UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

BRADLEY COLGATE, et al.,

Plaintiffs, v. JUUL LABS, INC.,

Defendant.

Case No. 18-cv-02499-WHO

ORDER PARTIALLY GRANTING MOTION TO DISMISS AND DENYING MOTION TO STRIKE Re: Dkt. Nos. 40, 41

Plaintiffs are adults and minors from seven states bring class claims against defendant , a market leader in the burgeoning electronic cigarette industry, for rettes. JUUL argues that the Tobacco Control Act, 21 U.S.C. § 387 et seq. (TCA) claims. It is partially correct concerning its product labelling, because the TCA is very detailed about what must appear on the label. But claims that JUUL misrepresents the amount of nicotine in its product are not preempted. JUUL also moves First Amended Complaint (FAC), because it pleading requirements, to state a claim, and to identify applicable state laws. As discussed below, I grant in part and deny in part , with leave to amend. JUUL to

23(c)(1)(A), and 23(d)(1)(D) is not ripe and is denied.

BACKGROUND Plaintiffs are thirteen individuals from seven states: California, New Jersey, Washington, No. 24] ¶¶ 12-52. Plaintiffs fall into two categories, (1) adults who use JUUL electronic nicotine s ENDS. Plaintiffs Bradley Colgate, Kaytlin McKnight, Anthony Smith, Corey Smith, Kacie Ann Lagun, Tommy Benham, and David Except for McKnight, the adult plaintiffs smoked cigarettes prior to us mother and natural Guardian Jennifer Hellman, A.U. and her mother and natural guardian

Id. JUUL is a Delaware corporation with its principal place of business in San Francisco, California. Id. corporation with its principal place of business in San Francisco, California. Id. ¶ 54. JUUL originally operated under the name PAX Labs, Inc. Id. ¶ 53. In 2017, it was renamed JUUL Labs, Inc. and a new company was spun out as Pax Labs, Inc. Id.

JUUL manufactures an ENDS about the size and shape of a pack of chewing gum. Id. ¶ 67. The ENDS consists primarily of a rechargeable battery and heating element. Id. Consumers purchase disposable pre- the ENDS. Id. o not work with other ENDS systems. Id. that activates the heating element, converting the liquid nicotine contained in the pod to an inhalable vapor. Id. ¶ 68. Pods are sold in packs of four and in a variety of flavors, including mango, cool cucumber, fruit medley, cool mint, and crème brulee. Id. ¶ 70. salts. Id. ¶ a more pronounced effect than the nicotine in traditional cigarettes. Id. ¶¶ 79-82. They cite a

s contain 6.2% nicotine salt, rather than the 5% nicotine advertised. Id. ¶ 83. They also cite the same study to claim that JUUL uses a higher level of benzoic acid in their retail pods than was tested when JUUL applied for Id. They that designed to contain approximately 0.7mL with 5% nicotine by weight at time of manufacture Id. ¶ 89. Plaintiffs allege thId. ¶ 77. The packaging bears a California Proposition 65 nicotine warning indicating that the product contains a substance known to cause cancer, and a warning to keep pods away from children and pets. Id. There is no nicotine warning on the ENDS or pods themselves. Id. The product labeling does not contain any information about the known effects, or unknown long-term effects, of vaping/inhaling nicotine salts. Id. II In June 2015, JUUL launched its multimillion- promote its new product. Id. ¶ 98. JUUL advertised on a 12-panel display over Times Square in New York City, as well as in the front spread of Id. The Id. JUUL also launched a - Id. Plaintiffs the same themes that tobacco companies used to advertise to young

Id. ¶ 99. They state that to the extent that the Vaporized advertisements disclosed that JUUL products contained nicotine, the warnings were in small print against low-contrast backgrounds. Id. ¶ 103. JUUL also advertised on a number of social media platforms including Twitter, Instagram, and Facebook. Id. ¶ 114. Plaintiffs cite a study that found that JUUL grew nearly 700% despite

business advertising. Id. ¶ 116. The study concluded that JUUL was taking advantage of the advertising. Id. ¶ 121.

gas stations. Id. ¶ 111. They concerning the existence, danger, or amount of nicotine in JUUL products. Id. ¶ 112. A pack of four JUUL pods cost approximately $13. Id. ¶ 108. JUUL offers a 15% discount to purchasers Id. ¶ 109.

