UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 18-9655-GW(FFMx)	Date	April 18, 2019
Title	*Toya Edwards v. Walmart, Inc.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie E. Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Mitchell M. Breit Justin J. Presnal	Jaikaran Sing

PROCEEDINGS: DEFENDANT WALMART, INC.'S MOTION DISMISS FIRST AMENDED CLASS ACTION COMPLAINT [24]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would DENY Defendant's Motion to Dismiss as to Plaintiffs' causes of action 1 through 3; GRANT it with leave to amend as to claims 4 through 7; and GRANT it without leave to amend as to claims 8 and 9.

The Court sets a scheduling conference for May 6, 2019 at 8:30 a.m., with a joint scheduling report to be filed by May 1, 2019.

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Initials of Preparer JG

Edwards et al. v. Walmart, Inc.; Case No. 2:18-cv-09655-GW (FFMx)
Tentative Ruling on Motion to Dismiss First Amended Class Action Complaint

I. Background

A. Factual Background

Toya Edwards and Jamal Erakat (collectively, "Named Plaintiffs"), on behalf of themselves and all others similarly situated (collectively with Named Plaintiffs, "Plaintiffs"), sue Walmart, Inc. ("Walmart" or "Defendant") for: (1) violation of California False Advertising Law ("FAL"), Business and Professional Code ("BPC") § 17500; (2) violation of California Unfair Competition Law ("UCL"), BPC § 17200; (3) violation of California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1761; (4) violation of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1799 *et seq.*; (5) breach of implied warranty of merchantability under Universal Commercial Code ("UCC") § 2-314; (6) breach of express warranty under UCC § 2-313; (7) violation of the Magnuson-Moss Warranty Act ("MMWA") 15 U.S.C. §2301 *et seq.*; (8) unjust enrichment; and (9) declaratory relief. *See generally* First Amended Complaint ("FAC"), Docket No. 20. Plaintiffs allege the following relevant facts:

The Named Plaintiffs are both citizens of California. *Id.* ¶ 19-20. Walmart is a Delaware corporation, with its principle place of business located in Arkansas. *Id.* ¶ 21. Walmart is the world's largest retail company and operates thousands of stores worldwide. *Id.* ¶ 1.

As part of their health and wellness department, Walmart stocks and sells brand name and generic over-the-counter ("OTC") medications, including pain relievers, under its Equate™ ("Equate") brand. *Id.* ¶ 3-5. Acetaminophen is an OTC pain reliever and fever reducer that comes in a variety of forms: liquid suspension, tablets, capsules, and gelcaps. *Id.* ¶ 25. Acetaminophen is one of the most commonly used drugs in the world for pain mitigation, with an estimated global market value over $350 million annually. *Id.* ¶ 27. Tylenol© ("Tylenol") is the well-recognized brand name of acetaminophen and is produced, manufactured, and distributed by Johnson & Johnson Consumer, Inc. ("J&J"). *Id.* ¶ 29.

In 2005, J&J introduced name brand Tylenol Extra Strength Rapid Release Gels to the American public as "specially designed" gelcaps "with holes to allow the release of powerful medicine even faster than before." *Id.* ¶ 6. In 2008, Tylenol launched Tylenol PM Rapid Release Gels using similar marketing. *Id.* The claim that rapid release gelcaps work faster than typical

Tylenol tablets, became associated with regular and PM versions of Tylenol Extra Strength Rapid Release Gels. *Id.* ¶ 35. In 2009, the rapid release gels were recalled and were not re-released until 2017. *Id.* ¶ 36. The return of the rapid release gels to market was Tylenol's "biggest product launch in years" and "involved triple the investment" of a typical J&J product release. *Id.* ¶ 37. J&J's marketing campaign reached over 25 million shoppers across five key markets. *Id.* ¶ 38. With its marketing, product labeling, and affirmative representations, J&J sought and continues to seek to further the inaccurate perception that rapid release Tylenol actually provides faster relief than other cheaper acetaminophen products. *Id.* ¶ 39.

