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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

DARRYL ROBINSON, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

BAYER CORPORATION, BAYER
HEALTHCARE LLC, and BAYER
HEALTHCARE
PHARMACEUTICALS INC.

Defendants.

Case No.

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 **I. Introduction.**

2 1. Defendants make, sell, and market Alka-Seltzer branded “Non-Drowsy”
3 over-the-counter cold and flu medicine that contain the active ingredient
4 Dextromethorphan Hydrobromide (“DXM”) and state prominently on the front of their
5 label that they are “Non-Drowsy.”¹

6 2. Defendants’ Non-Drowsy Alka-Seltzer Products state prominently on the
7 front of their label that they are “Non-Drowsy” products (juxtaposed against
8 Defendants’ nighttime versions that have no such claim and that are known to cause
9 drowsiness). By prominently labeling these products as “Non-Drowsy,” Defendants
10 led Plaintiff and other reasonable consumers to believe that the Non-Drowsy Alka-
11 Seltzer Products do not cause drowsiness, and that drowsiness cannot be a side effect
12 of those products.

13 3. But the truth is that products containing DXM—and thus the Non-Drowsy
14 Alka-Seltzer Products— can cause drowsiness, and drowsiness is a common side effect
15 of DXM. In this way, Defendants misled Plaintiff and other reasonable consumers
16 about the effects of the Non-Drowsy Alka-Seltzer Products.

17 4. In fact, after using Non-Drowsy Alka-Seltzer Product as directed on the
18 packaging during his work day, Plaintiff unexpectedly experienced drowsiness. He
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21 ¹ Throughout this Complaint, Alka-Seltzer products containing DXM that state on their
22 label that they are “Non-Drowsy” are called “Non-Drowsy Alka-Selzer Products.”
23 Specifically, the Non-Drowsy Products include: Alka-Seltzer Plus – Severe Cold
24 PowerFast Fizz Non-Drowsy Citrus Effervescent Tablets; Alka-Seltzer – Severe Cold
25 PowerFast Fizz Day Non-Drowsy Citrus Effervescent Tablets, Alka-Seltzer Plus –
26 Cold & Flu PowerMAX Gels Day Non-Drowsy, Alka-Seltzer Plus – Maximum
27 Strength Cold & Flu Day Non-Drowsy Liquid Gels; Alka-Seltzer Plus – Cold Day
28 Non-Drowsy Effervescent Tablets, Alka-Seltzer Plus – Severe Cold PowerFast Fizz
Day Non-Drowsy Citrus Effervescent Tablets; Day/Night Severe Cold and Flu (combo
pack); and Alka-Seltzer Plus – Cough, Mucus & Congestion PowerMAX Gels Day
Non-Drowsy.

1 would not have purchased or paid as much for a Non-Drowsy Alka-Seltzer Product had
2 he known that it could cause drowsiness.

3 5. Defendants' misrepresentations allowed them to overcharge Plaintiff and
4 other consumers for the Non-Drowsy Alka-Seltzer Products.

5 **II. Parties.**

6 6. Plaintiff Darryl Robinson is a citizen of California (domiciled in Ventura
7 County, California). In or around February 2022, Plaintiff last purchased a Non-
8 Drowsy Alka-Seltzer Plus Product (Alka-Seltzer Plus Severe Cold Day/Night Pack
9 PowerFast Fizz Tablets) at a Walgreens in Oxnard, California. The package said
10 "Non-Drowsy" prominently on the label, and Plaintiff read and relied on this statement
11 when purchasing the product and used it. But when Plaintiff took the recommended
12 dose of the medication as directed on the label by Defendants, he became unexpectedly
13 drowsy. Plaintiff was not on any other medication that would have caused drowsiness,
14 and there was no other potential cause for this drowsiness, aside from the ingredients
15 in the Non-Drowsy Alka-Seltzer Product. Plaintiff would not have bought the Non-
16 Drowsy Alka-Seltzer Product or paid what he had for it had he known that the product
17 did, in fact, cause drowsiness, and that drowsiness was a known side-effect of the
18 product. The price Plaintiff paid for the Alka-Seltzer medication was inflated due to
19 the misleading "Non-Drowsy" label, for the reasons set forth above. In fact, because
20 the product causes drowsiness, it was not worth the price he paid for it. Plaintiff would
21 purchase Non-Drowsy Alka-Seltzer Products again if they were actually "Non-
22 Drowsy" (i.e., if the product was sold as advertised). Plaintiff, however, faces an
23 imminent threat of harm because he will not be able to rely on the labels in the future,
24 and thus will not be able to purchase the products.

