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2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
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6 JASON TRABAKOOLAS and SHEILA
7 STETSON, individually and on behalf of all
8 others similarly situated,

9 Plaintiffs,

10 vs.

11 WATTS WATER TECHNOLOGIES, INC.,
12 WATTS REGULATOR CO., WATTS
13 ANDERSON-BARROWS METAL CORP.,
14 WATTS PLUMBING TECHNOLOGIES
15 (TAIZHO) CO., LTD., SAVARD
16 PLUMBING COMPANY, WOLVERINE
17 BRASS, INC., and JOHN DOES 1-100,

18 Defendants.

Case No.: 12-cv-01172-YGR

**ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANTS' AMENDED MOTION TO
DISMISS SECOND AND FIFTH CAUSES OF
ACTION, OR IN THE ALTERNATIVE, STRIKE
CERTAIN ALLEGATIONS**

19 On March 28, 2012, Plaintiffs Jason Trabakoolas and Sheila Stetson, on behalf of themselves
20 and others similarly situated, filed this action against Defendants: Watts Water Technologies, Inc.;
21 Watts Regulator Co.; Watts Anderson-Barrows Metal Corp.; Watts Plumbing Technologies
22 (TAIZHO) Co., LTD.; Savard Plumbing Co.; and Wolverine Brass, Inc. (Dkt. No. 1.) On April 26,
23 2012, Defendants Watts Regulator Co., Watts Water Technologies, Inc., and Wolverine Brass, Inc.¹
24 filed an Amended Motion to Dismiss Second and Fifth Causes of Action, or in the Alternative, Strike
25 Certain Allegations. (Dkt. No. 44 (“Motion” or “Mot.”).) Defendants seek dismissal of two of
26 Plaintiffs’ six claims: the second claim for Strict Liability-Design Defect/Manufacturing Defect and
27 Failure to Warn; and the fifth claim for Violation of the California Consumer Legal Remedies Act

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¹ References to “Defendants” in this Order refer to these moving defendants.

1 (Cal. Civ. Code § 1750 *et seq.*) (“CLRA”). As to the second claim, although Defendants argue only
2 that the manufacturing defect claim was pled inadequately, they seek dismissal of the entire second
3 claim—including the design defect and warning defect claims. In the alternative to dismissing the
4 entire second claim, Defendants move to strike all language referring to a “manufacturing defect.”²
5 On May 10, 2012, Plaintiffs filed their Opposition to Defendants’ Motion to Dismiss the Complaint.
6 (Dkt. No. 46 (“Opposition” or “Opp.”).) On May 17, 2012, Defendants filed their Reply in Support of
7 Motion to Dismiss Second and Fifth Causes of Action, or in the Alternative, Strike Certain
8 Allegations. (Dkt. No. 48 (“Reply”).) The Court held oral argument on June 5, 2012. (Dkt. No. 49.)
9 On June 6, 2012, the Court issued an Order Requiring Additional Briefing Regarding Motion to
10 Dismiss, specifically on the issue of whether Plaintiffs’ demand for replacement of the allegedly
11 defective part is properly characterized as “damages” or “injunctive relief” under the CLRA. (Dkt.
12 No. 50.) The parties provided the supplemental briefing to the Court as requested. (Dkt. Nos. 51
13 (“Plaintiffs’ Supp. Brief”) & 52 (“Defendants’ Supp. Brief”).)

14 Having carefully considered the papers submitted and the pleadings in this action, and for the
15 reasons set forth below, the Court hereby:

- 16 • **GRANTS** the Motion to Dismiss as to the second claim **WITH LEAVE TO AMEND** and
17 **DENIES** the Motion to Strike as moot; and
- 18 • **GRANTS WITH LEAVE TO AMEND** the Motion to Dismiss as to the fifth claim.

