UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 22-00253-DOC-ADS Date: July 7, 2022

Title: CHRISTIAN LEMUS v. RITE AID CORP.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS [18]

Before the Court is a Motion to Dismiss the First Amended Complaint ("Motion" or "Mot.") (Dkt. 18) brought by Defendant Rite Aid Corporation ("Rite Aid" or "Defendant"). The Court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Having reviewed the moving papers submitted by the parties, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Motion. The Court **VACATES** the hearing on the Motion but maintains the scheduling conference set for July 11, 2022.

I. Background

A. Facts

This case arises out of Plaintiff Christian Lemus' ("Plaintiff's") purchase of Rite Aid cough syrup, which contained dextromethorphan hydrobromide ("DXM") and was labeled "Non-Drowsy." *See generally* First Amended Complaint ("FAC") (Dkt. 17). The following facts are taken from Plaintiffs' FAC.

In December 2021, Plaintiff purchased a bottle of Rite Aid brand Daytime Severe Cold & Flu Relief (the "Medication") from one of Defendant's stores in Santa Ana, California. ¶ 35. The bottle contained the words "Non-Drowsy" on the label, and Plaintiff claims he bought the Medication specifically because it promised it would not induce drowsiness. *Id.* Plaintiff took the recommended dose of the Medication and claims that he then "became unexpectedly drowsy." *Id.* Plaintiff alleges that his drowsiness was directly caused by the Medication and, more specifically, by DXM. *Id.* at ¶¶ 3, 35.

B. Procedural History

On February 16, 2022, Plaintiff filed his Complaint in this Court (Dkt. 1). On April 8, 2022, Plaintiff filed his First Amended Complaint. Defendant filed the present Motion on April 22, 2022. Plaintiff opposed the motion ("Opp'n") on May 16, 2022 (Dkt. 19). Defendant filed its Reply on May 23, 2022 (Dkt. 22).

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.

1994), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

Defendant argues that some or all of Plaintiff's claims should be dismissed because: (1) Plaintiff's state law claims are preempted by federal law; (2) Plaintiff can only bring California law claims so any claims under other state laws should be dismissed; (3) Plaintiff has failed to plead sufficient facts to establish his claim that DXM causes drowsiness or that a reasonable consumer would be misled; (4) Plaintiff has failed to provide sufficient notice or to plead sufficient facts to establish a breach of warranty claim; (5) Plaintiff has failed to plead sufficient facts to establish his claims for intentional or negligent misrepresentation and those claims are barred by the economic loss rule; (6) Plaintiff has failed to show that he does not have an adequate remedy at law and so his claims for equitable relief should be dismissed. Mot. at 1-2. The Court considers each argument in turn.

A. Preemption of State Law Claims

Defendant first argues that Plaintiff's claims are expressly preempted by applicable Food and Drug Administration ("FDA") guidance and regulations regarding the labelling of over the counter ("OTC") cough medications. Mot. at 7. Defendant contends that because the FDA does not require medications containing DXM to carry a drowsiness warning, that Plaintiff is attempting to use state law to institute a requirement that is different from applicable federal law. *Id.* at 7-8. Plaintiff argues that because the "Non-Drowsy" labelling on the Medication was misleading, and because the FDA has

not expressly authorized use of the phrase "Non-Drowsy" on products containing DXM, his claims are not preempted. Opp'n at 1-3. The Court agrees with Plaintiff.

Under the Supremacy Clause, "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing U.S. CONST. art. VI, cl. 2). Federal preemption of state law, however, "will not lie unless it is the clear and manifest purpose of Congress." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (citation omitted). If a federal statute contains an express preemption clause, the plain wording of the clause necessarily contains the best evidence of Congress' preemptive intent. *Id.*

The Federal Food, Drug, and Cosmetic Act ("FDCA") contains an express preemption clause prohibiting state requirements that are "different from or in addition to, or otherwise not identical with" a requirement under the FDCA. 21 U.S.C. § 379r. However, the FDCA also deems drugs to be "misbranded" if they are "false or misleading in any particular." 21 U.S.C. § 352(a). The Ninth Circuit has found that preemption does not apply in cases where a plaintiff is seeking to prove that labelling was misleading, holding that such a state law claim imposed a duty "*identical* to . . . duty under the FDCA." *Ebner v. Fresh, Inc.*, 838 F. 3d 958, 965 (9th Cir. 2016) (emphasis in original).

