

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

JUNHAN JEONG,  
Plaintiff,  
v.  
NEXO FINANCIAL LLC, et al.,  
Defendants.

Case No. 21-cv-02392-BLF

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

[Re: ECF No. 27]

United States District Court  
Northern District of California

Before the Court is Defendants Nexo Financial LLC, Nexo Financial Services Ltd., Nexo Services OÜ, Nexo AG, and Nexo Capital Inc.’s (collectively, “Nexo”) Motion to Dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6) in this class action for breach of contract, declaratory judgment, and violations of California’s Consumer Legal Remedies Act (“CLRA”) and Unfair Competition Law (“UCL”).

As alleged in the Complaint, Nexo runs an online cryptocurrency platform, which allows users to post cryptocurrency assets as collateral and borrow against those assets up to a particular loan-to-value (“LTV”) ratio through a program called Nexo Crypto Credit. Plaintiff Junhan Jeong had a loan through Nexo Crypto Credit against assets in the cryptocurrency Ripple (“XRP”). Plaintiff alleges that in response to an SEC action against the issuer of XRP that caused its price to precipitously drop on December 23, 2020, Nexo improperly suspended the use of XRP to stake or pay down loans without notice to users, then proceeded to liquidate users’ XRP collateral without notice when users’ LTV ratios cratered due to the dropping XRP price. As a result, Plaintiff, who had posted collateral of 598,384.6188 XRP at a market value of approximately \$269,300 for a loan of approximately \$169,400, alleges that he was unable to maintain his LTV ratio despite using other cryptocurrency assets to pay down his loan, leading to Nexo’s liquidation of his collateral.

1 Accordingly, Plaintiff alleges that he suffered losses of approximately (1) \$100,000 in XRP assets  
2 and (2) \$11,000 in other cryptocurrency assets that he would have retained had he been able to pay  
3 off his Nexo loan with his XRP collateral at the time of Nexo's suspension of XRP.

4 Plaintiff brings claims on behalf of various classes of users of the Nexo Crypto Credit  
5 program for (1) breach of contract, (2) declaratory judgment, (3) violation of the CLRA, and  
6 (4) violation of the UCL. Nexo moves to dismiss (1) all claims for lack of subject matter jurisdiction  
7 based on a lack of Article III standing under Rule 12(b)(1); (2) all Defendants other than Nexo  
8 Capital Inc. for lack of personal jurisdiction under Rule 12(b)(2); (3) all claims for failure to state a  
9 claim under Rule 12(b)(6); and (4) Plaintiff's breach of contract and declaratory judgment claims  
10 under the *forum non conveniens* doctrine. Plaintiff opposes, and in response to Nexo's 12(b)(2)  
11 motion, requests in the alternative that the Court grant him leave to pursue jurisdictional discovery.

12 Based on the reasoning outlined below, the Court (1) GRANTS IN PART and DENIES IN  
13 PART Nexo's 12(b)(1) motion WITH LEAVE TO AMEND; (2) GRANTS Nexo's 12(b)(2) motion  
14 WITHOUT LEAVE TO AMEND; and (3) GRANTS IN PART and DENIES IN PART Nexo's  
15 12(b)(6) motion WITH LEAVE TO AMEND as to certain claims. The Court further DENIES  
16 Plaintiff's request for jurisdictional discovery.

### 17 I. BACKGROUND

18 Defendant Nexo Capital Inc. is a Cayman Island corporation with its principal place of  
19 business in London, England. *See* Complaint, ECF No. 1 ¶ 21. Defendant Nexo Financial LLC is  
20 a Delaware corporation with a registered agency address in Delaware, which is registered as a  
21 money services busines for activity in all fifty states and operates through branches in at least 24  
22 states, including California. *See id.* ¶ 17. Defendant Nexo Financial Services Ltd. is based in  
23 London, England. *See id.* ¶ 18. Defendant Nexo Services OÜ is an Estonian corporation with  
24 operations in both Estonia and Bulgaria. *See id.* ¶ 19. Defendant Nexo AG is a Swiss corporation  
25 with its listed address in Switzerland. *See id.* ¶ 20. Plaintiff alleges that Defendants collectively  
26 operate and maintain the Nexo website and offer the Nexo services advertised on that website and  
27 in a whitepaper, including through the Nexo Crypto Credit. *See id.* ¶ 22. Plaintiff is a California  
28 resident who took out a loan through the Nexo Crypto Credit. *See id.* ¶ 16.

1 According to Plaintiff, Nexo maintains and operates a website through which customers can  
2 use cryptocurrency assets as collateral to borrow cash via a program called Nexo Crypto Credit. *See*  
3 *id.* ¶ 45. Nexo Crypto Credit is governed by Nexo’s Borrow Terms, which users agree to in order  
4 to borrow using the Nexo Crypto Credit. *See id.* ¶ 46. Plaintiff alleges the Borrow Terms is an  
5 adhesion contract. *See id.* Nexo allows customers to borrow as much cash as they want as long as  
6 they maintain a certain loan-to-value (“LTV”) ratio. *See id.* ¶ 48. The value of the collateral  
7 fluctuates with the price of the cryptocurrency assets staked as collateral. *See id.* Customers can  
8 maintain the requisite LTV ratio by staking more cryptocurrency assets or paying back their loan.  
9 *See id.* ¶ 49. If a customer’s LTV ratio rises above an 83.3% threshold, Nexo will—after providing  
10 notice to the customer—liquidate the collateral. *See id.* ¶¶ 50–51. Plaintiff alleges that as of  
11 December 23, 2020, Nexo accepted XRP as collateral. *See id.* ¶ 2. As of December 23, 2020,  
12 Plaintiff had staked approximately 600,000 XRP as collateral at a market value of approximately  
13 \$269,300 and had borrowed approximately \$169,400 against those assets. *See id.* ¶ 16.

14 Plaintiff alleges that on December 22, 2020, the Securities and Exchange Commission  
15 (“SEC”) announced an action against Ripple Labs Inc. and two of its executives alleging that they  
16 had raised over \$1.3 billion through their unregistered, ongoing securities offering of Ripple. *See*  
17 *id.* ¶ 52. This announcement caused the price of Ripple to drop from approximately \$0.45 to \$0.21  
18 on December 23, 2020. *See id.* ¶ 52. According to Plaintiff, the price of Ripple continued to drop  
19 over the following days, reaching \$0.17 on December 29, 2020. *See id.* ¶ 94. Plaintiff alleges that  
20 in response to the drop in the price of Ripple, Nexo suspended customers’ ability to use Ripple as  
21 collateral or to pay down their loans. *See id.* ¶ 53. Plaintiff alleges that Nexo did not provide notice  
22 of the suspension. *See id.* Plaintiff alleges that Nexo initiated the suspension because it did not  
23 want to be left holding Ripple at its decreased value. *See id.* ¶ 54.

24 According to Plaintiff, the dropping price of XRP caused his LTV ratio to increase, but he  
25 was prevented from paying off his loan with his XRP collateral to keep his LTV ratio down because  
26 of Nexo’s suspension of XRP. *See id.* ¶¶ 8, 10, 16, 58, 89, 90, 135–36. Plaintiff alleges that he  
27 attempted to keep his LTV ratio down by using “47,190.47043 XLM (Lumen) (market value of  
28 approximately \$6,000), 0.009255 BTC (bitcoin) (market value of approximately \$215), 6.1673 ETH

1 (Ether) (market value of approximately \$3,600), and 168.18851 LNK (Link) (market value of  
2 approximately (\$1,800)” to pay down the loan. *See id.* ¶¶ 135–36. But he ultimately failed, and  
3 Nexo liquidated his XRP collateral without notice. *See id.* ¶ 9–10, 89–90, 93–94, 135–37.

