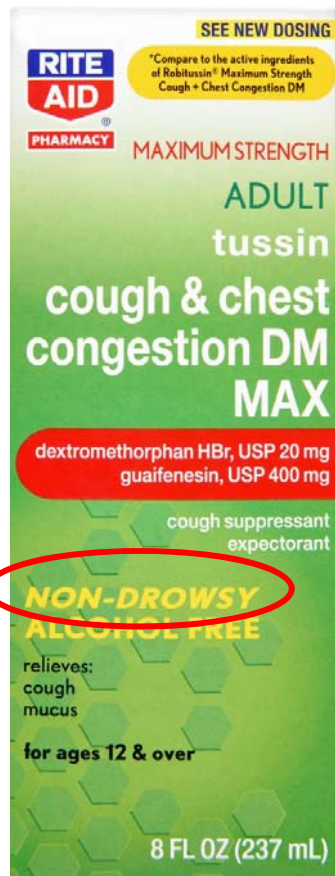
19 **IV. Facts.**

20 **A. Defendant makes, markets, and sells Rite Aid products prominently**
21 **labeled “Non-Drowsy.”**

22 11. Rite Aid manufactures, distributes, markets, and sells the Non-Drowsy
23 Rite Aid Products.

24 12. The front label of each Product prominently states that the product is
25 “Non-Drowsy.” For example:
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1 **Rite Aid Cough & Chest Congestion DM Max**²



16 **Rite Aid Daytime Cold & Flu Relief Softgels**³



27 ² <https://www.riteaid.com/shop/ra-tussin-dm-max-8z-0393525>

28 ³ <https://www.riteaid.com/shop/rite-aid-day-time-cold-flu-relief-non-drowsy-48-liquid-caps-8015816>

1 **Rite Aid Severe Multi-Symptom Cough, Cold & Flu**⁴



16 13. These representations are materially the same across all Non-Drowsy
17 Rite Aid Products.

18 14. In reality, however, the Non-Drowsy Rite Aid Products cause
19 drowsiness, and drowsiness is a known side effect of the products.

20 15. The Non-Drowsy Rite Aid Products do not disclose anywhere on their
21 packaging that they do or can cause drowsiness, or that drowsiness is a side effect of
22 the Non-Drowsy Rite Aid Products.

23 16. Based on the prominent “Non-Drowsy” label included on the face of
24 each product, a reasonable consumer would believe that the products do not cause
25 drowsiness. That is, a reasonable consumer would believe that drowsiness is *not* a
26 side effect of the product.

27 _____
28 ⁴ <https://www.riteaid.com/shop/rite-aid-adult-tussin-severe-multi-symptom-cough-cold-and-flu-cf-max-8-fl-oz>

1 17. Indeed, Defendant labeled the products this way because it intended
2 consumers to rely on the labels and to believe that the products would not cause
3 drowsiness, so that consumers would buy more products or pay more for them.

4 **B. The Non-Drowsy Rite Aid Products cause drowsiness.**

5 18. In truth, products containing DXM—like each of the Non-Drowsy Rite
6 Aid Products—do cause drowsiness. Drowsiness is a documented side effect of
7 DXM at the recommended dosages.⁵

8 19. Indeed, drowsiness is a common side effect at the recommended
9 dosages. For example, a study of DXM found that “[s]omnolence is a common side
10 effect of centrally acting antitussive drugs” like dextromethorphan, and that 10.4% of
11 users of products containing dextromethorphan develop drowsiness within three days
12 of starting treatment with DXM cough medicine.⁶ The “cases of intense somnolence”
13 were “related only to dextromethorphan” and not to the other drug studied. And the
14 patients in this clinical study were given an even smaller dosage of DXM (15 mg
15 three times a day) than the recommended dose found in Non-Drowsy Rite Aid
16 products.⁷

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18 ⁵ [Dextromethorphan: MedlinePlus Drug Information](https://medlineplus.gov/druginfo/meds/a682492.html), National Library of Medicine,
19 <https://medlineplus.gov/druginfo/meds/a682492.html> (last accessed November 22,
20 2021).