19 **I. FACTUAL AND PROCEDURAL BACKGROUND**³

20 Plaintiffs’ Complaint contains six claims, but only two are relevant to this Motion: the second
21 claim for Strict Liability-Design Defect/Manufacturing Defect and Failure to Warn (“Defect Claim”),
22 and the fifth claim, for Violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §
23 1750 *et seq.* (“CLRA Claim”). (Dkt. No. 1 (“Compl.”) ¶¶ 99–106, 128–139.) Plaintiffs’ second claim
24 incorporates all three types of strict products liability: design defect, manufacturing defect, and
25

26 ² This Order uses the term “Motion to Strike” to refer to Defendants’ alternative request, even though a
27 separate motion to strike was not made.

28 ³ Because the pending Motion addresses only certain claims and issues, the following section is not intended to
provide an exhaustive summary of the factual or procedural background in this action.

1 warning defect. *Id.* ¶¶ 99–106. Design defect and manufacturing defect are pled in the alternative.
2 *Id.* ¶ 101.

3 This case arises from alleged defects in certain toilet connectors (“Connectors”) which
4 Defendants design and manufacture. *Id.* ¶ 1. These Connectors use plastic coupling assemblies to
5 connect a water fixture shut-off valve to a toilet. *Id.* ¶ 26. Plaintiffs allege the plastic nuts used to
6 secure the couplings are defective in a number of respects, but assert a manufacturing defect claim
7 with respect to only *one defect*: “material selection/notch sensitivity.” *Id.* ¶ 35; Opp. at 4. Plaintiffs
8 contend the plastic used to manufacture the plastic nuts is defective and prone to notching, making the
9 plastic couplings prone to fracture spontaneously resulting in catastrophic water damage. Compl. ¶¶
10 25, 36–41. Plaintiffs purchased and installed the Connectors at issue and each suffered such fractures,
11 resulting in the flooding of Plaintiffs’ respective homes. *Id.* ¶¶ 11, 15. On this basis, Plaintiffs make
12 a claim for design defect or, in the alternative, manufacturing defect. They further allege that
13 Defendants violated the CLRA by intentionally and falsely representing the quality and benefits of
14 their products. *Id.* ¶ 131.

15 Defendants filed the instant Motion on April 26, 2012, seeking dismissal of the Defect and
16 CLRA Claims under Fed. R. Civ. P. 12(b)(6). In the alternative to dismissing the Defect Claim,
17 Defendants moved under Fed. R. Civ. P. 12(f) to strike all language referring to manufacturing
18 defects. In the hearing on this Motion, Plaintiffs conceded that, at this time, they have no specific
19 facts to support a manufacturing defect claim.

20 **II. DISCUSSION**

21 **A. Legal Standard under Federal Rule of Civil Procedure 12(b)(6) and 12(f)**

22 Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed against a defendant for
23 failure to state a claim upon which relief may be granted. Dismissal may be based on either the lack
24 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.
25 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter*
26 *Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss,
27 the court “must presume all factual allegations of the complaint to be true and draw all reasonable
28 inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th

1 Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly*
2 *Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

3 Mere conclusions couched in factual allegations are not sufficient to state a cause of action.
4 *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802,
5 810 (9th Cir. 1988). The complaint must plead “enough facts to state a claim [for] relief that is
6 plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“*Twombly*”). A
7 claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw
8 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
9 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Thus, “for a complaint to survive a motion to dismiss,
10 the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly
11 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969
12 (9th Cir. 2009); *Twombly*, 550 U.S. at 555 (a plaintiff’s obligation to provide the grounds of his
13 entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the
14 elements of a cause of action will not do”) (citations and quotations omitted). Courts may dismiss a
15 case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v.*
16 *Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

17 Fed. R. Civ. P. 12(f) provides that the court “may order stricken from any pleading any
18 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” “The
19 function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that
20 must arise from litigating spurious issues by dispensing with those issues prior to trial[.]”
21 *Whittlestone Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citing *Fantasy, Inc. v.*
22 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)). Motions to strike are generally disfavored. *Colaprico*
23 *v. Sun Microsystem, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991). Consequently, when a court
24 considers a motion to strike, it “must view the pleading in a light most favorable to the pleading
25 party.” *In re 2TheMart.com, Inc. Sec Lit.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2010). In deciding
26 whether to grant a motion to strike under Rule 12(f), the court must start with the rule’s plain
27 language and determine whether the matter at issue is: (1) an insufficient defense; (2) redundant;
28 (3) immaterial; (4) impertinent; or (5) scandalous. *Id.* at 973–74.