JUUL also owns and operates www. juullabs.com and www.juulvapor.com. Id. ¶ 123. tes. Id. ¶ 124. Plaintiffs allege that although JUUL represents that it uses state-of-the-art age verification for website purchases, it has been improperly implemented and numerous minors have been able to purchase products or obtain warranty service. Id. ¶ 127.

JUUL also offers a 15% discount to purchasers who join their pod subscription service. Id. ¶ 110. It asserts states that consumers may cancel their subscription at any time. Id. ¶ 129. Minor Plaintiffs allege that they were able to obtain JU prohibition on the sale of ENDS to those under the age of 18. M.H., L.B. and A.U. state that they

Id. ¶¶ 23, 30, 47. M.H. also asserts that pods are sold in her school by older students. Id. ¶ 23. L.B. claims that, November 2017. Id. ¶ 29.

LEGAL STANDARD I. MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss if a claim fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to on its Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation

Id. facts suffic Twombly, 550 U.S. at 555, 570.

en, where, and how of

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)

fraud be stated with particularity; other facts may be pleaded generally, or in accordance with Rule United States ex rel. Lee v. Corinthian Colls., 655 F.3d 984, 992 (9th Cir. 2011).

In deciding a motion to dismiss for failure to state a claim, the court accepts all of the factual allegations as true and draws all reasonable inferences in favor of the plaintiff. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). But the court is not required to accept as , or unreasonable In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). II. MOTION TO STRIKE

insufficient defense or any redundant, immateri

Sidney Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). Motions to strike are

Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F.

Supp. 2d 1048, 1057 (N.D. Cal. 2004). In addition, courts often require some showing of prejudice by the moving party before granting a motion to strike. Hernandez v. Dutch Goose, Inc., No. C 13-03537 LB, 2013 WL 5781476, at *5 (N.D. Cal. Oct. 25, 2013).

law, the motion to strike should be denied, leaving an assessment of the sufficiency of the allegations for adjudication on the merits Carolina Cas. Ins. Co. v. Oahu Air Conditioning Serv., Inc., 994 F. Supp. 2d 1082, 1090-91 (E.D. Cal. 2014). In resolving a motion to strike, I view the pleadings in a light most favorable to the nonmoving party. Platte Anchor Bolt, 352 F. Supp. 2d at 1057.

DISCUSSION Plaintiffs bring 11 causes of action: (1) False Advertising; (2) Violation of Consumers Legal Remedies Act, California Civil Code §§ 1750, et seq., and similar laws of other states; (3) Fraud;

(4) Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code § 17200 and similar laws of other states; (5) Unjust Enrichment, (6) Strict Liability Failure to Warn; (7) Strict Product Liability Design Defect; (8) Strict Liability Manufacturing Defect; (9) Breach of Implied Warranty of Merchantability; (10) Breach of Express Warranty; and (11) Negligent Misrepresentation. in the United States, a JUUL e- Id. ¶ 162. They also allege a at the time of their purchase were under the age of 18. Id. ¶ 163. JUUL moves to dismiss for three reasons. First, they argue that claims are preempted by the Federal Food, Drug, and Co TCA,

promulgate regulations on ENDS labeling. Second, they contend p fraud claim fails to assert that p

claims. I. EXPRESS PREEMPTION JUUL argues that p false advertising claim must be dismissed because it is expressly preempted by the FDCA as amended by the TCA and the relating implementing -13. JUUL contends that

ENDS are prescribed solely by 81 Fed. Reg. at 28988. Id. A. Relevant Statutes and Regulations The FDCA was enacted in 1938 and prohibits the misbranding of food. 21 U.S.C. § 301 et seq. In 2009, Congress enacted the TCA to grant the FDA authority to regulate tobacco products under the FDCA. See 21 U.S.C. § 387a(a). In enacting the TCA, Congress found that nicotine is he public interest for Congress to adopt legislation to address the public health crisis created by actions of the tobacco industry[.] Pub. L. 111-31, Div. A, § 2 (codified at 21 U.S.C. § 387a)(2009)).

Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking

Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco 28974 (May 10, 2016) (codified at 21 C.F.R. pts. 1100, 1140, 1143). The FDA Rule found that

81 Fed. Reg. §§ 28974, 28976. Covered tobacco products, such as ENDS, may not be sold to

individuals under the age of 18. 81 Fed. Reg. § 28974.

B. Preemption Under the TCA Express preem explicit congressional intent to pre- Barnett Bank of Marion Cnty., N.A. v.

Nelson, 517 U.S. 25, 31 (1996). When presented with the task of interpreting a statutory provision powers of the States were not to be superseded by the Federal Act unless that was the clear and

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal -emption case and any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose Id. at 485-86 (internal quotation marks and citations -emption statute and the statutory

Id. at 486.

The TCA contains an explicit preemption provision: No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labelling, registration, good manufacturing standards, or modified risk tobacco products.

written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompan

The FDA Rule requires precise language and placement of warnings labels on covered tobacco products, such as ENDS. The FDA Rule states that packaging for ENDS must display a warning that states: DA Rule contains strict

directly on the package, be clearly visible underneath any cellophane or other clear wrapping; . . . be located in a conspicuous and prominent place on the two principal display panels of the package and the warning area must comprise at least 30 percent of each of the principal display panels; and . . . must be in at least 12-point font size [with] the required warning statement [occup 21 C.F.R. § 1143.3(a)(2).

The FDA has unambiguously put forth the required language and placement of the nicotine warning label, down to the font and placement of the label. Considering the statutory and regulatory scheme in its entirety, I find that the FDA, through its authority under the TCA has prescribed the precise language and placement of warning labels on covered tobacco products such as ENDS under 21 C.F.R. §§ 1143.3(a)(1)(2). The specificity of the labelling requirements preemption provision, states and political subdivisions of states may not enact labeling

requirements or warnings contrary or in addition to those prescribed under 21 C.F.R. §§ 1143.3(a)(1)(2). See also In re Fontem US, Inc., No. SACV 15-01026, 2016 WL 6520142, at *3 (C.D. Cal. Nov. 1, 2016).

C. Claims Relating to More Thorough Warnings as Compared to Claims Relating to Nicotine Percentage Based on Product Labelling labelling claims essentially relate to two alleged misrepresentations by JUUL. First, plaintiffs allege that that JUUL should have warned consumers that the pharmacokinetics of salts, delivering an exceptionally potent dose of nicotine compared to traditional cigarettes. FAC

¶¶ 78-92. Second, plaintiffs allege that JUUL mislabels the dosage of nicotine on its pods at 5% when, in actuality, the dosage of nicotine is higher than 5%. Id. ¶ 83.

I find that Congress has intended to expressly preempt labeling requirements on ENDS packaging as shown by the preemption clause in the TCA and the specificity of the FDA Rule on labeling. 21

U.S.C.A. § 387p(2)(A); 21 C.F.R. §§ 1143.3(a)(1)(2). Plaintiffs believe that JUUL should be required to warn consumers of the pharmacokinetics, i.e. greater potency its benzoic acid and nicotine salt formulation delivers. If claims were allowed to go forward in this respect, it would constitute a usurpation of the power vested in the FDA by Congress to regulate the content of the warnings on labelling claims are pharmacokinetics of their formulation, even at a similar percentage of nicotine, is more potent than

it would be in a traditional cigarette due to its chemical makeup. JUUL may only be required to comply with the labeling requirements as articulated by 21 C.F.R. §§ 1143.3(a)(1)(2). To the extent that p the product label failing to disclose the greater potency motion to dismiss is granted. These claims are necessarily dismissed with prejudice.

To the extent that causes of action are based on the allegation that JUUL mislabels the dosage of nicotine on its pods at 5% when the dosage of nicotine is higher than 5%, these causes of action are not preempted by the TCA and FDA Rule. Plaintiffs allege that the actual percentage of nicotine contained Id. ¶ 83. This difference would 20% increase in nicotine would be the equivalent of a pack of cigarettes containing 24 cigarettes instead of 20. This difference, if proved, would be significant. An individual who believes they roducts may, in fact, be consuming the equivalent of four more cigarettes per pod.

