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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NICOLAS TORRENT, on behalf	)	Case No. CV 15-02511 DDP (JPRx)
of himself and all others	)	
similarly situated,	)	
	)	<b>ORDER GRANTING MOTION TO DISMISS</b>
Plaintiff,	)	<b>IN PART AND DENYING MOTION IN</b>
	)	<b>PART</b>
v.	)	
	)	
THIERRY OLLIVIER, NATIERRA,	)	[Dkt. 50]
and BRANDSTROM, INC.,	)	
	)	
Defendants.	)	
_____	)	

Presently before the court is Defendants' Motion to Dismiss. Having considered the submissions of the parties and heard oral argument, the court grants the motion in part, denies the motion in part, and adopts the following Order.

**I. Background**

Defendants market and sell "Himalania" brand goji berries. (First Amended Complaint ("FAC") ¶ 15.) Plaintiff, Nicolas Torrent, alleges that he purchased Himalania brand goji berries in March 2013. (Id. ¶ 8.) Plaintiff alleges that Defendants sold goji berries using packaging that created the impression that

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1 Defendants' berries are harvested from the Himalaya mountains.  
2 (Id. ¶ 9.) According to Plaintiff, Defendants' packaging includes  
3 images of mountains, as well as statements such as, "The most  
4 famous berry in the Himalayas," and "Goji berries originate in the  
5 high plateaus of the Himalayan mountains." Id. The parties appear  
6 to agree that Defendants' packaging no longer uses these  
7 statements.

8 Plaintiff further alleges that the berries "come from the  
9 Ningxia province of China, which is not what a reasonable consumer  
10 considers to be the Himalayas. (FAC ¶ 10.) Rather, "the Ningxia  
11 province is situated in an area of China far north of what the  
12 reasonable consumer considers as the Himalayas." (Id.)

13 Plaintiff, on behalf of a putative class of all California  
14 purchasers of Himalania brand goji berries, seeks an injunction and  
15 restitution under California's Unfair Competition Law and  
16 injunctive relief and damages under California's Consumer Legal  
17 Remedies Act ("CLRA").<sup>1</sup> Defendants now move to dismiss the FAC.

## 18 **II. Legal Standard**

19 A complaint will survive a motion to dismiss when it contains  
20 "sufficient factual matter, accepted as true, to state a claim to  
21 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
22 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
23 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
24 "accept as true all allegations of material fact and must construe  
25 those facts in the light most favorable to the plaintiff." Resnick

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26  
27 <sup>1</sup> Plaintiff also brings an independent cause of action for  
28 attorney fees, even though he also requests fees in his prayer for  
relief.

1 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
2 need not include "detailed factual allegations," it must offer  
3 "more than an unadorned, the-defendant-unlawfully-harmed-me  
4 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
5 allegations that are no more than a statement of a legal conclusion  
6 "are not entitled to the assumption of truth." Id. at 679. In  
7 other words, a pleading that merely offers "labels and  
8 conclusions," a "formulaic recitation of the elements," or "naked  
9 assertions" will not be sufficient to state a claim upon which  
10 relief can be granted. Id. at 678 (citations and internal  
11 quotation marks omitted).

12 "When there are well-pleaded factual allegations, a court  
13 should assume their veracity and then determine whether they  
14 plausibly give rise to an entitlement of relief." Id. at 679.  
15 Plaintiffs must allege "plausible grounds to infer" that their  
16 claims rise "above the speculative level." Twombly, 550 U.S. at  
17 555. "Determining whether a complaint states a plausible claim for  
18 relief" is a "context-specific task that requires the reviewing  
19 court to draw on its judicial experience and common sense." Iqbal,  
20 556 U.S. at 679.