25 7. Defendant Bayer Corporation is an Indiana corporation with its principal
26 place of business and headquarters located at 100 Bayer Road, Bldg. 4, Pittsburgh, PA,
27 15205. Bayer Corporation is a subsidiary of Bayer AG, a German company and one of
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1 the world's largest pharmaceutical companies. At all relevant times hereto, Bayer
2 Corporation was engaged in manufacturing, marketing, distributing, and advertising
3 Non-Drowsy Alka-Seltzer Products throughout the United States. Bayer Corporation
4 created and/or authorized the false and misleading advertising and labeling of the Non-
5 Drowsy Alka-Seltzer Products. the false and misleading advertising and labeling of the
6 Non-Drowsy Products.

7 8. Defendant Bayer HealthCare LLC is a Delaware company with its
8 principal place of business in Whippany, New Jersey. Bayer HealthCare LLC is one of
9 the owners, manufacturers, or distributors of the Non-Drowsy Alka-Seltzer Products,
10 and is one of the companies that created and/or authorized the false and misleading
11 labeling for the Non-Drowsy Alka-Seltzer Products.

12 9. Defendant Bayer HealthCare Pharmaceuticals Inc. is a Delaware
13 corporation with its principal place of business in Whippany, New Jersey. Bayer
14 HealthCare Pharmaceuticals Inc. is one of the owners, manufacturers, or distributors
15 of the Non-Drowsy Alka-Seltzer Products, and is one of the companies that created
16 and/or authorized the false and misleading labeling for the Non-Drowsy Alka-Seltzer
17 Products.

18 10. Defendants have been doing business in the State of California during all
19 relevant times. Directly and through their agents, Defendants have substantial contacts
20 with and receive substantial benefits and income from and through the State of
21 California.

22 **III. Jurisdiction and Venue.**

23 11. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2).
24 The amount in controversy exceeds the sum or value of \$5,000,000, exclusive of
25 interest and costs, and the matter is a class action in which one or more members of the
26 proposed class are citizens of a state different from the Defendants.
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1 12. The Court has personal jurisdiction over Defendants because Defendants
2 sold Non-Drowsy Alka-Seltzer Products to consumers in California, including
3 Plaintiff.

4 13. Venue is proper under 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(d)
5 because Defendants would be subject to personal jurisdiction in this District if this
6 District were a separate state, given that Defendants sold the Non-Drowsy Alka-Seltzer
7 Products to consumers in this District, including Plaintiff. Venue is also proper under
8 28 U.S.C. § 1391(b)(2) because a substantial part of Defendants’ conduct giving rise
9 to the claims occurred in this District, including selling the Non-Drowsy Alka-Seltzer
10 Products to Plaintiff.

11 **IV. Facts.**

12 **A. Defendants make, market, and sell Non-Drowsy Alka-Seltzer Products**
13 **prominently labeled “Non-Drowsy.”**

14 14. Defendants make, market and sell the Non-Drowsy Alka-Seltzer
15 Products. They are advertised prominently, including the front of each Non-Drowsy
16 Alka-Seltzer Product, that the product is “Non-Drowsy.” For example:
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ALKA-SELTZER PLUS® SEVERE NON-DROWSY COLD POWERFAST FIZZ™ CITRUS EFFERVESCENT TABLETS²

15. Further, the Products are sold as “Day Non-Drowsy” products that are meant to be consumed during the day when most people are awake, and offered for sale as an alternative to Defendants’ “Night” (and other products), which make no “Non-Drowsy” claim, such as the ones pictured below:

² <https://www.alkaseltzer.com/plus/cold-flu/products/nondrowsy-cold-powerfast-fizz-citrus-effervescent-tablets>.



ALKA-SELTZER PLUS® SEVERE DAY & NIGHT COLD POWERFAST FIZZ™ EFFERVESCENT TABLETS³



³ <https://www.alkaseltzer.com/plus/cold-flu/products/day-night-powerfast-fizz-effervescent-tablets>

1 **ALKA-SELTZER PLUS® MAXIMUM STRENGTH DAY COLD & FLU**
2 **POWERMAX® GELS**

3 Colds don't care about the busy day you've got planned, and the distracting symptoms
4 at every turn aren't exactly timed either. With Alka-Seltzer Plus® Maximum Strength
5 Day Cold & Flu PowerMax® Gels, you get concentrated power in a 25% smaller pill*
6 to help take back your day from:

- 7 • Nasal congestion
- 8 • Sinus pressure
- 9 • Sore throat
- 10 • Cough
- 11 • Headache and body ache
- 12 • Fever⁴

13 16. In reality, however, the “Day Non-Drowsy” version causes drowsiness.
14 Accordingly, if a reasonable consumer knew the truth, it would eviscerate the reason
15 that consumers buy “Day Non-Drowsy” cold and flu relief products in the first place:
16 to avoid drowsiness when they need to be alert.

