UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CREE, INC., a North Carolina Corporation,

Plaintiff,

v.

TARR INC., a California Corporation; IRON ADS, LLC a Nevada Limited Liability Company; NATHAN MARTINEZ an Individual; and DOES 1-10, Inclusive,

Defendants.

Case No.: 3:17-cv-00506-GPC-NLS

ORDER:

(1) DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION TO DISMISS

(2) DENYING DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT

[ECF No. 16]

Before the Court is a motion, filed by Defendants Tarr Inc., Iron Ads, LLC, and Nathan Martinez, to dismiss the claims in Plaintiff Cree Inc.'s complaint, ECF No. 1, for failure to state a claim on which relief can be granted or, in the alternative, for a more definite statement. ECF No. 16. The motion has been fully briefed. Plaintiff filed an opposition on June 9, 2017. ECF No. 19. On June 23, 2017, Defendants filed their response. ECF No. 20. Upon consideration of the moving papers, the applicable law,

and for the reasons set forth below, the Court **DENIES in part and GRANTS in part** Defendants' motion.

BACKGROUND

Cree Inc. ("Cree") manufactures silicon carbon wafers and innovative light emitting diodes ("LED") "for use in a variety of applications." Compl. ¶ 17. According to the complaint, Cree is a "market-leading innovator in the design, development, manufacture and sale of LEDS, lighting products using LEDs, semiconductor products" and a range of other merchandise. *Id.* ¶ 18.

Products created by Cree are branded with various trademarks, including but not limited to the CREE® mark. *Id.* Plaintiff has federally registered its CREE® trademark with the U.S. Patent and Trademark Office ("USPTO"). *Id.* ¶ 49, Exhibits A-FF. Plaintiff occasionally authorizes third party product manufacturers to use the CREE® trademark under license and to create CREE® LEDs. *Id.* ¶ 25. Plaintiff alleges that all products made and sold under the CREE® trademark are associated with high quality around the world, giving Cree and its trademarks distinctive value. *Id.* ¶ 22.

Defendant Tarr Inc. ("Tarr") is a California corporation located in Del Mar, California. *Id.* ¶ 3. Defendant Iron Ads, LLC ("Iron Ads") is a limited liability company with a principal place of business in Reno, Nevada. *Id.* According to documents from the USPTO, Iron Ads owns trademarks "Shadowhawk X800" and "Shadowhawk."[1] ECF No. 19-1, Exhibits C-D. Defendant Nathan Martinez is an individual residing in San Diego, California and is a "principal" of Tarr and Iron Ads. Compl. ¶ 5. According to

[1] In support of its response to Defendants' motion to dismiss, Plaintiff requests that the Court take judicial notice of USPTO documents indicating that Defendant Iron Ads owns the "Shadowhawk X800" and "Shadowhawk" trademarks. *See* ECF. No. 19-1 at 2-3, 9-14. Given that Defendants do not oppose Plaintiff's request, and keeping in mind that courts "may take judicial notice of records and reports of administrative bodies" under Federal Rule of Evidence 201(b), *Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953), the Court grants Plaintiff's request to take judicial notice of the USPTO documents. *See Am. DJ Supply Inc. v. Am. Lighting Inc.*, 2013 WL 12123770, at *10 n.2 (C.D. Cal. May 2, 2013) (taking judicial notice of USPTO trademarks pursuant to Rule 201(b)).

the California Secretary of State, Martinez is a director and officer of Defendant Tarr and, according to the Nevada Secretary of State, Martinez is an officer of Defendant Iron Ads. ECF No. 19-1, Exhibit A-B.[2] Plaintiff also alleges that "Defendants Tarr Inc., and Iron Ads are the alter egos of Defendant Nathan Martinez." Compl. ¶¶ 6-8.