21 ⁶ E. Catena and L. Daffonchio, “Efficacy and Tolerability of Levodropropizine in
22 Adult Patients with Non-productive Cough, Comparison with Dextromethorphan,” 10
23 *Pulmonary Pharmacology & Therapeutics* 89-96 (1997). The study reports this side
24 effect as “somnolence.” Somnolence means “the quality or state of being drowsy.”
25 Merriam Webster Dictionary, [https://www.merriam-](https://www.merriam-webster.com/dictionary/somnolence)
26 [webster.com/dictionary/somnolence](https://www.merriam-webster.com/dictionary/somnolence) (last accessed November 22, 2021).

27 ⁷ For example, Rite Aid Cough & Chest Congestion DM Max liquid contains 20 mg
28 of DXM per 20 ml of syrup and the recommended dosage is 20 ml orally every 4
hours. <https://www.riteaid.com/shop/ra-tussin-dm-max-8z-0393525>. Likewise, the
Rite Aid Cold & Flu Relief Softgels contain 10 mg of DXM per capsule and the
recommended dosage is two capsules every 4 hours.
[https://www.riteaid.com/shop/rite-aid-day-time-cold-flu-relief-non-drowsy-48-liquid-](https://www.riteaid.com/shop/rite-aid-day-time-cold-flu-relief-non-drowsy-48-liquid-caps-8015816)
[caps-8015816](https://www.riteaid.com/shop/rite-aid-day-time-cold-flu-relief-non-drowsy-48-liquid-caps-8015816).

20. Furthermore, the FDA’s adverse event report database confirms that sedation (i.e., drowsiness) is one of the most frequently-cited side effects of dextromethorphan-containing products.⁸

21. For this reason, the Federal Aviation Administration prohibits pilots from flying after ingesting DXM.⁹

Cough	Cough/cold products	Coricidin (allowed if no chlorpheniramine) guaifenesin (found in Mucinex and Robitussin) Mucinex fast-max severe congestion and cough (liquid) Identify combo vs isolated	dextromethorphan (Delsym) Dayquil (contains dextromethorphan) Most “night-time” or “PM” medications contain a sedating antihistamine: - Coricidin HBP cough & cold (contains chlorpheniramine) - Nyquil (contains doxylamine)	Most cough medications are safe for flight, but caution for combination products with sedating antihistamines. If the label states PM (for nighttime use) or DM (containing dextromethorphan), you should not fly for at least 5 half-lives after the last dose (see above).
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C. Defendant’s Non-Drowsy representations misled reasonable consumers.

22. The Food and Drug Administration prohibits drug labeling that is “false or misleading.” 21 C.F.R. § 201.6. It is misleading to label a product “Non-Drowsy” when it does cause drowsiness, or if drowsiness is a known side effect of one of its active ingredients.

23. Based on the fact that Defendant labels the Non-Drowsy Rite Aid Products as “Non-Drowsy,” a reasonable consumer would expect that those products do not cause drowsiness. Similarly, a reasonable consumer would expect that drowsiness is not a side effect of the products. Indeed, according to Consumer Reports, “‘Non-drowsy’ is code for antihistamines and other medications that don’t

⁸ Sedation is associated with drowsiness. See IV/Monitored Sedation, American Society of Anesthesiologists, <https://www.asahq.org/madeforthismoment/anesthesia-101/types-of-anesthesia/ivmonitored-sedation/> (even “minimal” sedation means that “you’ll feel drowsy”)

⁹ https://www.faa.gov/licenses_certificates/medical_certification/media/OTCMedicationsforPilots.pdf

1 make you sleepy.”¹⁰ This is the plain meaning of “non-drowsy,” which means “not
2 causing or accompanied by drowsiness.”¹¹

3 24. Rite Aid’s advertisements and labeling do not contain any language that
4 a reasonable consumer would understand to qualify these representations, or that
5 would otherwise put a reasonable consumer on notice of the fact that the Non-
6 Drowsy Rite Aid Products actually cause drowsiness.

7 25. Unlike Defendant, some other drug makers do not falsely claim that
8 DXM-products are non-drowsy. For example, DXM is an active ingredient in
9 Mucinex DM, sold by Reckitt. But the Mucinex label does not claim that Mucinex
10 DM is non-drowsy, because this is not the truth:



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20 26. Defendant could have simply omitted the false and misleading “Non-
21 Drowsy” statements from its products.