1 **B. Defect Claim**

2 While California recognizes three distinct theories of strict liability in instances of product
3 defects (*Brown v. Superior Court*, 44 Cal. 3d 1049, 1057 (1988)), only two are relevant to this
4 Motion. A design defect is present when a product “fail[s] to perform as safely as an ordinary
5 consumer would expect when used as intended or reasonably foreseeable, or if, on balance, the risk of
6 danger inherent in the challenged design outweighs the benefits of the design.” *Id.* Under a
7 manufacturing defect theory, a manufacturer may be strictly liable when a flaw in the manufacturing
8 process results in a product that differs from “the manufacturer’s intended result or from other
9 ostensibly identical units of the same product line.” *Lucas v. City of Visalia*, 726 F. Supp. 2d 1149,
10 1154–55 (E.D. Cal. 2010) (quoting *Barker v. Lull Eng’g Co.*, 20 Cal. 3d 413, 429 (1978)).

11 Defendants contend that the Complaint’s allegations fail to establish a basis for a
12 manufacturing defect claim because the allegations only concern the Connectors’ effectiveness, *i.e.*
13 their design. Mot. at 3–5. The complaint is devoid of allegations that the product failed because it
14 was not manufactured as intended. Plaintiffs respond with two arguments. First, they contend that
15 Fed. R. Civ. P. 8(d)(3) precludes dismissal of the manufacturing defect claim because it was pled in
16 the alternative to a legally sufficient design defect claim.⁴ Opp. at 6. Plaintiffs thus interpret Rule
17 8(d)(3) to preclude dismissal of a claim that it is pled in the alternative to another, legally sufficient
18 claim.⁵ *Id.* Second, they argue that Defendants have attempted to draw an artificial line in the
19 pleading standards for manufacturing and design defect claims. *Id.* Plaintiffs concede they lack
20 information of a manufacturing defect but argue that both claims should remain given that the nature
21 of the defect is within Defendants’ “exclusive” knowledge. *Id.*

22 **1. Motion to Dismiss Second Claim**

23 To survive a challenge to a manufacturing defect claim under Fed. R. Civ. P. 12(b)(6), a
24 plaintiff must “*identify/explain how* the [product] either deviated from [defendant’s] intended

25 ⁴ At the hearing on this Motion, Defendants conceded the legal sufficiency of the design defect claim.

26 ⁵ Fed. R. Civ. P. 8(d) states that “[a] party may set out 2 or more statements of a claim or defense alternatively
27 or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative
28 statements, the pleading is sufficient if any one of them is sufficient.” Fed. R. Civ. P. 8(d)(2). The rule
continues that “[a] party may state as many separate claims or defenses as it has, regardless of consistency.”
Fed. R. Civ. P. 8(d)(3).

1 result/design or *how* the [product] deviated from other seemingly identical [product] models.” *Lucas*,
2 726 F. Supp. 2d at 1155 (citing *Barker*, 20 Cal. 3d at 429) (emphasis in original). “A bare allegation
3 that the [product] had ‘a manufacturing defect’ is an insufficient legal conclusion.” *In re Toyota*
4 *Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Products Liab. Litig.*, 754 F. Supp.
5 2d 1208, 1222 (C.D. Cal. 2010) (citing *Barker*, 20 Cal. 3d at 429).

6 Plaintiffs’ arguments are untenable in light of these requirements. In support of their
7 manufacturing defect claim, Plaintiffs point only to Defendants’ “select[ion] [of] a low-grade [plastic]
8 for the coupling’s material” and the manner in which threading was cut into the sidewall of the plastic
9 nuts. Compl. ¶¶ 36–41. As a result of this confluence, they allege, the plastic nuts are prone to
10 fracturing during routine installation. *Id.* ¶ 41. However, Plaintiffs have not articulated how the
11 material selection, the threading, or the propensity for failure distinguish the toilet connectors at issue
12 from either the manufacturer’s intended result or other seemingly identical product models. Instead,
13 Plaintiffs make only conclusory allegations, such as “[i]n using this plastic, Defendants’ design,
14 manufacture, testing and assembly [were defective].” *Id.* ¶ 37.