Defendants have created numerous Internet websites including but not limited to shadowhawkx800.com, x800flashlight.com, and x800shadowhawk.com. *Id.* ¶¶ 37-39. The websites are allegedly used by Defendants to advertise, sell, or provide flashlights of purported military-grade quality, which Defendants advertise as being manufactured with "CREE LEDS." *Id.* ¶ 31. Plaintiff further alleges that Defendants use Plaintiff's CREE® trademarks to advertise Defendants' products within the pages of Defendants' websites. *Id.* ¶ 34. Moreover and as alleged in the complaint, Defendants advertise their products by using "terms which are confusingly similar to Plaintiff's marks, as keywords in their websites so that Defendants' websites appear in Internet search or web browser results for Plaintiff's products." *Id.* ¶ 33. As a result, Plaintiff alleges, Defendants' websites end up advertising their products as containing CREE®-branded technology when those products actually contain no component originating with Plaintiff, *i.e.*, no authentic CREE® LEDs. *Id.* ¶ 41. Plaintiff goes on to allege that at least one of Defendants' products, misleadingly advertised as containing CREE® LEDs, was actually manufactured with an LED bearing the brand name "LatticeBright," which is a Chinese manufacturer of budget lighting components. *Id.*

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[2] Plaintiff, in its response opposition, also requests that the Court take judicial notice of Tarr's Statement of Information filed with the California Secretary of State and a copy of the listing maintained by the Nevada Secretary of State regarding Iron Ads. ECF No. 19-1 at 2, 5-9. Again and given that Defendants do not dispute Plaintiff's request for judicial notice, the Court takes judicial notice of these matters of public record pursuant to Federal Rule of Evidence 201(b). *Hullinger v. Anand,* 2015 WL 11072169, *6 (C.D. Cal. Dec. 22, 2015) (taking judicial notice of corporation's "Statement of Information" as matter of public record); *Farina Focaccia & Cucina Italiana, LLC v. 700 Valencia St. LLC*, 2015 WL 4932640, *4 (N.D. Cal. Aug. 18, 2015) (taking judicial notice of existence of website of state secretary of state as well as website's displayed language as they were facts "not subject to reasonable dispute.").

Cree has never authorized nor consented to Defendants' use of the CREE® trademark. *Id.* ¶ 44. Plaintiff alleges that it has also never consented to Defendants' use of any "confusingly similar marks" and has never authorized Defendants to manufacture, copy, sell, import, market, or distribute any CREE® products. *Id*.

Given these facts and circumstances, Plaintiff alleges that Defendants have violated and continue to violate Cree's exclusive rights to its trademarked materials, goods, and services. *Id.* ¶ 42. More specifically, Plaintiff contends that through committing these acts, Defendants have caused irreparable harm to Plaintiff by (i) infringing, tarnishing, and diluting Plaintiff's right to the CREE® trademark; (ii) misleading the public into believing there is an association or connection between Defendants and Plaintiff or between their products; (iii) using "false designations of origin on or in connection with its goods and services"; (iv) engaging in unfair competition; (v) and unfairly profiting from such activity. *Id.* ¶ 45.

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed R. Civ. P. 8(a), and give "the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990).

In considering whether dismissal is suitable, a court will take all well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiff. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009). The court will also consider whether the complaint alleges sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

In the event that a court does grant a motion to dismiss, Rule 15 provides that leave to amend should be freely granted when justice so requires. Fed. R. Civ. P 15(a)(2). Accordingly, when a court dismisses a complaint for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (internal citations omitted). Amendment, therefore, may be denied if it would be futile. *See id.*

DISCUSSION

Plaintiff Cree's complaint alleges four causes of action against Defendants, namely, (1) trademark infringement under Section 32(a) of the Lanham Trademark Act ("Lanham Act"), 15 U.S.C. § 1114(1); (2) false designation of origin and unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (3) trademark dilution under the Federal Trademark Dilution Act,[3] 15 U.S.C. § 1125(c); and (4) unfair business practices in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*. Compl. at 1. Defendants, in response, argue that Plaintiff has failed to state a claim under any of these laws because (1) the complaint lacks "specific factual allegations" supporting the notion that "any of the Named Defendants ever owned or controlled any of the" allegedly infringing websites and (2) the lack of specificity in the complaint fails to put Defendants on notice of the misconduct

[3] The Federal Trademark Dilution Act amended the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051–1127 (1994). *See Avery v. Dennison Corp. v. Sumpton*, 189 F.3d 868, 871 (9th Cir. 1999). Accordingly, and for purposes of clarity, the Court will refer to this claim, along with Plaintiff's claims under § 32(a) and § 43(a) of the Lanham Act, as the "Lanham Act claims."

they allegedly performed and the claims against them. For the following reasons, however, the Court disagrees with Defendants. Plaintiff's allegations make a prima facie showing that Defendants have used Plaintiff's trademark and are, moreover, sufficiently detailed to apprise Defendants of the claims against them.

