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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOMAS LESZCZYNSKI,
Plaintiff,

v.

KITCHEN CUBE LLC; TIMOTHY A.
DUFFY; ALTAMATIC LLC; INSIDER
GOODS LLC; RANDALL TOLTZ; TYLER
RUBLE; DYLAN SPENCER,
Defendants.

Case No.: 8-23-cv-01698-MEMF-ADS

**ORDER GRANTING IN PART REQUESTS
FOR JUDICIAL NOTICE AND GRANTING
IN PART MOTIONS TO DISMISS [ECF
NOS. 44, 45, 46, 47, 51]**

Before the Court are a Motion to Dismiss and Request for Judicial Notice filed by Defendant Tyler Ruble (ECF Nos. 44, 46), a Motion to Dismiss and Request for Judicial Notice filed by Defendant Kitchen Cube LLC (ECF Nos. 45, 47), and a Motion to Dismiss filed by Defendants Timothy A. Duffy, Altamatic LLC, Randall Toltz, and Dylan Spencer (ECF No. 51). For the reasons stated herein, the Court GRANTS IN PART both Requests for Judicial Notice, and GRANTS IN PART the Motions to Dismiss.

///

BACKGROUND

I. Factual Background¹

Plaintiff Tomas Leszczynski (“Leszczynski”) is an individual residing in California. Compl. ¶ 9. Defendant Richard P. Clem² (“Clem”) is an individual residing in Minnesota. *Id.* ¶ 10. Defendant Kitchen Cube LLC (“Kitchen Cube”) is an entity based in Minnesota. *Id.* ¶¶ 11, 34. Defendant Timothy A. Duffy (“Duffy”) is an individual residing in Illinois. *Id.* ¶ 12. Defendant Altamatic LLC (“Altamatic”) is an entity based in Wyoming, which was created by Duffy. *Id.* ¶¶ 13, 35. Defendant Insider Goods LLC (“Insider Goods”) is an entity based in Nevada. *Id.* ¶ 14. Defendant Randall Toltz (“Toltz”) is an individual residing in Nevada. *Id.* ¶ 15. Defendant Tyler Ruble (“Ruble”) is an individual residing in Minnesota. *Id.* ¶ 16. Defendant Dylan Spencer (“Spencer”) is an individual residing in Florida (collectively “Defendants”). *Id.* ¶ 17.

Leszczynski invented an object, a measuring cube (“Cube”) which combines various measuring volumes into a single cubical structure. *Id.* ¶ 23.

On December 1, 2017, Leszczynski posted the Cube design and 3D print files under the name “iomaa” on Thingiverse.com (“Thingiverse”), the largest site for 3D print objects. *Id.* ¶ 18. On January 3, 2018, Leszczynski uploaded an updated file “cube_ver3.STL.” (the “Cube file”), which is version 3 of the Cube, available at <https://www.thingiverse.com/thing:2676324> (“Leszczynski’s Thingiverse page”). *Id.* ¶¶ 18, 19. The Cube file was provided under a Creative Commons, non-commercial, no derivatives license (“Creative Commons license”), which was stated on the page. *Id.* ¶¶ 18, 22, 36. The Creative Commons license prohibits any commercial use or creation of derivative works based on the Cube design. *Id.* ¶ 22. Leszczynski shared the Cube file free of charge for individuals to print and use at home. *Id.* ¶ 24. The Cube gained over 150,000 downloads in the first 2 years. *Id.* ¶ 23.

¹ Unless otherwise indicated, the following factual background is derived from Plaintiff Tomas Leszczynski’s Complaint. ECF No. 1 (“Complaint” or “Compl.”). For the purposes of these Motions, the Court treats these factual allegations as true, but at this stage of the litigation, the Court makes no finding on the truth of these allegations and is therefore not—at this stage—finding that they are true.

² Leszczynski initially brought the lawsuit against Clem, but on February 21, 2024, Leszczynski’s claims against Clem were dismissed following a stipulation filed by Leszczynski. ECF. Nos. 72, 76.

1 Leszczynski submitted an application for copyright registration on the Cube to the United
2 States Copyright Office. *Id.* ¶ 20.

3 Kitchen Cube manufactured and sold an identical version of the Cube even though it did not
4 design it. *See id.* ¶¶ 25, 27. Kitchen Cube used the Cube file, applied its logo to the Cube’s bottom
5 surface, arranged overseas production of the Cubes in China, and offered the Cubes for sale on
6 various platforms including the website of Kitchen Cube, Amazon, and Ebay. *Id.* Kitchen Cube
7 specified “This device was one of the most popular items on a popular 3D printing website with over
8 20,000 unique downloads” on its website, at a time when Leszczynski’s Thingiverse page displayed
9 that his Cube had been downloaded 20,000 times. *Id.* ¶ 26. ECF No. 45-12, Ex. K. Kitchen Cube
10 also stated on its website that “we designed and manufactured every kitchen measuring device in one
11 easy to use gadget.” *Id.* ¶ 27. Kitchen Cube filed a patent application for the Cube. *Id.*

12 Kitchen Cube introduced an affiliate program, through which it offered the production of the
13 Cube with customized branding options. Other defendants manufactured and sold the Cube with
14 their unique branding through the affiliate program. *Id.* ¶ 28.

15 Leszczynski received a delivery of a Cube from one unspecified defendant on July 26, 2023,
16 and received two additional Cubes from other unspecified defendants on July 29, 2023. *Id.* ¶ 5.
17 These deliveries were made to Leszczynski’s residence in California. *Id.*

18 **II. Procedural History**

19 Leszczynski filed suit in this Court on September 13, 2023. *See* Compl. The Complaint
20 asserts three causes of action against all Defendants: (1) copyright infringement under 17 U.S.C. §
21 501; (2) violation of Creative Commons license terms; and (3) false advertising and
22 misrepresentation under 15 U.S.C. § 1125(a). *Id.*

23 On October 23, 2023, Ruble filed his Motion to Dismiss (“Ruble Motion”) (ECF No. 44) and
24 a Request for Judicial Notice (“Ruble RJN”) (ECF No. 46). On the same day, Kitchen Cube also
25 filed a Motion to Dismiss (“Kitchen Cube Motion”) (ECF No. 45) and a Request for Judicial Notice
26 (“Kitchen Cube RJN”) (ECF No. 47). On October 24, 2023, Duffy, Altamatic, Insider Goods, Toltz,
27 and Spencer filed their Motion to Dismiss (“Duffy Motion”) (ECF No. 51).
28

1 On November 4, 2023, Leszczynski filed Oppositions³ to all Motions (respectively, “Ruble
2 Opp’n”, “Kitchen Cube Opp’n”, and “Duffy Opp’n”) (ECF Nos. 56, 57, 58). On November 13,
3 2023, Kitchen Cube filed a Reply in support of its Motion (“Kitchen Cube Reply”) (ECF No. 62),
4 and a Reply in support of its RJN (“Kitchen Cube RJN Reply”) (ECF No. 63). On the same day,
5 Ruble also filed a Reply in support of his Motion (“Ruble Reply”) (ECF No. 64), and a Reply in
6 support of its RJN (“Ruble RJN Reply”) (ECF No. 65). On March 21, 2024, Duffy, Altamatic,
7 Insider Goods, Toltz, and Spencer filed a Reply in support of their Motion (“Duffy Reply”) (ECF
8 No. 84).

9 On January 27, 2024, Leszczynski filed a stipulation to dismiss Clem. ECF No. 72. On
10 February 21, 2024, The Court issued an order granting the stipulation to dismiss Clem. ECF No. 76.

11 The Court held a hearing on the Motions on April 4, 2024. ECF No. 86.

12 **REQUESTS FOR JUDICIAL NOTICE (ECF NOS. 46, 47)**

13 **I. Applicable Law**

14 A court may judicially notice facts that: “(1) [are] generally known within the trial court’s
15 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy
16 cannot reasonably be questioned.” Fed. R. Evid. 201(b) (“Rule 201”). Under this standard, courts
17 may judicially notice “undisputed matters of public record,” but generally may not notice “disputed
18 facts stated in public records.” *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001),
19 *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125–26 (9th
20 Cir. 2002). Once a fact is judicially noticed, the court “must instruct the jury to accept the noticed
21 fact as conclusive.” Fed. R. Evid. 201(f).

22
23 ³ Leszczynski argues that Ruble and Kitchen Cube failed to comply with the meet and confer requirement in
24 advance of filing their Motions and RJNs under Local Rule 7-3. *See* ECF Nos 60, 61. Ruble and Kitchen
25 Cube argue in response that Leszczynski did not make himself available to meet in advance of the deadline to
26 file the motion, and they discussed the motion via email with Leszczynski. *See* ECF Nos. 63, 65. The Court
27 notes that, as described in Section VII(A) of the Court’s Standing Order, the meet and confer prior to filing a
28 Motion must be “in real-time” and email generally is not sufficient. The parties are admonished to meet and
confer in real time in advance of filing any motion, and to review the Local Rules and the Court’s Standing
Order and abide by them for the remainder of this action. Leszczynski makes a similar argument in his
Opposition to Duffy’s Motion, but does not specifically allege that Duffy failed to meet and confer, and so the
Court understands that this argument is directed only against Ruble and Kitchen Cube. ECF No. 58 at 5–8.