Defendant claims that because FDA has "extensively regulated" OTC cough medications without requiring a drowsiness warning for products containing DXM, that Plaintiff's suit is necessarily preempted. Mot. at 7-8. However, Defendant does not argue that the FDA explicitly authorized the use of the phrase "Non-Drowsy" on products containing DXM, only that a drowsiness warning was not expressly required. *Id.* at 7-10. In *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015), the Ninth Circuit rejected assertions of preemption where the labelling in question had not been expressly authorized by the FDA and the Plaintiff claimed that the labelling was false or misleading. Plaintiff's allegations, like those made in *Astiana*, are not that the Medication should have carried a drowsiness warning, but rather that the phrase "Non-Drowsy" was misleading because DXM may cause drowsiness. FAC at ¶¶ 1-3; *Astiana*, 783 F.3d 753 (9th Cir. 2015) (finding no preemption where the FDA had not issued regulations regarding the term "natural" and Plaintiff claimed the term was misleading). Because the FDA has not expressly approved the use of the phrase "Non-Drowsy" on products containing DXM, and Plaintiff has plausibly alleged that DXM may cause drowsiness as

described below, Plaintiff's has properly alleged that Defendant's labelling of the Medication was misleading.

Thus, Plaintiff's claims are not preempted and Defendant's Motion is DENIED with respect to preemption.

B. Plaintiff's Non-California Claims

Defendant next argues that the Court should dismiss or strike Plaintiff's claims under the laws of states other than California either for lack of standing or because Plaintiff cannot certify the class that he seeks to represent. Mot. at 11.

Plaintiff brings claims on behalf of three different classes: a claim for consumer protection violations on behalf of a class of persons who purchased the Medication in eleven states and the District of Columbia;[1] a claim for breach of warranty on behalf of a class of persons who purchased the Medication in twenty-one states and the District of Columbia; and "additional claims" on behalf of a subclass of persons who purchased the Medication in California. FAC at ¶¶ 37-39. Defendant seeks to dismiss or strike the first two classes. Mot. at 11.

Class allegations in a complaint are typically tested on a motion for class certification, not at the pleading stage. *See, e.g.*, Moreno v. Baca, No. CV007149ABCCWX, 2000 WL 33356835, at *2 (C.D. Cal. 2000); *Collins v. Gamestop Corp.*, No. C10–1210–TEH, 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6, 2010); *see also* Fed. R. Civ. P. 23(c)(1). Motions to strike class allegations are thus generally disfavored, particularly where the arguments against the class claims would benefit from discovery or would otherwise be more appropriate in a motion for class certification. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) ("[O]ften the pleadings alone will not resolve the question of class certification and . . . some discovery will be warranted.").

However, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). Thus,

[1] Plaintiff lists twelve states but Maryland is listed twice

courts in this Circuit have struck class allegations where it is clear from the pleadings that a class could not be certified. *See, e.g.*, S*anders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009).

Defendant first argues that the claims should be dismissed under *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), because California law cannot be applied to plaintiffs outside the state. Mot. at 11-12. However, Plaintiff correctly points out that he is not seeking to apply California law to out of state plaintiffs. Opp'n at 11-12. As a result, the first piece of *Mazza's* analysis concerning California's connection to out of state plaintiffs is irrelevant here. *Mazza*, 666 F.3d at 589-90.