17 17. These representations are materially the same across all Non-Drowsy
18 Alka-Seltzer Products.

19 18. Based on the prominent “Non-Drowsy” and “Day” label included on the
20 face of each product, a reasonable consumer would believe that the products do not
21 cause drowsiness. That is, a reasonable consumer would believe that drowsiness
22 cannot be a side-effect of the products.

23 19. Defendants labeled the products this way because they intended
24 consumers to rely on these representations of “Non-Drowsy” and to believe that the
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28 ⁴ <https://www.alkaseltzer.com/plus/cold-flu/products/day-cold-flu-powermax-gels>

1 products would not cause drowsiness, so that consumers would buy more products or
2 pay more for them.

3 **B. The Non-Drowsy Alka-Seltzer Products cause drowsiness.**

4 20. In truth, products containing DXM—like the Non-Drowsy Alka-Seltzer
5 Products—do cause drowsiness, and drowsiness is a documented side effect of DXM.⁵

6 21. In fact, drowsiness is a common side effect at the recommended dosages.
7 According to a 2017 GlaxoSmithKline presentation on drug labeling, a “common”
8 adverse reaction (i.e., side effect) is one that occurs in 3% or more drug takers and a
9 “very common” side effect occurs in 10% or more drug takers. Similarly, Pfizer’s
10 safety data sheet for DXM drugs states that “drowsiness” is a “common” adverse
11 reaction associated with “clinical use.”⁶ For example, one study found that
12 “[s]omnolence is a common side effect of centrally acting antitussive drugs” like
13 dextromethorphan, and that 10.4% of users of products containing dextromethorphan
14 develop drowsiness within three days of starting treatment with DXM cough medicine.
15 ^{7, 8} The “cases of intense somnolence” were “related only to dextromethorphan” and
16 not to the other drug studied. And patients in this clinical study were given an even
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20 ⁵ Dextromethorphan: MedlinePlus Drug Information, NIH National Library of
21 Medicine, <https://medlineplus.gov/druginfo/meds/a682492.html> (listing drowsiness as
a side effect)

22 ⁶Pfizer, Safety Data Sheet at page 6, March 25, 2015,
23 [https://imgcdn.mckesson.com/CumulusWeb/Click_and_learn/SDS_9PFIZ_ROBITU
24 SSIN_DM_SYRP_4OZ.pdf](https://imgcdn.mckesson.com/CumulusWeb/Click_and_learn/SDS_9PFIZ_ROBITU_SIN_DM_SYRP_4OZ.pdf) (“Common adverse reactions associated with the clinical
use of dextromethorphan hydrobromide include, drowsiness”).

25 ⁷ E. Catena and L. Daffonchio, “Efficacy and Tolerability of Levodropropizine in Adult
26 Patients with Non-productive Cough, Comparison with Dextromethorphan,” 10
Pulmonary Pharmacology & Therapeutics 89-96 (1997).

27 ⁸ The study reports this side effect as “somnolence.” Somnolence means “the quality
28 or state of being drowsy.” Merriam Webster Dictionary, [https://www.merriam-
webster.com/dictionary/somnolence](https://www.merriam-webster.com/dictionary/somnolence)

1 smaller dosage of DXM (15 mg three times a day) than the recommended dose found
 2 in many Alka-Seltzer products.⁹

3 22. The FDA’s adverse event report database confirms that “sedation” is one
 4 of the most frequently-cited side effects of dextromethorphan-containing products.¹⁰

5 23. For this reason, the Federal Aviation Administration prohibits pilots from
 6 flying after ingesting medicines that contain “dextromethorphan,” including
 7 specifically DayQuil, a cough/cold medicine similar to Non-Drowsy Alka-Seltzer
 8 Products. Drugs like DayQuil are “antihistamine free,” yet are still banned by the FAA
 9 because they have DXM that causes drowsiness¹¹:

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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16 **C. Defendants’ Non-Drowsy representations are misleading to reasonable**
 17 **consumers.**

18 24. It is misleading to label a product “Non-Drowsy” when it can cause
 19 drowsiness, or if drowsiness is a known side effect of one of its active ingredients.