4 Plaintiff alleges that in a December 30 statement, Nexo sought to justify its suspension of  
5 XRP on several grounds. First, Nexo invoked a provision of its Borrow Terms allegedly giving it  
6 “sole and absolute discretion” to, for example, “suspend the provision of the Nexo Crypto Credit or  
7 of all or part of the other Nexo services[.]” *Id.* ¶¶ 65–69 (citing Borrow Terms § III.3). Plaintiff  
8 alleges that if this provision applied, any contractual rights that Nexo customers have regarding  
9 Nexo Crypto Credit would be illusory. *See id.* ¶ 69. Second, Nexo argued that it acquires  
10 “ownership” over users’ collateral, so when Nexo liquidates collateral, it is liquidating its own  
11 assets. *See id.* ¶¶ 72, 97–100. In support of this position, Nexo cited a provision of the Borrow  
12 Terms stating that “[u]nless prohibited by any Applicable Law, by virtue of this Agreement Nexo  
13 acquires the ownership of the Collateral while the Nexo Crypto Credit is outstanding.” *See id.*  
14 ¶¶ 99–100 (citing Borrow Terms § IV.4). Plaintiff alleges that this provision is unconscionable,  
15 unenforceable as ambiguous, and was likely to mislead customers in light of Nexo’s advertising that  
16 it does not own users’ collateral. *See id.* ¶¶ 99–133.

17 Plaintiff alleges that Nexo breached its Borrow Terms by (1) suspending the use of XRP  
18 collateral to pay down loans, (2) doing so without notice, and (3) liquidating users’ XRP collateral  
19 without notice. *See id.* ¶¶ 83–84, 177–73. Plaintiff further alleges that Nexo breached the duty of  
20 good faith and fair dealing under the Borrow Terms based on its conduct. *See id.* ¶¶ 55, 60, 66–81,  
21 169. Plaintiff further seeks declaratory judgment that (1) Nexo is not authorized to suspend XRP  
22 under its Borrow Terms; (2) Nexo does not possess various unfettered rights under the Borrow  
23 Terms, including to (a) suspend the provision of the Crypto Credit; (b) change, suspend, disable, or  
24 discontinue any features or content of the Crypto Credit; or (c) do so without providing notice to  
25 customers; and (3) Nexo does not acquire ownership of users’ collateral. *See id.* ¶¶ 174–89.  
26 Moreover, Plaintiff alleges that Nexo’s actions were violations of the “unlawful” and “unfair”  
27 prongs of California’s UCL, including based on Nexo’s other violations, its unconscionable  
28 contractual provisions, and its deceptive or misleading advertising indicating that Nexo did not

1 acquire “ownership” over users’ collateral. *See id.* ¶¶ 190–205. Additionally, Plaintiff alleges that  
2 Nexo violated the California CLRA by offering a “service” pursuant to unconscionable contractual  
3 provisions. *See id.* ¶¶ 206–214. Plaintiff seeks damages under the breach of contract and UCL  
4 claims, *see id.* at 52; *id.* ¶ 173; restitutionary disgorgement under the UCL claim, *see id.* ¶¶ 198–99;  
5 attorneys’ fees under the UCL and CLRA claims, *see id.* ¶¶ 198, 205, 214; and injunctive relief  
6 preventing Nexo from enforcing certain contractual provisions under the UCL and CLRA claims,  
7 *see id.* ¶¶ 200–204.

## 8 **II. LEGAL STANDARD**

### 9 **A. Lack of Subject Matter Jurisdiction – Rule 12(b)(1)**

10 A party may challenge the Court's subject matter jurisdiction by bringing a motion to dismiss  
11 under Federal Rule of Civil Procedure 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial  
12 or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack  
13 like in the present case, the movant asserts that the lack of subject matter jurisdiction is apparent  
14 from the face of the complaint. *Id.*

### 15 **B. Lack of Personal Jurisdiction – Rule 12(b)(2)**

16 “Federal courts ordinarily follow state law in determining the bounds of their jurisdiction  
17 over persons.” *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (quoting *Daimler AG v. Bauman*,  
18 571 U.S. 117, 125 (2014)). California’s long-arm statute is coextensive with federal due process  
19 requirements. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–801 (9th Cir.  
20 2004). “Although a nonresident’s physical presence within the territorial jurisdiction of the court is  
21 not required, the nonresident generally must have ‘certain minimum contacts . . . such that the  
22 maintenance of the suit does not offend traditional notions of fair play and substantial justice.’”  
23 *Walden*, 571 U.S. at 283 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

24 When a defendant raises a challenge to personal jurisdiction, the plaintiff bears the burden  
25 of establishing that jurisdiction is proper. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir.  
26 2015) (citing *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011)).  
27 “Where, as here, the defendant’s motion is based on written materials rather than an evidentiary  
28 hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the

1 motion to dismiss.” *Id.* (quotation marks and citation omitted). “[T]he plaintiff cannot simply rest  
2 on the bare allegations of its complaint,” but the uncontroverted allegations in the complaint must  
3 be accepted as true. *Schwarzenegger*, 374 F.3d at 800 (quotation marks and citation omitted). The  
4 court may consider evidence presented in affidavits in considering a 12(b)(2) motion. *Doe v. Unocal*  
5 *Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citation omitted). Where not directly controverted,  
6 plaintiff’s version of the facts is taken as true. *Id.* (citation omitted). Conflicts between the facts  
7 contained in the parties’ affidavits must be resolved in plaintiffs’ favor for purposes of deciding  
8 whether a prima facie case for personal jurisdiction exists. *Id.* (citation omitted).

9 Personal jurisdiction may be either general or specific. General personal jurisdiction exists  
10 when the defendant’s contacts “are so continuous and systematic as to render [it] essentially at home  
11 in the forum State.” *Daimler*, 571 U.S. at 127 (quotation marks and citation omitted). Specific  
12 personal jurisdiction exists when the defendant’s contacts with the forum state are more limited but  
13 the plaintiff’s claims arise out of or relate to those contacts. *Id.* at 127–28.

### 14 C. Failure to State a Claim – Rule 12(b)(6)

15 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
16 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation Force*  
17 *v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732  
18 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all  
19 well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese*  
20 *v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not  
21 “accept as true allegations that contradict matters properly subject to judicial notice” or “allegations  
22 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*  
23 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations  
24 omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient  
25 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*  
26 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A  
27 claim is facially plausible when it “allows the court to draw the reasonable inference that the  
28 defendant is liable for the misconduct alleged.” *Id.* On a motion to dismiss, the Court’s review is

1 limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v.*  
 2 *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581  
 3 (9th Cir. 1983).

4 **D. Leave to Amend**

5 In deciding whether to grant leave to amend, the Court must consider the factors set forth by  
 6 the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the Ninth  
 7 Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003). A district court  
 8 ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue  
 9 delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4)  
 10 undue prejudice to the opposing party, or (5) futility of amendment. *Eminence Capital*,  
 11 316 F.3d at 1052. “[I]t is the consideration of prejudice to the opposing party that carries the  
 12 greatest weight.” *Id.* However, a strong showing with respect to one of the other factors may  
 13 warrant denial of leave to amend. *Id.*

14 **III. DISCUSSION**

15 Nexo moves to dismiss (1) all claims against all Defendants for lack of subject matter  
 16 jurisdiction due to a lack of Article III standing under Rule 12(b)(1); (2) all claims against  
 17 Defendants Nexo Financial Services Ltd., Nexo Services OÜ, Nexo AG, and Nexo Financial LLC  
 18 for lack of personal jurisdiction under Rule 12(b)(2); (3) all claims for failure to state a claim under  
 19 Rule 12(b)(6); and (4) the breach of contract and declaratory judgment claims against all Defendants  
 20 under the *forum non conveniens* doctrine. The Court considers each motion in turn.