22 27. Or, if Defendant wanted to say something to indicate that a Non-Drowsy
23 Rite Aid Product might cause *less* drowsiness than another Rite Aid product, it could
24 have made a truthful statement to this effect, as other drug makers do.

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27 ¹⁰ [“How to read over the counter \(OTC\) drug labels,” Consumer Reports,](https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-drug-labels/index.htm)
[https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-drug-](https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-drug-labels/index.htm)
[labels/index.htm](https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-drug-labels/index.htm)

28 ¹¹ <https://www.merriam-webster.com/medical/nondrowsy>

1 28. For example, Dramamine contains an active ingredient that causes
2 drowsiness, Dimenhydrinate. Dramamine also sells a “less drowsy” version that
3 contains a different active ingredient, Meclizine, which causes less drowsiness. The
4 front label of Dramamine Less Drowsy prominently displays that it is “less drowsy.”



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15 29. Because Defendant makes and sells the Non-Drowsy Rite Aid Products,
16 Defendant researched the known and common side effects of DXM. This is diligence
17 that large companies like Defendant would do when selling a drug. As a result,
18 Defendant knew that DXM causes drowsiness. Furthermore, Defendant controls its
19 labeling, knowingly put on the “Non-Drowsy” representations, and knows the plain
20 meaning of “Non-Drowsy.” Finally, it is standard practice in the industry to test
21 labeling with consumers, and Defendant’s testing would confirm that “Non-Drowsy”
22 is misleading. For these reasons, Defendant knew that its labeling was false and
23 misleading, or was reckless or willfully blind to this fact. And as alleged above,
24 Defendant intended that consumers would rely on the “Non-Drowsy” labeling, so that
25 consumers would purchase more products and pay a price premium.

26 30. Whether or not an over-the-counter drug causes drowsiness is material to
27 a reasonable customer. In certain situations, consumers prefer over-the-counter drugs
28 that will not make them drowsy to products that may make them drowsy. For

1 example, all else equal, a reasonable consumer would prefer to take a drug that does
2 not cause drowsiness to one that does cause drowsiness during the day (or any
3 periods of time when they plan to be awake). As a second example, if a consumer is
4 planning to engage in activities that require them to be alert, or during which they
5 would prefer to be alert, that consumer would prefer to take a drug that does not
6 cause drowsiness to one that does. Indeed, in many situations, taking a drug that does
7 or can cause drowsiness can be dangerous. For example, taking a drug that causes
8 drowsiness while driving, or flying a plane, is dangerous.

9 31. Defendant's false statements increased the demand for Non-Drowsy Rite
10 Aid Products and allowed Defendant to charge a price premium. As explained above,
11 consumers specifically value the "Non-Drowsy" claim because consumers demand
12 cough medicine that will not make them drowsy (e.g., during the day, at work or
13 while driving) and that they can take during the day. As a result, Defendant was able
14 to charge more for these products than it would have been able to had the labeling
15 been truthful. Accordingly, as a direct result of Defendant's false statements,
16 Defendant was able to charge a price premium for these products. As purchasers,
17 Plaintiff and each class member paid this price premium and sustained economic
18 injury.

19 **D. Plaintiff was misled by Defendant's misrepresentations.**

20 32. In December 2021, Plaintiff bought a bottle of Rite Aid "Non-Drowsy"
21 Daytime Severe Cold & Flu Relief from a Rite Aid store in Santa Ana, California.
22 The package said "Non-Drowsy" prominently on the label, and he read and relied on
23 those statements when purchasing the product. Accordingly, these representations
24 were part of the basis of the bargain, in that he would not have purchased the Rite Aid
25 "Non-Drowsy" Daytime Severe Cold & Flu Relief on the same terms, or would not
26 have purchased them at all, had he known these representations were not true.
27 However, Plaintiff did not receive the benefit of his bargain because his Non-Drowsy
28 Rite Aid Product was not, in fact, a "Non-Drowsy" medication. When Plaintiff took

1 the medication as directed by Defendant, he became unexpectedly drowsy. He would
2 not have bought this product had he known that the product did, in fact, cause
3 drowsiness, and that drowsiness was a known side-effect of the product.