22 ⁹ For example: Alka-Seltzer Day Cold & Flu Multi-symptom Relief Liquid contains 20
 23 mg of DXM per 30 ml of syrup and the recommended dosage is 30 ml orally every 4
 24 hours.

25 ¹⁰ Sedation is associated with drowsiness. *See* IV/Monitored Sedation, American
 26 Society of Anesthesiologists, <https://www.asahq.org/madeforthismoment/anesthesia-101/types-of-anesthesia/ivmonitored-sedation/> (even “minimal” sedation means that
 27 “you’ll feel drowsy”)

28 ¹¹ https://www.faa.gov/licenses_certificates/medical_certification/media/OTCMedicationsforPilots.pdf

1 25. While the Federal Regulations relating to the labelling of antitussive drug
2 products do not require products with DM HBr to include an affirmative “drowsiness”
3 warning, see generally, 21 C.F.R. § 341.74, Defendants could have simply omitted the
4 false and misleading “Non-Drowsy” representations from the product labels. By
5 contrast, this case is about Defendants’ affirmative, “Non-Drowsy” misrepresentation
6 of its Products, not whether Defendants are required to warn whether their Non-Drowsy
7 Alka-Seltzer Products can cause drowsiness because they contain DXM.

8 26. Based on the fact that Defendants advertised the Non-Drowsy Alka-
9 Seltzer Products as “Non-Drowsy,” a reasonable consumer would expect that those
10 products cannot cause drowsiness. Similarly, a reasonable consumer would expect that
11 drowsiness is not a side effect of the products (much less a common side effect).
12 Indeed, according to Consumer Reports, “‘Non-drowsy’ is code for antihistamines and
13 other medications that don’t make you sleepy.”¹² This is the plain meaning of “non-
14 drowsy,” which means “not causing or accompanied by drowsiness.”

15 27. Unlike Defendants, some other drug makers do not falsely claim that
16 DXM-products are non-drowsy. For example, DXM is an active ingredient in Mucinex
17 DM, sold by Reckitt. But the Mucinex label does not claim that Mucinex DM is non-
18 drowsy, because this is not the truth.

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27 ¹² How to read over the counter (OTC) drug labels, Consumer Reports,
28 <https://www.consumerreports.org/cro/2014/04/how-to-read-over-the-counter-drug-labels/index.htm>



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11 28. Defendants could have simply omitted the false and misleading
12 statements, “Non-Drowsy” and “Day” from its products.

13 29. If Defendants wanted to say something to indicate that a Non-Drowsy
14 Alka-Seltzer Product might cause *less* drowsiness than another product, they could
15 have made a truthful statement to this effect, as other drug makers do.

16 30. For example, Dramamine contains an active ingredient that causes
17 drowsiness, Dimenhydrinate. Dramamine also sells a “less drowsy” version that
18 contains a different active ingredient, Meclizine, which causes less drowsiness. The
19 front label of Dramamine Less Drowsy prominently displays that it is “less drowsy”
20 not that it is “Non-Drowsy”:
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31. Whether or not an over-the-counter drug causes drowsiness is material to a reasonable customer. In certain situations, consumers prefer over-the-counter drugs that will not make them drowsy to products that may make them drowsy. For example, all else equal, a reasonable consumer would prefer to take a drug that does not cause drowsiness to one that does cause drowsiness during the day (or any periods of time when they plan to be awake). As a second example, if a consumer is planning to engage in activities that require them to be alert (like work), or during which they would prefer to be alert, that consumer would prefer to take a drug that does not cause drowsiness to one that does. Indeed, in many situations, taking a drug that does or can cause drowsiness can be dangerous. For example, taking a drug that causes drowsiness while driving is dangerous.

32. Because Defendants make and sell the Non-Drowsy Alka-Seltzer Products, Defendants researched the known and common side effects of DXM as required when selling a drug. As a result, Defendants knew that DXM could cause drowsiness. Furthermore, Defendants control their labeling, knowingly put on the “Non-Drowsy” and “Day” representations, and know the plain meaning of “Non-Drowsy.” Finally, it is standard practice in the industry to test labeling with consumers, and Defendants’ testing would confirm that “Non-Drowsy” is misleading. For these

1 reasons, Defendants knew or had reason to know that their advertising of their Non-
2 Drowsy Alka-Seltzer Products was false and misleading, or was reckless or willfully
3 blind to this fact.