21 **A. 12(b)(1) Motion – Article III Standing**

22 Nexo argues that Plaintiff fails to adequately allege that he has Article III standing to bring  
 23 his claims. “[T]he ‘irreducible constitutional minimum’ of standing consists of three elements.”  
 24 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*,  
 25 504 U.S. 555, 560 (1992)). A plaintiff must have (1) suffered an injury in fact, (2) that is fairly  
 26 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a  
 27 favorable judicial decision. *Id.* (citations omitted). To establish injury in fact, a plaintiff must show  
 28 that he or she suffered “an invasion of a legally protected interest” that is “concrete and

1 particularized” and “actual or imminent, not conjectural or hypothetical.” *Id.* at 339 (citing *Lujan*,  
2 504 U.S. at 560). Further, to establish that an injury is fairly traceable to a defendant’s conduct, a  
3 plaintiff must show that the injury is “not the result of the independent action of some third party  
4 not before the court.” *Lujan*, 504 U.S. at 560 (alterations and citations omitted).

5 Nexo argues that Plaintiff has failed to plead Article III standing for any of his claims  
6 because (1) Plaintiff has failed to plead his alleged injury was fairly traceable to the suspension of  
7 XRP and (2) Plaintiff has failed to plead facts sufficient to meet either (a) the traceability  
8 requirement or (b) the concrete injury requirement for Nexo’s alleged failure to provide notice of  
9 the XRP suspension. *See* Motion, ECF No. 27 at 10–14. In response, Plaintiff argues that his  
10 standing to seek declaratory judgment and equitable relief under the UCL and CLRA is undisputed.  
11 *See* Opposition, ECF No. 35 at 9. Further, Plaintiff argues that he has pled sufficient facts that but  
12 for Nexo’s XRP suspension and its failure to provide notice for that suspension, Plaintiff would  
13 have (1) sold his XRP on December 23 before its price dropped and ultimately retained  
14 approximately \$100,000 of XRP that Nexo liquidated and (2) retained the non-XRP crypto assets  
15 he liquidated in attempting to maintain his LTV ratio. *See id.* at 10–12.

16 The Court considers the Article III standing issues briefed by the parties as to (1) Nexo’s  
17 suspension of XRP, (2) Nexo’s alleged failure to provide notice of the suspension, and (3) Plaintiff’s  
18 declaratory judgment and equitable relief claims. Further, the Court considers Article III standing  
19 issues related to Plaintiff’s theory related to lack of notice regarding Nexo’s liquidation of his  
20 collateral.

### 21 **1. Suspension of XRP – Traceability**

22 Nexo argues that Plaintiff failed to adequately allege he has Article III standing to bring any  
23 claims based on Nexo’s suspension of XRP, because his alleged injuries were not traceable to the  
24 suspension. Nexo argues that since Plaintiff was able to use cryptocurrencies other than XRP to  
25 maintain his LTV ratio, he has failed to plead facts sufficient to show that his injuries were fairly  
26 traceable to Nexo’s suspension of XRP. *See* Motion, ECF No. 27 at 12. Nexo further argues that  
27 Plaintiff’s losses were triggered by an independent cause—the SEC’s announcement of its lawsuit  
28 against Ripple, which caused the price of XRP to drop. *See id.* at 12–13. In response, Plaintiff



1 argues that had he been able to use his XRP collateral to pay down his loan on December 23  
2 following the SEC announcing its litigation against Ripple Labs Inc., he could have immediately  
3 paid off his loan when XRP was at a higher value and ultimately retained \$100,000 worth of XRP.  
4 *See* Opposition, ECF No. 35 at 10–11. Further, Plaintiff argues that if Nexo had not suspended the  
5 use of XRP to pay down loans, then Plaintiff would not have used over \$11,000 in other  
6 cryptocurrencies in attempting to pay down his loan. *Id.* Plaintiff additionally argues that  
7 (1) Nexo’s arguments about the drop in XRP prices between December 23 and December 29 are  
8 irrelevant because damages are measured at the time of breach and (2) Nexo’s argument that  
9 Plaintiff could have paid down his loan with other cryptocurrencies is an improper mitigation of  
10 damages argument inapplicable to standing. *Id.* On reply, Nexo argues that the XRP suspension  
11 was neither a breach nor a material breach that would have suspended Plaintiff’s obligation to  
12 maintain his LTV ratio. Reply, ECF No. 41 at 9–10.

13 The Court agrees with Plaintiff. Plaintiff has adequately alleged that without Nexo’s  
14 suspension of XRP, he could have paid down his loan using his XRP collateral when its value was  
15 higher and ultimately retained some XRP. Further, he would not have used any other cryptocurrency  
16 assets to try to pay down his loan, since he could have paid down his loan entirely with the value of  
17 his XRP collateral. Instead, with XRP suspended, Plaintiff tried and failed to pay down his loan  
18 with other cryptocurrency assets and ultimately had his XRP collateral liquidated, leaving him with  
19 nothing. While the Court recognizes that Nexo was not responsible for the drop in the price of XRP  
20 and assets other than XRP were available for paying down loans, these facts are insufficient to  
21 negate Plaintiff’s allegations connecting Nexo’s conduct to his losses.

22 At the very least, Nexo’s suspension of XRP made it more difficult for Plaintiff to pay down  
23 his loan, which plausibly contributed to his injury. In fact, Plaintiff alleges that Nexo’s suspension  
24 made it nearly impossible for him to pay down his loan, since removing any XRP from the amount  
25 Plaintiff had staked with Nexo might cause a liquidation event. *See* Complaint, ECF No. 1 ¶ 9. This  
26 difficulty was compounded by other alleged features of Nexo’s platform, like the fact that converting  
27 digital assets into cash and then using that cash on the Nexo platform to pay down loans takes as  
28 much as a week. *See id.* ¶ 94. Thus, Plaintiff has plausibly pled how Nexo’s conduct—not the

1 conduct of third parties—contributed to his injury. The Court does not consider the Article III  
2 standing traceability requirement to demand anything more from Plaintiff at this stage. *See, e.g.,*  
3 *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000)  
4 (“[T]he threshold requirement of traceability does not mean that plaintiffs must show to a scientific  
5 certainty that [defendant] caused the precise harm suffered by the plaintiffs[.]”).

6 Nexo’s argument that Plaintiff could use other types of assets to pay down his loan is beside  
7 the point. *See, e.g., Leung v. XPO Logistics, Inc.*, 164 F.Supp.3d 1032, 1038 (N.D. Ill. 2015)  
8 (“[B]lame-the-victim arguments, although they may work in *mitigation* of damages, fail in the  
9 standing context.”) The fact that other types of assets were usable for payment on Nexo’s platform  
10 does not change the fact that Nexo’s suspension of XRP allegedly made it more difficult for Plaintiff  
11 to pay down his loan. Nexo’s argument is further undermined by the fact that Plaintiff alleges that  
12 he tried to maintain his LTV ratio using other assets but ultimately failed to do so. *See* Complaint,  
13 ECF No. 1 ¶ 135.

14 Accordingly, the Court finds that Plaintiff has adequately alleged that his losses were  
15 traceable to Nexo’s suspension of XRP. Since Nexo does not challenge the injury-in-fact or  
16 redressability elements, and the Court finds that Plaintiff has adequately alleged the traceability  
17 element, the Court DENIES Nexo’s 12(b)(1) motion as to Plaintiff’s breach of contract claim  
18 regarding the suspension of XRP.

## 19 **2. Lack of Notice of Suspension**

20 Nexo further argues that Plaintiff failed to adequately allege he has Article III standing to  
21 bring any claims based on Nexo’s failure to provide notice regarding the suspension of XRP.