15 In *In re Toyota*, the plaintiffs similarly alleged that “ETCS systems . . . were defectively
16 designed and manufactured in that they were highly susceptible to malfunction . . . [and] failed to
17 conform with [Toyota’s] manufacturing specifications.” *In re Toyota*, 754 F. Supp. 2d at 1222
18 (emphasis omitted). In that case, the court found it dispositive that plaintiffs failed to allege *how* the
19 cars at issue deviated from Toyota’s design or other product models. *Id.* at 1223; *see also Lucas*, 726
20 F. Supp. 2d at 1155 (dismissing a manufacturing defect claim because the complaint contained no
21 factual allegations identifying what aspect of manufacture made the product defective). Plaintiffs
22 have thus provided only the insufficient legal conclusion that “the [product] had a manufacturing
23 defect” and have failed to allege a legally sufficient manufacturing defect claim. *In re Toyota*, 754 F.
24 Supp. 2d at 1222 (internal quotation omitted).⁶

25 The Court therefore **DISMISSES** Plaintiffs’ second claim **WITH LEAVE TO AMEND** and re-plead
26 the second claim without the manufacturing defect claim. Plaintiffs may file a motion for leave to

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28 ⁶ This is not an instance of pleading alternative statements *of a claim* under Rule 8(d). Plaintiffs attempt to
plead two alternative claims with one set of facts, but, in this case, the facts are sufficient to allege only design
defect, not manufacturing defect.

1 amend to re-plead their manufacturing defect claim when and if they obtain discovery providing a
2 factual basis for such claim.

3 2. Motion to Strike Allegations Regarding Manufacturing Defect

4 Defendants' Motion to Strike allegations regarding manufacturing defects is **DENIED** as moot.

5 C. The CLRA Claim

6 The second issue before the Court is whether the CLRA Claim should be dismissed for failure
7 to comply with the pre-filing notice requirement. To make this determination, the Court must
8 evaluate whether Plaintiffs' request that the Court order the replacement of all Connectors constitutes
9 "actual damages" or "injunctive relief" under the CLRA.

10 The Court's analysis begins "where all such inquiries must begin: with the language of the
11 statute itself." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *In re Google*
12 *Inc. Street View Electronic Commc'ns Litig.*, 794 F. Supp. 2d 1067, 1074–75 (N.D. Cal. 2011).

13 Where the language of the statute is plain, it is also where the inquiry should end: "the sole function
14 of the courts is to enforce [the statute] according to its terms," assuming that an absurd interpretation
15 does not result. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Hartford Underwriters Ins. Co.*
16 *v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). If the language is ambiguous, a court may then
17 turn to the legislative history to assist in the interpretation. *S.E.C. v. McCarthy*, 322 F.3d 650, 655
18 (9th Cir. 2003).

19 The California Consumer Legal Remedies Act prohibits, *inter alia*, misrepresentations
20 regarding (i) the characteristics, uses, or benefits of products and services, and (ii) the particular
21 standard, quality, or grade of goods. Cal. Civ. Code §§ 1770(a)(5) & (a)(7). California Civil Code
22 section 1780(a) enumerates the types of relief available to plaintiffs in response to violations of
23 section 1770 as follows: "(1) Actual damages . . .[;] (2) An order enjoining the methods, acts, or
24 practices[;] (3) Restitution of property[;] (4) Punitive damages[; and] (5) Any other relief that the
25 court deems proper." Cal. Civ. Code §§ 1780(a)(1)–(5). The CLRA also requires pre-filing notice
26 before a plaintiff can seek damages in court. It provides:

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- 1 (a) Thirty days or more prior to the commencement of an action for damages
2 pursuant to this title, the consumer shall do the following:
3 (1) Notify the person alleged to have employed or committed the methods,
4 acts, or practices declared unlawful by Section 1770 of the particular
5 alleged violations of Section 1770.
6 (2) Demand that the person correct, repair, replace, or otherwise rectify the
7 goods or services alleged to be in violation of Section 1770.