4 33. And as alleged above, Defendants intended that consumers would rely on
5 the “Non-Drowsy” and “Day” advertising, so that consumers would purchase more
6 products, pay a price premium, and buy them as alternatives to their “Nighttime”
7 products.

8 34. Defendants’ false statements increased the demand for Non-Drowsy
9 Alka-Seltzer Products and allowed Defendants to charge a price premium. As
10 explained above, consumers specifically value the “Non-Drowsy” claim because
11 consumers demand cold/cough and flu medicine that will not make them drowsy (e.g.,
12 during the day, at work or while driving). As a result, Defendants were able to charge
13 more for these products than they would have been able to had the advertising been
14 truthful. Accordingly, as a direct result of Defendants’ false statements, Defendants
15 were able to charge a price premium for these products. As purchasers, Plaintiff and
16 each class member paid this price premium and sustained economic injury.

17 35. In addition, because the Non-Drowsy Alka-Seltzer Products actually do
18 cause drowsiness, Plaintiff and each class member did not get what they paid for: a
19 cold/cough and flu medicine that does not cause drowsiness. Instead, they received
20 something that is worth less: a cold/cough and flu medicine that can cause drowsiness.
21 Plaintiff and each class member sustained an economic injury for this additional reason,
22 i.e., they received something worth less than the price they paid for it.

23 36. Moreover, the Non-Drowsy Alka-Seltzer Products are sold specifically
24 for use in situations where it is not acceptable for consumers to become drowsy (e.g.,
25 while driving, working, or supervising children). As a result, the products that Plaintiff
26 and each class member did receive in exchange for the price they paid—Non-Drowsy
27 Alka-Seltzer Products that cause drowsiness—were not suitable for, and were thus
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1 worthless for, their intended purpose. The economic injury Plaintiff and each class
2 member sustained consists of the entire purchase price of the products, because what
3 they received was worthless for its intended use.

4 **D. Class Action Allegations.**

5 37. Plaintiff brings certain claims on behalf of a subclass of consumers who
6 live in the identified states (the “**Consumer Protection Subclass**”).

7 38. For certain claims, Plaintiff brings those claims on behalf of a subclass of
8 consumers who, like Plaintiff, purchased Non-Drowsy Alka-Seltzer Products in
9 California (the “**California Subclass**”).

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

19 ***Numerosity***

20 40. The proposed class contains members so numerous that separate joinder
21 of each member of the class is impractical. Based on the pervasive distribution of Non-
22 Drowsy Alka-Seltzer Products, there are millions of proposed class members.

23 ***Commonality***

24 41. There are questions of law and fact common to the proposed class.
25 Common questions of law and fact include, without limitation:
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- 27 • Whether the Non-Drowsy Alka-Seltzer Products cause drowsiness;
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- 1 • Whether Defendants’ labeling of the Non-Drowsy Alka-Seltzer Products
2 as “Non-Drowsy” and “Day” is deceptive and misleading;
- 3 • Whether Defendants violated state consumer protection statutes;
- 4 • Whether Defendants committed a breach of express warranty; and
- 5 • Damages needed to reasonably compensate Plaintiff and the proposed
6 class.

7 ***Typicality***

8 42. Plaintiff’s claims are typical of the proposed class. Like the proposed
9 class, Plaintiff purchased Non-Drowsy Alka-Seltzer Products.

10 ***Predominance and Superiority***

11 43. The prosecution of separate actions by individual members of the
12 proposed class would create a risk of inconsistent or varying adjudication with respect
13 to individual members, which would establish incompatible standards for the parties
14 opposing the class. For example, individual adjudication would create a risk that
15 breach of the same express warranty is found for some proposed class members, but
16 not others.

17 44. Common questions of law and fact predominate over any questions
18 affecting only individual members of the proposed class. These common legal and
19 factual questions arise from central issues which do not vary from class member to
20 class member, and which may be determined without reference to the individual
21 circumstances of any particular class member. For example, a core liability question
22 is common: whether Defendants’ “Non-Drowsy” labeling is false and misleading.

23 45. A class action is superior to all other available methods for the fair and
24 efficient adjudication of this litigation because individual litigation of each claim is
25 impractical. It would be unduly burdensome to have individual litigation of millions
26 of individual claims in separate lawsuits, every one of which would present the issues
27 presented in this lawsuit.
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1 **V. Claims.**

2 **Count I: Violations of California Consumer Protection Law and**
 3 **Materially-Similar State Consumer Protection Laws**

4 **(on behalf of Plaintiff and the Consumer Protection Subclass and in the**
 5 **alternative the California Subclass)**

6 46. Plaintiff incorporates by reference each and every factual allegation set forth above.