### 22 a. Traceability

23 Nexo argues that Plaintiff fails to plead any facts indicating how his lack of notice regarding  
24 the XRP suspension impacted his losses. Motion, ECF No. 27 at 13. In response, Plaintiff argues  
25 that the sooner he learned of the suspension as the price of XRP fell on December 23, 2020, the  
26 greater the value he could have obtained for his XRP. Opposition, ECF No. 35 at 12.

27 As outlined above, the Court finds Plaintiff’s allegations to be sufficient to connect Nexo’s  
28 conduct to his losses. Upon learning that XRP was about to be suspended as a means for paying

1 down a loan, Plaintiff alleges he could have paid off his loan in its entirety and ultimately retained  
2 some XRP rather than having Nexo liquidate it all. The Court finds it plausible based on Plaintiff's  
3 allegations that by not notifying Plaintiff of the suspension, Nexo further contributed to his failure  
4 to pay off his loan. Again, the Court does not consider the traceability requirement of Article III  
5 standing to require anything more. *See Southwest Marine, Inc.*, 236 F.3d at 995.

6 b. Concrete Injury

7 Nexo further argues that Plaintiff has failed to allege that he suffered an injury-in-fact based  
8 on Nexo's failure to provide notice of the suspension of XRP. *See* Motion, ECF No. 27 at 14. Nexo  
9 points to the *TransUnion*, *Spokeo*, and *Adobe* cases in support of his argument, arguing that these  
10 cases establish that a mere lack of notice, without more, is insufficient to satisfy the "concrete injury"  
11 requirement of Article III. *See id.* (citing *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (June 25,  
12 2021), *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), and *In re Adobe Sys., Inc. Privacy*  
13 *Litig.*, 66 F. Supp. 3d 1197, 1211 (N.D. Cal. 2014)).

14 The cases Nexo cites establish that a statutory procedural violation, including a violation of  
15 a statutory notice requirement, is insufficient to constitute an injury-in-fact for Article III standing  
16 purposes—a plaintiff must also plead a "concrete injury" from the violation. This Court has  
17 previously held that a breach of contract alone is also not sufficient to show concrete injury—a  
18 plaintiff must also show an injury-in-fact. *See Svenson v. Google Inc.*, No. 13-cv-04080-BLF,  
19 2016 WL 8943301, at \*10 (N.D. Cal. Dec. 21, 2016) (finding that where a statute permits nominal  
20 damages for breach of contract, "a plaintiff still must show the *fact* of injury in order to have Article  
21 III standing") (emphasis in original). However, the Court finds that Plaintiff has adequately alleged  
22 a concrete injury related to Nexo's lack of notice regarding the suspension of XRP. Plaintiff alleges  
23 that he would have retained XRP and other cryptocurrency assets had he received notice of the XRP  
24 suspension, which is a plausible concrete injury for Article III standing purposes. *See TransUnion*,  
25 141 S.Ct. at 2204 ("[C]ertain harms readily qualify as concrete injuries under Article III. The most  
26 obvious are traditional tangible harms, such as physical harms and monetary harms.").

27 Accordingly, the Court finds that Plaintiff has adequately alleged concrete injury based on  
28 lack of notice regarding Nexo's suspension of XRP.

### 3. Lack of Notice Prior to Liquidation

1 It is unclear from the Complaint whether Plaintiff is also asserting a breach of contract claim  
 2 based on Nexo's alleged failure to provide notice prior to liquidation of Plaintiff's collateral. *See*  
 3 Complaint, ECF No. 1 ¶¶ 166–73; *see also id.* ¶¶ 83–84; *Tinian Women Ass'n v. United States Dep't*  
 4 *of the Navy*, 976 F.3d 832, 841 (9th Cir. 2020). The parties fail to address this theory in their briefing  
 5 regarding Article III standing. To the extent Nexo is not moving to dismiss under 12(b)(1) Plaintiff's  
 6 breach of contract claim based on the lack of notice prior to liquidation, the Court finds it necessary,  
 7 *sua sponte*, to consider whether Plaintiff has adequately alleged Article III standing as to this theory.  
 8 *See Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) (“[F]ederal courts are  
 9 required *sua sponte* to examine jurisdictional issues such as standing.”) (citing *B.C. v. Plumas*  
 10 *Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir.1999)); *see also* Fed.R.Civ.P. 12(h)(3) (“Whenever  
 11 it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject  
 12 matter, the court shall dismiss the action.”).

13 To the extent Plaintiff is asserting that Nexo was in breach of contract for failing to provide  
 14 notice prior to liquidation of Plaintiff's collateral, the Court finds that Plaintiff has inadequately pled  
 15 an injury-in-fact. Plaintiff has not adequately alleged how lack of notice prior to Nexo's liquidation  
 16 of his collateral—as opposed to notice that his LTV ratio was too high, which is not an alleged  
 17 requirement of the Borrow Terms, and which may have allowed Plaintiff to remedy his LTV ratio—  
 18 caused him any injury.

19 Accordingly, Plaintiff has failed to adequately allege that he has Article III standing for  
 20 purposes of his breach of contract claim for lack of notice prior to liquidation of his collateral. *See*  
 21 *Svenson*, 2016 WL 8943301, at \*10.

### 4. Declaratory Judgment and Injunctive Relief

22 Nexo generally argues that all four of Plaintiff's claims should be dismissed for lack of  
 23 Article III standing, including his claims for declaratory judgment and injunctive relief under the  
 24 CLRA and UCL. *See* Motion, ECF No. 27 at 10. Nexo argues that all four claims “hinge on”  
 25 Nexo's allegations related to the suspension of XRP without notice. *See id.* In response, Plaintiff  
 26 argues that Nexo fails to dispute that Plaintiff has standing to bring his declaratory judgment and  
 27  
 28

1 equitable relief claims. *See* Opposition, ECF No. 35 at 9. Plaintiff argues that he has standing to  
2 seek declaratory relief because he is entitled to seek clarification of contractual rights over which he  
3 and Nexo disagree. *See id.* Further, Plaintiff argues that he has standing to seek equitable relief  
4 because he “face[s] a substantial, certainly impending risk of harm” from defendant’s enforcement  
5 of the contract. *See id.* On reply, Nexo fails to dispute Plaintiff’s arguments. *See* Reply,  
6 ECF No. 41 at 9–10.

7       Regarding standing for injunctive relief, “[p]ast exposure to harmful or illegal conduct does  
8 not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer  
9 adverse effects.” *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010). Article III requires  
10 plaintiffs show a “real or immediate threat . . . that [they] will again be wronged in a similar way”  
11 to obtain injunctive relief. *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). In  
12 a class action, a named plaintiff must show that he or she personally faced the threat of harm—a  
13 likelihood of future injury to the class not faced by a named plaintiff is not sufficient for pleading  
14 injunctive relief. *See In re Yahoo Mail Litig.*, 308 F.R.D. 577, 587 (N.D. Cal. 2015) (citing *Hodgers-*  
15 *Durgin v. de la Vina*, 199 F.3d 1037, 1044–45 (9th Cir. 1999)); *Wang v. Chinese Daily News, Inc.*,  
16 737 F.3d 538, 545 (9th Cir. 2013).