8 Section 1782(a). Despite the foregoing, section 1782(d) provides that actions seeking only injunctive
9 relief require no such notice and may be amended later, under certain circumstances, to include a
10 damages claim:

- 11 (d) An action for injunctive relief brought under the specific provisions of Section
12 1770 may be commenced without compliance with subdivision (a). Not less
13 than 30 days after the commencement of an action for injunctive relief, and
14 after compliance with subdivision (a), the consumer may amend his or her
15 complaint without leave of court to include a request for damages. The
16 appropriate provisions of subdivision (b) or (c) shall be applicable if the
17 complaint for injunctive relief is amended to request damages.

18 Here, Plaintiffs request “an order for declaratory, equitable and/or injunctive relief prohibiting
19 Defendants from engaging in the methods, acts, or practices alleged herein and . . . [an] order
20 [requiring] Defendants to replace all of the defective Toilet Connectors previously sold.” Compl. ¶
21 138 (emphasis supplied). Plaintiffs argue that this replacement request plainly seeks only injunctive
22 relief. Opp. at 7; Plaintiffs’ Supp. Brief at 3. Defendants contend the contrary. Mot. at 6.
23 Defendants urge the Court to dismiss Plaintiffs’ CLRA Claim for failure to provide the requisite
24 notice under section 1782(a). *Id.* at 5–7.

25 The Court looks first to the language of the CLRA. The notice requirement of section 1782(a)
26 explicitly requires a plaintiff to demand that a defendant “correct, repair, replace, or otherwise rectify”
27 the alleged wrongdoing before bringing suit. If such rectification is made—for example, if a
28 replacement is given—then an action for damages will not lie. Cal. Civ. Code § 1782(b). By creating
this framework, the Legislature effectively made replacements a substitute for damages in CLRA
actions.⁷ The language of section 1782(a) is plain and unambiguous.

⁷ James S. Reed, a former chief counsel of the assembly judiciary committee who served as a draftsman of the CLRA, has voiced this same conclusion. James S. Reed, *Legislating for the Consumer: An Insider’s Analysis of the Consumers Legal Remedies Act*, 2 Pac. L.J. 1, 18 (1971) (“[T]he court should equate the term ‘correction, repair, replacement or other remedy’ with damages, since it is essentially a substitute for damages.”), attached as Ex. B to Defendants’ Supp. Brief (Dkt. No. 52).

1 By contrast, section 1782(d) regarding injunctive relief is not defined specifically. California
2 courts have expounded on the nature thereof, articulating that it is not meant “to resolve a private
3 dispute but to remedy a public wrong. Whatever the individual motive of the party requesting
4 injunctive relief, the benefits of granting injunctive relief by and large do not accrue to that party, but
5 to the general public in danger of being victimized by the same deceptive practices as the plaintiff
6 suffered.” *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1080 (1999)⁸; *see America*
7 *Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 16 (Cal. Ct. App. 2001).