As the Ninth Circuit did in *Mazza*, the parties then move to a choice of law analysis and dispute whether Plaintiff's proposed multi-state classes can be certified due to potentially material differences between the state laws at issue. Mot. at 12-13; Opp'n at 11-12. This Court has applied California's choice of law to class certification analysis before, dismissing nationwide classes due to material differences in law and the strong interest other states have in enforcing their own laws. *Glenn v. Hyundai Motor Am.*, No. SA CV 15-2052-DOC, 2016 WL 3621280 (C.D. Cal. June 24, 2016); *Vinci v. Hyundai Motor Am.*, No. SA CV 17-0997-DOC, 2018 WL 6136828 (C.D. Cal. Apr. 10, 2018). Other courts in the Ninth Circuit have also dismissed multi-state claims at the pleading stage when there are material differences in the various state laws at issue. *See, e.g.*, *Phan v. Sargento Foods, Inc*, No. 20-cv-09251-EMC, 2021 WL 2224260 (N.D. Cal. June 2, 2021).

Defendant asserts that the same result should follow here due to material differences between the consumer protection and warranty laws of the states that Plaintiff has included. Mot. at 12-14. Plaintiff counters that the laws he has chosen in each class *are* materially similar and therefore can be certified into a single class. Opp'n at 11-13. Because courts in this Circuit have previously found material differences in the laws at issue, the Court agrees with Defendant.

Based on Plaintiff's pleadings, his consumer protection claim cannot be certified. Defendant correctly points out that *Mazza* itself involved the consumer protection laws of California and New York, among others, and found that the requirements for demonstrating reliance differed between those two states' consumer protection laws. Reply at 11; *Mazza*, 666 F.3d at 591. Additionally, a court in this Circuit has found the

Rhode Island law that Plaintiff seeks to apply to be materially different from the California law Plaintiff cites on issues of reliance, damages, and statutory exemptions. *Cover v. Windsor Surry Co.*, No. 14-cv-05262-WHO, 2016 WL 520991, at *6 (N.D. Cal. Feb. 10, 2016). Because Plaintiff pled California, New York, and Rhode Island laws within his consumer protection class, there are material differences among the consumer protection laws Plaintiff seeks to certify into a single class that demonstrate that the class cannot be certified.

Plaintiff's multi-state warranty claim is similarly uncertifiable. This Court follows another court in this Circuit, which has already recognized at least four materially different reliance requirements in breach of express warranty laws between California, Florida, Virginia, and Washington, all of which are included in Plaintiff's class. *Darisse v. Nest Labs, Inc.*, No. 5:14-cv-01363-BLF, 2016 WL 4385849, at *11 (N.D. Cal. Aug. 15, 2016). As that court noted, California has a "presumption of reliance that can be overcome," Florida requires demonstrating actual reliance, Virginia does not require demonstrated reliance, and Washington does "not require a showing of reliance in some circumstances." *Id.* Thus, it is clear at the pleading stage that Plaintiff's class of express warranty laws also cannot be certified.

Because neither of Plaintiff's multi-state classes can be certified as currently pled, Defendant's Motion is GRANTED with respect to Plaintiff's claims for consumer protection and breach of warranty to the extent that each seeks to represent multi-state classes. Leave to amend is granted with respect to Plaintiff's consumer protection class should he be able to truly narrow the class to states with materially similar laws. However, because Plaintiff's own California warranty claim is dismissed as discussed below, Plaintiff's multi-state breach of warranty claim is DISMISSED without leave to amend.