17       In the Complaint, Plaintiff’s only allegation of future harm in support of his injunctive relief  
18 claim is “he faces the imminent prospect of irreparable harm in the likely event—including because  
19 of the uncertain regulatory status of many currently ‘acceptable’ digital assets on the Nexo  
20 platform—that Nexo invokes the unconscionable provisions of the Nexo Borrow Terms and  
21 Conditions that it invoked on December 30, 2020.” Complaint, ECF No. 1 ¶ 140; *see also id.* ¶¶  
22 141, 201–204. The Court does not consider Plaintiff’s allegations sufficient to plead Article III  
23 standing to bring injunctive relief. Plaintiff makes no allegations regarding what harm would come  
24 to him personally if Nexo were to suspend other currently acceptable digital assets or otherwise  
25 invoke its allegedly unconscionable contractual provisions. According to Plaintiff, his XRP  
26 collateral has already been liquidated, and he does not allege that he holds or plans to hold any other  
27 assets through the Nexo platform or the Nexo Crypto Credit. *See id.* ¶¶ 16, 135. Allegations about  
28 “increased demand for Nexo services” are not enough. *Id.* ¶ 141. Plaintiff must plead a likelihood

1 of future harm that will come to *him*—not members of the class or the public. *See Yahoo Mail*, 308  
 2 F.R.D. at 587; *Chinese Daily News*, 737 F.3d at 545. Accordingly, the Court DISMISSES Plaintiff’s  
 3 claims for injunctive relief under the UCL for lack of Article III standing WITH LEAVE TO  
 4 AMEND.<sup>1</sup>

5 Regarding standing for declaratory relief, the Declaratory Judgment Act provides that “[i]n  
 6 a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing  
 7 of an appropriate pleading, may declare the rights and other legal relations of any interested party  
 8 seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201.  
 9 Since the Court has already found that Plaintiff’s claims stem from an actual controversy regarding  
 10 the suspension of XRP without notice, which Plaintiff has adequately alleged caused him concrete  
 11 injury traceable to Nexo’s conduct, the Court finds that Plaintiff has standing to pursue his related  
 12 claim for declaratory judgment. *See* Motion, ECF No. 27 at 5 (Plaintiff’s “four claims hinge on the  
 13 allegations that Nexo harmed him by” suspending XRP without notice). Accordingly, the Court  
 14 declines to dismiss Plaintiff’s declaratory judgment claim on Article III standing grounds.

15 \* \* \*

16 Based on the above reasoning, the Court DENIES Nexo’s 12(b)(1) motion regarding  
 17 Plaintiff’s breach of contract theory based on the suspension of XRP without notice. Further, the  
 18 Court DENIES Nexo’s 12(b)(1) motion regarding Plaintiff’s declaratory judgment claim.  
 19 Additionally, the Court DISMISSES Plaintiff’s claims for (1) injunctive relief under the UCL and  
 20 (2) breach of contract based on lack of notice regarding the liquidation of Plaintiff’s XRP collateral,  
 21 based on lack of subject matter jurisdiction due to a failure to adequately plead Article III standing,  
 22 WITH LEAVE TO AMEND.

23 **B. 12(b)(2) Motion – Personal Jurisdiction**

24 Nexo moves to dismiss all claims against all Defendants except Nexo Capital Inc. for lack  
 25 of personal jurisdiction. Plaintiff alleges that the Court has personal jurisdiction over all Defendants  
 26 based on their contacts with California both (1) individually and (2) operating as a single enterprise.

27 \_\_\_\_\_  
 28 <sup>1</sup> As outlined below, the Court dismisses Plaintiff’s CLRA claim without leave to amend.

1 See Complaint, ECF No. 1 ¶¶ 22–37; Opposition, ECF No. 35 at 3–8. Nexo concedes that Nexo  
2 Capital Inc., which issued Plaintiff the credit line at issue in this case, is subject to specific personal  
3 jurisdiction in California for purposes of this case. See Motion, ECF No. 27 at 6 n.1; Declaration  
4 of Antoni Trenchev (“Trenchev Decl.”), ECF No. 27-1 ¶ 19. Nexo moves to dismiss Plaintiff’s  
5 claims against all other Defendants for lack of personal jurisdiction: the European Defendants—  
6 Nexo Financial Services Ltd., Nexo Services OÜ, and Nexo AG—and Nexo Financial LLC, which  
7 is a Delaware corporation. See Motion, ECF No. 27 at 6; Complaint, ECF No. ¶¶ 17–22. Nexo  
8 argues that Plaintiff has failed to allege that Nexo Financial Services Ltd., Nexo Services OÜ, Nexo  
9 AG, or Nexo Financial LLC are subject to personal jurisdiction in California under (1) general  
10 jurisdiction, (2) specific jurisdiction, or (3) based on a single-enterprise liability theory. See Motion,  
11 ECF No. 27 at 6–10. Nexo submits a declaration of Antoni Trenchev, a director of Nexo Capital  
12 Inc., disputing Plaintiff’s jurisdiction-related allegations. See Trenchev Decl., ECF No. 27-1.  
13 Plaintiff argues in support of personal jurisdiction over all Defendants, and in the alternative requests  
14 that the Court grant him jurisdictional discovery. See Opposition, ECF No. 35 at 3–9.

15 The Court considers the issues of (1) general jurisdiction and (2) specific jurisdiction over  
16 Nexo Financial Services Ltd., Nexo Services OÜ, Nexo AG, and Nexo Financial LLC individually.  
17 Further, the Court considers (3) whether it is warranted to treat Defendants’ contacts with California  
18 together under a single-enterprise liability theory.

### 19 **1. General Jurisdiction**

20 Plaintiff does not allege that the Court has general jurisdiction over any of Defendants. See  
21 Complaint, ECF No. 1 ¶¶ 30–37; Opposition, ECF No. 35 at 3–8.

### 22 **2. Specific Jurisdiction**

23 Nexo argues that Plaintiff has not alleged sufficient facts to show that this Court has specific  
24 personal jurisdiction in California over the European Nexo Entities or Nexo Financial LLC. See  
25 Motion, ECF No. 27 at 7. Plaintiff argues that this Court has specific personal jurisdiction over the  
26 European Nexo Entities and Nexo Financial LLC because of their contacts with California through  
27 Nexo’s highly interactive website and Nexo Financial LLC’s California Finance Lender license.  
28 See Opposition, ECF No. 35 at 3–5.

1 Courts use a three-prong test for determining whether there is specific personal jurisdiction  
2 over a defendant:

3  
4 (1) The non-resident defendant must purposefully direct his activities  
5 or consummate some transaction with the forum or resident thereof;  
6 or perform some act by which he purposefully avails himself of the  
7 privilege of conducting activities in the forum, thereby invoking the  
8 benefits and protections of its laws;

9 (2) the claim must be one which arises out of or relates to the  
10 defendant's forum-related activities; and

11 (3) the exercise of jurisdiction must comport with fair play and  
12 substantial justice, i.e. it must be reasonable.

13 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citing *Lake v. Lake*,  
14 817 F.2d 1416, 1421 (9th Cir. 1987)). A purposeful availment analysis is most often used in suits  
15 sounding in contract, whereas a purposeful direction analysis is most often used in suits sounding  
16 in tort. *Id.*

17 a. Purposeful Availment

18 Plaintiff argues that the first prong of the specific jurisdiction test is satisfied based on a  
19 purposeful availment analysis. *See* Opposition, ECF No. 35 at 3–5. “A showing that a defendant  
20 purposefully availed himself of the privilege of doing business in a forum state typically consists of  
21 evidence of the defendant’s actions in the forum, such as executing or performing a contract there.”  
22 *Schwarzenegger*, 374 F.3d at 802. By taking such actions, a defendant “purposefully avails itself  
23 of the privilege of conducting activities within the forum State, thus invoking the benefits and  
24 protections of its laws.” *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The purposeful  
25 availment inquiry focuses on whether a defendant has voluntarily derived some benefit from its  
26 interstate activities such that it “will not be haled into a jurisdiction solely as a result of ‘random,’  
27 ‘fortuitous,’ or ‘attenuated’ contacts.” *Global Commodities Trading Grp., Inc. v. Beneficio de Arroz*  
28 *Choloma*, 972 F.3d 1101, 1107 (9th Cir. 2020) (quoting *Burger King Corp. v. Rudzewicz*,  
471 U.S. 462, 474–75 (1985)).