7 47. As alleged below, Plaintiff (who lives in California) brings his individual
 8 and certain subclass claims based on California consumer protection laws. In the
 9 alternative, Plaintiff brings his claims on behalf of a California Subclass. At the motion
 10 to dismiss stage (pre-certification), his claims are governed by California law. At
 11 certification, Plaintiff intends to certify this count on behalf of the Consumer Protection
 12 Subclass, which includes consumers who live in the states listed below:

State	Statute
California	Cal. Bus. & Prof. Code § 17200, and the following; <i>Id.</i> §17500, and the following Cal. Civ. Code §1750 and the following.
Illinois	815 ILCS § 501/1, and the following.
Maryland	Md. Code Ann. Com. Law, § 13-301, and the following.
Hawaii	Haw. Rev. Stat. § 480-2, and the following.
New York	N.Y. Gen. Bus. Law § 349, and the following.
Washington, D.C.	D.C. Code § 28-3901, and the following.

1 2	Missouri	Mo. Rev. Stat. § 407, and the following.
3 4	Washington	Wash. Rev. Code § 19.86.010, and the following.
5 6	Connecticut	Conn. Gen. Stat. Ann. §§ 42-110, and the following.

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48. Each of these statutes is materially similar to California consumer protection law. Each broadly prohibits deceptive conduct in connection with the sale of goods to consumers. No state requires proof of individualized reliance, or proof of Defendants' knowledge or intent. Instead, it is sufficient that the deceptive conduct is misleading to reasonable consumers and that the conduct proximately caused harm. Defendants' conduct violates each statute's shared prohibitions.

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49. 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. Defendants' conduct, including the false labeling of the Non-Drowsy Alka-Seltzer Products and sale of those misleading products to Plaintiff and Class members, violates each statute's prohibitions.

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50. Defendants' misrepresentations were a substantial factor in Plaintiff's purchase decision and the purchase decision of Class members. Defendants' misrepresentations were misleading to a reasonable consumer, and Plaintiff and Class members reasonably relied on Defendants' misrepresentations.

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51. Plaintiff and Subclass members were injured as a direct and proximate result of Defendants' conduct because (a) they would not have purchased the Products if they had known that the products cause drowsiness; (b) they overpaid for the Products because the products are sold at a price premium due to Defendants'

1 misrepresentations; or (c) they received products that were worthless for their intended
2 purpose.

3 **Count II: Violation of California’s Unfair Competition Law (UCL)**
4 **(on behalf of Plaintiff and the California Subclass)**

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

7 53. Plaintiff brings this cause of action on behalf of himself and members of
8 the California Subclass.

9 54. Defendants has violated California’s Unfair Competition Law (UCL) by
10 engaging in unlawful, fraudulent, and unfair conduct (i.e., violating each of the three
11 prongs of the UCL).

12 ***The Unlawful Prong***

13 55. Defendants engaged in unlawful conduct by violating the CLRA and FAL,
14 as alleged below and incorporated herein. In addition, Defendants engaged in unlawful
15 conduct by violating the California Sherman Act, Cal. Health & Safety Code § 110390,
16 which prohibits drug labeling that is “false or misleading in any particular.”

17 ***The Fraudulent Prong***

18 56. As alleged in detail above, Defendants’ “Non-Drowsy” and “Day”
19 representations were false and misleading. Defendants’ misrepresentations were likely
20 to deceive, and did deceive, Plaintiff and reasonable consumers.

21 ***The Unfair Prong***

22 57. Defendants violated established public policy by violating the CLRA and
23 FAL, as alleged below and incorporated herein. The unfairness of this practice is
24 tethered to a legislatively declared policy (that of the CLRA, FAL, and Sherman Act).

25 58. The harm to Plaintiff and the Class greatly outweighs the public utility of
26 Defendants’ conduct. There is no public utility to misrepresenting the side effects of
27 an over-the-counter medication. This injury was not outweighed by any countervailing
28

1 benefits to consumers or competition. Misleading medication labels only injure
2 healthy competition and harm consumers.

3 59. Defendants' conduct, as alleged above, was immoral, unethical,
4 oppressive, unscrupulous, and substantially injurious to consumers.

5 60. Plaintiff and the Class could not have reasonably avoided this injury. As
6 alleged above, Defendants' representations were deceiving to reasonable consumers
7 like Plaintiff.