C. Plaintiff's Claim that DXM Causes Drowsiness and the Reasonable Consumer Standard

Defendant next contends that Plaintiff's non-warranty claims—misrepresentation, unjust enrichment, and violation of California consumer protection, false advertising, and unfair competition laws—all of which "sound in fraud," have not been pleaded with sufficient particularity to satisfy the heightened pleading standard under Federal Rule of Civil Procedure 9(b). Mot. at 15. Specifically, Defendant argues that Plaintiff has failed

to plausibly allege with particularity that DXM causes drowsiness or that a reasonable consumer would be misled by the Medication's labelling. Mot. at 15-16. The Court disagrees.

a. Adequacy of Plaintiff's Claims Under Rule 9(b)

Federal Rule of Civil Procedure 9(b) governs pleading the special matters of fraud, mistake, and conditions of mind. An allegation of "fraud or mistake must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). This standard applies to claims arising under state law, and requires a claimant to set forth "the who, what, when, where, and how" of the alleged fraud, including "what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 371 F.3d 1097, 1103, 1107 (9th Cir. 2003). However, "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see also Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (explaining that Rule 9(b)'s heightened pleading standard may be relaxed when the allegations of fraud relate to matters particularly within the opposing party's knowledge, such that a plaintiff cannot be expected to have personal knowledge). Rule 9(b)'s heightened pleading standard applies not only to federal claims, but also to state law claims brought in federal court. *Id.* at 1103.

This heightened pleading standard ensures that "allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

The Court finds that Plaintiff has provided enough detail to satisfy Rule 9(b). Plaintiff has identified the what, where, and when of the allegedly misleading conduct—a bottle of the Medication purchased from a Rite Aid store in Santa Ana in December 2021. FAC at ¶ 35. Plaintiff has also identified the specific statement that was allegedly misleading—"Non-Drowsy"—and how it was misleading—"[w]hen Plaintiff took the recommended dose of the medication as directed by Defendant, he became unexpectedly drowsy." *Id.* Plaintiff then specifically identifies DXM as the cause of his unexpected drowsiness and supports this assertion with citations to scientific studies and government documents from the NIH, FDA, and FAA that suggest drowsiness is a potential side effect of DXM. *Id.* at ¶¶1 7-20.

This Court has found pleadings alleging misleading labelling to be sufficient under Rule 9(b) when they identified the specific claim alleged to be misleading and provided evidence that the claim is false. *Mier v. CVS Pharmacy, Inc.*, No. SA CV 20-01979-DOC-ADS, 2021 WL 1559367, at *4 (C.D. Cal. Mar. 22, 2021) (denying a motion to dismiss a claim alleging that CVS's statement that a particular hand sanitizer "kills 99.99% of germs" because plaintiff provided scientific studies that showed the statement was not true). Plaintiff need not prove his allegations at this juncture, only plead them with sufficient particularity to allow Defendant to defend against the particular fraud alleged. *Semegen*, 780 F.2d at 731. By identifying the potentially misleading statement and providing evidence that it is false, Plaintiff has provided Rite Aid with such notice.

Therefore, Defendant's Motion is DENIED with respect to the Rule 9(b) standard.

b. The Reasonable Consumer Standard

Defendant also argues that Plaintiff has not adequately alleged that a reasonable consumer would be misled by the Medication's labelling. Mot. at 18-19.

Under California law, claims under the False Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), and Unfair Competition Law (UCL) are governed by the reasonable consumer test. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citations omitted). Under the reasonable consumer standard, a plaintiff must "show that members of the public are likely to be deceived." *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir.1995) (quotations omitted). "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). Rather, it must be "probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.* The relevant consumer is "the ordinary consumer within the larger population," not the "least sophisticated consumer" nor one that is "exceptionally acute and sophisticated." *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1304 (2011) (citation omitted).

Generally, however, "whether a reasonable consumer would be deceived . . . [is] a question of fact not amenable to determination on a motion to dismiss." *Ham v. Hain*

Celestial Grp., Inc., 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014); *see Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015). "In *rare* situations a court may determine, as a matter of law, that the alleged violations of the UCL, FAL, and CLRA are simply not plausible." *Ham*, 70 F. Supp. 3d at 1193 (emphasis added); *see, e.g.*, *Werbel ex rel. v. Pepsico, Inc.*, No. 09–cv–04456–SBA, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010) (a reasonable consumer would not be deceived into believing that cereal named "Crunch Berries" derived significant nutritional value from fruit). This action does not present one of those rare situations.