4 33. To be sure, Plaintiff would purchase Non-Drowsy Rite Aid Products
5 again if they were actually “Non-Drowsy” (i.e., if the product was sold as advertised).
6 Plaintiff, however, faces an imminent threat of harm because he will not be able to
7 rely on the labels in the future, and thus will not be able to purchase the products.

8 **E. Class Action Allegations.**

9 34. Plaintiff brings the asserted claims on behalf of the proposed class of: all
10 persons who purchased a Non-Drowsy Rite Aid Product in the United States during
11 the applicable statute of limitations (the “**Nationwide Class**”).

12 35. For certain claims, Plaintiff brings those claims on behalf of a subclass
13 of consumers who live in certain identified states (the “**Consumer Protection**
14 **Subclass**”).

15 36. For certain claims, in the alternative, Plaintiff brings those claims on
16 behalf of a subclass of consumers who, like Plaintiff, purchased Non-Drowsy Rite
17 Aid Products in California (the “**California Subclass**”).

18 37. The following people are excluded from the Class and the Subclasses:
19 (1) any Judge or Magistrate Judge presiding over this action and the members of their
20 family; (2) Defendant, Defendant’s subsidiaries, parents, successors, predecessors,
21 and any entity in which the Defendant or its parents have a controlling interest and
22 their current employees, officers and directors; (3) persons who properly execute and
23 file a timely request for exclusion from the Class; (4) persons whose claims in this
24 matter have been finally adjudicated on the merits or otherwise released; (5)
25 Plaintiff’s counsel and Defendant’s counsel, and their experts and consultants; and (6)
26 the legal representatives, successors, and assigns of any such excluded persons.

27 ***Numerosity***

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1 38. The proposed class contains members so numerous that separate joinder
2 of each member of the class is impractical. There are millions of proposed class
3 members.

4 ***Commonality***

5 39. There are questions of law and fact common to the proposed class.
6 Common questions of law and fact include, without limitation:

- 7
- 8 • Whether the Non-Drowsy Rite Aid Products cause drowsiness;
 - 9 • Whether Defendant’s labelling of the Non-Drowsy Rite Aid Products as
10 “non-drowsy” is deceptive and misleading;
 - 11 • Whether Defendant violated state consumer protection statutes;
 - 12 • Damages needed to reasonably compensate Plaintiff and the proposed
13 class.

13 ***Typicality***

14 40. Plaintiff’s claims are typical of the proposed class. Like the proposed
15 class, Plaintiff purchased Non-Drowsy Rite Aid Products. Like the proposed class,
16 Plaintiff would not have purchased the products, or would have paid less for them,
17 had he known that they cause drowsiness.

18 ***Predominance and Superiority***

19 41. The prosecution of separate actions by individual members of the
20 proposed class would create a risk of inconsistent or varying adjudication with
21 respect to individual members, which would establish incompatible standards for the
22 parties opposing the class.

23 42. Common questions of law and fact predominate over any questions
24 affecting only individual members of the proposed class. These common legal and
25 factual questions arise from certain central issues which do not vary from class
26 member to class member, and which may be determined without reference to the
27 individual circumstances of any particular class member. For example, a core
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1 liability question is common: whether Defendant’s “Non-Drowsy” representations are
2 false and misleading.

3 43. A class action is superior to all other available methods for the fair and
4 efficient adjudication of this litigation because individual litigation of each claim is
5 impractical. It would be unduly burdensome to have individual litigation of millions
6 of individual claims in separate lawsuits, every one of which would present the issues
7 presented in this lawsuit.

8 **V. Causes of Action.**

9 **Count I: Violations of State Consumer Protection Acts**
10 **(on behalf of Plaintiff and the Consumer Protection Subclass)**

11 44. Plaintiff incorporates by reference each and every factual allegation set
12 forth above.

13 45. This count is brought on behalf of Plaintiff and the Consumer Protection
14 Subclass for violations of the following state consumer protection statutes:

State	Statute
Arizona	Ariz. Rev. Stat. §§ 44-1521, and the following.
Arkansas	Ark. Code § 4-88-101, and the following.
California	Cal. Bus. & Prof. Code § 17200, and the following; <i>Id.</i> §17500, and the following Cal. Civ. Code §1750 and the following.
Colorado	Colo. Rev. Stat. Ann. § 6-1-101, and the following.
Connecticut	Conn. Gen Stat. Ann. § 42- 110, and the following.
Delaware	6 Del. Code § 2513, and the following.
Washington, D.C.	D.C. Code § 28-3901, and the following.
Georgia	Ga. Code Ann. § 10-1-390, and the following.
Hawaii	Haw. Rev. Stat. § 480-2, and the following.