A. Whether Defendants "Actually Used" Plaintiff's Trademark

In the introduction to their motion to dismiss, Defendants state that the fundamental flaw in Plaintiff's complaint is that it "lacks any specific factual allegations to support that the Named Defendants ever owned or controlled any of the twenty advertising websites and thus ever infringed the CREE® trademarks." ECF No. 16-1 at 6. Defendants further contend that "Plaintiff may have a viable trademark infringement claim against those who owned or controlled those twenty advertising websites," but Plaintiff does not have a claim against Defendants. *See id.* The Court, however and as explained below, does not find this line of argument persuasive. While "actual use" of a protected trademark is necessary to prove a trademark infringement claim under 15 U.S.C. § 1114 and 15 U.S.C. § 1125, at the motion to dismiss stage, a plaintiff need only allege prima facie facts demonstrating that the defendant "used" the plaintiff's trademark.

1. Lanham Act Claims

Claims for trademark infringement, brought under § 32 of the Lanham Act, and claims for false designation of origin or unfair competition, brought under § 43(a) of the Act, require a plaintiff to establish that the defendant is "using a mark confusingly similar to a valid, protectable trademark." *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999); *see also New W. Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979) ("Whether we call the violation infringement, unfair competition, or false designation of origin, the test is identical is there a 'likelihood of confusion?'"). Relatedly, a claim for trademark dilution under § 43(c) of the Federal Trademark Dilution Act requires a plaintiff to establish, among other elements, that the defendant "is making use of the mark in commerce" and that "defendant's use of the mark is likely to cause dilution by blurring or dilution by tarnishment." *Jada Toys, Inc. v.*

Mattel, Inc., 518 F.3d 628, 634 (9th Cir. 2008) (citing 15 U.S.C. § 1125(c)(1)). Whether a defendant "uses" a trademark, therefore, is a necessary prima facie element of each of Plaintiff's three Lanham Act claims.

Defendants contend that this "vital element of each of Plaintiff's Lanham Act claims" is missing because Plaintiff has failed to provide "factual allegations" demonstrating that the "Named Defendants ever 'used' the Plaintiff's trademark." ECF No. 16-1 at 11.[4]

This assertion, however, underestimates the facts in the complaint. The complaint states that Defendants "have built, maintain and/or utilize" websites that infringe upon Plaintiff's trademark by advertising their products as CREE® products when, in reality, they have no association with the CREE® mark. Compl. ¶ 37 ("Defendants have built, maintain and/or utilize numerous websites for the purpose of falsely and deceptively advertising and selling 'tactical military flashlights,' which infringe Plaintiff's CREE® Trademarks . . . . ," *id.* ¶ 14 ("Defendants own, operate, control and sponsor highly interactive, commerce-enabled Internet websites which are used to advertise, offer for sale, sell and distribute flashlights to consumers using Plaintiff's registered trademarks."). Plaintiff goes on to identify twenty websites that allegedly infringe upon Plaintiff's trademark by falsely advertising that the flashlights sold on those websites are associated with the CREE® trademark. *Id.* ¶ 38. Plaintiff explains that these websites infringe upon Plaintiff's trademark because they hold out that they contain "CREE LEDs" even though Plaintiff has never "authorized or consented to" the websites' use of the CREE® mark.[5] *Id.* ¶¶ 38-42.

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[4] The Court observes that Defendants' motion exclusively attacks the "use" element of Plaintiff's Lanham Act claims and does not seek to explain why the other elements of Plaintiff's claims are lacking under the notice pleading standard. Absent any such argument, the Court will not visit the issue *sua sponte* on behalf of Defendant and review the other elements of Plaintiff's Lanham Act claims.