1 On a motion to dismiss, courts are generally prohibited from “consider[ing] any material
2 beyond the pleadings.” *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011)
3 (quoting *Lee*, 250 F.3d at 688). Courts generally only consider the complaint and other materials
4 “submitted with and attached to the Complaint.” *Id.* at 999. Documents not attached to the
5 complaint—including documents that might otherwise be subject to judicial notice—may only be
6 considered if: “(1) the complaint refers to the document; (2) the document is central to the plaintiff’s
7 claim; and (3) no party questions the authenticity of the document.” *Id.* (citing *Marder v. Lopez*, 450
8 F.3d 445, 448 (9th Cir.2006)). A court considering a motion to dismiss should not take judicial
9 notice of material that cannot be considered for the motion. *See Lee*, 250 F.3d at 689–90. Although a
10 district court generally may not consider any material beyond the pleadings in ruling on a motion to
11 dismiss, the Court may take judicial notice of matters in the public record, without converting a
12 motion to dismiss into one for summary judgment. *Id.*

13 A Court may take judicial notice of a document and consider it in analyzing a motion to
14 dismiss. *See Corinthian Colleges*, 655 F.3d at 998. In order to do so, the document must satisfy both
15 the *Corinthian Colleges* test and the requirements of Federal Rule of Evidence 201. *See id.* (first
16 considering whether document was referenced in and central to complaint, and second considering
17 Rule 201). However, a Court may also consider certain documents in deciding a motion to dismiss
18 without taking judicial notice of the documents. *See Marder*, 450 F.3d at 448 (finding documents
19 may be considered in deciding motion to dismiss, based on a test identical to the one in *Corinthian*
20 *Colleges*, without taking judicial notice of the documents). In some circumstances, it may be
21 appropriate to deny a request for judicial notice, avoiding the obligation to instruct the jury on the
22 trust of a document, but nevertheless, consider the document as evidence in deciding a motion to
23 dismiss. *See id.*

24 **II. Discussion**

25 Ruble requests the Court to take judicial notice of ten (10) exhibits in support of its Motion to
26 Dismiss. *See* ECF No. 46. Kitchen Cube also requests the Court to take judicial notice of twelve (12)
27 exhibits in support of its Motion to Dismiss, the first ten of which are overlapping with Ruble’s RJN.
28

1 See ECF No 47. Leszczynski filed Oppositions to each RJN. ECF Nos. 60, 61. Ruble and Kitchen
2 Cube replied respectively. ECF Nos. 63, 65.

3 The documents Ruble and Kitchen Cube request judicial notice of are:

- 4 1. Search results pages from the United States Copyright Office’s public catalog for works
5 registered to “Leszczynski, Tomas”, attached as Exhibit A to Ruble Motion and Kitchen
6 Cube Motion (ECF Nos. 44-2, 45-2);
- 7 2. Search results pages from the United States Copyright Office’s public catalog for works
8 titled “Bakercube Measuring Cube” and “Bakercube”, attached as Exhibit B to Ruble
9 Motion and Kitchen Cube Motion (ECF Nos. 44-3, 45-3);
- 10 3. Search results pages from the United States Copyright Office’s public catalog for works
11 with Registration Number “1-12981752441”, attached as Exhibit C to Ruble Motion and
12 Kitchen Cube Motion (ECF Nos. 44-4, 45-4);
- 13 4. Search results pages from the United States Copyright Office’s public catalog for works
14 with the Document Number “1-12981752441”, attached as Exhibit D to Ruble Motion
15 and Kitchen Cube Motion (ECF Nos. 44-5, 45-5):
- 16 5. The search guidelines of the Copyright Office website, available at
17 <https://cocatalog.loc.gov/help/regnum.htm>, attached as Exhibit E to Ruble Motion and
18 Kitchen Cube Motion (ECF Nos. 44-6, 45-6):
- 19 6. Leszczynski’s Thingiverse page, available at
20 <http://www.thingiverse.com/thing:2676324>, attached as Exhibit F to Ruble Motion and
21 Kitchen Cube Motion (ECF Nos. 44-7, 45-7):
- 22 7. An archive of Leszczynski’s Thingiverse page, available at
23 <https://web.archive.org/web/20180329085627/https://www.thingiverse.com/thing:26763>
24 [24/](https://web.archive.org/web/20180329085627/https://www.thingiverse.com/thing:26763), attached as Exhibit G to Ruble Motion and Kitchen Cube Motion (ECF Nos. 44-8,
25 45-8);
- 26 8. The Creative Commons Attribution-NonCommercial-NoDerivs 4.0 International license,
27 available at <https://creativecommons.org/licenses/by-nc-nd/4.0/legalcode.en>, attached as
28 Exhibit H to Ruble Motion and Kitchen Cube Motion (ECF Nos. 44-9, 45-9);

- 1 9. The Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Unported license,
2 available at <https://creativecommons.org/licenses/by-nc-nd/3.0/legalcode.en>, attached as
3 Exhibit I to Ruble Motion and Kitchen Cube Motion (ECF Nos. 44-10, 45-10);
- 4 10. The Creative Commons Attribution-NonCommercial-NoDerivs 2.0 Generic license,
5 available at <https://creativecommons.org/licenses/by-nc-nd/2.0/legalcode.en>, attached as
6 Exhibit J to Ruble Motion and Kitchen Cube Motion (ECF Nos. 44-11, 45-11);
- 7 11. A page of a section titled “About Us” from the webpage of Kitchen Cube, available at
8 <https://thekitchencube.com/pages/about>, attached as Exhibit K to Kitchen Cube Motion
9 (ECF No. 45-12); and
- 10 12. Search results page from the Minnesota Secretary of State’s website for Kitchen Cube,
11 available at
12 [https://mbportal.sos.state.mn.us/Business/SearchDetails?filingGuid=1ee0bc2f-512f-
14 ea11-9190-00155d01b4fc](https://mbportal.sos.state.mn.us/Business/SearchDetails?filingGuid=1ee0bc2f-512f-
13 ea11-9190-00155d01b4fc), attached as Exhibit L to Kitchen Cube Motion (ECF No. 45-
15 13).

16 The Court takes judicial notice of Exhibits A–D, as search results on registration with the
17 copyright office are public records which are proper for judicial notice. *See Reyn’s Pasta Bella, LLC*
18 *v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (“We may take judicial notice of court filings
19 and other matters of public record.”); *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007);
20 *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1064 (9th Cir. 2006) (taking
21 notice of trademark registrations by the United States Patent and Trademark Office).

22 Likewise, the Court takes judicial notice of Exhibits E and L, where Exhibit E is a search
23 guideline of the Copyright Office website, and Exhibit L is a search results page from the Minnesota
24 Secretary of State’s website, as they are publicly available by government entities. *See Daniels-Hall*
25 *v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (“It is appropriate to take judicial notice
26 of this information, as it was made publicly available by government entities (the school districts),
27 and neither party disputes the authenticity of the web sites or the accuracy of the information
28 displayed therein.”)

1 Furthermore, the Court takes judicial notice of Exhibit K—the Kitchen Cube website page—
2 as it is: (1) referenced in the Complaint; (2) central to Leszczynski’s claims; and (3) no party
3 questions its authenticity. *Corinthian Colleges*, 655 F.3d at 998. Leszczynski referenced the website
4 of Kitchen Cube in Complaint with exact words that Kitchen Cube used to support his claims,
5 particularly false advertising and misrepresentation claim, against it. Compl. ¶¶ 26, 40. The
6 statements on the website of Kitchen Cube are central to Leszczynski’s false advertisement or
7 misrepresentation claim. *Id.* ¶ 40. Leszczynski did not question the authenticity of Exhibit K.

8 The Court finds Exhibits F–J (Leszczynski’s Thingiverse page and three versions of the
9 Creative Commons license) are not appropriate for judicial notice. The existence of these documents
10 and the facts contained within them are not “generally known within the trial court’s territorial
11 jurisdiction.” *See* Fed. R. Evid. 201(b). Nor can they be “accurately and readily determined from
12 sources whose accuracy cannot reasonably be questioned.” *See id.* These documents are not public
13 records, and the Court cannot verify their accuracy. The documents thus do not meet the
14 requirements of Rule 201. *See id.*

15 However, the Court nevertheless finds it appropriate to consider these documents in deciding
16 the Motion. *See Marder*, 450 F.3d at 448 (finding documents may be considered in deciding motion
17 to dismiss, without taking judicial notice of the documents). The documents at issue meet all
18 requirements of the *Corinthian Colleges* test. *See Corinthian Colleges*, 655 F.3d at 998.

19 First, the documents are referenced in the complaint. *See id.* (the first requirement is that “the
20 complaint refers to the document”). Leszczynski explicitly references his Thingiverse website and
21 the archive page to explain he uploaded the Cube design on Thingiverse, and the download number
22 of the Cube design shows on the page. ECF Nos. 44-7, 44-8, 45-7, 45-8. *See* Compl. ¶¶ 18, 19, 21,
23 26. The Complaint also references the Creative Commons license regarding the breach of contract
24 claim, without a specific version. ECF Nos. 44-9, 44-10, 44-11, 45-9, 45-10, 45-11. *See id.* ¶¶ 18,
25 22, 36, 37. These documents are central to the complaint because the thrust of Leszczynski’s claims
26 is that Defendants infringed his copyright and/or violated the Creative Commons license. *Corinthian*
27 *Colleges*, 655 F.3d at 998 (second requirement is that “the document is central to the plaintiff’s
28 claim”). Finally, Leszczynski has not questioned the authenticity of the documents. *See id.* (third

1 requirement is that “no party questions the authenticity of the document”). The Court therefore finds
2 that it is appropriate to consider these documents in deciding the Motion. This is notwithstanding the
3 denial of the RJN.

4 **MOTIONS TO DISMISS (ECF NOS. 44, 45, 51)**

5 **I. The Court has Personal Jurisdiction over All Defendants.**

6 **A. Applicable Law**

7 Under Federal Rule of Civil Procedure 12(b)(2), a party may file a motion to dismiss a
8 complaint for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). In the face of a 12(b)(2) motion,
9 “the plaintiff bears the burden of demonstrating that the court has jurisdiction.” *In re W. States*
10 *Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 741 (9th Cir. 2013). In determining whether it
11 lacks personal jurisdiction, a court may consider evidence presented in affidavits and may order
12 discovery on the jurisdictional issues. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001),
13 *overruled on other grounds as discussed in Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1024
14 (9th Cir. 2017).