8 Here, Plaintiffs’ request for injunctive relief is both prospective and retrospective, with both
9 private and public characteristics. The prospective request relates only to an ongoing prohibition from
10 “engaging in the methods, acts, or practices alleged herein.” In this context, it legitimately seeks to
11 protect the general public from future deceptive practices. However, the second portion—“to replace
12 all of the defective Toilet Connectors previously sold”—seeks to remedy prior damage incurred by
13 those who have suffered damage due to Defendants’ allegedly faulty Connectors. Such an order
14 would *not* protect the general public from the allegedly wrongful practices at issue but requires the
15 Court to evaluate retrospectively what Defendants did and order action specifically related to prior
16 damage. *See Broughton*, 21 Cal. 4th at 1079–80 (a plaintiff seeking CLRA injunctive relief functions
17 as a “private attorney general, enjoining *future* deceptive practices on behalf of the general public”)
18 (emphasis supplied). Thus, “replacement” as a remedy falls squarely within the context of the
19 provision requiring notice. To find otherwise would not only require the Court to ignore the plain
20 language of section 1780(a)(2), but to ignore the stated purpose and intent of section 1782. *Id.* at
21 1085 (“These differing approaches to actions for damages and for injunctive relief reflect the differing
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24 ⁸ In *Broughton*, defendants sought an order compelling plaintiffs’ CLRA claims for damages and injunction to
25 arbitration. The California Supreme Court granted in part, severing the damage and injunction claims and
26 sending only the damage claim to arbitration. In the wake of *Concepcion v. AT&T*, -- U.S. --, 131 S. Ct. 1740
27 (2011), the Ninth Circuit abrogated *Broughton* in *Kilgore v. KeyBank, Nat. Ass’n*, 674 F.3d 947 (9th Cir. 2012)
28 to hold that the entire CLRA claim (for damages and injunctive relief) could be sent to arbitration. However,
Kilgore retained the distinction between public injunctive relief and damages, and other district courts have
continued to discuss CLRA injunctive relief in terms of “public injunctive” relief post-*Concepcion*. *See, e.g.,*
Nelson v. AT&T Mobility, LLC, No. C10-4802 THE, 2011 WL 3651153, at *1 (C.D. Cal. Oct. 6, 2011)
 (“Public injunctive relief claims are designed to prevent further harm to the public at large rather than to redress
or prevent injury to a plaintiff”) (internal citation and quotation omitted).

1 purposes of the two actions. The former is primarily to remedy individual wrongs . . . [and] [t]he
2 latter is for the protection of the public.”).

3 For these reasons, the Court holds that for purposes of CLRA, Plaintiffs’ request for
4 replacements to constitute a request for damages under section 1782(a), not injunctive relief under
5 section 1782(d). Because Plaintiffs filed suit requesting damages without providing the requisite 30-
6 day notice, their CLRA Claim for damages must be dismissed. *See* Cal. Civ. Code § 1782(a).

7 A significant split among the courts exists on whether dismissal of a CLRA claim for violation
8 of section 1782(a)’s notice requirement should be granted with or without prejudice. *Compare, e.g.,*
9 *Morgan v. AT&T Wireless Servs.*, 177 Cal. App. 4th 1235, 1259–61 (Cal. Ct. App. 2009) (dismissing
10 without prejudice) *and Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2006 WL 3782902, at *5–6
11 (N.D. Cal. Dec. 21, 2006) (dismissing without prejudice) *with Cattie v. Wal-Mart Stores, Inc.*, 504 F.
12 Supp. 2d 939, 949–50 (S.D. Cal. 2007) (dismissing with prejudice) *and Waller v. Hewlett-Packard*
13 *Co.*, No. 11cv0454-LAB (RBB), 2011 WL 6325972, at *5–6 (S.D. Cal. Dec. 16, 2011) (dismissing
14 with prejudice). The statute itself is silent.

15 The leading cases for dismissing with prejudice are *Cattie v. Wal-Mart Stores, Inc.* and *Laster*
16 *v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008),
17 *rev’d on other grounds by AT&T Mobility LLC v. Concepcion*, -- U.S. --, 131 S. Ct. 1740 (2011). In
18 each case, the court relied on the reasoning of *Outboard Marine Corp. v. Superior Court*, 52 Cal.
19 App. 3d 30, 40–41 (Cal. Ct. App. 1975). In *Outboard Marine*, the court stated:

20 The purpose of the notice requirement of section 1782 is to give the manufacturer or
21 vendor sufficient notice of alleged defects to permit appropriate corrections or
22 replacements. . . . The clear intent of the act is to provide and facilitate precomplaint
23 settlements of consumer actions wherever possible and to establish a limited period
24 during which such settlement may be accomplished. This clear purpose may only be
25 accomplished by a literal application of the notice provisions.

26 *Outboard Marine*, 52 Cal. App. 3d at 40–41. The courts reasoned that such a “literal
27 application” required dismissal with prejudice.