[5] It is also worth noting that fifteen of the twenty allegedly infringing websites, all of which have similar names, contain the term "Shadowhawk," which is a registered trademark of Defendant Iron Ads.

Notwithstanding Defendants' protestations to the contrary, the above are factual allegations that support the "use" element of Plaintiff's Lanham Act claims. Cree claims that Defendants have "used" the CREE® trademark by owning, maintaining, or otherwise directing websites that falsely represent that the advertised flashlights contain CREE LEDs. Such allegations place Defendants on sufficient notice of the misconduct that they have allegedly committed and are enough to state the prima facie element of "use" as required by the Lanham Act. *See generally* Fed. R. Civ. P. 8(a)(2) (requiring a "short and plain statement of the claim showing that the pleader is entitled to relief"); Fed. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted."). Indeed, although Defendants have argued that Plaintiff has failed to provide factual allegations supporting the "use" element of their Lanham Act claims, Defendants' own characterization of the complaint recognizes that Plaintiff has made such factual allegations. *See* ECF No. 16-1 at 8 ("Plaintiff's Complaint rests on the *factual premise* that 'Defendants have built, maintain and/or utilize' these twenty advertising websites that infringe the CREE® trademarks") (emphasis supplied).

The Court further concludes that none of the legal authority cited by Defendants persuades the Court that Plaintiff's "use" allegations are insufficient. Although Defendants emphasize throughout their briefing that Plaintiff was required to plead "specific factual allegations" regarding "actual ownership" of the infringing websites, Defendants have not provided the Court with a single authority supporting such an assertion. Defendants, for instance, erroneously cite to *Mophie, Inc. v. Shah*, which passed upon Lanham Act claims at summary judgment, not at a motion to dismiss. 2014 WL 10988347, *1, 22 (C.D. Cal. Nov. 12, 2014) (observing that the defendant must actually use the trademark to be liable for trademark infringement). Defendants also cite to a number of other inapposite authorities that do not stand for the proposition that a plaintiff's factual allegations concerning ownership are insufficient to state the "use" element of a Section 32 or 43 Lanham Act claim. *See Perfect 10 Inc. v. Giganews, Inc.*, 2015 WL 1746484, *14 (C.D. Cal. Mar. 24, 2015) (stating that a plaintiff had not

adequately alleged "use" of the trademark where defendant merely facilitated third-party's use of the mark through an Internet search engine function); *Fractional Villas, Inc. v. Tahoe Clubhouse*, 2009 WL 160932, *4 (S.D. Cal. Jan. 22, 2009) (plaintiff failed to plead any "specific facts" showing that defendant's use of trademark "caused confusion, induced mistake, or deceived as to the affiliation of defendant with plaintiff"); *Stillwell v. Radioshack Corp.*, 2007 U.S. Dist. LEXIS 103212, *18 (S.D. Cal. Dec. 18, 2007) (concluding that plaintiff's conclusory assertion that defendant engaged in false and deceptive advertising was insufficient because it failed to identify any false statement). Accordingly and absent some indication that Plaintiff's Lanham Act allegations require a more rigorous review than that prescribed by the notice pleading standard, the Court concludes that Defendants' insistence on "specific factual allegations" is misplaced.

B. Whether Defendants Have Notice of the Misconduct Alleged

The other argument advanced by Defendants throughout their motion, is that the complaint fails to adequately apprise Defendants of how they have allegedly infringed upon the CREE® trademark. Specifically, Defendants argue that Plaintiffs have (1) engaged in improper group pleading that does not give Defendants sufficient notice of the claims against them and (2) failed to state a claim under the California UCL because any alleged "deception" instigated by Defendants has not been pled with particularity. These contentions, however and as explained below, lack merit. Just as the Court is convinced that Plaintiff has sufficiently alleged that Defendants "used" Plaintiff's CREE® mark, the Court is likewise persuaded that Plaintiff's allegations place Defendants on notice of the misconduct alleged.