Plaintiff cites to Consumer Reports' guidance on OTC medication labels, which asserts that "'Non-drowsy' is code for antihistamines and other medications that don't make you sleepy." FAC at ¶ 23. Plaintiff then displays packaging of a medication that contain DXM but does not contain the phrase "Non-Drowsy" and another product containing a different active ingredient that advertises itself as "less drowsy" to indicate that consumers would infer that a product affirmatively labelled "Non-Drowsy" does not cause drowsiness. *Id.* at ¶¶ 25-28. Reading the pleadings in the light most favorable to Plaintiff, Plaintiff has plausibly alleged that a reasonable consumer would interpret "Non-Drowsy" to mean that the Medication would not cause drowsiness. The truth of those allegations is a matter of fact that cannot be resolved on a motion to dismiss.

Thus, Defendant's Motion is DENIED with respect to the reasonable consumer standard.

D. Plaintiff's Claim for Breach of Warranty

Defendant next claims that Plaintiff both failed to provide adequate notice to bring his warranty claim and did not plead sufficient facts to support a claim of breach of warranty. Mot. at 19-20. Because the notice issue is dispositive, the Court does not reach the adequacy of Plaintiff's pleading with respect to breach of warranty.

Under California law, a plaintiff bringing a claim for breach of warranty must provide "reasonable notice" to the product manufacturer before filing suit. Cal. Com. Code § 2607(3)(A). As the Ninth Circuit has recognized, reasonable notice requires pre-suit notice and is intended to allow the Defendant an opportunity to cure the defect before litigation begins. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932.

Plaintiff contends that he has met the notice requirement by first filing a complaint without including a warranty claim before notifying Defendant and then amending his complaint to include the warranty claim two months later. Opp'n at 21. To support this position, Plaintiff cites only to a Northern District of California case that allowed a warranty claim to proceed with three days of pre-suit notice. *Id; Stearns v. Select Comfort Retail Corp.*, 763 F Supp. 2d 1128 (N.D. Cal. 2010). However, even in that case, notice was given three days before *any* litigation was initiated. *Stearns*, 763 F. Supp. 2d at 1142-43. Here, Plaintiff instead brought related claims concerning the Medication's labelling—without first providing notice to Defendant—and then attempted to add his warranty claims later to circumvent the notice requirement. Opp'n at 21. Because the notice requirement exists specifically to allow manufacturers to cure defects and avoid litigation, Plaintiff's attempt to provide notice after commencing litigation does not satisfy the statutory notice requirement. *Alvarez*, 656 F.3d at 932.

Thus, Plaintiff's warranty claim is barred, and Defendant's Motion is GRANTED with respect to Plaintiff's claim for breach of warranty.

E. Plaintiff's Claims for Intentional and Negligent Misrepresentation and the Economic Loss Rule

Defendant contends that Plaintiff has failed to adequately plead knowledge or intent with respect to his claims of intentional and negligent misrepresentation under Rule 9 and that the economic loss rule bars both claims. Mot. at 20-21.

a. Adequacy of Plaintiff's Pleading of Knowledge or Intent

Defendant argues that Plaintiff has failed to adequately plead that Defendant knew or should have known that any alleged misrepresentation was false. Mot. at 20-21. The Court disagrees.

Under California law, to establish intentional misrepresentation requires proving "knowledge of falsity" and "intent to defraud." *Lazar v. Superior Ct.*, 12 Cal. 4th 631, 638 (1996). Establishing negligent misrepresentation requires proof that Defendant acted "without reasonable ground for believing [the misrepresentation] to be true" and with "intent to induce another's reliance on the fact misrepresented." *Apollo Cap. Fund v. Roth Cap. Partners*, 158 Cal. App. 4th 226, 243 (2007).