15 “However, ‘when a district court acts on a defendant’s motion to dismiss without holding an
16 evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to
17 withstand the motion to dismiss. That is, the plaintiff need only demonstrate facts that if true would
18 support jurisdiction over the defendant.’” *Id.* (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th
19 Cir. 1995)). Under such circumstances, a district court must accept the uncontroverted allegations in
20 the plaintiff’s complaint as true. *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127
21 (9th Cir. 2010). Although the court may not assume the truth of allegations in a pleading that are
22 contradicted by an affidavit, conflicts between the facts contained in the parties’ affidavits must be
23 resolved in the plaintiff’s favor for purposes of deciding whether a prima facie case for personal
24 jurisdiction exists. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011);
25 *Unocal*, 248 F.3d at 922.

26 Moreover, when no applicable federal statute governing personal jurisdiction exists, as is the
27 case here, the district court applies the law of the state in which the district court sits. *Picot v.*
28 *Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 125

1 (2014)). Accordingly, the Court looks to “California’s long-arm statute [which] allows the exercise
2 of personal jurisdiction to the full extent permissible under the U.S. Constitution.” *Id.* at 1211
3 (quoting *Daimler*, 571 U.S. at 125); *see also* Cal. Civ. Proc. Code § 410.10.

4 Due process allows courts to exercise jurisdiction only over a defendant who has “certain
5 minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional
6 notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)
7 (internal quotation marks omitted). Personal jurisdiction may be either general or specific. *See Picot*,
8 780 F.3d at 1211; *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1141–42 (9th Cir. 2017); *see also*
9 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The “minimum
10 contacts” test requires a determination of reasonableness by the court by weighing the facts of each
11 case “to determine whether the requisite ‘affiliating circumstances’ are present.” *Kulko v. Superior*
12 *Ct. of Cal. ex rel City & County of San Francisco*, 436 U.S. 84, 92 (1978) (quoting *Hanson v.*
13 *Denckla*, 357 U.S. 235, 246 (1958)).

14 i. General Jurisdiction

15 “General jurisdiction exists when a defendant is domiciled in the forum state or his activities
16 there are ‘substantial’ or ‘continuous and systematic.’” *Panavision Int’l, L.P. v. Toppen*, 141 F.3d
17 1316, 1320 (9th Cir. 1998) (quoting *Helicopteros*, 466 U.S. at 414–16), *modified*, *Yahoo! Inc. v. La*
18 *Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006). The Ninth
19 Circuit has recognized this as “an exacting standard, as it should be, because a finding of general
20 jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its
21 activities anywhere in the world.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801
22 (9th Cir. 2004); *see also Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th
23 Cir. 2000) (noting that the standard for establishing general jurisdiction is “fairly high” and requires
24 contacts “that approximate physical presence”), *overruled on other grounds by San Diego Cnty.*
25 *Credit Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1035 (9th Cir. 2023).

26 ii. Specific Jurisdiction

27 Even if a defendant has not had continuous and systematic contacts with the state sufficient
28 to confer general jurisdiction, a court may exercise specific jurisdiction over the defendant. *Picot*,

1 780 F.3d at 1211. Specific jurisdiction exists where the claim for relief arises directly from a
2 defendant’s contacts with the forum state. *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586,
3 588 (9th Cir. 1996). Jurisdiction is proper “where the contacts proximately result from actions by the
4 defendant himself that create a ‘substantial connection’ with the forum State.” *Burger King Corp. v.*
5 *Rudzewicz*, 471 U.S. 462, 475 (1985). For a court to exercise specific jurisdiction over a defendant:

6 (1) The non-resident defendant must purposefully direct his activities or consummate
7 some transaction with the forum or resident thereof; or perform some act by which he
8 purposefully avails himself of the privileges of conducting activities in the forum,
9 thereby invoking the benefits and protections of its laws; (2) the claim must be one
10 which arises out of or relates to the defendant’s forum-related activities; and (3) the
exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must
be reasonable.

11 *Picot*, 780 F.3d at 1211.

12 The plaintiff bears the burden of satisfying the first two prongs of this test. *Schwarzenegger*,
13 374 F.3d at 802. If the plaintiff does so, the burden then shifts to the defendant to show why the
14 exercise of personal jurisdiction would not be reasonable and fair under the third prong. *Id.*

15 Purposeful availment is found where “the defendant has taken deliberate action within the
16 forum state or if [it] has created continuing obligations to forum residents.” *Ballard*, 65 F.3d 1498.

17 Purposeful direction is also a relevant analysis for claims sounding in tort. *Glob. Commodities*
18 *Trading Grp., Inc. v. Beneficio de Arroz Coloma, S.A.*, 972 F.3d 1101, 1107 (9th Cir. 2020)

19 (explaining that under both purposeful availment and purposeful direction, the question is “whether
20 defendants have voluntarily derived some benefit from their interstate activities such that they ‘will
21 not be haled into a jurisdiction solely as a result of ‘random, fortuitous, or attenuated’ contacts.”).

22 When determining purposeful direction, the “effects” test applies. *Herbal Brands, Inc. v.*

23 *Photoplaza, Inc.*, 72 F.4th 1085, 1091 (9th Cir. 2023) (“That test ‘focuses on the forum in which the
24 defendant's actions were felt, whether or not the actions themselves occurred within the forum.’”)

25 **B. Discussion**

26 Ruble, Kitchen Cube, Duffy, Toltz, and Spencer argue in their Motions that the Court lacks
27 personal jurisdiction over them. The Court finds that there is not general jurisdiction over these
28

1 Defendants. However, Leszczynski has adequately pleaded facts that are sufficient to establish
2 specific personal jurisdiction over all Defendants.

3 i. The Court has personal jurisdiction over Kitchen Cube.

4 1. *General Jurisdiction*

5 The Court does not find general jurisdiction over Kitchen Cube, based on the facts before it.
6 The Supreme Court has explained that the “paradigm all-purpose forums for general jurisdiction are
7 a corporation’s place of incorporation and principal place of business.” *Daimler AG*, 571 U.S. at
8 118. Kitchen Cube is a Minnesota corporation. Compl. ¶ 11. Its principal place of business is in
9 Minnesota. ECF No. 45-13, Ex. L. While these are not the only ways to find general jurisdiction
10 over a company, it is rare for general jurisdiction to be satisfied in other ways. *See BNSF Ry. Co. v.*
11 *Ryrell*, 581 U.S. 402, 413 (2017) (noting that outside of these two forums, general jurisdiction is
12 only established in an “exceptional case” where “a corporate defendant’s operations in another
13 forum ‘may be so substantial and of such a nature as to render the corporation at home in that
14 State’”); *see also Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (explaining that
15 “*Daimler* makes clear the demanding nature of the standard for general personal jurisdiction over a
16 corporation”). Here, Leszczynski only argues that the Court has specific personal jurisdiction over
17 Kitchen Cube and does not provide any facts on general jurisdiction. Accordingly, the Court declines
18 to find general jurisdiction over Kitchen Cube.

19 2. *Specific Jurisdiction*

20 Nevertheless, the Court finds specific jurisdiction over Kitchen Cube as (1) Kitchen Cube
21 purposefully availed itself of the California market, (2) Leszczynski’s claims arise out of or relate to
22 Kitchen Cube’s in-state activities, and (3) it is not unreasonable to exercise jurisdiction over Kitchen
23 Cube.

24 First, Kitchen Cube purposefully availed itself of the forum. The Ninth Circuit states that
25 “operating a website ‘in conjunction with something more’—conduct directly targeting the forum—
26 is sufficient” to satisfy the express aiming prong. *Herbal Brands, Inc.*, 72 F.4th at 1092 (citing
27 *Mavrix*, 647 F.3d at 1229). In *Herbal Brands*, the court held that “the sales of physical products into
28 a forum via an interactive website can be sufficient to establish that a defendant expressly aimed its

1 conduct at the forum, provided that two key elements are present.” *Herbal Brands*, 72 F.4th at 1094.
2 “First, the sales must occur as part of the defendant’s regular course of business instead of being
3 ‘random, isolated, or fortuitous.’” *Herbal Brands*, 72 F.4th at 1094 (quoting *Keeton*, 465 U.S. at
4 774) “Second, the defendant must exercise some level of control over the ultimate distribution of its
5 products beyond simply placing its products into the stream of commerce.” *Id.*

6 Leszczynski’s allegations meet this standard. Even though Leszczynski did not specify from
7 which Defendant he received delivery of the Cubes, he alleges on Complaint that one Cube was
8 delivered on July 26, 2023, and other two Cubes were delivered on July 29, 2023, both to his
9 residence in California. Compl. ¶ 5. Leszczynski also contends that Kitchen Cube “conduct[s]
10 business in the state of California using Amazon.com, and/or Ebay.com, and/or their individual
11 websites.” *Id.* ¶¶ 5, 32. While Kitchen Cube lists a number of things it does not do in California, it
12 notably does not dispute that it markets and sells the Cubes in California through its website. ECF
13 No. 45 at 20. Therefore, Kitchen Cube allegedly used its website as their means of conducting
14 regular business—to make product sales to California residents and cause the product, the Cube, to
15 be delivered to the forum.

16 Second, Leszczynski’s claims relate to Kitchen Cube’s forum-related activities.
17 Leszczynski’s claims—Kitchen Cube infringed his copyright on the Cube, breached the Creative
18 Commons license, and falsely advertised the Cube—clearly arise out of and relate to Kitchen Cube’s
19 conduct of selling those same products to California residents. *See* Compl. *See also Herbal Brands*,
20 72 F.4th at 1096 (holding that the defendant’s promotion, sale, and distribution of products through
21 Amazon in the forum relate to the plaintiff’s trademark claims).