28 The most oft-cited cases in support of dismissal without prejudice are *Morgan v. AT&T*
Wireless Servs. and *Deitz v. Comcast Corp.* In *Morgan*, the court adopted *Outboard*’s understanding
of the notice requirement’s purpose, stating that the “requirement exists in order to allow a defendant

1 to avoid liability for damages if the defendant corrects the alleged wrongs within 30 days after
2 notice.” *Morgan*, 177 Cal. App. 4th at 1261. However, in contrast to *Cattie* and *Laster*, it held
3 dismissal with prejudice to be unnecessary to meet that goal. “Instead [of being dismissed with
4 prejudice], the claim must simply be dismissed until 30 days or more after the plaintiff complies with
5 the notice requirements.” *Id.* In *Deitz*, the court reasoned that dismissing with prejudice would be
6 draconian in light of the statute’s provision for amending an action that initially seeks only injunctive
7 relief, so long as the required thirty days run prior to amendment. *Deitz*, 2006 WL 3782902, at *5–6.

8 The Court looks to the statute’s legislative history where the language is not clear and
9 unambiguous. CLRA’s legislative history indicates that it was enacted to assist unsophisticated
10 consumers:

11 QUESTION – Who will the Act benefit most?

12 ANSWER – Low income or ghetto consumers. One of the most important points in
13 the Report of the National Advisory Commission on Civil Disorders is that much
14 resentment against the establishment found in ghetto areas is generated by
15 unconscionable practices of merchants in business there.

16 This bill will enable legal aid societies, district attorneys’ consumer fraud units,
17 and other legal assistance agencies to more easily combat unconscionable practices.

18 Assembly Comm. on Judiciary, Questions and Answers Regarding Assembly Bill No. 292 (1970 Reg.
19 Sess.), attached as Ex. A to Defendants’ Supp. Brief. The statute itself indicates that its “underlying
20 purposes [are] to protect consumers against unfair and deceptive business practices and to provide
21 efficient and economical procedures to secure such protection.” Thus, the consumer, not the
22 merchant, is of primary concern. *See also*, Reed, 2 Pac. L.J. at 8, attached as Ex. B to Defendants’
23 Supp. Brief (“[T]he policy statement was intended as a concise guide to the interpretation and
24 application of its many provisions. The message is clear—*when in doubt, decide in the consumers’*
25 *favor.*”) (emphasis in original).

26 Nothing in the legislative history indicates that the 30-day notice period was intended to bar
27 consumer actions or was not curable. Under section 1782(d), the notice could be provided as a matter
28 of right within 30 days of filing an action for injunctive relief: “the consumer may amend his or her
complaint *without leave of court* to include a request for damages.” (Emphasis supplied.) The
corollary must therefore also exist, that is, that a court *may* grant leave at any later date. The

1 Legislature provided a 30-day window to resolve quickly and efficiently consumer complaints. It
2 inured to the consumers' benefit. To interpret the statute in such a way as to convert that same
3 provision into a sword against consumers would violate the fundamental principle upon which the
4 Legislature enacted the CLRA.

5 Accordingly, the Court grants leave for Plaintiffs to provide notice under section 1782(d). The
6 CLRA Claim for damages is **DISMISSED WITHOUT PREJUDICE**. The CLRA Claim remains intact to
7 the extent that it seeks purely declarative and injunctive relief.

8 **III. CONCLUSION**

9 For the foregoing reasons, the Court hereby:

- 10 • **GRANTS** the Motion to Dismiss as to Plaintiffs' second claim, **WITH LEAVE TO**
11 **AMEND** and re-plead the second claim without any manufacturing defect claim. This
12 dismissal is **WITHOUT PREJUDICE** to Plaintiffs seeking leave to file an amended claim
13 based upon manufacturing defect should they discover additional facts in support
14 thereof;
- 15 • **GRANTS WITH LEAVE TO AMEND** the Motion to Dismiss as to the fifth claim.

16 Plaintiffs have **thirty-five (35) days** from the date of this Order to file a First Amended
17 Complaint. Thereafter, Defendants have **twenty-one (21) days** from the date of filing to respond.
18 This Order terminates Dkt. No. 44.

19 **IT IS SO ORDERED.**

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21 Dated: July 9, 2012



22 **YVONNE GONZALEZ ROGERS**
23 **UNITED STATES DISTRICT COURT JUDGE**
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