1	Idaho	Idaho Code. Ann. § 48-601, and the following.
2	Illinois	815 ILCS § 501/1, and the following.
3	Kansas	Kan. Stat. Ann. § 50-623, and the following.
4	Louisiana	LSA-R.S. § 51:1401, and the following.
5	Maine	Me. Rev. Stat. Ann. Tit. 5, § 207, and the
6		following.
7	Maryland	Md. Code Ann. Com. Law, § 13-301, and the
8		following.
9	Massachusetts	Mass. Gen Laws Ann. Ch. 93A, and the
10		following.
11	Michigan	Mich. Comp. Laws Ann. § 445.901, and the
12		following.
13	Minnesota	Minn. Stat. § 325F, and the following.
14	Montana	Mont. Code Ann. §§ 30-14-101, and the
15		following.
16	Missouri	Mo. Rev. Stat. § 407, and the following.
17	Nebraska	Neb. Rev. St. § 59-1601, and the following.
18	Nevada	Nev. Rev. Stat. § 41.600, and the following.
19	New Hampshire	N.H. Rev. Stat. § 358-A:1, and the following.
20	New Jersey	N.J. Stat. Ann. § 56:8, and the following.
21	New Mexico	N.M. Stat. Ann. § 57-12-1, and the following.
22	New York	N.Y. Gen. Bus. Law § 349, and the following.
23	North Carolina	N.C. Gen Stat. § 75-1.1, and the following.
24	North Dakota	N.D. Cent. Code § 51-15, and the following.
25	Ohio	Ohio Rev. Code Ann. § 1345.01, and the
26		following.
27	Oklahoma	Okla. Stat. tit. 15 § 751, and the following.
28		

Oregon	Or. Rev. Stat. § 646.605, and the following.
Pennsylvania	73 P.S. § 201-1, and the following.
Rhode Island	R.I. Gen. Laws § 6-13.1- 5.2(B), and the following.
South Carolina	S.C. Code Ann. § 39-5-10, and the following.
South Dakota	S.D. Codified Laws § 37-24-1, and the following.
Tennessee	Tenn. Code Ann. § 47-18-101, and the following.
Texas	Tex. Code Ann., Bus. & Con. § 17.41, and the following.
Utah	Utah Code. Ann. § 13-11-175, and the following.
Vermont	9 V.S.A. § 2451, and the following.
Virginia	Va. Code Ann. § 59.1-199, and the following.
Washington	Wash. Rev. Code § 19.86.010, and the following.
West Virginia	W. Va. Code § 46A, and the following.
Wisconsin	Wis. Stat. § 100.18, and the following.
Wyoming	Wyo. Stat. Ann. § 40-12-101, and the following.

46. Each of these consumer protection statutes prohibits unfair, unconscionable, and/or deceptive acts or practices in the course of trade or commerce or in connection with the sales of goods or services to consumers. Defendant's conduct, including the false labelling of the Non-Drowsy Rite Aid Products and sale of those misleading products to Plaintiff and Class members, violates each statute's prohibitions.

1 47. Defendant's misrepresentations were a substantial factor in Plaintiff's
2 purchase decision and the purchase decision of Class members. Defendant's
3 misrepresentations were misleading to a reasonable consumer, and Plaintiff and Class
4 members reasonably relied on Defendant's misrepresentations.

5 48. Defendant intended that Plaintiff and the proposed Class members would
6 rely on its materially deceptive representations. Defendant was also aware of the side
7 effects of DXM and thus knew that its representations were false and were likely to
8 mislead consumers.

9 49. For applicable statutes, Plaintiff mailed Defendant a written notice and
10 demand for correction on February 16, 2022. Upon the expiration of any governing
11 statutory notice period, Plaintiff and the class seek all available injunctive or
12 monetary relief.