8 61. For all prongs, Defendants' misrepresentations were intended to induce
9 reliance, and Plaintiff saw, read and reasonably relied on them when purchasing Non-
10 Drowsy Alka-Seltzer Products. Defendants' misrepresentations were a substantial
11 factor in Plaintiff's purchase decision.

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

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

17 64. Plaintiff and Subclass members were injured as a direct and proximate
18 result of Defendants' conduct because (a) they would not have purchased the Products
19 if they had known that the products cause drowsiness; (b) they overpaid for the
20 Products because the products are sold at a price premium due to Defendants'
21 misrepresentations; or (c) they received products that were worthless for their intended
22 purpose.

23 65. Plaintiff seeks an injunction and equitable restitution (in the alternative to
24 legal relief).

25
26 **Count III: Violation of California's False Advertising Law (FAL)**
27 **(on behalf of Plaintiff and the California Subclass)**
28

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

3 67. Plaintiff brings this cause of action on behalf of himself and members of
4 the California Subclass.

5 68. As alleged more fully above, Defendants has falsely advertised Non-
6 Drowsy Alka-Seltzer Products by falsely representing that the products cannot cause
7 drowsiness and that drowsiness is not a side-effect of the products.

8 69. Defendants' representations were likely to deceive, and did deceive,
9 Plaintiff and reasonable consumers. Defendants knew, or should have known through
10 the exercise of reasonable care, that these statements were inaccurate and misleading.

11 70. Defendants' misrepresentations were intended to induce reliance, and
12 Plaintiff saw, read and reasonably relied on them when purchasing Non-Drowsy Alka-
13 Seltzer Products. Defendants' misrepresentations were a substantial factor in
14 Plaintiff's purchase decision.

15 71. In addition, classwide reliance can be inferred because Defendants'
16 misrepresentations were material, i.e., a reasonable consumer would consider them
17 important in deciding whether to buy the Non-Drowsy Alka-Seltzer Products.

18 72. Defendants' misrepresentations were a substantial factor and proximate
19 cause in causing damages and losses to Plaintiff and Subclass members.

20 73. Plaintiff and Subclass members were injured as a direct and proximate
21 result of Defendants' conduct because (a) they would not have purchased the Products
22 if they had known that the products cause drowsiness; (b) they overpaid for the
23 Products because the products are sold at a price premium due to Defendants'
24 misrepresentations; or (c) they received products that were worthless for their intended
25 purpose.

26 74. Plaintiff seeks an injunction and equitable restitution (in the alternative to
27 legal relief).
28

Count IV: Violation of California’s Consumer Legal Remedies Act
(CLRA)

(on behalf of Plaintiff and the California Subclass)

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3 75. Plaintiff incorporates by reference and re-alleges each and every
4 allegation set forth above as though fully set forth herein.

5 76. Plaintiff brings this cause of action on behalf of himself and members of
6 the California Subclass.

7 77. Plaintiff and the other members of the California Subclass are
8 “consumers,” as the term is defined by California Civil Code § 1761(d).

9 78. Plaintiff, the other members of the California Subclass, and Defendants
10 has engaged in “transactions,” as that term is defined by California Civil Code §
11 1761(e).

12 79. The conduct alleged in this Complaint constitutes unfair methods of
13 competition and unfair and deceptive acts and practices for the purpose of the CLRA,
14 and the conduct was undertaken by Defendants in transactions intended to result in,
15 and which did result in, the sale of goods to consumers.

16 80. As alleged more fully above, Defendants has violated the CLRA by falsely
17 representing to Plaintiff and the other members of the California Subclass that the Non-
18 Drowsy Alka-Seltzer Products cannot cause drowsiness, and that drowsiness is not a
19 side effect of the products, when in fact, the products can cause drowsiness.

20 81. As a result of engaging in such conduct, Defendants have violated
21 California Civil Code § 1770(a)(5), (a)(7), and (a)(9).

22 82. Defendants’ representations were likely to deceive, and did deceive,
23 Plaintiff and reasonable consumers. Defendants knew, or should have known through
24 the exercise of reasonable care, that these statements were inaccurate and misleading.

25 83. Defendants’ misrepresentations were intended to induce reliance, and
26 Plaintiff saw, read and reasonably relied on them when purchasing Non-Drowsy Alka-
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1 Seltzer Products. Defendants' misrepresentations were a substantial factor in
2 Plaintiff's purchase decision.

3 84. In addition, classwide reliance can be inferred because Defendants'
4 misrepresentations were material, i.e., a reasonable consumer would consider them
5 important in deciding whether to buy the Non-Drowsy Alka-Seltzer Products.