Generic brands like Equate seek to mimic the product offerings of J&J by selling generic versions of Tylenol for a price less than the name brand equivalent. Id. ¶ 31. Sales of generic versions of Tylenol products have been profitable for Walmart. Id. ¶ 32. Walmart sells its own version of Tylenol Extra Strength Rapid Release Gels called Equate Extra Strength Acetaminophen Rapid Release Gelcaps. *Id.* ¶ 7. Walmart also sells its own version of the Tylenol Extra Strength PM Rapid Release Gels called Equate Extra Strength Acetaminophen PM Rapid Release Gelcaps. *Id.* ¶ 8. Walmart relied on J&J's "massive marketing campaign" and the success of its rapid release product when it released its rapid release gelcaps. *Id.* ¶ 57. Consumers were already familiar with the claims that Tylenol rapid release products were "fast-acting" when Walmart released it's generic Equate versions of the medications. *Id.* ¶ 61. The Equate rapid release gelcaps are marketed as comparable to Tylenol Extra Strength Rapid Release gels, even though, on information and belief, they do not contain the unique laser drilled holes of the name brand version. *Id.* ¶ 10. The Equate gels are also designed to look the same or similar as the Tylenol rapid release products. *Id.* ¶ 58-60.

Walmart sells Equate rapid release gels at a higher price than its non-rapid release acetaminophen tablets. *Id.* ¶ 14. Walmart has long known, or should have known, that traditional, non-rapid release acetaminophen products can be equally effective, in the same, if not faster, time-period as its rapid release products. *Id.* ¶ 12. A new study ("Study") demonstrates that Equate rapid release acetaminophen gelcaps dissolve slower than Equate non-rapid release tablets. *Id.* ¶ 13. There is no proven significant efficacy difference between Equate rapid release gelcaps and Equate non-rapid release products. *Id.* ¶ 72. Walmart has done nothing to correct the impression that rapid release gelcaps work faster than other, cheaper acetaminophen products, and has sought to further consumer misperception through its own deceptive labeling and marketing. *Id.* ¶¶ 62-

63. The packaging for Equate rapid release gelcaps associates the product with the name-brand Tylenol equivalents. *Id.* ¶¶ 58-64. Walmart also advertises the Equate rapid release gelcaps using the phrase "rapid release." *Id.* ¶ 65. Consumers try the Equate rapid release gelcaps because they are labeled "rapid release" and because they are cheaper than Tylenol's rapid release products. *Id.* ¶ 66.

Plaintiff Edwards began purchasing Equate Extra Strength Acetaminophen Rapid Release Gelcaps "about two years ago" based on her doctor's suggestion that the rapid release product would alleviate her pain faster. *Id.* ¶ 77-79. She purchased the rapid release gelcaps rather than less expensive Equate acetaminophen products because the advertising and labeling of the products, which included phrases such as "rapid release" and "rapid relief," led her to believe that the rapid release gelcaps would provide faster pain relief. *Id.* 82-83. Had Edwards known that the rapid release gelcaps did not work any faster than traditional Equate acetaminophen products, she would not have been willing to pay the premium Walmart charges for the rapid release gelcaps. *Id.* ¶ 84.

Plainitff Erkat has been buying Equate Extra Strength Acetaminophen Rapid Release PM Gelcaps for the last two years. *Id.* ¶ 86-88. He purchased the rapid release gelcaps over other Equate acetaminophen products solely, or in part, because they were advertised as "rapid release" and offering "rapid relief." *Id.* ¶ 89. Erkat would not have bought the more expensive gelcaps if he had known that the product did not work faster than traditional, cheaper acetaminophen products. *Id.* 92.

Plaintiffs bring this action individually and as a class action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3). *Id.* ¶ 96. Plaintiffs propose a California Class defined as: "During the fullest period allowed by law, all persons who purchased the Class Rapid Release Gelcaps in the State of California." *Id.* "Class Rapid Release Gelcaps" include "Equate Extra Strength Acetaminophen Rapid Release Gelcaps, and any other Equate or Walmart brand acetaminophen product labeled and/or marketed as 'rapid release.' " *Id.* ¶ 98.