13 50. Plaintiff and Subclass members were injured as a direct and proximate
14 result of Defendant's conduct because (a) they would not have purchased Non-
15 Drowsy Rite Aid Products if they had known that the products cause drowsiness,
16 and/or (b) they overpaid for the products because the products are sold at a price
17 premium due to the misrepresentation. In this way, Plaintiff and the proposed Class
18 members have suffered an ascertainable loss, in an amount to be determined at trial.

19 **Count II: Violation of California's Unfair Competition Law (UCL)**

20 **(on behalf of Plaintiff and the California Subclass)**

21 51. Plaintiff incorporates by reference and re-alleges each and every factual
22 allegation set forth above as though fully set forth herein.

23 52. As alleged in Count I, state consumer protection laws are sufficiently
24 similar such that Plaintiff may bring a claim on behalf of the Consumer Protection
25 Subclass. In the alternative, Plaintiff brings this cause of action on behalf of himself
26 and members of the California Subclass.

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1 53. Defendant has violated California’s Unfair Competition Law (UCL) by
2 engaging in unlawful, fraudulent, and unfair conduct (i.e., violating each of the three
3 prongs of the UCL).

4 ***The Unlawful Prong***

5 54. Defendant engaged in unlawful conduct by violating the CLRA and
6 FAL, as alleged below and incorporated here.

7 ***The Fraudulent Prong***

8 55. As alleged in detail above, Defendant’s “Non-Drowsy” representations
9 were false and misleading. Defendant’s misrepresentations were likely to deceive,
10 and did deceive, Plaintiff and reasonable consumers.

11 ***The Unfair Prong***

12 56. Defendant violated established public policy by violating the CLRA and
13 FAL, as alleged below and incorporated here. The unfairness of this practice is
14 tethered to a legislatively declared policy (that of the CLRA and FAL).

15 57. The harm to Plaintiff and the Class greatly outweighs the public utility
16 of Defendant’s conduct. There is no public utility to misrepresenting the side effects
17 of an over-the-counter medication. This injury was not outweighed by any
18 countervailing benefits to consumers or competition. Misleading medication labels
19 only injure healthy competition and harm consumers.

20 58. Plaintiff and the Class could not have reasonably avoided this injury. As
21 alleged above, Defendant’s representations were deceiving to reasonable consumers
22 like Plaintiff.

23 * * *

24 59. For all prongs, Defendant’s misrepresentations were intended to induce
25 reliance, and Plaintiff saw, read and reasonably relied on them when purchasing Non-
26 Drowsy Rite Aid Products. Defendant’s misrepresentations were a substantial factor
27 in Plaintiff’s purchase decision.

1 60. In addition, classwide reliance can be inferred because Defendant's
2 misrepresentations were material, i.e., a reasonable consumer would consider them
3 important in deciding whether to buy the Non-Drowsy Rite Aid Products.

4 61. Defendant's misrepresentations were a substantial factor and proximate
5 cause in causing damages and losses to Plaintiff and Subclass members.

6 62. Plaintiff and Class members were injured as a direct and proximate
7 result of Defendant's conduct because (a) they would not have purchased Non-
8 Drowsy Rite Aid Products if they had known that the products cause drowsiness,
9 and/or (b) they overpaid for the products because the products are sold at a price
10 premium due to the misrepresentation.

11 **Count III: Violation of California's False Advertising Law (FAL)**

12 **(on behalf of Plaintiff and the California Subclass)**

13 63. Plaintiff incorporates by reference and re-alleges each and every
14 allegation set forth above as though fully set forth herein.

15 64. Plaintiff brings this cause of action on behalf of himself and members of
16 the California Subclass.

17 65. As alleged more fully above, Defendant has falsely advertised Non-
18 Drowsy Rite Aid Products by falsely representing that the products do not cause
19 drowsiness and that drowsiness is not a side-effect of the products.

20 66. Defendant's representations were likely to deceive, and did deceive,
21 Plaintiff and reasonable consumers. Defendant knew, or should have known through
22 the exercise of reasonable care, that these statements were inaccurate and misleading.

23 67. Defendant's misrepresentations were intended to induce reliance, and
24 Plaintiff saw, read and reasonably relied on them when purchasing Non-Drowsy Rite
25 Aid Products. Defendant's misrepresentations were a substantial factor in Plaintiff's
26 purchase decision.