22 Finally, it is reasonable for the Court to exercise jurisdiction over Kitchen Cube. The Court
23 considers whether the exercise of personal jurisdiction over Kitchen Cube as to Leszczynski’s claims
24 offends the traditional notions of fair play and substantial justice, and finds that it does not. *Burger*
25 *King Corp.*, 471 U.S. at 476. Courts should “evaluate ‘the burden on the defendant,’ ‘the forum
26 State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient and
27 effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of
28 controversies,’ and the ‘shared interest of the several States in furthering fundamental substantive

1 social policies.” *Id.* at 477 (noting that “[t]hese considerations sometimes serve to establish the
2 reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be
3 required”). It is the defendant’s burden to establish that personal jurisdiction in this case would be
4 unconstitutional. *Id.* at 482. Here, Kitchen Cube does not present any arguments with regard to these
5 factors, including any burden on it from litigating in California.

6 Accordingly, the Court finds it reasonable to exercise specific jurisdiction over Kitchen
7 Cube.

8 ii. The Court has personal jurisdiction over Ruble, Toltz, and Spencer.

9 Ruble, Toltz, and Spencer⁴ argue that the Court does not have personal jurisdiction over
10 them. ECF Nos. 44 at 21–22, 51 at 11–12.

11 General jurisdiction exists either in a forum where the defendant is domiciled, or where the
12 defendant has activities that are either “substantial” or “continuous and systematic” *Panavision*, 141
13 F.3d at 1320. Here, Leszczynski alleges: (1) Ruble is domiciled in Minnesota; (2) Toltz is domiciled
14 in Nevada; and (3) Spencer is domiciled in Florida. Compl. ¶¶ 15, 16, 17. Leszczynski only argues
15 that the Court has specific personal jurisdiction over Ruble, and does not provide any facts on the
16 general jurisdiction of Ruble, Toltz, and Spencer. Accordingly, the Court declines to find general
17 jurisdiction over all of them.

18 Nevertheless, the Court finds specific jurisdiction over them as (1) they purposefully availed
19 themselves of the California market, (2) Leszczynski’s claims arise out of or relate to their in-state
20 activities, and (3) it is reasonable to exercise jurisdiction over them.

21 First, Leszczynski has properly alleged that Ruble, Toltz, and Spencer purposefully availed
22 themselves of the forum.⁵ Even though Leszczynski did not specify from which Defendant he
23

24 ⁴ Toltz and Spencer include their personal jurisdiction argument under the subtitle “Plaintiff Has Pled No
25 Valid Claims Against the Individual Defendants,” alleging that Leszczynski insufficiently argues facts
regarding personal jurisdiction. ECF No. 51 at 10–12.

26 ⁵ Toltz and Spencer argues in their Motion that the sole alleged basis for jurisdiction over them is their
27 association with their respective entities and the corporate veil needs to be pierced. ECF No. 51 at 11.
28 However, Leszczynski does not allege that Toltz or Spencer should be liable for actions of other corporation
Defendants, rather Leszczynski merely argues that they are individually liable. Compl. ¶¶ 52–54. Likewise,

1 received delivery of the Cubes, he alleges on Complaint that one Cube was delivered on July 26,
2 2023, and other two Cubes were delivered on July 29, 2023, both to his residence in California.
3 Compl. ¶ 5. Leszczynski also contends that “all defendants conduct business in the state of
4 California using Amazon.com, and/or Ebay.com, and/or their individual websites.” *Id.* ¶¶ 5, 32.
5 Toltz and Spencer argue that there is not any assertion that they should be held liable separate and
6 apart from their corporations, ECF No. 51 at 12, and Ruble lists a number of things he does not do in
7 California. ECF No. 45 at 20. But, notably, these three defendants do not dispute that they market
8 and sell the Cubes in California through online markets or websites. The sales of physical products
9 into a forum via an interactive website can be sufficient to establish that a defendant expressly aimed
10 its conduct at the forum. *Herbal Brands, Inc.*, 72 F.4th at 1094. Therefore, Leszczynski properly
11 alleged that they used online market or their website as their means of conducting regular business—
12 to make product sales to California residents and cause the product, the Cube, to be delivered to the
13 forum.

14 Second, Leszczynski has properly alleged that his claims relate to the forum-related activities
15 of Toltz, Ruble, and Spencer. Leszczynski’s claims—that the Defendants infringed his copyright on
16 the Cube, breached the Creative Commons license, and falsely advertised the Cube—clearly arise
17 out of and relate to their forum-related activities of selling the Cubes to California residents. Compl.
18 ¶¶ 30, 31, 33. *See also Herbal Brands*, 72 F.4th at 1096 (holding that the defendant’s promotion,
19 sale, and distribution of products through Amazon in the forum relate to the plaintiff’s trademark
20 claims).

21 Finally, it is reasonable for the Court to exercise jurisdiction over these Defendants. The
22 Court considers whether the exercise of personal jurisdiction over these Defendants as to
23 Leszczynski’s claims offends the traditional notions of fair play and substantial justice, and finds
24 that it does not. *Burger King Corp.*, 471 U.S. at 476. Furthermore, it is the *defendant’s* burden to
25

26 Leszczynski does not argue Ruble’s specific activities related to Kitchen Cube in either Complaint. *See*
27 Compl. In Opposition, Leszczynski argues that Ruble “set up the fraudulent LLC for the sole purpose of
28 escaping personal liability and Plaintiff has the right to challenge Defendant in this matter, fraudulent LLCs
do not protect their owners from personal liabilities,” but the Court does not consider it because there is no
allegation of Ruble’s liability concerning the activity of Kitchen Cube in Complaint. ECF No. 56 at 21.

1 establish that there is not personal jurisdiction in this case. *Id.* at 482. Here, Ruble does not present
2 any arguments with regard to these factors, including any burden on it from litigating in California.
3 *See* ECF No. 44. Although Toltz and Spencer argue Leszczynski’s claim fails under Wyoming law
4 on piercing the corporate veil, this argument does not meet their burden under the third element—
5 because Leszczynski’s jurisdictional claim is not based upon piercing the corporate veil. ECF No. 51
6 at 11–12.

7 Accordingly, the Court finds it reasonable to exercise specific jurisdiction over Ruble, Toltz,
8 and Spencer.

9 iii. The Court has personal jurisdiction over Duffy.

10 Duffy argues that the Court does not have personal jurisdiction over Duffy. ECF No. 51 at
11 11. Leszczynski argues that Duffy is liable for the actions of Altamatic under the doctrine of piercing
12 corporate veil because Duffy created Altamatic for fraudulent purposes related to the Cube. Compl. ¶
13 50.

14 General jurisdiction exists either in a forum where the defendant is domiciled, or where the
15 defendant has activities that are either “substantial” or “continuous and systematic” *Panavision*, 141
16 F.3d at 1320. Leszczynski alleges Duffy is domiciled in Illinois, and Altamatic—allegedly created
17 by Duffy for fraudulent purposes—is a corporation based in Wyoming. Compl. ¶¶ 12, 13.
18 Leszczynski does not further provide any facts on Duffy’s general jurisdiction. Accordingly, the
19 Court declines to find general jurisdiction over Duffy.

20 Concerning specific jurisdiction, Duffy argues that Leszczynski’s claim against Duffy is
21 unjust or unfair, because his claim against Altamatic fails under Wyoming law which requires an
22 injustice or unfairness must be proven. ECF No. 51 at 11. However, a request to pierce the corporate
23 veil is only a means of imposing liability for an underlying cause of action and is not a cause of
24 action in and of itself. *Loc. 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th
25 Cir. 1999). The only factual basis for personal jurisdiction over Duffy on Complaint is that Duffy
26 created Altamatic exclusively for fraudulent purposes related to the Cube. Compl. ¶ 35. Given the
27 Court has found that it has personal jurisdiction over Altamatic, this factual allegation is sufficient
28

1 for finding personal jurisdiction over Duffy. Compl. ¶ 50. Therefore, the Court finds it reasonable to
2 exercise specific jurisdiction over Duffy.

3 **II. Ruble Failed to Show that Service against Him Was Improper**

4 **A. Applicable Law**

5 Under Federal Rule of Civil Procedure Rule 4(e)–(1), a plaintiff may serve a defendant by
6 either (1) following state law for serving a summons in an action brought in courts of general
7 jurisdiction in the state where the district court is located or where service is made; or (2) doing any
8 of the following: (A) delivering a copy of the summons and of the complaint to the individual
9 personally; (B) leaving a copy of each at the individual’s dwelling or usual place of abode with
10 someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an
11 agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. Rule 4(e).

12 California law authorizes service to a person outside the state by, among other means,
13 “sending a copy of the summons and of the complaint to the person to be served by first-class mail,
14 postage prepaid, requiring a return receipt.” *See* Cal. Civ. Proc. Code § 415.40 (“section 415.40”).

15 Plaintiff bears the burden of establishing the validity of service. *Hickory Travel Sys., Inc. v.*
16 *TUI AG*, 213 F.R.D. 547, 551–552 (N.D.Cal.2003). “The filing of a proof of service creates a
17 rebuttable presumption that the service was proper.” *Floveyor Int’l, Ltd. v. Super. Ct.*, 59
18 Cal.App.4th 789, 795 (1997).

19 **B. Discussion**

20 Although Leszczynski filed a purported proof of service as to Ruble, Ruble argues the Court
21 should dismiss all claims against him for insufficient service of process. Having reviewed the record,
22 the Court finds that Leszczynski properly served Ruble.