B. Procedural Background

Plaintiffs filed a Complaint on November 15, 2018, *see* Complaint, Docket No. 1, and subsequently filed a First Amended Complaint on January 11, 2019. *See* FAC. Defendant filed a motion to dismiss. *See* Notice of Motion and Defendant's Notice of Motion and Motion to Dismiss First Amended Class Action Complaint ("MTD"), Docket No. 24. Attached to the MTD,

Defendant filed a Request for Judicial Notice of eight exhibits. *See* Request for Judicial Notice in Support of Walmart, Inc.'s Motion Dismiss First Amended Complaint ("RJN") (grammatical errors contained in original), Docket No. 24-2. Plaintiffs filed an opposition to Defendant's MTD. *See* Plaintiffs' Opposition to Defendant Walmart's Motion to Dismiss First Amended Class Action Complaint ("MTD Opp."), Docket No. 27. Defendant filed a reply in support of the MTD. *See* Reply Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss First Amended Class Action Complaint, Docket No. 28.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a 12(b)(6) motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a 12(b)(6) motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

III. Analysis

A. Preemption

Defendant argues that Plaintiffs' claims are expressly preempted by the National Uniformity for Nonprescription Drugs Statute, 21 U.S.C. § 379r. *See* MTD at 5. 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." *CSXTransp., 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 indicates the best evidence of Congress' preemptive intent. *Id.* Section 379r(a) provides that states may not "establish or continue in effect − any requirement (1) that relates to the regulation of a drug that is not subject to the requirements of [21 U.S.C.] Section 353(b)(1) or 353(f)(1)(A) [[1]] ; and (2) that is different from or in addition to, or that is otherwise not identical with, a requirement under [the FDCA] . . . ." 21 U.S.C. § 379r(a). Section 379r contains a savings clause, which exempts from its preemptive scope "any action . . . under the product liability law of any State." *Id*. § 379r(e). Section 379r would cover OTC drugs.[2]

Here, all of Plaintiffs' state law claims (claims 1-6, 8 and 9) are premised on the contention that Defendant misled consumers by branding its Equate acetaminophen gelcaps as "rapid release" when in fact the gelcaps dissolved more slowly than the less expensive regular Equate acetaminophen tablets that were not labeled "rapid release." *See generally*, FAC. Plaintiffs argue that their claims cannot be pre-empted because the FDA regulations are "silent" with regard to "rapid release" acetaminophen. MTD Opp. at 1.

Defendant contends that there is a federal regulatory regime enacted and enforced by the FDA which governs OTC medication labeling and marketing. *See* MTD at 7-8, citing 21 C.F.R. §§ 330 *et seq.* FDA regulations govern the criteria that must be met in order for an OTC drug such as acetaminophen to be considered "safe, effective and not misbranded." *Id.* § 330.1. Any OTC drug which fails to conform to each of the conditions contained in the FDA regulations or in an

[1] Section 353(b)(1) deals with dangerous prescription drugs which require medical professional supervision and Section 353(f) covers veterinary prescription drugs.

[2] Additionally, federal law does require that OTC "labeling shall be clear and truthful in all respects and may not be false or misleading in any particular." 21 C.F.R. § 330.10(a)(4)(v).

applicable monograph can be subject to FDA regulatory action. *Id.* Defendant argues that the FDA has specifically regulated OTC drugs such as acetaminophen through a 1988 tentative final monograph titled "Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-the-Counter Human Use" ("1988 TFM"), citing to 21 C.F.R. § 343. *See* MTD at 8-9. However, contrary to the assertions of Defendant, there is no 21 C.F.R. §343.[3] The relevant portion of the TFM (as cited by Defendant) only regulates the dissolution standards applicable to asprin, *see* § 343.90; it does not regulate the dissolution standards applicable to acetaminophen. *See id.*

Defendant further asserts that acetaminophen dissolution standards are specifically set out in two FDA guidance documents[4]: (1) "Dissolution Testing and Acceptance Criteria for Immediate-Release Solid Oral Dosage Form Drug Products Containing High Solubility Drug Substances" ("Dissolution Testing guidance"), *see* Ex. A to MTD, Docket No. 24-3, and (2) "Waiver of In Vivo Bioavailability and Bioequivalence Studies for Immediate-Release Solid Oral Dosage Forms Based on a Biopharmaceutics Classification System" ("Waiver of Studies guidance"), *see* Ex. B to MTD, Docket No. 24-4. The Court is unconvinced that the content of these guidance documents, without much more, would preempt Plaintiffs' state law claims. The guidance documents specifically indicate that they do not "establish any rights for any person and [are] not binding on FDA or the public." *See* Ex. A at 1; Ex. B at 1. The documents also state that the industry is permitted to use an "alternative approach if it satisfies the requirements of the applicable statutes and regulations." *Id.* At the top of each page of the guidance documents, is the bold header "Contains Nonbinding Recommendations." *See generally id.* Further, they also state: "FDA's guidance documents do not establish legally enforceable responsibilities." *Id.* at 2. This is hardly indicative of binding regulation warranting preemptive effect. *See Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 341-42 (3rd Cir. 2009) (finding that FDA policy statements "hardly" support a finding of preemption).