JUUL argues that plaintiffs Opposition [Dkt. No. 55] at 17. At the motion to dismiss stage, I must accept all the factual

allegations as true and draw all reasonable inferences in favor of the plaintiffs. Usher, 828 F.2d at 561. For the purposes of this motion, I accept p contain 6.2% nicotine, rather than the 5% JUUL represents on the packaging. To the extent that

denied.

D. Retroactivity of the FDA RULE One court has already addressed whether the FDA Rule preempts p before and after the promulgation of the rule on August 8, 2016. Order Granting in Part and

Certification for Interlocutory Appeal, In Re Fontem US, Inc. Consumer Class Action Litig., 15-CV-01026 (C.D. Cal. March 8, 2017), Dkt. No. 110. In that case, Judge Selna found that the preemption clause of the TCA contained clear congressional intent favoring retroactivity. Id. at 5-effect with respect to a tobacco product any requirement which is different from, or in addition to,

any requirement . . .relating to to allow plaintiffs to pursue claims on conduct preempted by the TCA and FDA Rule which took place before August 8, 2016, would continue in effect policies preempted by federal law. Id. (citing Ileto v. Glock, Inc., 565 F.3d 1126, 1138 (9th Cir. 2009)). I agree with Judge Selna. Plaintiffs may not pursue their claims for conduct preempted under the TCA which took place

before August 8, 2016.

E. What Claims Survive Preemption? s are essentially based on either discussed above, I find that only claims based on the allegation that the product labelling fails to s of nicotine ingestion are expressly preempted. Any claims based on the mislabeling of the percentage of nicotine per pod are not preempted.

Further, I find that this distinction does not extend to advertisements. The TCA contains a subsection

[The preemption clause] does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. 21 U.S.C.A. § 387p(2)(B). The exception clause expressly excepts advertisements from preemption and no aspect of plaintiffs claims based on an allegedly misleading or fraudulent advertising is preempted by the TCA, including the issue of warning consumers about the potency . Resolving all inferences in favor of the non-moving party, this would apply to any plaintiffs who may have seen an advertisement but failed to closely read the label. Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 531 (N.D. Cal. 2012).

ments or the mislabeling of the amount of nicotine contained in each pod are not preempted by the TCA.

P . I now turn to whether

the misconduct Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)

fraud be stated with particularity; other facts may be pleaded generally, or in accordance with Rule United States ex rel. Lee v. Corinthian Colls., 655 F.3d 984, 992 (9th Cir. 2011). The purpose

misconduct which is alleged to constitute the fraud charged so that they can defend against the Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citation omitted). must identify 'the time, place, and content of [the] alleged misrepresentation[s],' as well as the 'circumstances indicating falseness' or 'manner in which the representations at issue were false and Frenzel v. AliphCom, 76 F. Supp. 3d 999, 1005 (N.D. Cal. 2014) (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 48 (9th Cir.1994)). JUUL argues that plaintiffs have failed to meet the heightened pleading requirement for claims sounding in fraud under Federal Rule of Civil Procedure 9(b) because they failed to identify what particular advertisements they saw; as a result, they cannot allege with specificity how those advertisements were false or misleading. Id. at 14-15. It asserts that plaintiffs have also failed to state when they saw the advertisements, where they saw them, or how they were influenced by them. Id.

Plaintiffs contend that they have sufficiently alleged that they saw the package labelling but labelling is not at issue here. Oppo. 17. They also cite In re Tobacco Cases II, 46 Cal.4th 298, 327-28 (2009) to argue that they do not need to identify specific advertisements in their complaint. Oppo. 15. But In re Tobacco Cases II was a Cal Plaintiffs further the class period were misleading. Id. at 18. If I were to accept this argument, it would eviscerate

Plaintiffs have failed to specifically identify what the advertisements they saw and, as a result, neither I nor JUUL can determine precisely what statements were allegedly false, misleading, or unfair. They have also failed to state where, other than on social media, they saw