23 The filing of a proof of service creates a presumption that the service was proper, however, if
24 the sufficiency of service is challenged, “the party on whose behalf service was made . . . has the
25 burden to establish its validity.” *Hickory Travel Sys.*, 213 F.R.D. at 551. Ruble raises two arguments
26 as to why service was improper: (1) the address—5123 W 98th Street, #1114, Minneapolis, MN
27 55437—where a copy of the Summons and Complaint was mailed is not Ruble’s address and is
28 rather a virtual PO box listed as the “Contact Us” address for Kitchen Cube; and (2) the return

1 receipt was signed by unauthorized person. ECF No. 44 at 3–4. Ruble asserts that he resides in North
2 Carolina, and that he does not know who the person who signed the receipt for the mail (“Mau Jo
3 Kofles”) is. *See* Ruble Motion at 4; *see also* ECF No. 19 (Proof of Service as to Ruble). Ruble
4 further states that he “has not been to the Minnesota Address in over two years,” an apparent
5 concession that he has been to that address at some point and does have some affiliation with it. *See*
6 Ruble Motion at 4.

7 Leszczynski argues in his Opposition that Ruble provided the Minnesota address to Amazon
8 when Ruble responded to Leszczynski’s Digital Millennium Copyright Act (DMCA) complaint. *See*
9 ECF No. 56-9 (Ruble’s DMCA Response). Ruble appears to have stated that the Minnesota address
10 was his mailing address and agreed to have accept service of process from Leszczynski. *See id.*
11 (“Full Legal Name: Tyler Ruble[;] Email Address: info@thekitchencube.com[;] Mailing Address:
12 5123 W 98th St. #1114 Minneapolis MN 55437 . . . I agree to accept service of process from the
13 person who provided notification under subsection (c)(1)(C) or an agent of such person”). The
14 DMCA response does not state specifically that Ruble agreed to accept service at the Minnesota
15 address, and only states that the Minnesota address is his mailing address, and he will accept service
16 of process from Leszczynski. *See id.*

17 The Court finds that because Ruble himself provided this address in connection with the
18 dispute with Leszczynski, Ruble’s argument that the summons was sent to the wrong address fails.
19 Although Ruble states that he does not live at that address, he does not argue that he is unable to
20 receive mail there. *See* ECF No. 44-15. In fact, Ruble concedes that he did in fact receive a copy of
21 the service package delivered in Minnesota, because Kitchen Cube (an LLC of which Ruble is the
22 sole member) “receives scans of mail that is received at the” Minnesota address. *See id.* ¶ 6. Section
23 415.40, which authorizes service to a person by first-class mail, does not require that the mail be
24 delivered to the person’s place of residence. *See* Cal. Civ. Proc. Code § 415.40. Although the Court
25 is aware of no authority addressing this question, it stands to reason that if a person has a different
26 mailing address than their address of residence, service by mail should go to the mailing address.
27 Ruble provided the Minnesota address to Leszczynski as his mailing address, and once the mail was
28 delivered there, Ruble received a copy of it.

1 Ruble's arguments otherwise are unavailing. Ruble argues that the signature by Mau Jo
2 Kofles makes the service improper. But section 415.40 only requires that process be served "by first-
3 class mail, postage prepaid, requiring a return receipt." See Cal. Civ. Proc. Code § 415.40. It does
4 not require the return receipt be signed by the person who is to be served. See *id.* Here, there is no
5 doubt that the mail arrived, given Ruble's concession that he received a scanned copy. See ECF No.
6 44-15 ¶ 6. No authority suggests that the signature makes service invalid. Ruble cites to *Lebel v.*
7 *Mai*, 210 Cal. App. 4th 1154 (2012), which Ruble asserts stands for a rule that "if the signature on
8 the return receipt is that of someone other than the defendant, that person" must be authorized to
9 receive service of process. See Ruble Motion at 4 (citing *Lebel*, 210 Cal. App. 4th at 1164). But the
10 portion of *Lebel* cited was discussing California Code of Civil Procedure section 416.90, which
11 authorizes service "by delivering a copy of the summons and of the complaint to such person or to a
12 person authorized by him to receive service of process." See *Lebel*, 210 Cal. App. 4th at 1164 (citing
13 Cal. Civ. Proc. Code § 416.90). *Lebel* never even mentions section 415.40. See *Lebel*, 210 Cal. App.
14 4th at 1164. No authority suggests that service via mail pursuant to section 415.40 must be signed
15 for by either the defendant himself or an agent to receive process. Ruble next cites to *Cruz-Packer v.*
16 *District of Columbia*, 539 F. Supp. 2d 181 (D.D.C. 2008), which held, in analyzing the service rules
17 of the District of Columbia, that if the person who signs for mail is not authorized to receive service,
18 the service via mail is insufficient. See Ruble Mot. at 4; *Cruz-Packer*, 539 F. Supp. 2d at 187. This
19 case analyzing a different service rule has little relevance to the Court's analysis of section 415.40.
20 Finally, Ruble cites to *Little v. Eastern Dist. Police Station*, 2014 WL 271628, (D.Md. Jan.22, 2014),
21 which analyzed Maryland's service rules and held that "Service by certified mail, not designated for
22 'Restricted Delivery,' to an unauthorized agent at a Defendant's workplace is not sufficient." See
23 Ruble Mot. at 4; *Little v.*, 2014 WL 271628 at *3. Again, this case analyzing another service rule has
24 little relevance. Ruble has not provided any authority suggesting that when a defendant is served via
25 mail outside of California pursuant to section 415.40, and the defendant does not dispute that the
26 mail was received, but notes that the signature on the mail was not by his authorized agent for
27 service of process, the service is improper.
28

1 The Court finds that service was proper under section 415.40, and thus proper under the
2 relevant Federal Rule. Thus, Ruble’s arguments regarding service of process fail, and the claims
3 against Ruble will not be dismissed on this basis.

4 **III. Defendants’ Assertions that Leszczynski’s Complaint Fails to State a Claim Succeed**
5 **in Part**

6 **A. Applicable Law**

7 Under Federal Rule of Civil Procedure Rule 12(b)(6), a party may file a motion to dismiss
8 for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). The purpose
9 of Rule 12(b)(6) is to “enable defendants to challenge the legal sufficiency of claims asserted in a
10 complaint.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). A district
11 court may properly dismiss a claim under Rule 12(b)(6) if the complaint fails to allege sufficient
12 facts to support a cognizable legal theory. *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d
13 1156, 1159 (9th Cir. 2016).

14 “To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to
15 ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
16 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “The plausibility standard is not
17 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has
18 acted unlawfully.” *Id.* While a complaint does not need detailed factual allegations, a plaintiff’s
19 obligation to provide the grounds of his entitlement to relief requires more than “threadbare recitals
20 of the elements of a cause of action.” *Id.* “Determining whether a complaint states a plausible claim
21 for relief is ‘a context-specific task that requires the reviewing court to draw on its judicial
22 experience and common sense.’” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (quoting
23 *Iqbal*, 556 U.S. at 679).

24 When evaluating a complaint under Rule 12(b)(6), the court “must accept all well-pleaded
25 material facts as true and draw all reasonable inferences in favor of the plaintiff.” *Caltex*, 824 F.3d at
26 1159; *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (“We
27 accept factual allegations in the complaint as true and construe the pleadings in the light most
28

1 favorable to the nonmoving party.”). This tenet, however, is “inapplicable to legal conclusions.”
2 *Iqbal*, 556 U.S. at 678.

3 A district court should generally grant leave to amend freely. *Cervantes v. Countrywide*
4 *Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). However, “a district court may dismiss
5 without leave where a plaintiff’s proposed amendments would fail to cure the pleading deficiencies
6 and amendment would be futile.” *Id.*

7 **B. The Copyright Infringement Claim Fails as Leszczynski Has Not Registered The**
8 **Copyright to the Cube.**

9 i. Applicable Law

10 To establish infringement, two elements must be proven: (1) ownership of a valid copyright,
11 and (2) copying of constituent elements of the work that are original. *Feist Publications, Inc. v.*
12 *Rural Telephone Service Co. Inc.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc.*
13 *v. Nation Enterprises*, 471 U.S. 539, 548 (1985)) As to registration and civil infringement actions, 17
14 U.S.C. § 411(a) dictates that:

15 Except for an action brought for a *violation of the rights of the author under section*
16 *106A(a)*, and subject to the provisions of subsection (b), no civil action for
17 infringement of the copyright in any United States work shall be instituted until
18 preregistration or registration of the copyright claim has been made in accordance
19 with this title. In any case, however, where the deposit, application, and fee required
for registration have been delivered to the Copyright Office in proper form and
registration has been refused, the applicant is entitled to institute a civil action for
infringement if notice thereof, with a copy of the complaint, is served on the Register
of Copyrights.

20 17 U.S.C. § 411(a) (emphasis added).

21 The Supreme Court has held that “we conclude that ‘registration ... has been made’ within
22 the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the
23 Register has registered a copyright after examining a properly filed application.” *Fourth Est. Pub.*
24 *Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

25 ii. Discussion

26 Defendants argue that Leszczynski failed to obtain a registration decision before filing the
27 lawsuit, and his claims must be dismissed for this reason. ECF Nos. 44 at 8–9, 45 at 6–7, 51 at 5–6.
28 Leszczynski merely alleges that he filed an application for copyright registration for the Cube.

1 Compl. ¶ 20. In his Oppositions, he admits he has not yet obtained registration by the Copyright
2 Office, but he still opposes the Motions on two grounds: (1) *Fourth Est. Pub. Benefit Corp.* allows
3 the filing of copyright infringement claim once the application for registration is filed; and (2) an
4 exception of 17 U.S.C. § 411(a) which allows a civil action for a violation of the rights under §
5 106A(a) applies to this case because the Cube falls into “works of visual art”. ECF Nos. 56 at 15–16,
6 57 at 15–16, 58 at 13–14.