1. "Group Pleading"

Defendants contend that Plaintiff has engaged in improper "group pleading" that impermissibly "lumps" Defendants Iron Ads, Tarr, and Martinez together throughout the complaint. ECF No. 16-1 at 10. Defendants moreover argue that Plaintiff's "group pleading" fails to provide them with sufficient notice of "how each Named Defendant

relates to each claim" and fails to satisfy Rule 8(a)(2)'s notice pleading standard. *Id.* at 10-11.

The purpose of a complaint is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957). It is a functional standard that ensures that the opposing party can properly defend itself in court. *See* Fed. R. Civ. P. 8. Here, and as stated above, Plaintiff has alleged that Defendants have infringed upon its CREE® trademark by owning, or otherwise operating, twenty websites that advertise flashlights as being made of CREE® products when they do not, in fact, contain CREE® components. Plaintiff goes on to explain that Defendants' "use" of its trademark through these websites gives rise to each of Plaintiff's four causes of action.

Such allegations are sufficient to place Defendants on notice of the misconduct alleged and how that misconduct relates to each of Plaintiff's claims. This is not a case where the complaint is so "confusingly conclusory" that neither the court nor the defendants are sure what the plaintiff's claims are, what types of infringement are being alleged as to which defendant, or how each defendant's activities have allegedly caused infringement. *See GenProbe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 960-62 (S.D. Cal. 1996) (finding group pleading impermissible where each count of the complaint contained multiple causes of actions against multiple defendants and did not explain whether defendants were liable for direct trademark infringement, contributory infringement or inducement of infringement). This is, moreover, not a case where the plaintiff has failed to identify what misconduct each defendant committed. *See Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E. D. Cal. 2014) (concluding that "rambling complaint lacks facts of defendants' specific wrongdoing to provide fair notice as to what each defendant is to defend"); *U.S. Bank Nat'l Ass'n v. Friedrichs*, 2013 WL 589111, *9 (S.D. Cal. Feb. 13, 2013) (concluding that plaintiff's conclusory allegations failed to notify each of the defendants of what "act of negligent misrepresentation" each had committed).

The misconduct alleged, here, is that Defendants own, operate, or otherwise manage websites that misleading advertise their flashlights as containing CREE® products when they do not contain any CREE® components. Accordingly, Defendants have sufficient information to understand the claims against them and defend themselves. *See Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015) (finding that where plaintiff defined "Defendants" as inclusive of all defendants and where the gravamen of plaintiff's allegations was that all defendants infringed on the trademarks and copyrights, complaint provided sufficient notice); *see also Sebastian Brown Prods., LLC v. Muzooka, Inc.*, 143 F. Supp. 3d 1026, 1037 (N.D. Cal. 2015) (finding complaint did not impermissibly lump defendants and provided them with sufficient notice where it stated that individual corporate directors and officers committed infringement through operation of various websites). While the Court understands that Defendants dispute that they own any of the twenty allegedly infringing websites, *see* ECF No. 16-1 at 8, that dispute is properly raised in an answer and not in a motion to dismiss. Accordingly and given that Defendants themselves have admitted that "Plaintiff may have a viable trademark infringement claim against those who owned or controlled those twenty advertising websites," ECF No. 16-1 at 6, the Court concludes that Plaintiff's group allegations survive the notice-pleading standard.

2. UCL claim

Defendants' arguments regarding the sufficiency of Plaintiff's UCL claim fail for similar reasons. Defendants assert that Cree has failed to state a claim under California's Unfair Competition Law because it has failed to plead, with particularity, what false representations were made by which Defendants. ECF No. 16-1 at 19 ("Plaintiff needed to plead specific factual allegations identifying "the time, please, and specific content of the false representations as well as the parties to the misrepresentations."). While the Court agrees with Defendants that Rule 9(b)'s heightened pleading standard applies to Plaintiff's UCL claim, the Court disagrees that Plaintiff has not alleged Defendants' fraudulent course of conduct with sufficient particularity to survive Rule 9(b).