However, at the pleading stage, intent and knowledge "may be alleged generally." Fed. R. Civ. Pro. 9(b). Additionally, the pleading requirements are relaxed when "the circumstances of the alleged fraud are peculiarly within the defendant's knowledge" and the plaintiff "can not be expected to have personal knowledge of the relevant facts." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). In such cases, the plaintiff need only plead "the factual basis for the belief" that the defendant possessed the required intent or knowledge. *Id.*

Here, Plaintiff has met this low bar. Plaintiff alleges that Defendant "controls its labelling" and that "it is standard practice in the industry to test labelling with consumers." FAC ¶ 30. Plaintiff also alleges that Defendant researched the side effects of DXM and chose to label the Medication "Non-Drowsy" despite the allegedly misleading nature of such a claim. *Id.* According to Plaintiff, Defendant did so to "increase the demand" for the Medication "so that consumers would purchase more products and pay a price premium." *Id.* at ¶¶ 30-31.

Because the process and results of any such research or consumer testing are precisely the kind of facts that are "peculiarly within the defendant's knowledge," Plaintiff need only provide a factual basis for his allegations of knowledge and intent. *Neubronner*, 6 F.3d at 672. By alleging that Defendant conducted research and testing relating to possible side effects of DXM but chose to affirmatively market the Medication as "Non-Drowsy," Plaintiff has met the low bar for pleading his misrepresentation claims.

b. The Economic Loss Rule

Defendant also claims that both claims are barred by the economic loss rule. Mot. at 21. The Court disagrees.

The "economic loss rule" prohibits plaintiffs from suing in tort for damages that lie only in contract. The economic loss rule concerns situations in which the alleged wrongful conduct and associated damages are demarcated by the contract itself, and so assessing the misconduct and injury under a tort framework would frustrate the very notion of a contract at all. *See Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). "Put simply, the economic loss doctrine was created to prevent 'the law of contract and the law of tort from dissolving one into the other.'" *In re Sony Gaming*

Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 967 (S.D. Cal. 2014) (quoting *Robinson Helicopter Co.*, 34 Cal. 4th at 988 (internal quotations omitted)). "[I]n actions arising from the sale or purchase of a defective product, plaintiffs seeking economic losses must be able to demonstrate that either physical damage to property (other than the defective product itself) or personal injury accompanied such losses." *N. Am. Chem. Co. v. Superior Ct.*, 59 Cal. App. 4th 764, 780 (1997).

In California, courts have found that there are certain exceptions to this general rule. First, the economic loss rule does not apply to claims of affirmative misrepresentation. In *Robinson Helicopter*, the California Supreme Court determined that the economic loss rule did not bar claims for fraud and misrepresentation but stated that its holding was "narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." *Robinson Helicopter Co.*, 34 Cal. 4th at 993. Second, some courts have found that the economic loss rule does not apply where there is a "special relationship" between the plaintiff and the defendant such that "it would be equitable to impose a duty of care to avoid purely economic loss." *Stewart v. Electrolux Home Prod., Inc.*, 304 F. Supp. 3d 894, 903 (E.D. Cal. 2018). Third, some district courts—including the Central District of California, recently—have found that there is a blanket exception for negligent misrepresentation claims. *See Capaci v. Sports Rsch. Corp.*, 445 F. Supp. 3d 607, 626 (C.D. Cal. 2020).

In *Mier*, this Court recognized the blanket exception for negligent misrepresentation as a "species of fraud" and denied a motion to dismiss the claim. *Mier v. CVS Pharmacy, Inc.*, No. SA CV 20-01979-DOC-ADS, 2021 WL 1559367, at *9 (C.D. Cal. Mar. 22, 2021) (quoting *Kalitta Air, L.L.C. v. Cent. Tex. Airborne Sys., Inc.*, 315 F. Appx. 603, 607 (9th Cir. 2008). The Court accepts Plaintiff's invitation to do the same here. Opp'n at 21.