7 First, in *Fourth Est. Pub. Benefit Corp.*, the Supreme Court clearly held that merely filing an
8 application to the United States Copyright Office does not satisfy the registration element under 17
9 U.S.C. § 411(a). *Fourth Est. Pub. Benefit Corp.*, 139 S. Ct. at 892. Therefore, Leszczynski’s first
10 argument fails.

11 Second, the exception for 17 U.S.C. § 410(a) does not apply to this case because Leszczynski
12 argues that Defendants infringed his exclusive copyright under *Section 106*, not his rights of the
13 author to attribution and integrity under *Section 106A(a)*. See generally Compl. 17 U.S.C.

14 17 U.S.C. § 106A(a) sets forth five rights of attribution and integrity that “the author of a
15 work of visual art” shall have:

16 [1] the right . . . to claim authorship of that work . . .

17 [2] [the right] to prevent the use of his or her name as the author of any work of visual
art which he or she did not create . . .

18 [3] the right to prevent the use of his or her name as the author of the work of visual art
in the event of a distortion, mutilation, or other modification of the work which would
be prejudicial to his or her honor or reputation . . .

19 [4] the right . . . to prevent any intentional distortion, mutilation, or other modification
20 of that work which would be prejudicial to his or her honor or reputation, and any
intentional distortion, mutilation, or modification of that work is a violation of that right,
21 and

22 (5) [the right] to prevent any destruction of a work of recognized stature, and any
intentional or grossly negligent destruction of that work is a violation of that right.

23 17 U.S.C. § 106A(a)(1)–(3).

24 The purpose of 17 U.S.C. § 106A is to protect two ‘moral rights’ of artists—the rights of
25 ‘integrity’ and ‘attribution.’ *Cheffins v. Stewart*, 825 F.3d 588, 592 (9th Cir. 2016) (*citing Cort v. St.*
26 *Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 984–85 (9th Cir. 2002)) “The right of integrity allows
27 the [artist] to prevent any deforming or mutilating changes to his work, even after the title in the
28 work has been transferred” *Id.* at 985. “The right of attribution allows the artist to be recognized by

1 name as the creator of a work.” *Id.* However, here, Leszczynski brought the copyright infringement
2 claim under 17 U.S.C. § 106, a different section, alleging that Defendants reproduced, distributed,
3 and created derivative works for the Cube. Compl. ¶ 31. *See also* 17 U.S.C. § 106. Furthermore, in
4 his Oppositions, although he argues that the Cube falls into “works of visual arts,” he does not argue
5 that Defendants violated his moral rights as an author—the rights of ‘integrity’ and ‘attribution.’
6 ECF No. 58 at 14. Accordingly, the exception of 17 U.S.C. § 411(a) does not apply to this lawsuit,
7 and the Court need not further analyze whether the Cube falls into “works of visual arts” or not.

8 Therefore, Leszczynski did not obtain copyright registration for the Cube before filing this
9 lawsuit which is a prerequisite for civil action under 14 U.S.C. 411(a). The Motions are GRANTED.

10 **C. The Claim Regarding Breach of the Creative Commons License Survives.**

11 i. Applicable Law

12 To state a claim for breach of contract under California law⁶, Plaintiff must plead facts
13 establishing the following elements: (1) the existence of the contract, (2) the plaintiff’s performance
14 or excuse for nonperformance, (3) the defendant’s breach, and (4) the resulting damages to the
15 plaintiff. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). A breach of contract claim
16 should be dismissed if the plaintiff fails to allege specific facts supporting the necessary elements.
17 *Neal v. Quality Loan Serv. Corp.*, 301 Fed.Appx. 679, 680 (9th Cir. 2008).

18 Under California law, “[i]t is essential to the existence of a contract that there should be: (1)
19 [p]arties capable of contracting; (2) [t]heir consent; (3) [a] lawful object; and (4) [a] sufficient cause
20 or consideration.” Cal. Civ. Code § 1550. California courts apply an objective test to ascertain
21 whether there is mutual assent. *Meyer v. Benko*, 127 Cal.Rptr. 846, 848 (Cal.Ct.App.1976).

22 California Civil Code section 3300 provides, “For the breach of an obligation arising from
23 contract, the measure of damages . . . is the amount which will compensate the party aggrieved for
24 all the detriment proximately caused thereby, or which, in the ordinary course of things, would be
25 likely to result therefrom.” Cal. Civ. Code § 3300. California Civil Code section 3301 further
26

27 ⁶ The Court finds California law applies here, because the choice of law is not disputed, where Leszczynski
28 did not mention which state law should apply to this claim on Complaint, and Defendants cite California law
as to this claim in their Motions. Compl. ¶¶ 36–38. ECF No. 45 at 13–16.

1 provides that “No damages can be recovered for a breach of contract which are not clearly
2 ascertainable in both their nature and origin.” *Id* at § 3301. A plaintiff seeking damages for future
3 harms must prove “with reasonable certainty and probability that damages will result in the future.”
4 *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 961 (9th Cir. 2001) (quoting *Caminetti*
5 *v. Manierre*, 23 Cal.2d 94, 101 (1943)).

6 ii. Discussion

7 Kitchen Cube and Ruble argue Leszczynski’s claim for violation of the Creative Commons
8 license must be dismissed because (1) a contract does not exist; (2) Kitchen Cube did not breach the
9 Creative Commons license; (3) it is a duplicative claim for copyright infringement claim with no
10 damages; and (4) there has been no consideration or performance by Leszczynski. ECF Nos. 44 at
11 15–18, 45 at 13–16. Duffy argues that the Creative Commons license only applies to material in
12 which a copyright exists, and because Leszczynski does not have a copyright on the Cube, it is not
13 protected by the license.⁷ ECF No. 51 at 6.

14 Leszczynski alleges in the Complaint that Defendants violated the Creative Commons license
15 terms prohibiting non-commercial and non-derivative use, which was clearly stated on the Cube’s
16 Thingiverse page. Compl. ¶¶ 36, 37.

17 The Court finds that Leszczynski has properly pleaded a cause of action for breach of
18 contract.

19 *1. Leszczynski has properly pleaded the existence of a contract between*
20 *Leszczynski and Defendants, namely the Creative Commons license.*

21 There is no dispute that the first and second required elements—parties capable of
22 contracting and a lawful object—are present. *U.S. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462
23 (9th Cir. 1999). Kitchen Cube argues that the second element—mutual consent—and the fourth
24 element—consideration—are missing. ECF No. 45 at 13–16. Kitchen Cube also contends that
25 Leszczynski fails to plead the terms of the Creative Commons license at issue. *Id.*

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⁷ At the hearing, Defendants also argued that this state law claim should be preempted by the Copyright Act. The Court need not reach this issue because it was not raised by the Defendants in their papers.

1 First, Defendants argue that it is unclear which specific version of the Creative Commons
2 license Leszczynski alleges that Defendants violated because Leszczynski did not refer to any
3 website, nor file Exhibitions attached to the Complaint. However, Defendants do not argue that
4 version does not contain terms prohibiting commercial use or derivative use of the copyrighted
5 subject. The Court finds, reading the Complaint in Leszczynski's favor, that Leszczynski adequately
6 alleges that Defendants violated the non-commercial clause of the Creative Commons license
7 regardless of which version of that license is deemed relevant. Compl. ¶ 18. He also alleges that the
8 license's terms prohibit any commercial activities involving the Cube. *Id.* ¶¶ 36, 37. At this stage of
9 Motion to Dismiss, Leszczynski's allegation that Creative Commons license prohibited commercial
10 or derivative use of the Cube is sufficient.

11 Second, Kitchen Cube argues that mutual consent is missing as Leszczynski has not alleged
12 acceptance of the Creative Commons license. The Court finds that the Defendants' act of
13 downloading or utilizing the Cube file from Leszczynski's Thingiverse page can constitute
14 acceptance. In the Complaint, Leszczynski alleges that "[the Cube file was] provided under the
15 Creative Commons, non-commercial, no derivatives use license . . . the Cube's availability for the
16 public under a strict non-commercial license," "I chose to distribute the Cube under a Creative
17 Commons license, specifically the non-commercial, no derivatives use license." Compl. ¶¶ 18, 22. It
18 is undisputed that Creative Commons license was accessible on his Thingiverse page.⁸ The Court
19 must accept that allegation as true and construe it in the light most favorable to Leszczynski. The
20 most favorable interpretation of the allegations "provided under Creative Commons," "under a
21 Creative Commons" is that the Cube file was distributed to those who only accept the Creative
22 Commons license, and thus Defendants had accepted the agreement.

23 Lastly, Kitchen Cube argues that there was no consideration provided for the Creative
24 Commons license. The Court finds that there is consideration sufficient to create a contract. The
25 California Civil Code provides that consideration is an essential element of a contract. Cal. Civ.

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27 ⁸ Kitchen Cube, in its RJN, explains that Leszczynski's Thingiverse page states that "Bakercube by iomaa is
28 licensed under the Creative Commons-Attribution-Non-Commercial-No-Derivates license," and Kitchen
Cube provides the link to Creative Commons license version 4.0. ECF No. 47 at 6.