6 85. Defendants' misrepresentations were a substantial factor and proximate
7 cause in causing damages and losses to Plaintiff and Subclass members.

8 86. Plaintiff and Subclass members were injured as a direct and proximate
9 result of Defendants' conduct because (a) they would not have purchased the Products
10 if they had known that the products cause drowsiness; (b) they overpaid for the
11 Products because the products are sold at a price premium due to Defendants'
12 misrepresentations; or (c) they received products that were worthless for their intended
13 purpose.

14 87. Accordingly, pursuant to California Civil Code § 1780(a)(3), Plaintiff, on
15 behalf of himself and all other members of the California Subclass, seeks injunctive
16 relief.

17 88. CLRA § 1782 NOTICE. On June 7, 2022, a CLRA demand letter was
18 sent to Defendants' registered agent, via certified mail (return receipt requested). This
19 letter provided notice of Defendants' violation of the CLRA, for Plaintiff and the class,
20 and demanded that Defendants correct the unlawful, unfair, false and/or deceptive
21 practices alleged here. If Defendants does not fully correct the problem for Plaintiff
22 and the Class within 30 days, Plaintiff will amend to seek all available monetary relief.
23

24 **Count V: Negligent Misrepresentation**
(on behalf of Plaintiff and the California Subclass)

25 89. Plaintiff incorporates by reference the facts alleged above.

26 90. Plaintiff alleges this claim individually and on behalf of the California
27 Subclass.
28

1 91. As alleged in detail above, Defendants' labeling represented to Plaintiff
2 and Subclass members that the Non-Drowsy Alka-Seltzer Products do not cause
3 drowsiness and that drowsiness is not a side effect of these products.

4 92. These representations were false. As alleged above, the Non-Drowsy
5 Alka-Seltzer Products cannot cause drowsiness and drowsiness is a documented side
6 effect.

7 93. When Defendants made these misrepresentations, they knew or should
8 have known that they were false. Defendants had no reasonable grounds for believing
9 that these representations were true when made.

10 94. Defendants intended that Plaintiff and Subclass members rely on these
11 representations and Plaintiff and Subclass members read and reasonably relied on
12 them.

13 95. In addition, classwide reliance can be inferred because Defendants'
14 misrepresentations were material, i.e., a reasonable consumer would consider them
15 important in deciding whether to buy the Non-Drowsy Alka-Seltzer Products.

16 96. Defendants' misrepresentations were a substantial factor and proximate
17 cause in causing damages and losses to Plaintiff and Subclass members.

18 97. Plaintiff and Subclass members were injured as a direct and proximate
19 result of Defendants' conduct because (a) they would not have purchased the Products
20 if they had known that the products cause drowsiness; (b) they overpaid for the
21 Products because the products are sold at a price premium due to Defendants' false
22 misrepresentations; or (c) they received products that were worthless for their intended
23 purpose.
24

25 **Count VI: Quasi-Contract / Unjust Enrichment**
26 **(on behalf of Plaintiff and the California Subclass)**

27 98. Plaintiff incorporates by reference the facts alleged above.

28 99. Plaintiff brings this claim in the alternative to his legal claims.

1 100. As alleged in detail above, Defendants' false and misleading advertising
2 caused Plaintiff and the California Class to purchase Non-Drowsy Alka-Seltzer
3 Products and to pay a price premium for these products.

4 101. In this way, Defendants received a direct and unjust benefit, at Plaintiff's
5 expense.

6 102. Plaintiff and the California Class seek restitution.

7 **VI. Jury Demand.**

8 103. Plaintiff demands a jury trial on all issues so triable.

9 **VII. Prayer for Relief.**

10 104. Plaintiff seeks the following relief individually and for the proposed class
11 and subclasses:

- 12 • An order certifying the asserted claims, or issues raised, as a class
13 action;
- 14 • A judgment in favor of Plaintiff and the proposed class;
- 15 • Damages, treble damages, and punitive damages where applicable;
- 16 • Restitution;
- 17 • Disgorgement, and other just equitable relief;
- 18 • Pre- and post-judgment interest;
- 19 • An injunction prohibiting Defendants' deceptive conduct, as allowed by
20 law;
- 21 • Reasonable attorneys' fees and costs, as allowed by law;
- 22 • Any additional relief that the Court deems reasonable and just.

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27 Dated: June 7, 2022

Respectfully submitted,

By: /s/Scott Edelsberg

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