Plaintiff raises two arguments to support that he has alleged sufficient facts to show  
purposeful availment for the European Nexo Entities and Nexo Financial LLC. First, Plaintiff



1 argues that all Defendants have purposefully availed themselves of the privilege of conducting  
 2 business in California by “collectively operating and maintaining” a highly interactive website made  
 3 available in California. *See* Opposition, ECF No. 35 at 3–4. Second, Plaintiff argues that Nexo  
 4 Financial LLC’s California Finance Lender (“CFL”) license further supports purposeful availment  
 5 for Nexo Financial LLC. *Id.* at 4. The Court considers each argument in turn.

6 i. Website – European Nexo Entities and Nexo Financial LLC

7 Plaintiff argues that Nexo’s highly interactive website is sufficient to show purposeful  
 8 availment in California. *See* Opposition, ECF No. 35 at 3–4. The Ninth Circuit has found that when  
 9 a defendant’s contacts with a forum comprise an interactive website, the extent of the defendant’s  
 10 purposeful availment in that forum is proportional to the interactivity of the website. *See Cybersell,*  
 11 *Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418–19 (9th Cir. 1997). There is no personal jurisdiction where  
 12 “a website advertiser [does] nothing other than register a domain name and post an essentially  
 13 passive website.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1157 (9th Cir.2006) (quotations  
 14 omitted). But operating a more interactive website in a forum can be sufficient to constitute  
 15 purposeful availment. *See Cybersell*, 130 F.3d at 418–19.

16 In the Complaint, Plaintiff alleges that all Defendants offer services through a highly  
 17 interactive website—nexo.io—which they make available in California. *See* Complaint, ECF No. 1  
 18 ¶¶ 32–35. Plaintiff alleges that (1) the website links to Nexo’s whitepaper, which co-founder  
 19 Trenchev stated has been “instrumental” in raising funds; (2) it allows users to reach descriptions  
 20 and advertisements of Nexo’s business and services; (3) it has multiple links to the “Terms and  
 21 Conditions”; and (4) customers use the website to post collateral, take out loans, monitor their LTV  
 22 ratios, maintain accounts, and other critical activities involving transmission of computer files and  
 23 data. *See id.* ¶ 33(a)–(f). Plaintiff argues that the highly interactive Nexo website is sufficient to  
 24 show purposeful availment for all Defendants, including the European Nexo Entities and Nexo  
 25 Financial LLC. *See* Opposition, ECF No. 35 at 3–4. In response, Nexo argues that (1) only Nexo  
 26 Capital Inc. is the operator of the Nexo website; (2) the website directed California customers to  
 27 Nexo Capital Inc., rather than the other Defendants; and (3) while Nexo Services OÜ was the  
 28 operator of the Nexo app when the events in this lawsuit occurred, Jeong does not allege he used

1 the app and Nexo Services OÜ did not issue the credit line to Jeong. *See* Reply, ECF No. 41 at 5–6;  
2 Trenchev Decl., ECF No. 27-1 ¶ 15; Reply Declaration of Antoni Trenchev (“Trenchev Reply  
3 Decl.”), ECF No. 41-1 ¶ 3. Nexo does not dispute that the Nexo website was highly interactive or  
4 made available in California. *See* Reply, ECF No. 41 at 4–6. Nexo instead disputes that any of the  
5 Defendants other than Nexo Capital Inc., the operator of the Nexo website, were sufficiently  
6 connected to the website to show that they purposefully availed themselves of the privilege of  
7 conducting business in California. *See id.*

8 The first question is whether Plaintiff has alleged sufficient facts to show purposeful  
9 availment for the European Nexo Entities or Nexo Financial LLC based on the Nexo website. The  
10 parties appear to agree that it is the “operation” of an interactive website that matters for the  
11 purposeful availment analysis. *See* Opposition, ECF No. 35 at 3 (“[T]he operation of an interactive  
12 website has been interpreted by courts as subjecting the operator to specific jurisdiction.”) (quoting  
13 *iCall, Inc. v. Reliance Commc’ns Ltd.*, 2010 WL 11583236, at \*4 (N.D. Cal. Sept. 16, 2010)); Reply,  
14 ECF No. 41 at 4–6. Nexo presents evidence that Nexo Capital Inc.—not any of the other  
15 Defendants—was the operator of the Nexo website when the events at the heart of the case took  
16 place. *See* Trenchev Decl., ECF No. 27-1 ¶ 3, 19; Trenchev Reply Decl., ECF No. 41-1 ¶ 3.  
17 Plaintiff’s conclusory allegations regarding the fact that Defendants “collectively operat[e] and  
18 maintain[] the Nexo website” are insufficient to overcome Nexo’s evidence. *See* Opposition, ECF  
19 No. 35 at 4 (citing Complaint ¶¶ 18, 19, 22). Accordingly, the Court finds that Plaintiff has not  
20 alleged sufficient facts to meet its burden for showing that the European Nexo Entities or Nexo  
21 Financial LLC purposefully availed themselves of the privilege of conducting business in California  
22 through the Nexo website. *See Circle Click Media LLC v. Regus Management Grp. LLC*, No. 12–  
23 04000 SC, 2013 WL 57861, at \*3 (N.D. Cal. Jan. 3, 2013).

24 The second question is whether the facts regarding Nexo Services OÜ’s involvement with  
25 the Nexo app are sufficient to show purposeful availment for that entity. Nexo presents evidence  
26 that Nexo Services OÜ was the operator of the Nexo app at the time the events at the heart of this  
27 lawsuit took place. *See* Trenchev Reply Decl, ECF No. 41-1 ¶ 4. Further, Plaintiff alleges that the  
28 Nexo website “may be accessed through Nexo applications.” Complaint, ECF No. 1 ¶ 33(e). Since

1 there is no dispute that the website was highly interactive, and based on the alleged facts users could  
2 access the Nexo website via the Nexo app, the Court finds that Nexo Services OÜ’s operation of the  
3 app is sufficient to satisfy the purposeful availment prong of the specific jurisdiction test. *See*  
4 *Cybersell*, 130 F.3d at 418–19.

5 Accordingly, the Court finds that Plaintiff’s website and app-related allegations are  
6 sufficient to meet its burden for showing purposeful availment as to Nexo Services OÜ, but not as  
7 to any of the other European Nexo Entities or Nexo Financial LLC.

8 ii. California Finance Lender License – Nexo Financial LLC

9 Plaintiff argues that it has pled sufficient facts to show purposeful availment for Nexo  
10 Financial LLC by alleging that it had a CFL license in California and operates as a money services  
11 business through a branch in California. *See* Opposition, ECF No. 35 at 4–5 (citing Complaint, ECF  
12 No. 1 ¶ 17). In response, Nexo argues and presents evidence that (1) Nexo Financial LLC has no  
13 connection to California other than holding the CFL license and (2) Nexo Financial LLC did not  
14 obtain the license until after the events at the heart of this case. *See* Motion, ECF No. 27 at 7; Reply,  
15 ECF No. 41 at 4; Trenchev Decl., ECF No. 27-1 ¶ 20. While the evidence Nexo submitted supports  
16 that Nexo Financial LLC did not obtain the CFL license until after December 2020, Nexo does not  
17 dispute Plaintiff’s allegation that Nexo Financial LLC has a money services branch in California or  
18 indicate whether this was established before or after December 2020. *See* Complaint ¶ 17. Nexo  
19 argues that Nexo Financial LLC “has no connection to California other than holding that license,”  
20 but the Court must accept as true Plaintiff’s allegation that Nexo operates a branch of its money  
21 services business in California without any evidence to the contrary. *See* Motion, ECF No. 27 at 7;  
22 Trenchev Decl., ECF No. 27-1 ¶ 20 (“Nexo Financial LLC is registered to do business and has a  
23 registered agent for service of process in California[.]”). Accordingly, the Court considers  
24 Plaintiff’s allegations sufficient to show purposeful availment for Nexo Financial LLC.