1 Code § 1550. It further provides that “[a]ny benefit conferred, or agreed to be conferred, upon the
2 promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice
3 suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent
4 lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.”
5 *Id.* at § 1605. The term “good consideration,” as used in this section, is equivalent to “valuable
6 consideration” and not adequate consideration in terms of monetary value. *Bank of California v.*
7 *Connolly*, 36 Cal. App. 3d 350, 377 (Ct. App. 1973)

8 Leszczynski sufficiently alleges that there was consideration in the Creative Commons
9 license. *See* Compl. ¶¶ 23, 24. He describes that his Cube gained a high reputation and popularity of
10 the Cube, with over 150,000 downloads in the first 2 years, by providing the Cube free of charge
11 with the Creative Commons license. *Id.* Leszczynski made his design available, and received
12 reputational benefits as a result, and requested that any user of the design (including, allegedly,
13 Defendants) agree not to use the design commercially. This appears to be a benefit to both sides,
14 which is a sufficient allegation of consideration at this stage. *See Coastside Fishing Club v.*
15 *California Res. Agency*, 158 Cal. App. 4th 1183, 1193 (explaining that a charitable foundation,
16 which entered into memorandum of understanding (MOU) with a government agency to provide
17 private funds to defray the costs of implementing the Marine Life Protection Act (MLPA), received
18 adequate consideration for the funds it provided, where the MOU imposed numerous duties on the
19 agency that were not mandated by the MLPA.)

20 Accordingly, the Court finds that a contract exists between Leszczynski and Defendants.

21 *2. Leszczynski has properly alleged the existence of a valid license*
22 *agreement regarding the Cube.*

23 Defendants argue that the license agreement is not valid because Leszczynski has not
24 registered his copyright on the Cube, and the Cube is not copyrightable because of its function.

25 First, even though Leszczynski does not registered a copyright on the Cube, he could own a
26 copyright on the Cube without registration as long as he created it. “Registration of the copyright is a
27 simply a precondition for filing a copyright infringement lawsuit. Registration is permissive, not
28 mandatory, and may be made long after the work comes into existence. The owner has various

1 exclusive rights in the work, regardless of whether it is registered.” *Alaska Stock, LLC v. Houghton*
2 *Mifflin Harcourt Pub. Co.*, 747 F.3d 673, 678 (9th Cir. 2014). (“When a photographer has fixed an
3 image in a tangible medium of expression, he owns the copyright, even though he has not registered
4 it with the Copyright Office.”) The owner of copyright has the exclusive rights under 17 U.S.C. §
5 106. Thus, Leszczynski has the rights to prohibit reproducing, preparing derivative works, and
6 distributing copies to the public by sale by Creative Commons license.

7 Second, the Court finds that, at this stage, Leszczynski’s allegations as to the copyrightability
8 of the Cube suffice. Defendants argue that the Cube is not copyrightable because it is a “useful
9 article” under 17 U.S.C. § 101. ECF No. 45 at 7. A “useful article” is an article having an intrinsic
10 utilitarian function that is not merely to portray the appearance of the article or to convey
11 information. 17 U.S.C. § 101. Section 101 affords limited protection for the artistic elements of a
12 useful article, dictating:

13 “*Pictorial, graphic, and sculptural works*” include two-dimensional and three-
14 dimensional works of fine, graphic, and applied art, photographs, prints and art
15 reproductions, maps, globes, charts, diagrams, models, and technical drawings,
16 including architectural plans. Such works shall include works of artistic
17 craftsmanship insofar as their form but not their mechanical or utilitarian aspects are
18 concerned; *the design of a useful article*, as defined in this section, *shall be*
19 *considered a pictorial, graphic, or sculptural work* only if, and only to the extent that,
20 such design incorporates *pictorial, graphic, or sculptural features* that can be
21 identified *separately* from, and are capable of existing independently of, the
22 utilitarian aspects of the article.

19 *Id.* (emphasis added).

20 The Supreme Court has held that “a feature incorporated into the design of a useful article is
21 eligible for copyright protection only if the feature (1) can be perceived as a two-or three-
22 dimensional work of art separate from the useful article and (2) would qualify as a protectable
23 pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of
24 expression—if it were imagined separately from the useful article into which it is incorporated.” *Star*
25 *Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 408 (2017).

26 Here, Leszczynski alleges that the Cube “combines various measuring volumes into a single
27 cubical structure,” Compl. ¶ 23, and, in his Oppositions, he admits that it has a utilitarian function—
28 although he argues utility is a secondary purpose. ECF No. 56 at 3. Thus, the Cube falls into a

1 “useful art,” as it is not merely to portray the appearance of the article or to convey information, but
2 it has a function as a measuring device. 17 U.S.C. § 101. However, at this stage, the *Star Athletica*
3 test is satisfied in this case. Leszczynski alleges that the Cube is a unique and creative work that
4 combines various measuring volumes into a single cubical structure. Compl. ¶ 23. Reading the
5 Complaint in Leszczynski’s favor, he has alleged protection over a feature of the design. First, one
6 can identify the cubical structure with various volumes as features having pictorial, graphic, or
7 sculptural qualities. Second, imaginatively the cubical structure is separated from the Cube, and it
8 qualifies as a three-dimensional work of art. For example, the cubical structure can be printed by a
9 3D printer of a smaller or bigger size than the original one, and it would not replicate the Cube as a
10 measuring device with ten different volumes. In *Star Athletica*, the Supreme Court rejected “the
11 view that a useful article must remain after the artistic feature has been imaginatively separated from
12 the article,” and explained that “statutory text indicates that separability is a conceptual undertaking
13 [. . .] the physical-conceptual distinction is unnecessary.” *Star Athletica*, 580 U.S. 421–22. Thus, for
14 purposes of these motions, the cubical structure is separable from the Cube and eligible for copyright
15 protection.

16 Finally, although the Defendants allege that the Creative Commons license is limited to
17 copyright, it appears that the license actually concerns “Copyrights and Similar Rights,” which is
18 presumably broader than copyright and plausibly includes the additional rights Leszczynski alleges
19 were violated.

20 3. *Leszczynski properly pleads Defendants breached the Creative*
21 *Commons license.*

22 Kitchen Cube and Ruble argue that Defendants did not breach the Creative Commons license
23 because it only prohibits the *exercise of the copyright* in a licensed work, but not the *use* of the Cube
24 file.⁹ ECF Nos. 44 at 16, 45 at 15. Leszczynski alleges that the Creative Commons license restricts
25 commercial use or creation of derivative works of the Cube (which was posted on Leszczynski’s
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27 ⁹ Kitchen Cube and Ruble differentiate “the exercise of copyright” and “the use of the Cube file.” ECF Nos.
28 44 at 16, 45 at 15. However, since Leszczynski can exercise his copyright of the Cube without registration of
the copyright at the Copyright Office, he can prohibit the use of the Cube file as the exercise of copyright.

1 Thingiverse page). Compl. ¶¶ 18, 22. Reading the Complaint in the light most favorable to
2 Leszczynski, as the Court must at this stage, Leszczynski sufficiently alleges that manufacturing and
3 selling the Cube constitute the commercial use of the Cube, and is prohibited under the Creative
4 Commons license; thus, Defendants breached the agreement. The Court thus declines to dismiss the
5 breach of contract claim on this ground.

6 *4. Leszczynski sufficiently pleads actual damages at this stage.*

7 Defendants argue that Leszczynski has failed to properly plead damages from the breach
8 because he only pleads damages related to copyright infringement, and the only remedy for violation
9 of the Creative Commons license is the termination of the license. ECF Nos. 44 at 17, 45 at 15.

10 First, the Court finds that Leszczynski has properly pleaded damage from the breach. In his
11 prayer for relief, he states that he seeks “actual damages” and does not limit those to his copyright
12 infringement claim. Compl. ¶¶ 41–43, 46–48, 51–53. Accordingly, drawing all inferences in his
13 favor, he is seeking—and has pleaded—actual damages from the copyright infringement and the
14 breach. Reading the Complaint in Leszczynski’s favor, he pleads that his actual damages from the
15 breach and/or the copyright infringement can be measured by multiplying the number of units sold
16 by each Defendant by \$10 per unit. The Court finds that, at this stage, Leszczynski’s damages
17 allegations suffice.

18 Second, the Court finds that Leszczynski is not prevented from seeking a remedy other than
19 termination of the license, as at least one version of the Creative Commons license explicitly states
20 “right [...] to seek remedies” other than termination of the license. The Creative Commons license
21 4.0 section 6 states that:

- 22 a. This Public License applies for the term of the Copyright and Similar Rights
23 licensed here. However, if You fail to comply with this Public License, then Your
24 rights under this Public License terminate automatically.
25 b. Where Your right to use the Licensed Material has terminated under Section 6(a), it
26 reinstates: 1. automatically as of the date the violation is cured, provided it is cured
27 within 30 days of Your discovery of the violation; or 2. upon express reinstatement
28 by the Licensor.
For the avoidance of doubt, this Section 6(b) *does not affect any right* the Licensor
may have to seek *remedies* for Your violations of this Public License.

ECF No. 45-9 at 8 (emphasis added).

1 Accordingly, under Section 6(b), the licensor can still exercise rights to seek remedies,
2 including actual damages, for violations even after a terminated license is reinstated. *Id.* It stands to
3 reason that a licensor could exercise similar rights even if a terminated license is not reinstated. Even
4 though the other two versions of the Creative Commons license do not have similar clauses referring
5 to other remedies, they importantly do not *exclude* the licensor’s right to seek damages resulting
6 from violation of the agreement. ECF Nos. 45-10, 45-11. Accordingly, drawing all inferences in
7 Leszczynski’s favor, he can seek damages for Defendants’ breaches of the Creative Commons
8 license.

9 Therefore, the Motions are DENIED.

10 **D. Leszczynski Properly States a False Advertising and Misrepresentation Claim**
11 **against Kitchen Cube, But Not Against the Other Defendants.**

12 i. Applicable Law

13 15 U.S.C. § 1125(a), which is Lanham Act § 43(a), prohibits the use of false designations of
14 origin, false descriptions, and dilution.