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1 68. In addition, classwide reliance can be inferred because Defendant's
2 misrepresentations were material, i.e., a reasonable consumer would consider them
3 important in deciding whether to buy the Non-Drowsy Rite Aid Products.

4 69. Defendant's misrepresentations were a substantial factor and proximate
5 cause in causing damages and losses to Plaintiff and Subclass members.

6 70. Plaintiff and Class members were injured as a direct and proximate
7 result of Defendant's conduct because (a) they would not have purchased Non-
8 Drowsy Rite Aid Products if they had known that the products cause drowsiness,
9 and/or (b) they overpaid for the products because the products are sold at a price
10 premium due to the misrepresentation.

11 **Count IV: Violation of California's Consumer Legal Remedies Act (CLRA)**

12 **(on behalf of Plaintiff and the California Subclass)**

13 71. Plaintiff incorporates by reference and re-alleges each and every
14 allegation set forth above as though fully set forth herein.

15 72. Plaintiff brings this cause of action on behalf of himself and members of
16 the California Subclass.

17 73. Plaintiff and the other members of the California Subclass are
18 "consumers," as the term is defined by California Civil Code § 1761(d).

19 74. Plaintiff, the other members of the California Subclass, and Defendant
20 have engaged in "transactions," as that term is defined by California Civil Code §
21 1761(e).

22 75. The conduct alleged in this Complaint constitutes unfair methods of
23 competition and unfair and deceptive acts and practices for the purpose of the CLRA,
24 and the conduct was undertaken by Defendant in transactions intended to result in,
25 and which did result in, the sale of goods to consumers.

26 76. As alleged more fully above, Defendant has violated the CLRA by
27 falsely representing to Plaintiff and the other members of the California Subclass that
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1 the Non-Drowsy Rite Aid Products do not cause drowsiness, and that drowsiness is
2 not a side effect of the products, when in fact, the products do cause drowsiness.

3 77. As a result of engaging in such conduct, Defendant has violated
4 California Civil Code § 1770(a)(5), (a)(7), and (a)(9).

5 78. Defendant's representations were likely to deceive, and did deceive,
6 Plaintiff and reasonable consumers. Defendant knew, or should have known through
7 the exercise of reasonable care, that these statements were inaccurate and misleading.

8 79. Defendant's misrepresentations were intended to induce reliance, and
9 Plaintiff saw, read and reasonably relied on them when purchasing Non-Drowsy Rite
10 Aid Products. Defendant's misrepresentations were a substantial factor in Plaintiff's
11 purchase decision.

12 80. In addition, classwide reliance can be inferred because Defendant's
13 misrepresentations were material, i.e., a reasonable consumer would consider them
14 important in deciding whether to buy the Non-Drowsy Rite Aid Products.

15 81. Defendant's misrepresentations were a substantial factor and proximate
16 cause in causing damages and losses to Plaintiff and Subclass members.

17 82. Plaintiff and Class members were injured as a direct and proximate
18 result of Defendant's conduct because (a) they would not have purchased Non-
19 Drowsy Rite Aid Products if they had known that the products cause drowsiness,
20 and/or (b) they overpaid for the products because the products are sold at a price
21 premium due to the misrepresentation.

22 83. Accordingly, pursuant to California Civil Code § 1780(a)(2), Plaintiff,
23 on behalf of himself and all other members of the California Subclass, seeks
24 injunctive relief.

25 84. CLRA § 1782 NOTICE. On February 16, 2022, a CLRA demand letter
26 was sent to Defendant's headquarters and California registered agent, via certified
27 mail (return receipt requested). This letter provided notice of Defendant's violation
28 of the CLRA and demanded that Defendant correct the unlawful, unfair, false and/or

1 deceptive practices alleged here. If Defendant does not fully correct the problem for
2 Plaintiff and for each member of the California subclass within 30 days of receipt,
3 Plaintiff and the California subclass will seek all monetary relief allowed under the
4 CLRA.

5 **Count V: Negligent Misrepresentation**

6 **(on behalf of Plaintiff and the Nationwide Class)**

7 85. Plaintiff incorporates by reference the facts alleged above.

8 86. Plaintiff alleges this claim individually and on behalf of the Nationwide
9 Class.