The UCL defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." *See Cel-Tech Commc'ns Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (citing Cal. Bus. & Prof. Code § 17200). To state a cause of action under § 17200, a plaintiff must show that members of the public are likely to be deceived by the defendant's actions. *See Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1144 (Cal. Ct. App. 2001). A plaintiff also must demonstrate actual reliance. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 325 (2009). "[A]ctual reliance . . . is inferred from the misrepresentation of a material fact." *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 299 (Cal. Ct. App. 2013).

Where a plaintiff's UCL claim is "grounded in fraud," Rule 9(b) applies. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (where plaintiff alleges a fraudulent course of conduct as the basis of his or her UCL claim that claim is "grounded in fraud" for purposes of Rule 9(b)). The course of conduct alleged here is that Defendants have knowingly infringed upon Plaintiff's trademark by "falsely advertising" that their flashlights contain CREE® products when they do not contain such products. *See* Compl. ¶¶ 31-34. Plaintiff further explains that Defendants engage in such "false advertising" by causing "the display of internet search results" to be in a "format that is likely to, and appears to be designed to confuse consumers into believing that the resulting listings offer genuine versions of Plaintiff's product . . . ." *Id.* Accordingly and because Plaintiff's allegations are grounded in Defendant' course of false advertisement, the Court concludes that Plaintiff's complaint is grounded in fraud and that Rule 9(b) applies.

The heightened pleading standard of Rule 9(b) requires that any complaint alleging fraud state with particularity the circumstances constituting fraud. *See* Fed. R. Civ. P. 9(b). To satisfy this heightened pleading requirement, the plaintiff must set forth "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir.

2007) (internal citations omitted). As a general rule, Rule 9(b) "require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007).

Defendants argue that Plaintiff's allegations fail to satisfy Rule 9(b).[6] *See* ECF No. 16-1 at 15. The Court disagrees. Cree alleges that each of the Defendants use and continue to use the CREE® trademark by owning, managing, or otherwise maintaining twenty specifically-identified websites that falsely promote the flashlights advertised as containing CREE® components. *See, e.g.*, Compl. ¶¶ 30-41, 74-77. Plaintiff goes on to explain that Defendants engage in such false promotion by purposefully placing the CREE® mark and other related terms on their sites in order to funnel customers to their pages and make it appear that the consumer is purchasing a flashlight made with genuine CREE® products. *Id.* ¶¶ 32-34. Such allegations adequately state "the time, place, and specific content" of Defendants' false "representations as well as the identities of the parties to the misrepresentation." *Odom*, 486 F.3d at 553. Accordingly, the Court rejects Defendants' notion that Plaintiff's UCL claim must fail because it does not allege Defendants' alleged fraudulent course of conduct with particularity. Plaintiff's allegations are sufficiently specific to put Defendants on notice of the misrepresentation they have allegedly committed and, therefore, are enough to satisfy Rule 9(b). *See Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003) (internal citations omitted) (plaintiff's allegations must "be specific enough to give defendants notice of the particular misconduct [so] that they can defend against the charge and not just deny that they have done anything wrong.").

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[6] The Court observes that Defendants do not attack the sufficiency of Plaintiff's UCL allegations other than to point out that Plaintiff has not alleged the claim with particularity. Accordingly, the Court will not address the other elements of Plaintiff's UCL claim as Defendants have made no meaningful argument demonstrating other elements are lacking as well.

C. Alter Ego Allegations

Defendants also challenge the sufficiency of Plaintiff's alter ego allegations. Specifically, Defendants contend that Plaintiff has failed to proffer factual allegations supporting its contention that Tarr and Iron Ads are the alter egos of Defendant Martinez. ECF No. 16-1 at 16. For the following reasons, the Court agrees.[7]

"In determining whether alter ego liability applies, we apply the law of the forum state." *In re Schwarzkopf*, 626 F.3d 1032, 1037 (9th Cir. 2010). Under California law, the alter ego doctrine applies when a party is using the corporate form to unjustly hide from personal liability. *See Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 300 (1985). To state an alter ego relationship under California law, a plaintiff must establish that "(1) there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased, and (2) an adherence to the fiction of the separate existence of the corporation . . . would sanction a fraud or promote injustice." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 677 (9th Cir. 2017). "Conclusory allegations of 'alter ego' status are insufficient to state a claim. Rather a plaintiff must allege specific facts supporting both of the necessary elements." *Gerritsen v. Warner Bros. Entm't Inc.*, 116 F. Supp. 3d 1104, 1136 (C.D. Cal. 2015).