15 To demonstrate a false advertising claim under Lanham Act § 43(a), the plaintiff must show
16 five elements: (1) a false statement of fact by the defendant in a commercial advertisement about its
17 own or another’s product; (2) the statement actually deceived or has the tendency to deceive a
18 substantial segment of its audience; (3) the deception is material, in that it is likely to influence the
19 purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and
20 (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct
21 diversion of sales from itself to defendant or by a lessening of the goodwill associated with its
22 products. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (quoting
23 *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th
24 Cir.1990))

25 Furthermore, Federal Rule of Civil Procedure 9(b) states that an allegation of “fraud or
26 mistake must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b).
27 Specifically, the “circumstances” required by Rule 9(b) are the “who, what, when, where, and how”
28 of the fraudulent activity. *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003);

1 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (“[Rule 9(b) requires] the times, dates, places,
2 benefits received, and other details of the alleged fraudulent activity”). Additionally, the allegation
3 “must set forth what is false or misleading about a statement, and why it is false.” *Vess*, 317 F.3d at
4 1106 (quoting *In re Glenfed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

5 Even in cases where fraud is not a necessary element of a claim, the Rule 9(b)’s requirements
6 apply to alleged fraudulent conduct. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir.
7 2018) (“Because Davidson’s common law fraud, CLRA, FAL, and UCL causes of action are all
8 grounded in fraud, the FAC must...the heightened pleading requirements of Rule 9(b)); *See also*
9 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (“[W]e have specifically ruled that
10 Rule 9(b)’s heightened pleading standards apply to claims for violations of the CLRA and UCL.”);
11 *Vess*, 317 F.3d at 1103–04 (“[i]n cases where fraud is not a necessary element of a claim, a plaintiff
12 may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent
13 conduct.”)

14 ii. Discussion

15 The Kitchen Cube argues that the claim for false advertising and misrepresentation requires
16 dismissal because (1) Leszczynski has no right to assert a Lanham Act 43(a) false advertising claim,
17 and (2) Leszczynski admits that Kitchen Cube’s statements are true. ECF No. 45 at 16–19.
18 Altamatic, Insider Goods, Toltz, Ruble, Duffy, and Spencer argue that Leszczynski fails to allege the
19 claim against them and plead elements under the Lanham Act 43(a). ECF. No. 51 at 6–7.

20 *I. Leszczynski fails to plead this claim against Altamatic, Insider*
21 *Goods, Toltz, Ruble, Duffy, and Spencer.*

22 Rule 9(b)’s heightened pleading standards apply to this claim for false advertising and
23 misrepresentation because Leszczynski alleges that the defendants have engaged in fraudulent
24 conduct. *See Davidson*, 889 F.3d at 964. Federal Rule of Civil Procedure 9(b) requires “who, what,
25 when, where, and how” of the fraudulent activity. *Vess*, 317 F.3d at 1106. Additionally, the
26 allegation “must set forth what is false or misleading about a statement, and why it is false.” *Id.*
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1 Here, while Leszczynski alleges this cause of action is against all Defendants, he does not
2 provide any specific allegations against any Defendants other than Kitchen Cube.¹⁰ Compl. ¶¶ 39–
3 41. Hence, the Court concludes Leszczynski does not satisfy Rule 9(b)’s requirement concerning his
4 allegation against Altamatic, Insider Goods, Toltz, Ruble, Duffy, and Spencer. Leszczynski shall be
5 granted leave to amend as it does not appear that amendment would be futile. *See Manzarek*, 519
6 F.3d at 1031.

7 The Ruble Motion and the Duffy Motion are GRANTED as to the false advertising claim.
8 Leszczynski is granted leave to amend.

9 *2. Leszczynski has standing under the Lanham Act because he has*
10 *properly pleaded injury.*

11 Kitchen Cube argues that Leszczynski has failed to plausibly allege statutory standing under
12 the Lanham Act because Leszczynski did not argue any injury caused by the violation. ECF No. 45
13 at 17.

14 In *Lexmark*, the Supreme Court held that, to have statutory standing, a plaintiff alleging a
15 Lanham act violation must show: (1) she is within the “zone of interest” protected by the statute; and
16 (2) that there is proximate cause between her injury and the alleged violation. *See Lexmark Intern.,*
17 *Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 131–132 (2014). To “come within the
18 zone of interests in a suite for false advertising under § 1125(a), a plaintiff must allege an injury to a
19 commercial interest in reputation or sales.” *Id.* at 131–32. A plaintiff must also show that her injury is
20 “proximately caused by violations of the statute.” *Id.* at 132. While the “proximate-cause inquiry is
21 not easy to define,” “courts have a great deal of experience applying it, and there is a wealth of
22 precedent for them to draw upon in doing so.” *Id.* at 133. Ultimately, the “question [the proximate-
23 cause inquiry] presents is whether the harm alleged has a sufficiently close connection to the conduct
24 the statute prohibits.” *Id.* In the Lanham Act false advertising context, the Supreme Court has held
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27 ¹⁰ Leszczynski merely argues that his allegations as to false advertising and misrepresentation are specific and
28 detailed, articulating “who, what, when, where, and how” of the alleged Defendants’ behaviors; however,
does not offer further detailed facts on them in his Oppositions. ECF No. 58 at 12–13, 18–19.

1 that a plaintiff “must show economic or reputation injury flowing directly from the deception
2 wrought by the defendant’s advertising.” *Id.*

3 Here, although Leszczynski did not clearly state what specific injury was caused, reading
4 Complaint in Leszczynski’s favor, Leszczynski sufficiently shows that Kitchen Cube’s behavior
5 misleads the public regarding the Cube’s origin which affects Leszczynski’s market. Comp. ¶ 41.
6 Since *Lexmark* allows a claim under Lanham Act 43(a) when a plaintiff shows reputational injury, as
7 well as economic injury, the Court finds that Leszczynski can sue for his losses regarding
8 reputational injury. *Lexmark Intern.*, 572 U.S. at 129, 131–132.

9 *3. Leszczynski properly alleges a false statement by Kitchen Cube.*

10 Leszczynski alleges that Kitchen Cube’s website contains the following false statements: (1)
11 that Kitchen Cube “designed and manufactured” the Cube; and (2) that Kitchen Cube filed a patent
12 application on the Cube. *See* Compl. Kitchen Cube argues that Leszczynski admits that the alleged
13 first false statements are true, as his copyright infringement claim is about Kitchen Cube’s
14 manufacturing of the Cube, and he alleges that Kitchen Cube made a change to the original Cube
15 design. ECF No. 45 at 18.

16 The Lanham Act “authorizes suit against persons who make false and deceptive statements in
17 a commercial advertisement about their own or the plaintiff’s product.” *Jarrow Formulas, Inc. v.*
18 *Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002). “To demonstrate falsity within the meaning
19 of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by
20 necessary implication, or that the statement was literally true but likely to mislead or confuse
21 consumers.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

22 First, Leszczynski clearly alleges that the statement Kitchen Cube “designed and
23 manufactured [the Cube]” is misleading because Kitchen Cube did not design it, but rather used
24 Leszczynski’s design without authorization. Compl. ¶ 40. Leszczynski does not argue that Kitchen
25 Cube’s statement on its website is false because Kitchen Cube did not manufacture it. It can also be
26 reasonably inferred that Leszczynski alleges the statement is false regardless of whether Kitchen
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1 Cube made changes to the design of the Cube, because Leszczynski argues that *his* design was used
2 by Kitchen Cube.¹¹ *See generally* Compl.

3 Second, the Court finds that Leszczynski properly alleges that Kitchen Cube has falsely
4 advertised and misrepresented in its patent application to the United States Patent and Trademark
5 Office. Reading the Complaint in Leszczynski's favor, he alleges that Kitchen Cube stated it created
6 the Cube in the patent application and it is a false statement because Kitchen Cube did not invent it.
7 Compl. ¶ 41.

8 The Kitchen Cube Motion is DENIED as to this claim.

9 **CONCLUSION**

10 For the foregoing reasons, the Court hereby ORDERS as follows:

- 11 1. Defendant Ruble's Motion to Dismiss (ECF No. 44) is GRANTED IN PART:
- 12 a. The first cause of action is DISMISSED as to Ruble WITHOUT LEAVE TO
13 AMEND.
- 14 b. The Motion to Dismiss the second cause of action is DENIED.
- 15 c. The third cause of action is DISMISSED as to Ruble WITH LEAVE TO AMEND.
- 16 2. Defendant Kitchen Cube's Motion to Dismiss (ECF No. 45) is GRANTED IN PART:
- 17 a. The first cause of action is DISMISSED as to Kitchen Cube WITHOUT LEAVE TO
18 AMEND.
- 19 b. The Motion to Dismiss the second and third causes of action is DENIED.
- 20 3. Defendant Duffy, Altamatic, Insider Goods, Toltz, and Spencer's Motion to Dismiss (ECF
21 No. 51) is GRANTED IN PART:
- 22 a. The first cause of action is DISMISSED as to these Defendants WITHOUT LEAVE
23 TO AMEND.
- 24 b. The Motion to Dismiss as to the second cause of action is DENIED.
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28 ¹¹ Leszczynski argues in his Oppositions that even though Kitchen Cube modified its original design, the statement is still false because it implies *original* design. ECF No. 58 at 19.

1 c. The third cause of action is DISMISSED as to all these Defendants WITH LEAVE
2 TO AMEND.

3 4. Defendant Ruble's Request for Judicial Notice (ECF No. 46) is GRANTED IN PART; and

4 5. Defendant Kitchen Cube's Request for Judicial Notice (ECF No. 47) is GRANTED IN
5 PART.

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7 IT IS SO ORDERED.



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9 Dated: April 17, 2024

10 MAAME EWUSI-MENSAH FRIMPONG

11 United States District Judge
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