In addition, neither of the two cited documents indicates that they were intended to govern the branding/labeling of OTC drugs. The Dissolution Testing guidance states that it "is intended to describe when a standard release test and criteria may be used in lieu of extensive method

[3] There is 21 C.F.R. Part 343 which includes §§ 343.1 – 343.90, but none of those sections deals with acetaminophen.

[4] The Court will take judicial notice of the guidance documents given that they contain information from government agency websites. *See U.S., ex rel. Modglin v. DJO Global Inc.*, 114 F.Supp.3d 993, 1008 (C.D.Cal. 2015).

development and acceptance criteria-setting exercises." *See* Ex. A at 1. Likewise, the Waiver of Studies guidance indicates that it: "provides recommendations for sponsors of investigational new drug applications (INDs), and applicants who submit new drug applications (NDAs), abbreviated new drug applications (ANDAs), and supplements to these applications for immediate-release (IR) solid oral dosage forms, and who wish to request a waiver of an in vivo bioavailability (BA) and/or bioequivalence (BE) study requirement." *See* Ex. B at 1. Neither of the documents refer to acetaminophen at all.

Furthermore the Dissolution Testing guidance was finalized in 2018, and its stated purpose is to "provide manufacturers with recommendations for submission of new drug applications . . . ." Ex. A at 1. Given that the products at issue were allegedly purchased by Plaintiffs beginning two years ago, this guidance was not even applicable at the time the Defendant applied for approval of its generic medication. Moreover, its purpose is not guidance regarding ongoing regulation of drug labels. *Id.* Rather it is clearly intended as guidance for companies in the proper methods for completing applications for approval by the FDA. *Id.* As such, the Court would find that it is not applicable to the current action.

Finally, it is strange that Defendant attempts to present a preemption argument seeking to dismiss Plaintiffs' branding/labeling state causes of action by citing to documents which do not specifically (or really even remotely) govern the issue; and yet it fails to reference the controlling regulation which actually does delineate certain requirements as to labeling in regards to OTC drug products which contain acetaminophen (the active ingredient involved herein) – that is 21 C.F.R. § 201.326(a)(1).[5]

Federal preemption is an affirmative defense, so "it is [defendant's] burden to establish that it applies." *Perez v. Kroger Co.*, 2017 WL 3601998, Case No. 2:17-cv-02448-ODW-(AGR) (C.D.Cal. 2017). Given that Defendant has not thus far provided any binding regulation (or other applicable federal law) that would preempt Plaintiffs' state law claims, the Court would deny Defendant's motion to dismiss insofar as it is premised on federal preemption.

B. Primary Jurisdiction Doctrine

Defendant also argues that the Court should dismiss Plaintiffs' claims based on the doctrine of primary jurisdiction. MTD at 15-16. "The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within

[5] It is also noted that Plaintiffs likewise did not cite to that relevant regulation.

the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). It "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts." *GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1263–64 (9th Cir. 2011) (internal quotation marks omitted). "It is useful ... in instances where the federal courts do have jurisdiction over an issue, but decide that a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Id*. at 1264 (internal quotation marks omitted). It applies in "limited circumstances" and is "not designed to secure expert advice from agencies every time a court is presented with an issue conceivably within the agency's ambit." *Clark*, 523 F.3d at 1114 (internal quotation marks omitted). The "deciding factor" in determining whether the primary jurisdiction doctrine should apply is "efficiency." *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007).

Here, the Court fails to see how the primary jurisdiction doctrine even comes into serious play. Defendant has failed to reference any pending or upcoming proceeding or other situation wherein the FDA intends to or will be specifically addressing an issue raised within the present litigation.[6] Additionally, the controversies raised in this action do not appear to be matters of first impression, nor particularly complicated. There is no reason to believe there would be any efficiency interest that would warrant dismissing Plaintiffs' claims under the primary jurisdiction doctrine. Therefore, the Court would decline Defendant's MTD on primary jurisdiction grounds.