25 b. Arising Out of Forum-Related Activities

26 The second requirement for specific jurisdiction is that the claim “arises out of or relates to  
27 the defendant’s forum-related activities.” *Schwarzenegger*, 374 F.3d at 802. To satisfy this  
28 requirement, the defendant’s forum-related activities must be a “but for” cause of the plaintiff’s

1 claims. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000),  
2 *overruled in part on other grounds by Walden*, 571 U.S. at 285.

3 Regarding Nexo Services OÜ, the only potential basis for specific jurisdiction in California  
4 is its operation of the Nexo app at the time of the events at the heart of this case. However, as Nexo  
5 argues, Plaintiff has not alleged that he used the Nexo app, and Nexo Services OÜ did not issue the  
6 credit line to Plaintiff. Reply, ECF No. 41 at 5. Accordingly, the Court finds that Plaintiff has not  
7 alleged sufficient facts to support that Nexo Services OÜ’s forum-related activities were a “but for”  
8 cause of Plaintiff’s claims.

9 Regarding Nexo Financial LLC, Nexo argues that “Plaintiff’s claims arise out of Nexo’s  
10 maintenance of the highly interactive website and out of Nexo Financial’s practice of lending money  
11 in California.” Opposition, ECF No. 35 at 5. But Nexo has submitted evidence indicating that Nexo  
12 Financial LLC (1) did not operate the Nexo website, (2) did not lend money to Plaintiff, and (3) did  
13 not obtain its CFL license until after December 2020. *See* Trenchev Decl., ECF No. 27-1 ¶ 20;  
14 Trenchev Reply Decl., ECF No. 41-1 ¶ 3. Accordingly, the Court finds that Plaintiff has failed to  
15 allege sufficient facts to support that his claims arose out of Nexo Financial LLC’s forum-related  
16 activities.

17 Accordingly, while Plaintiff has alleged sufficient facts to support a showing of purposeful  
18 availment as to Nexo Services OÜ and Nexo Financial LLC, he has not adequately pled that his  
19 claims arose out of these Defendants’ forum-related activities.

20 c. Reasonableness

21 Because Plaintiff has not met his burden to satisfy the first two prongs of the test, the Court  
22 does not reach the third prong. *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1068–69  
23 (9th Cir. 2017)

24 \* \* \*

25 Accordingly, the Court finds that Plaintiff has not alleged sufficient facts to meet its burden  
26 for showing specific personal jurisdiction in California as to any of the European Nexo Entities  
27 (Nexo Financial Services Ltd., Nexo Services OÜ, and Nexo AG) or Nexo Financial LLC.

28 **3. Single-Enterprise Liability**

1 Plaintiff alleges that Defendants should be treated as a single enterprise for purposes of  
 2 personal jurisdiction. *See* Complaint, ECF No. 1 ¶¶ 23–29; Opposition, ECF No. 35 at 5–8. “If . . .  
 3 one corporation [is] the alter ego of another, the Court may ‘pierce the corporate veil’  
 4 jurisdictionally and attribute ‘contacts’ accordingly.” *RAE Sys., Inc. v. TSA Sys., Ltd.*,  
 5 No. C 04–2030 FMS, 2005 WL 1513124, AT \*3 (N.D. Cal. June 24, 2005) (quoting *Certified*  
 6 *Building Prods., Inc. v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1975)). Courts treat two entities as alter  
 7 egos or a single enterprise for purposes of personal jurisdiction where a plaintiff makes a prima facie  
 8 case that (1) there is such unity of interest and ownership that the separate personalities of the two  
 9 entities no longer exist and (2) that failure to disregard their separate identities would result in fraud  
 10 or injustice. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015) (citations omitted).  
 11 Conclusory allegations of “alter ego” status are insufficient to state a claim. *Sandoval v. Ali*,  
 12 34 F.Supp.3d 1031, 1040 (N.D. Cal. Mar. 28, 2014) (quoting *Neilson v. Union Bank of Cal., N.A.*,  
 13 290 F.Supp.2d 1101, 1116 (C.D. Cal. 2003)). Rather, a plaintiff must allege specifically both  
 14 elements of alter ego liability, as well as facts supporting each. *Id.* Disregarding the corporate entity  
 15 is recognized as an “extreme remedy,” and courts will only pierce the corporate veil in “exceptional  
 16 circumstances.” *Gonzalez v. Drew Indus. Inc.*, No. CV 06–08233 DDP (JWJx),  
 17 2008 WL 11338569, at \*1 (C.D. Cal. Apr. 1, 2008) (quoting *Calvert v. Huckins*, 875 F.Supp. 674,  
 18 678 (E.D. Cal. 1995)).

19 In support of his single enterprise theory, Plaintiff alleges that (1) Nexo states that it is  
 20 “powered” by Credissimo, which is a European Financial/Technological (“FinTech) Group based  
 21 in Bulgaria whose majority shareholders and founders—Kosta Kantchev, Georgi Shulev, and  
 22 Antoni Trenchev—are the majority shareholders and founders of Nexo; (2) Kantchev, Shulev, and  
 23 Trenchev are publicly identified as “co-founders” and “managing partners” of “Nexo,” without  
 24 distinguishing between Defendants; (3) Defendants commingle funds and assets; (4) Defendants do  
 25 not maintain distinct minutes or corporate records; (5) Defendants have similar equitable ownership  
 26 because Kantchev, Shulev, and Trenchev hold the majority of equity in each Defendant; (6)  
 27 Defendants have similar supervision and management in that some combination of Kantchev,  
 28 Shulev, and Trenchev is responsible for oversight of each entity; (7) one or more of Nexo Financial

1 LLC, Nexo Financial Services Ltd., and Nexo AG may serve as a mere shell, instrumentality, or  
 2 conduit for Nexo Services OÜ; and (8) Defendants do not honor corporate formalities or maintain  
 3 an arm’s-length relationship, and they treat employees as working for “Nexo” as a whole. *See*  
 4 Complaint, ECF No. 1 ¶¶ 23(a)–(h). Plaintiff further alleges that Trenchev has repeatedly referred  
 5 to Nexo as a single, global entity, including by saying, “We are a global enterprise. We are operating  
 6 in any jurisdiction, apart from the sanctioned countries, so this varies from country to country,” and,  
 7 “[I]t is important to know that Nexo is SEC-compliant and adheres to all relevant European  
 8 legislation[.]” *Id.* ¶¶ 24, 25, 27(b); *see also id.* ¶ 27(a). Plaintiff also points to Nexo Capital Inc.’s  
 9 suit against a customer for defaming “Nexo.” *Id.* ¶ 28. And Plaintiff points to the fact that on Nexo  
 10 Financial LLC’s CFL license, the listed address of Nexo Financial LLC is the London address of  
 11 both Nexo Financial Services Ltd. (the U.K. entity) and Nexo Capital Inc. (the Cayman Islands  
 12 entity). *Id.* ¶ 26.