The intentional misrepresentation claim is more difficult. This Court in *Mier* granted a motion to dismiss the plaintiff's intentional misrepresentation claim but did so after plaintiff implausibly pled that a special relationship existed between himself individually and CVS. *Mier* at *8-9. At other times, courts in this District, including this Court, have refused to bar intentional misrepresentation claims on the grounds that the misrepresentations fraudulently induced the buyer into a contract and could therefore be brought in tort. *Arabian v. Organic Candy Factory*, No. 2:17-cv-05410-ODW-PLA, 2018

WL 1406608, at *8 (C.D. Cal. Mar. 19, 2018); *SpinTouch, Inc. v. Outform, Inc.*, No. SA CV 21-00840-DOC-ADS, 2021 WL 6103549, at *3 (C.D. Cal. Nov. 8, 2021). Because Plaintiff pled here that he would not have bought the Medication but for the alleged misrepresentations, his claims also include an element of fraudulent inducement into a contract such that they are appropriate under tort law. FAC at ¶¶106, 114.

As a result, Plaintiff's claims for negligent and intentional misrepresentation are not barred by the economic loss rule and Defendant's Motion is DENIED with respect to Plaintiff's misrepresentation claims.

F. Plaintiff's Request for Equitable Relief

A plaintiff seeking equitable relief under FAL or UCL must establish that she lacks an adequate remedy at law. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020) (stating that "Sonner must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA") (citing *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996)). However, as this Court recognized in *Mier*, a plaintiff "may seek equitable relief under FAL and UCL to the extent that his claims are premised on alleged future harm." *Mier v. CVS Pharmacy, Inc.*, No. SA CV 20-01979-DOC-ADS, 2021 WL 1559367, at *13 (C.D. Cal. Mar. 22, 2021). Recognizing that *Sonner* dealt with past, rather than future, harms, this Court denied a motion to dismiss a complaint seeking to have allegedly misleading labelling removed from hand sanitizer products. *Id.* The same result follows here.

Plaintiff has alleged that he and other consumers "will not be able to rely on the labels in the future" if the labelling or content of the Medication is not changed. FAC at ¶ 36. As a result, Plaintiff has plausibly premised his claims for equitable relief on the possibility of future harm and it would be improper to dismiss such claims at this early stage of the litigation.

Therefore, Defendant's Motion is DENIED with respect to Plaintiff's claims for equitable relief.

IV. Disposition

For the reasons set forth above, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Motion to Dismiss. The hearing on the Motion scheduled for July 11,

2022, is accordingly **VACATED**. The Scheduling Conference remains on calendar for July 11, 2022 at 8:00 AM.

The Motion is **GRANTED** as follows:

- At least some of the state laws in the multi-state classes that Plaintiff seeks to represent are materially different, rendering the classes uncertifiable as constructed. Therefore, the Motion is **GRANTED** with regards to Plaintiff's multi-state claims and Counts I and V are dismissed as applied to any out of state parties. Leave to amend is granted on Count I but not on Count V.

- Because Plaintiff failed to provide adequate pre-suit notice of his breach of warranty claims, the Motion is **GRANTED** with respect to Plaintiff's warranty claim and Count V is dismissed in full without leave to amend.

The Motion is **DENIED** as follows

- Because Plaintiff claims that Defendant's labelling was misleading and the FDA has not explicitly approved use of the phrase "Non-Drowsy," Plaintiff's claims are not preempted, and Defendant's Motion is **DENIED** with respect to preemption.

- Plaintiff has pled sufficient facts to allege Defendant's knowledge that the statement "Non-Drowsy" was false and his misrepresentation claims are not barred by the economic loss rule. Defendant's Motion is **DENIED** with respect to Counts VI and VII, the intentional and negligent misrepresentation claims.

- Plaintiff has plausibly pled a possibility of future harm and Defendant's Motion is **DENIED** with respect to Plaintiff's request for equitable relief.

The Clerk shall serve this minute order on the parties.