Plaintiffs cite a number of cases to argue that they are not required to state exactly when they saw the advertisements, only that they saw the advertisements during the class period. Oppo. 16-17 (see e.g. Bruton v. Gerber Prod. Co., No. 12-CV-02412-LHK, 2014 WL 172111, at *13 (N.D. Cal. Jan. 15, 2014) advertise Nevertheless, because plaintiffs have not identified which advertisements they saw during the class period, or where they saw them (outside of social media), I grant JUU plaintiffs false advertising, CLRA and laws of similar states, fraud, and UCL and laws of similar

states claims. These claims are dismissed with leave to amend insofar as they relate to claims .

III. FAILURE TO STATE A CLAIM UNDER STATE CONSUMER PROTECTION STATUTES
JUUL seeks dismissal of p Act of California and Similar Laws of other states as well as for violations of the Unfair, Unlawful

and Deceptive Trade Practices, Business and Professions Code § 17200. Massachusetts Consumer Protection Act, Mass. Gen. Laws Ann. Ch. 93A, §§ 1, et seq.; Michigan Consumer Protection Act, Mich. Comp. Laws Ann. §§ 445.903, et seq.; New Jersey Consumer Protection Act, N.J. Stat. Ann. § 56:8-1, et seq.; Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §§ 201-2 & 201-3, et seq., New York General Business Law, N.Y. Gen. Bus. Law §§ 349, et seq., Washington Consumer Protection Act, Wash. Rev. Code Ann. §§ 19.86.020, et seq., and the laws of all other states and the District of Columbia. First, JUUL argues that dismissal of p protection statutes is justified because plaintiffs have failed to identify the subsections of the to Dismiss 19-20. I agree.

Massachusetts, Michigan, New Jersey, Pennsylvania, New York, and Washington for the

egal Remedies dismissed with leave to amend. Should plaintiffs choose to amend their claim, they must identify the state laws they seek to invoke. Second, JUUL seeks dismissal of the identified state consumer protection statutes in plaintiffs second and fourth causes of action for: (1) failure to plead causation or reliance by not alleging exposure to misleading representations (2) failure to plead reasonable reliance or a likelihood of deception. Mot. to Dismiss 20-26. JUUL argues that plaintiffs have not identified a consumers.

, JUUL is incorrect on both counts and its motion is denied representation that the pods contained a formulation of 5% nicotine when plaintiffs have

sufficiently alleged that the pods contain a formulation of 6.2% nicotine. FAC ¶ 13. I find that approximately equivalent to the amount of nicotine in a pack of cigarettes was reasonable.

p p second and fourth causes of action is denied.

As applied to JUUL what advertisements they saw and what statements in the advertisements were allegedly false, misleading, or unfair. This lack of specificity is insufficient to state a claim under the identified state consumer protection statutes. to dismi advertisements is granted with leave to amend.

IV. FAILURE TO STATE A CLAIM FOR UNJUST ENRICHMENT JUUL argues that p or unjust enrichment fails because plaintiffs cannot considered unjust. Mot. to Dismiss. 27-28. It contends that because p the unjust enrichment claim would be duplicative and must necessarily fail.

As I have found that several p p p cause of action for unjust enrichment is denied. V. FAILURE TO STATE A CLAIM FOR DESIGN DEFECT Pursuant to California law, a design defect may be established under either of two alternative tests: (1) the consumer expectation test or (2) the risk-benefit test. See Barker v. Lull Eng'g Co. found defective in design if the plaintiff establishes that the product failed to perform as safely as

an ordinary consumer would expect when Id. Alternatively, under the risk- plaintiff demonstrates that the product's design proximately caused his injury and the defendant

fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged Id. plaintiff has met his burden if he establishes that there was a defect in the manufacture or design of

Dimond v. Caterpillar Tractor Co., 65 Cal. App. 3d 173, 177 (Ct. App. 1976). JUUL argues that plaintiffs have not plausibly alleged a design defect claim because they have stated only conclusory allegations and that their ENDS operates as intended, as a device to 29-30. However, I find that under the consumer expectation test, plaintiffs have stated a claim for

5% nicotine advertised. FAC ¶ 83. Plaintiffs have sufficiently alleged that perform as safely as an ordinary consumer would expect because each inhalation would deliver

JUUL argues that since the pods contains nicotine, a known addictive substance, there cannot possibly be a product defect any more than vodka is defective because it contains alcohol. contain nicotine, it is that they contain more nicotine than users expect. p denied.