When determining whether a plaintiff has alleged a "unity of interest" justifying application of the alter ego doctrine, California courts look to a long list of nonexhaustive factors that include (1) commingling of funds and other assets; (2) failure to segregate funds of the separate entities; (3) unauthorized diversion of corporate funds or assets; (4) treatment by the individual of the assets of the corporation as his own; (5) undercapitalization; (6) the concealment and misrepresentation of the identity of the

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[7] The Court observes that its conclusion that Plaintiff has failed to plead an alter ego relationship between Martinez and Tarr, along with Martinez and Iron Ads, has a minimal effect on the pleadings. This is so because the complaint has alleged that each of the Defendants are primarily liable for all causes of action, and therefore none of Plaintiff's causes of action rely on the alter ego relationship to establish liability. *See* Compl. ¶ 11 (Defendants are "jointly, severally and concurrently liable and responsible with one another upon the causes of action hereinafter set forth.").

responsible ownership; and (7) the disregard of legal formalities, among many other factors. *See Zoran Corp. v. Chen*, 185 Cal. App. 4th 799, 811-12 (Cal. Ct. App. 2010). A court assessing these factors should not treat any one factor as determinative, but rather should "examine all the circumstances to determine whether to apply the doctrine." *VirtualMagic Asia, Inc. v. Fil–Cartoons, Inc.*, 99 Cal. App. 4th 228, 245 (Cal. Ct. App. 2002).

The facts alleged in the complaint, when viewed as a whole, are insufficient to satisfy the "unity of interest" element of California's alter ego doctrine. Plaintiff alleges that Defendants Tarr and Iron Ads are the alter egos of Defendant Martinez. Compl. ¶ 9. It goes on to allege that Defendants Tarr and Iron Ads "do not have sufficient funding to assume responsibility for their foreseeable and actual liabilities," that both companies are "undercapitalized," and that both have "failed to observe corporate formalities required by law." *Id.* ¶¶ 6-8. Plaintiff further alleges that Martinez is a "principal" of both Tarr and Iron Ads and that Martinez "personally directed and benefited from the infringing activities of Defendants Tarr Inc., and Iron Ads, LLC." *Id.* ¶¶ 5, 9.

Although Plaintiff contends that these allegations are enough to plead alter ego liability between Defendant Martinez and Defendants Iron Ads and Tarr, the Court finds them to be conclusory. Other than the assertion that Martinez is a "principal" of Iron Ads and Tarr, these allegations are devoid of any non-conclusory facts supporting the notion that Tarr and Iron Ads are the alter ego of Martinez. That sole factual assertion, however, is not enough on its own to demonstrate a "unity of interest and ownership" that warrants inferring that the separate personalities of Martinez and Iron Ads, and Martinez and Tarr, no longer exist. *See Xyience Beverage Co., LLC v. Statewide Beverage Co. Inc.*, 2015 WL 13333486, *7 (C.D. Cal. Sept. 24, 2015) (allegation that two companies have two officers who have some degree of control over both companies does not satisfy "unity of interest" element); *see also Katzir's Floor & Home Design, Inc. v. M–MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) ("mere fact of sole ownership and control does not eviscerate the separate corporate identity"). Accordingly and absent other factual

allegations supporting any of the other above-mentioned factors, the Court will not infer that there is a "unity of interest" between Martinez and Iron Ads, and Martinez and Tarr, merely because Martinez is a "principal" of both.