### 21 **III. Discussion**

#### 22 A. Reasonable Consumer Test

23 Defendants contend first that Plaintiff's UCL and CLRA claims  
24 should be dismissed because the reasonable consumer does not know  
25 about Ningxia province's location relative to the Himalayas. (Mot.  
26 at 6.) Plaintiff's UCL and CLRA claims are governed by a  
27 "reasonable consumer" test, which looks to whether, regardless of  
28 the actual falsity of a representation, members of the public are

1 likely to be deceived. Williams v. Gerber Prods. Co., 552 F.3d  
2 934, 938 (9th Cir. 2008); Yumul v. SmartBalance, Inc., 733  
3 F.Supp.2d 1117, 1125 (C.D. Cal. 2010). Although questions  
4 regarding deceptiveness typically cannot be resolved on a motion to  
5 dismiss, courts do dismiss product packaging claims where it  
6 appears as a matter of law that the public is not likely to be  
7 deceived. See Jones v. ConAgra Foods, Inc., 912 F.Supp.2d 889, 899  
8 (N.D. Cal. 2012).

9 The court agrees with Defendants, in part. The FAC alleges  
10 that “[t]he goji berries come from the Ningxia province of China,  
11 which is not what a reasonable consumer considers to be the  
12 Himalayas.” (FAC ¶ 10.) The FAC also includes a map, which  
13 appears to depict the Ningxia province “in an area of China far  
14 north of what the reasonable consumer considers as the  
15 Himalayas[.]” (Id.) Plaintiff cannot, however, plausibly allege  
16 that reasonable consumers are well-versed enough in Chinese  
17 geography to have any beliefs about Ningxia’s location or whether  
18 Ningxia province qualifies as “Himalayan.” Indeed, although  
19 Defendants’ packaging does represent that the berries are a  
20 “Product of China,” it makes no reference to Ningxia. Thus, to the  
21 extent Plaintiff alleges that the packaging is misleading because  
22 reasonable consumers do not consider Ningxia to be part of the  
23 Himalayas, those allegations are dismissed.

24 The implausible references to consumers’ knowledge of Chinese  
25 or Himalayan geography do not, however, render the UCL and CLRA  
26 claims deficient in their entirety. The FAC also alleges that  
27 Defendants “inten[d] to create the impression in the minds of  
28 consumers that the berries are harvested from the Himalayas . . . ,”

1 and makes repeated references to this "impression." (FAC ¶¶ 9,  
2 15.) That assertion is supported by the factual allegations that  
3 Defendants' packaging includes the statements, "The most famous  
4 berry in the Himalayas," and "Goji berries originate in the high  
5 plateaus of the Himalayan mountains." These facts, putting aside  
6 any allegations about consumers' knowledge of Ningxia, themselves  
7 could support a claim that Defendants' packaging would lead a  
8 reasonable consumer to believe that Defendants' berries are  
9 harvested in the Himalayas, when in fact the berries are not  
10 harvested in the Himalayas. Accordingly, Plaintiff's UCL and CLRA  
11 claims are dismissed only insofar as they relate to consumers'  
12 knowledge of the Ningxia province of China.

13 B. CLRA Notice

14 Plaintiff's original Complaint alleged causes of action under  
15 California's UCL and the CLRA. The complaint sought injunctive  
16 relief, including corrective advertising, as well as restitution  
17 and damages. (Complaint at 11-12.) Damages, however, are not  
18 recoverable under the UCL. See Durell v. Sharp Healthcare, 183  
19 Cal. App. 4th 1350, 1359 (2010). Damages are available under the  
20 CLRA. Cal. Civil Code § 1780. The CLRA requires, however, that a  
21 plaintiff seeking damages first notify the prospective defendant of  
22 the alleged violations and afford the prospective defendant a  
23 thirty-day period to remedy the problem. Cal. Civ. Code § 1782.  
24 An action for injunctive relief, in contrast, "may be commenced"  
25 without prior notice. Cal. Civ. Code. § 1782(d). If a plaintiff  
26 initiates an action for injunctive relief and then satisfies the  
27 notice requirement, the plaintiff may, "not less than 30 days after

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1 commencement of an action for injunctive relief," amend the  
2 complaint to include a request for damages. Id.

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4 Here, Plaintiff sent a CLRA notice letter on the same day that  
5 he filed his complaint for damages. More than thirty days later,  
6 Plaintiff filed the FAC, explicitly requesting damages under the  
7 CLRA and referencing his CLRA notice letter. Defendants move to  
8 dismiss Plaintiff's damages claim, with prejudice, for failure to  
9 comply with Section 1782. Plaintiff responds that, because he  
10 amended the complaint and filed the FAC more than 30 days after  
11 sending a CLRA notice letter, he has satisfied Section 1782.