VI. FAILURE TO STATE A CLAIM FOR MANUFACTURING DEFECT is readily identifiable

because a defective product is one that differs from the manufacturer's intended result or from other o Barker v. Lull Engineering Co., 20 Cal.3d 413, 430 (1978 suitable design is in place, but that the manufacturing process has in some way deviated from that

In re Coordinated Latex Glove Litigation, 99 Cal.App.4th 594, 605 (2002).

JUUL argues that plaintiffs have failed to state a claim for manufacturing defect because Plaintiffs allege that JUUL routinely added more nicotine salt and benzoic acid to their pods than represented. FAC ¶¶ 250- 251. While plaintiffs may not have alleged that a particular pod differs from identical ones from JUUL, plaintiffs have plausibly alleged that these pods differ from the product that JUUL intended to sell, i.e. pods with 5% nicotine. See Johnson v. Nissan N. Am., Inc., 272 F. Supp. 3d 1168, 1177 (N.D. Cal. 2017). This could be due to a defect in manufacturing rather than a design defect. See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 754 F. Supp. 2d 1145, 1181 (C.D. Cal. 2010); see also Marshall v. Hyundai Motor Am., 51 defects arose from a faulty design, faulty materials or faulty workmanship cannot be ascertained absent discovery, since any information concerning the true origin of the alleged defect is within the sole possession of the (citations omitted).

It is too early to dismiss this theory. Plaintiffs allege a defect that could be attributed to either a design or manufacturing defect. As a result, they have pleaded facts sufficient to state a claim for manufacturing defect. Accordingly, I deny J manufacturing defect claim.

VII. FAILURE TO STATE A CLAIM FOR BREACH OF IMPLIED WARRANTY OF MERCHANTIBILITY JUUL argues that plaintiffs have failed to state a claim for breach of implied warranty because the implied warranty of merchantability does not impose a general requirement that goods precisely fulfill the expectation of the buyer. Mot. to Dismiss at 32-33. Rather, the implied warranty provides only for a minimum level of quality. Id. JUUL contends that plaintiffs have not plausibly alleged facts showing a breach, and that they have only pleaded conclusory purpose. Id.

iability for an implied warranty does not depend

upon any specific conduct or promise on [the defendant's] part, but instead turns upon whether Hauter v. Zogarts, 534 P.2d 377 (1975). The Commercial Code doe Id. A plaintiff who

claims a breach of the implied warranty of merchantability must show that the product Mocek v. Alfa Leisure, Inc., 114

Cal.App. 4th 402, 406 (2003) (citing Cal. Comm. Code § 2314(2)). A product may also be unmerchantable if it fails to r affirmations of fact made on the product did not match the representations on the container or label. See Hauter, 534 P.2d at 384-

87.

JUUL argues that its alleged misrepresentation of the percentage of nicotine contained in its pods does not render their products unmerchantable for failure to conform to the promises or affirmations made on their containers because p d Pankow Study. Reply 19. But at the motion to dismiss stage, I must accept all of the factual allegations as true and draw all reasonable inferences in favor of the plaintiffs. Usher, 828 F.2d at 561. For the purposes of this motion, I accept plaintif nicotine, rather than the 5% JUUL represents on the packaging. I find that plaintiffs have

successfully stated a claim for implied warranty of merchantability based on the allegation that the percentage claim is denied. VIII. FAILURE TO STATE A CLEAIM FOR BREACH OF EXPRESS WARRANTY California Commercial Code section 2313 applies a three-step inquiry for a breach of express warranty claim court determines if the

relating to the goods and that promise was part of the basis of the bargain, the court must

determine if the seller breached the McDonnell Douglas Corp. v. Thiokol Corp., 124 F.3d 1173, 1176 (9th Cir. 1997) (citations omitted); see also Elias v. Hewlett Packard Co., 903 F.Supp.2d 843, 849 (N.D. Cal. 2012); Weinstat v. Dentsply Intern., Inc., 103 Cal.Rptr.3d 614, 626 (Ct. App. 2010). JUUL argues that plaintiffs cannot state a claim for breach of express warranty based on advertising and other descriptions of the product, rather than breach of a written contractual warranty, without alleging the exact terms of the warranty. Mot. to Dismiss 31-32. It also contends that the provisions of it warranty claim as it only provides a limited one-year warranty.