C. Failure to State a Claim Under California Consumer Protection Statutes

Defendant argues that Plaintiffs' UCL, FAL, and CLRA claims (Claims 1,2, and 3), "which are all premised on the allegation that Walmart falsely and misleadingly labeled the Equate Gelcap Products as 'Rapid Release,' should be dismissed for failure to state a claim" because Plaintiffs have not "plausibly alleged" that the labeling of the Equate Gelcap Products, using the words "rapid release" are false, deceptive, or misleading. *Id.* at 16. Defendant cites to the FDA regulations which it claims "*conclusively* prove that the Equate Gelcaps *are* 'Rapid Release.' " *Id.* For the same reasons set forth in the Court's analysis of preemption, the Court would disagree.

[6] Defendant's references to the two guidance documents cited above are insufficient. The FDA has declined to promulgate a single final regulation related to the dissolution standards for OTC analgesic medications, despite considering the issue as far back as 1988. *See* 1988 TFM. Defendant does not raise any indication that the FDA is intending to revisit that matter in the near future.

Although the FDA has released guidance indicating what constitutes "rapidly dissolving" and "very rapidly dissolving" OTC medications, that does not end the Court's inquiry into whether Plaintiffs have sufficiently alleged that the Equate gelcap labels are false, deceptive, or misleading.

As alleged by Plaintiffs, the advertising and labeling at issue indicates that the "rapid release" product would give the consumer "rapid relief." *See* FAC ¶¶ 82, 89. Whether that statement was false, deceptive, or misleading cannot be determined by reference to non-binding FDA guidance defining "rapidly dissolving" medication. Additionally, Plaintiffs have alleged that a study has demonstrated that Defendant's higher priced Equate rapid release acetaminophen gelcaps actually dissolve slower than its lower priced Equate non-rapid release tablets and that the Defendant knew (or should have known) that the former is not any faster or more effective than the latter. Under California's Consumer Protection Laws, a statement need not even necessarily be untrue, if for a reasonable consumer the statement would be "either actually misleading" or have the "capacity, likelihood, or tendency to deceive or confuse the public." *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Taken in the light most favorable to Plaintiffs, they have certainly alleged that the labeling of the Equate gelcaps could have the capacity to confuse/mislead the public. The Equate gelcaps are sold as an alternative to traditional acetaminophen tablets, which are sold at a lower price and do not contain the statement "rapid release" language on the label. *See generally* FAC. It is certainly plausible that a reasonable consumer, under the circumstances, could be convinced by the Equate label, that it would provide more rapid relief than traditional acetaminophen tablets.

The Court is not convinced by any of the alternative contentions asserted by Defendant in support of its argument that Plaintiffs have failed to state a claim under the California Consumer Protection Statutes. Plaintiffs reliance on *In re iPhone 4s Consumer Litig.*, 637 F. App'x 414, 415 (9th Cir. 2016) is misplaced. In that case, the Circuit found that plaintiffs failed to allege with certainty what their expectations of the product were. *Id.* at 415-416. Here, Plaintiffs allege that they expected the rapid release gelcaps to work more quickly than traditional acetaminophen tablets. *See generally* FAC. Furthermore, Plaintiffs are not relying on lack of substantiation to make their claims. *See* MTD at 20. They are merely utilizing a scientific study as evidence that the labeling of the Equate gelcaps was misleading. The study also does nothing to disprove Plaintiffs' claim. As explained above, Plaintiffs need not show that Defendant's claims were necessarily untrue if they can prove that the claims would mislead a reasonable consumer. Finally,

the Court will not dismiss, at this time, Plaintiffs' claims on the assertion that the Equate gelcaps labeling and advertisements were "mere puffery." MTD at 19. As stated previously, unlike in *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Service Inc.*, 911 F.2d 242, 245-46 (9th Cir. 1990), Plaintiffs here have asserted facts which would plausibly lead to the conclusion that a reasonable consumer could interpret the Equate labels to contain factual statements upon which he or she could rely.

The Court would also find that Plaintiffs have plausibly stated a claim that Defendant violated its duty to disclose. Under *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal.3d 285, 294 (1990), a cause of action for duty to disclose may arise if "the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosures likely to mislead." *Id.* Here, Plaintiffs allege that Defendant stated that the gelcaps would provide "rapid relief" but did not qualify that statement with the fact that the relief would be no more "rapid" than that provided with its alternative traditional tablets. *See generally* FAC. This omission, as alleged in the FAC, had a likelihood of misleading consumers, and did mislead Named Plaintiffs. *See generally* FAC. Therefore, the Court is not convinced by this argument by Defendant.