10 87. As alleged in detail above, Defendant's labeling represented to Plaintiff
11 and Class members that the Non-Drowsy Rite Aid Products do not cause drowsiness
12 and that drowsiness is not a side effect of these products.

13 88. These representations were false. As alleged above, the Non-Drowsy
14 Rite Aid Products do cause drowsiness and drowsiness is a documented side effect.

15 89. When Defendant made these misrepresentations, it knew or should have
16 known that they were false. Defendant had no reasonable grounds for believing that
17 these representations were true when made.

18 90. Defendant intended that Plaintiff and Class members rely on these
19 representations and Plaintiff and class members read and reasonably relied on them.

20 91. In addition, classwide reliance can be inferred because Defendant's
21 misrepresentations were material, i.e., a reasonable consumer would consider them
22 important in deciding whether to buy the Non-Drowsy Rite Aid Products.

23 92. Defendants' misrepresentations were a substantial factor and proximate
24 cause in causing damages and losses to Plaintiff and Class members.

25 93. Plaintiff and Class members were injured as a direct and proximate
26 result of Defendant's conduct because (a) they would not have purchased Non-
27 Drowsy Rite Aid Products if they had known that they cause drowsiness, and/or (b)
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1 they overpaid for the products because they are sold at a price premium due to the
2 misrepresentation.

3 **Count VI: Intentional Misrepresentation**

4 **(on behalf of Plaintiff and the National Class)**

5 94. Plaintiff incorporates by reference and re-alleges each and every
6 allegation set forth above as though fully set forth herein.

7 95. Plaintiff alleges this claim individually and on behalf of the Nationwide
8 Class.

9 96. As alleged in detail above, Defendant's labeling represented to Plaintiff
10 and Class members that the Products do not cause drowsiness, and that drowsiness is
11 not a side effect of these products.

12 97. These representations were false and misleading. As alleged above, the
13 Products do cause drowsiness and drowsiness is a documented side effect.

14 98. As alleged in detail above, when Defendant made these
15 misrepresentations, it knew that they were false, was reckless to the truth, or was
16 willfully blind.

17 99. Defendant intended that Plaintiff and Class members rely on these
18 representations and Plaintiff and class members read and reasonably relied on them.

19 100. Defendant's misrepresentations were a substantial factor and proximate
20 cause in causing damages and losses to Plaintiff and Class members.

21 101. Plaintiff and Class members were injured as a direct and proximate
22 result of Defendant's conduct because (a) they would not have purchased the
23 Products if they had known that the products cause drowsiness, and/or (b) they
24 overpaid for the products because the products are sold at a price premium due to the
25 misrepresentation.

26 **Count VII: Quasi-Contract / Unjust Enrichment**

27 **(on behalf of Plaintiff and the Nationwide Class)**

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1 102. Plaintiff incorporates by reference and re-alleges each and every
2 allegation set forth above as though fully set forth herein.

3 103. Plaintiff alleges this claim individually and on behalf of the Nationwide
4 Class.

5 104. As alleged in detail above, Defendant's false and misleading labeling
6 caused Plaintiff and the Class to purchase Non-Drowsy Rite Aid Products and to pay
7 a price premium for these products.

8 105. In this way, Defendant received a direct and unjust benefit, at Plaintiff's
9 expense.

10 106. Plaintiff and the Nationwide Class seek restitution.

11 **VI. Jury Demand.**

12 107. Plaintiff demands a jury trial on all issues so triable.

13 **VII. Prayer for Relief.**

14 108. Plaintiff seeks the following relief for himself and the proposed class and
15 subclasses:

- 16 • An order certifying the asserted claims, or issues raised, as a class
17 action;
 - 18 • A judgment in favor of Plaintiff and the proposed class;
 - 19 • Damages, including statutory, treble, and punitive damages where
20 applicable;
 - 21 • Restitution;
 - 22 • Disgorgement, and other just equitable relief;
 - 23 • Pre- and post-judgment interest;
 - 24 • An injunction prohibiting Defendant's deceptive conduct, as allowed by
25 law;
 - 26 • Reasonable attorneys' fees and costs, as allowed by law; and
 - 27 • Any additional relief that the Court deems reasonable and just.
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1 Dated: February 16, 2022

Respectfully submitted,

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3 By: /s/ Jonas B. Jacobson

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