12 Although the CLRA notice requirement is not jurisdictional,  
13 compliance with it is necessary to state a claim. Outboard Marine  
14 Corp. v. Superior Court, 52 Cal. App. 3d 30, 39 (1975). Although  
15 Plaintiff makes no mention of it, and Defendants refer to it only  
16 in a footnote, "[a] significant split among the courts exists on  
17 whether dismissal of a CLRA claim for violation of section  
18 1782(a)'s notice requirement should be granted with or without  
19 prejudice." Trabakoolas v. Watts Water Techs., Inc., No. 12-cv-  
20 01172-YGR, 2012 WL 2792441 at \*7 (N.D. Cal. July 9, 2012). The  
21 Outboard Marine court concluded that "[t]he clear intent of the  
22 [CLRA] is to provide and facilitate pre-complaint settlements of  
23 consumer actions wherever possible and to establish a limited  
24 period during which such settlement may be accomplished." 52 Cal.  
25 App. 3d at 41. Some federal courts, citing Outboard Marine, have  
26 dismissed improperly noticed CLRA damages claims with prejudice,  
27 finding that such "strict adherence to the statute's notice  
28 provision is required to accomplish the Act's goals of expeditious

1 remediation before litigation." Laster v. T-Mobile USA, Inc., 407  
2 F.Supp.2d 1181, 1196 (S.D. Cal. 2005); See also Cattie v. Wal-Mart  
3 Stores, Inc., 504 F.Supp.2d 939, 949-50 (S.D. Cal. 2007); Von Grabe  
4 v. Sprint PCS, 312 F.Supp.2d 1285, 1304 (S.D. Cal. 2003); but see  
5 Dietz v. Comcast Corp., No. C 06-06352 WHA, 2006 WL 3782902 at \*6  
6 (N.D. Cal. Dec. 21, 2006) (concluding that dismissal with prejudice  
7 would be "draconian," and finding that other disciplinary measures  
8 would more accurately serve the California legislature's intent).

9 Some courts, however, have determined that a dismissal with  
10 prejudice for failure to comply with the CLRA's notice requirement  
11 is not necessary to satisfy the California legislature's goal of  
12 allowing defendants to avoid liability by promptly correcting the  
13 alleged wrongs. Morgan v. AT&T Wireless Servs., Inc., 177 Cal.  
14 App. 4th 1235, 1261 (2009); Dietz, 2006 WL 3782902 at \*2. As the  
15 Trabakoolas court observed, the CLRA's notice requirement was  
16 intended to "resolve quickly and efficiently consumer complaints,"  
17 and "inured to the consumers' benefit," and therefore should not  
18 operate as a "sword against consumers." Trabakoolas, 2012 WL  
19 2792441 at \*8 (dismissing CLRA damages claim with leave to amend);  
20 See also Benson v. Southern California Auto Sales, Inc., 239  
21 Cal.App.4th 1198, 1212 (2015) ("[The CLRA] actually has two  
22 purposes. Protecting consumers is one; providing efficient and  
23 economical procedures to secure such protection is the other.").

24 This court agrees with the reasoning of Dietz, Morgan, and  
25 Trabakoolas that dismissal of Plaintiff's CLRA damages claim with  
26 prejudice would be unduly harsh, and would not serve the interest  
27 of protecting consumers. Under the circumstances here, however,  
28 the court is not persuaded that mere dismissal with leave to amend

1 would be appropriate. Such a result, which would require Defendant  
2 to defend against an improperly noticed CLRA damages claim while  
3 simultaneously attempting to rectify the underlying issues, would  
4 not adequately disincentivize Plaintiff's noncompliance with the  
5 CLRA notice requirement and would hamper efforts to quickly and  
6 efficiently address consumer concerns. The court, therefore,  
7 dismisses Plaintiff's CLRA damages claim without leave to amend in  
8 the instant action, but also without prejudice to the refiling of  
9 the damages claim.