P irmations of fact and promises made in the marketing of JUUL e-cigarettes became part of the basis of the bargain between Defendant and p 264. But they

they ing Biennis v. Hewlett Packard Co., No. C 07 00333 JF, 2008 WL 818526, at *2 (N.D. Cal. March 25, 2008). motion to dismiss p granted. claim is dismissed with leave to amend. IX. FAILURE TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was Fox v. Pollack, 181 Cal. App. 3d 954, 962 (Ct. App. 1986). Tarmann v. State Farm Mut. Auto. Ins. Co., makes clear that a negligent misrepresentation claim must be based on a misrepresentation of past or existing material facts and not on a promise or prediction as to future events. 2 Cal. Rptr. 2d 861, 864 (Cal. Ct. App. 1991); see also Stockton Mortgage, Inc. v. Tope future can support an intentional misrepresentation claim, it does not support a claim for negligent

not proved reasonable or justifiable actual reliance. Mot. to Dismiss 27. Plaintiffs have alleged

that JUUL misrepresented the pharmacokinetics of their ENDS, the nicotine content of their pods, and the role of benzoic acid in the nicotine formulation. As stated above, allegations relating to the pharmacokinetics and role of benzoic acid are preempted by the TCA and FDA Rule. For the purposes of deciding this motion to dismiss, I accept as true that JUUL has misrepresented the amount of nicotine in each pod. The question here is whether plaintiffs have shown that they reasonably or justifiably 5% nicotine when they alleged that the pods contain a formulation of 6.2% nicotine. Plaintiff Colgate asserts nt amount of nicotine as a pack of cigarettes when he curtail his nicotine addiction and quit smoking. FAC ¶ 13. Because Colgate has sufficiently pleaded reliance cotine in the pods, to dismiss plaintiffs denied.

REPLY JUUL asked that I dismiss the its reply brief. Reply 20. It is improper to raise a new argument in a reply brief. Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007); In re Capacitors Antitrust Litig., No. 14-CV-03264-JD, 2017 WL 897340, at *1 (N.D. Cal. time.

XI. THE MOTION TO STRIKE JUUL moves to strike p Civil Procedure 12(f), 23(c)(1)(A), and 23(d)(1)(D). JUUL argues that a nationwide class would be inappropriate because material variations among the laws of the many states would require detailed inquiries into the legal elements, recognized defenses, and remedies applicable under each ing predominance.

This motion is premature. For one thing, the pleadings are not settled and plaintiffs indicated at oral argument that they will amend with sufficient specificity to allow all of their s observation Morris v. SolarCity Corp., No. 15-cv-05107-RS, 2016 WL 1359378, *3 (N.D. Cal. Apr. 6, 2016) While class allegations may be stricken at the pleading stage in the appropriate case, doing so is not warranted here.... [as defendant] has not presented any argument that would completely preclude class motion to strike plaintiffs nationwide class allegations is denied.

CONCLUSION granted in part and denied in part. Insofar as p misrepresenting nicotine formulation on the product labelling, they are preempted and dismissed with prejudice.

Plaintiffs on of the percentage of nicotine on the labelling of heightened pleading requirements of Rule 9(b) and are dismissed with prejudice.

To the extent that plaintiffs remaining claims are based on mislabeled nicotine percentage granted only as to the breach of express warranty claim and the unidentified state law consumer protection statutes claim. These claims are dismissed with leave to amend. denied as it is not ripe at this stage of the litigation.

IT IS SO ORDERED. Dated: October 30, 2018

William H. Orrick United States District Judge