Finally, Plaintiff Edwards has standing to pursue her California consumer protection claims. Under the UCL, FAL, and CLRA a plaintiff must show that a misrepresentation was an immediate cause of the alleged injury, but it is not "necessary that [plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct." *In re Tobacco II Cases*, 46 Cal.4th 298, 326 (Cal. 2009). Here, although Edward's doctor suggested she purchase Equate's gelcaps, she also clearly asserts that she relied upon the labeling of the product in deciding to make her purchase. FAC ¶ 82-84. Therefore, Defendant's argument that Edwards lacks standing fails.

Thus the Court would decline to dismiss any of Plaintiffs' consumer protection claims on the basis of failure to state a claim.

D. California's Safe Harbor Doctrine

Defendant claims that Plaintiffs' FAL (Claim 1), UCL (Claim 2), and CLRA (Claim 3) claims should be dismissed under California's "safe harbor" doctrine because it has complied with the FDA regulatory scheme for using the words "rapid release." MTD at 21. This argument fails for the same reasons Defendant's argument related to preemption fails. *See Von Koenig v. Snapple*

Beverage Corp., 713 F.Supp.2d 1066, 1076 (E.D.Cal. 2010) ("[T]he determination of whether federal policy is to be accorded the weight of federal law for purposes of the application of the safe harbor rule is analogous to that same determination for the purposes of preemption."). Defendant has not established any binding federal law or regulation that governs the use of the words "rapid release" or exactly how the Defendant maneuvered itself into that position. Therefore, the Court would decline to dismiss Plaintiffs' claims based on California's safe harbor doctrine.

E. Failure to State a Claim for Breach of Implied and Express Warranty

Defendant asserts that Plaintiffs' warranty causes of action under the Song-Beverly Act (Claim 4), the UCC (Claims 5 and 6) and the Magnuson-Moss Warranty Act (Claim 7) must be dismissed because the FAC does not plausibly allege that Walmart failed to fulfill any of the "promises or affirmations of fact on the label." MTD at 22-23. The Court would agree. The only language which Plaintiffs appear to reference are the words "rapid release" and, thereafter, they make the generalized contention that the rapid release gelcaps do not conform to the promises or affirmations of fact made on the label or in the advertising and marketing of the product because they do not provide "rapid release or provide rapid release faster than cheaper, non-rapid release acetaminophen Walmart Equate products." *See* FAC at ¶¶ 141-42, 152-53, 163-64, 177. However, Plaintiffs fail to reference or allege that there is actual language on the Defendant's rapid release gelcap packaging (or anywhere else in the product) which actually promises faster or cheaper relief. Nor have the Plaintiffs cited to any actual wording which incorporates comparative representations (*e.g.* "faster" as opposed to "fast"). To say that a product provides "rapid relief" is like saying it provides "fast relief." It is unclear what the warranty breach would be in that context. Likewise, Plaintiffs have not alleged that Defendant's challenged products do not in fact provide pain relief.

In sum, the Court would grant Defendant's motion to dismiss Plaintiffs' warranty causes of action but with leave to amend.

F. Plaintiffs' Remaining Claims

Defendant asserts that Plaintiffs' claims for unjust enrichment (Claim 8) and declaratory relief (Claim 9) fail because they cannot serve as a stand alone claim for relief. This Court would agree. As stated in *Sacramento E.D.M., Inc. v. Hynes Aviation Indus.*, No. 2:13–cv–0288–KJN, 2017 WL 1383289 *20 (E.D. Ca. Apr. 18, 2017), "Declaratory relief and unjust enrichment are

not independent causes of action under California law; instead, they are forms of relief that may be requested in conjunction with a cognizable cause of action that permits a court to grant such relief." *See also Hill v. Roll Int'l Corp*., 195 Cal. App. 4th 1295, 1307 (2011) ("Unjust enrichment is not a cause of action," therefore providing no basis for relief in the absence of an actionable wrong). Thus, claims 8 and 9 must be dismissed as they cannot constitute independent causes of action, although they may serve as a request for a form of relief that can be granted pursuant to some other claim.

IV. Conclusion

In sum, the Court would **DENY** Defendant's MTD as to Plaintiffs' causes of action 1 through 3; **GRANT** it with leave to amend as to claims 4 through 7; and **Grant** it without leave to amend as to claims 8 and 9.