10 **C. Alter EGO**

11 Plaintiff's FAC alleges that Defendant Ollivier is liable as  
12 the alter ego of both corporate defendants. "The alter ego  
13 doctrine arises when a plaintiff comes into court claiming that an  
14 opposing party is using the corporate form unjustly and in  
15 derogation of the plaintiff's interests. In certain circumstances  
16 the court will disregard the corporate entity and will hold the  
17 individual shareholders liable for the actions of the corporation."  
18 Nielson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1115  
19 (C.D. Cal. 2003). The purpose of the alter ego doctrine is to  
20 avoid injustice when there is an abuse of the corporate privilege.  
21 Id. Only "exceptional circumstances" allow a court to disregard  
22 the corporate form and find liability as to the individuals  
23 underneath it. Leek v. Cooper, 194 Cal. App. 4th 399, 411 (2011).  
24 There is a large list of factors a court can consider when  
25 determining alter ego liability. Id. at 417-18. "An allegation  
26 that a person owns all of the corporate stock and makes all of the  
27 management decisions is insufficient to cause the court to  
28 disregard the corporate entity." Id. at 415.

1 "Corporate officers and directors cannot ordinarily be held  
2 personally liable for the acts or obligations of their  
3 corporations. However, they may become liable if they directly  
4 authorize or actively participate in wrongful or tortious conduct."  
5 Taylor-Rush v. Multitech Corp., 217 Cal. App. 3d 103, 113 (1990).  
6 A wide variety of factors may be pertinent to the alter ego  
7 inquiry, depending on the circumstances of the particular case.  
8 Assoc. Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 838  
9 (1962). These factors include, but are not limited to, commingling  
10 of funds, unauthorized diversion of corporate funds to other uses,  
11 failure to maintain adequate corporate records, sole or family  
12 ownership of all of the stock in a corporation, failure to  
13 adequately capitalize a corporation, use of a corporation as a  
14 conduit for the business of an individual, disregard of legal  
15 formalities, and diversion of assets from a corporation to a  
16 stockholder to the detriment of creditors. Schwarzkopf, 626 F.3d  
17 at 1038; Zoran Corp. v. Chen, 185 Cal. App. 4th 799, 811-12 (2010);  
18 Assoc. Vendors, 210 Cal. App. 2d at 838-39.

19 The only specific facts alleged regarding Defendant Ollivier  
20 are that he founded one corporate defendant and serves as a  
21 corporate officer and "opened the doors" of the other corporate  
22 defendant. (FAC ¶ 13.) Although the FAC conclusorily asserts that  
23 a unity of interest and ownership exists between Ollivier and the  
24 corporate defendants, it makes no factual allegations to support  
25 that assertion. Plaintiff's Opposition does no more than repeat,  
26 in block quotes, the FAC's inadequate alter ego allegations.<sup>2</sup>

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28 <sup>2</sup> Plaintiff's Opposition similarly fails to identify any facts  
(continued...)

1 Plaintiff's claims against Defendant Ollivier are dismissed, with  
2 prejudice.

3 **D. Attorneys' Fees**

4 Plaintiff's opposition asks this court "to use its equitable  
5 powers to find an independent cause of action for attorneys' fees."  
6 (Opp. at 18). The court is aware of no authority or reason  
7 justifying such a course of action. Plaintiff's Third Cause of  
8 Action is, therefore, dismissed with prejudice.

9 **IV. Conclusion**

10 For the reasons stated above, Defendants' Motion to Dismiss is  
11 GRANTED in part and DENIED in part. Plaintiff's UCL claims and  
12 CLRA claim for injunctive relief survive this motion to the extent  
13 the claims are premised upon the "most famous berry in the  
14 Himalayas" and "Goji berries originate in the high plateaus of the  
15 Himalayan mountains" statements. Plaintiff's CLRA damages claim is  
16 dismissed without prejudice to its refiling. Leave to amend the  
17 operative complaint in this action, however, is denied.  
18 Plaintiff's alter ego and punitive damages claims, and independent  
19 cause of action for attorneys' fees, are dismissed, with prejudice.

20

21 IT IS SO ORDERED.

22

23 Dated: September 2, 2016



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DEAN D. PREGERSON  
United States District Judge

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26 <sup>2</sup>(...continued)  
27 supporting a claim for punitive damages. Although the Opposition  
28 contends that the FAC alleges purposeful deceit, it contains no  
citation to any such allegation, and the FAC does not appear to  
include any factual allegation of malice sufficient to support a  
claim for punitive damages.