Moreover and even if Plaintiff's allegations were enough to plead a "unity of interest," Plaintiff has also failed to plead the second element of the alter ego doctrine. As stated above, the second prong of the doctrine requires a plaintiff to demonstrate that adherence to the fiction of the separate existence of the corporation sanctions fraud or promotes injustice. *Perfect 10*, 847 F.3d at 677. "The 'inequitable result' prong of alter ego liability exists to address circumstances in which 'adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.'" *Warner Bros.*, 116 F. Supp. 3d at 1143. This means that, generally speaking, California courts will require that "some evidence of bad faith conduct on the part of defendants" be demonstrated "before concluding that an inequitable result justifies an alter ego finding." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1117 (C.D. Cal. 2003). Plaintiff, however, has not proffered any allegation, or argument, directed at the "inequitable result" prong of the alter ego test. Accordingly, the Court further concludes that Plaintiff has also failed to plead the second element of alter ego liability.[8]

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[8] In reaching this conclusion the Court rejects Plaintiff's reliance on *Adobe Sys. Inc. v. My Choice Software, LLC*, 2014 WL 6346776, *3 (N.D. Cal. Nov. 14, 2014) and *Adobe Sys. Inc. v. Software Speedy*, 2014 WL 7186682, *5 (N.D. Cal. Dec. 16, 2014). Although the *My Choice* court found similarly sparse allegations were sufficient to plead alter ego liability, the Court is not bound by that decision. 2014 WL 6346776, at *3 (fact that individuals were part-owners and officers of company and that they personally directed misconduct, among other factors, was enough to plead alter ego liability). As for *Software Speedy*, the Court finds that authority to be unpersuasive because it involved substantially different circumstances. 2014 WL 7186682, at *5 (finding that individual was alter ego of company because he owned the company, listed himself as a "sales representative" of the company, and because the infringing conduct at issue involved the unauthorized sale and distribution of plaintiff's product).

D. Motion for a More Definite Statement

Defendants have alternatively moved for a more definite statement under Fed. R. Civ. P. 12(e). ECF No. 16 at 12. For the following reasons, the Court denies the motion.

Rule 12(e) provides that "[i]f a pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P 12(e). A motion for a more definite statement attacks the unintelligibility in a pleading, not simply the mere lack of detail. *See Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996). If discovery will provide the detail sought by a motion for a more definite statement, the motion should be denied. *See Beery v. Hitachi Home Elec., (America), Inc.*, 157 F.R.D. 477, 480 (C.D. Cal. 1993). "Whether to grant a Rule 12(e) motion is within the discretion of the trial court." *Griffin v. Cedar Fair, L.P.*, 817 F. Supp. 2d 1152, 1154 (N.D. Cal. 2011). Motions for a more definite statement are "not favored by the courts since pleadings in federal courts are only required to fairly notify the opposing party of the nature of the claim." *Id.* Ultimately, therefore, a Rule 12(e) motion "should not be granted unless the defendant cannot frame a responsive pleading." *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981) (citing *Boxall v. Sequoia Union High Sch. District*, 464 F. Supp. 1104, 1114 (N.D. Cal. 1979)); *see also Beery*, 157 F.R.D. at 480 (finding12(e) motions are "only appropriate when the defendants cannot understand the substance of the claim asserted").

Plaintiff's complaint is not so "ambiguous," "vague" or "unintelligible" that it warrants granting Defendants' motion for a more definite statement. As stated above, Plaintiff's allegations are sufficiently detailed to apprise Defendants of the misconduct alleged and the claims against them. Accordingly, the Court finds no reason to conclude that Plaintiff's allegations prevent Defendants from making a responsive pleading.

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CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

(1) Defendants' motion to dismiss for failure to state a claim is **DENIED** as to Plaintiff's Lanham Act and UCL claims against Tarr Inc., Iron Ads, LLC, and Nathan Martinez.

(2) Defendants' motion for a more definite statement is **DENIED**.

(3) Defendants' motion to dismiss Plaintiff's alter ego allegations between Tarr, Inc. and Nathan Martinez and Iron Ads, LLC and Nathan Martinez are **GRANTED without prejudice.** Plaintiff has thirty (30) days from the date of this order to amend its complaint to cure the deficiencies as identified by this order.

(4) The Court **DENIES** Defendants' requests for judicial notice, ECF No. 16-2 and ECF No. 20-1, as moot because their contents do not alter the Court's analysis.

IT IS SO ORDERED.

Dated: July 28, 2017

Hon. Gonzalo P. Curiel
United States District Judge