13 a. Unity of Interest

14 The “unity of interest and ownership” prong requires “a showing that the parent controls the  
 15 subsidiary to such a degree as to render the latter the mere instrumentality of the former.” *Ranza*,  
 16 793 F.3d at 1073 (citations omitted). This test envisions “pervasive control over the subsidiary,  
 17 such as when a parent corporation dictates every facet of the subsidiary’s business—from broad  
 18 policy decisions to routine matters of day-to-day operation.” *Id.* (citations and quotations omitted).  
 19 “Total ownership and shared management personnel are alone insufficient to establish the requisite  
 20 level of control.” *Id.* (citations omitted). Further, one company being “involved directly in decision-  
 21 making” of another where each entity “observe[s] all of the corporate formalities necessary to  
 22 maintain corporate separateness” is insufficient to show that they should be treated as a single  
 23 enterprise for personal jurisdiction. *Unocal*, 248 F.3d at 928. Courts consider nine factors when  
 24 assessing the first prong of the alter ego test:

- 25  
 26 (1) inadequate capitalization, (2) commingling of funds and other  
 27 assets, (3) disregard of corporate formalities and failure to maintain  
 28 an arm’s length relationship, (4) holding out by one entity that is liable  
 to the debts of the other, (5) identical equitable ownership, (6) use of  
 the same offices and employees, (7) lack of segregation of corporate  
 records, (8) manipulating assets between entities so as to concentrate

1 the assets in one and the liabilities in another, and (9) identical  
2 directors and officers.

3 *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 491 F.Supp.3d 610, 635 (N.D. Cal. 2020)  
4 (citing *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1250 (9th Cir. 2017)).

5 Nexo argues that (1) Plaintiff's allegation regarding Credissimo has no apparent connection  
6 to his single-enterprise liability theory, (2) the other allegations in paragraph 23 of the complaint are  
7 conclusory and boilerplate, and (3) the allegations regarding media quotes and press releases are  
8 legally immaterial. *See* Motion, ECF No. 27 at 9 (citing *Ranza*, 793 F.3d at 1074). Nexo further  
9 provides the declaration of Antoni Trenchev, which contravenes several of Plaintiff's allegations.  
10 *See* Trenchev Decl., ECF No. 27-1. In response, Plaintiff argues that Nexo fails to dispute Plaintiff's  
11 allegations regarding (1) Kantchev, Shulev, and Trenchev's supervision of and equity in each of  
12 Defendants; (2) the principal place of business shared between Nexo Capital Inc. and Nexo Financial  
13 Services Ltd.; (3) Nexo's shared employees; (4) Nexo Capital Inc.'s lawsuit; and (5) Nexo's public  
14 statements about its single-entity character. *See* Opposition, ECF No. 35 at 6–7 (citing Complaint,  
15 ECF No. 1 ¶¶ 21, 23(b, e, f, h), 24–25, 28). On reply, Nexo argues that the present case parallels  
16 *Reynolds v. Binance Holdings Ltd.*, where the Court found there to be no unity of interest. *See*  
17 Reply, ECF No. 41 at 6–8 (citing *Reynolds*, 481 F.Supp.3d 997 (N.D. Cal. 2020)).

18 The Court considers Plaintiff's allegations under the *Daewoo* factors. Plaintiff's allegations  
19 fail to address the first, fourth, and eighth *Daewoo* factors—(1) whether any of the Nexo entities  
20 were inadequately capitalized; (4) whether any Nexo entity was held out as liable for the debts of  
21 any other; and (8) whether the Nexo entities manipulated assets between entities so as to concentrate  
22 the assets in one and the liabilities in another. *See* *Purdue Pharma*, 491 F.Supp.3d at 635.  
23 Accordingly, the Court finds that the first, fourth, and eighth factors weigh against a finding of unity  
24 of interest. *See* *Stewart v. Screen Gems-EMI Music, Inc.*, 81 F.Supp.3d 938, 955–956 (N.D. Cal.  
25 2015); *Reynolds*, 481 F.Supp.3d at 1005.

26 Further, Plaintiff's allegations related to the second, third, and seventh *Daewoo* factors—(2)  
27 whether the Nexo entities commingled funds and other assets, (3) whether the Nexo entities show a  
28 disregard of corporate formalities and failure to maintain an arm's length relationship, and (7)  
whether the Nexo entities lacked segregation of corporate records—are conclusory and controverted

1 by the declaration of Antoni Trenchev. *See Purdue Pharma*, 491 F.Supp.3d at 635; Complaint,  
 2 ECF No. 1 ¶ 23(c) (“These Nexo entities commingle funds and assets[.]”); *id.* ¶ 23(d) (“These Nexo  
 3 entities do not maintain distinct minutes or corporate records[.]”); *id.* ¶ 23(g) (“One or more of Nexo  
 4 Financial, Nexo Financial Services, and Nexo AG *may* serve as a mere shell, instrumentality, or  
 5 conduit for the Nexo Services business based and operating in Bulgaria and Estonia.”) (emphasis  
 6 added); *id.* ¶ 23(h) (“These Nexo entities do not honor corporate formalities, [and] do not maintain  
 7 arm’s length relationships[.]”); Trenchev Decl., ECF No. 27-1 ¶¶ 18, 22 (stating Nexo entities “have  
 8 maintained corporate formalities, . . . have maintained separate bank accounts, have not commingled  
 9 assets or funds, [and] have maintained separate books and records”). Plaintiff fails to address  
 10 Nexo’s evidence and arguments regarding its allegations related to these factors in its Opposition.  
 11 *See* ECF No. 35 at 6–7. Accordingly, the Court finds that the second, third, and seventh *Daewoo*  
 12 factors weigh against a finding of unity of interest, given that Plaintiff’s allegations are conclusory  
 13 and controverted. *See Sandoval*, 34 F.Supp.3d at 1040; *Gerritsen v. Warner Bros. Entm’t Inc.*,  
 14 112 F.Supp.3d 1011, 1042–43 (C.D. Cal. 2015) (collecting cases finding conclusory allegations to  
 15 be insufficient to support unity of interest).

16 Plaintiff alleges facts to show that the fifth, sixth, and ninth *Daewoo* factors provide some  
 17 support for his claim of single-enterprise liability. For the fifth and ninth factors—(5) identical  
 18 equitable ownership and (9) identical directors and officers—Plaintiff alleges, and Nexo fails to  
 19 dispute, that Nexo’s co-founders Kantchev, Shulev, and Trenchev hold most of the equity in each  
 20 Nexo entity and, “in some combination,” are responsible for oversight of each entity. *See Purdue*  
 21 *Pharma*, 491 F.Supp.3d at 635; Complaint, ECF No. 1 ¶¶ 23(a), (e), (f). The vague and conclusory  
 22 nature of these allegations—“effectively identical equitable ownership,” “some combination of  
 23 Kantchev, Shulev, and Trenchev is responsible for . . . oversight”—undercuts their support for the  
 24 unity of interest between the Nexo entities. *See* Complaint, ECF No. 1 ¶¶ 23(a), (e), (f). Based on  
 25 these allegations, it is unclear whether or to what extent the Nexo entities have “*identical* equitable  
 26 ownership” and “*identical* directors and officers.” *Purdue Pharma* 491 F. Supp. 3d at 635 (emphasis  
 27 added). Further, courts tend not to weigh these factors heavily, particularly in the absence of other  
 28 alleged facts. *See Ranza*, 793 F.3d at 1074–75 (“Total ownership and shared management personnel



1 are alone insufficient to establish the requisite level of control.”) (citing *Harris Rutsky & Co. Ins.*  
2 *Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003)); *Kramer Motors, Inc. v. British*  
3 *Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir.1980) (no alter ego relationship where, *inter alia*, parent  
4 placed several directors on subsidiary’s board).

5 Plaintiff also pleads facts in support of the sixth *Daewoo* factor—(6) use of the same offices  
6 and employees. Plaintiff pleads that (1) the Nexo entities “treat the employees of any particular  
7 entity as working for ‘Nexo’ as a whole”; (2) Nexo Capital Inc. and Nexo Financial Services Ltd.  
8 share the same principal place of business; and (3) Nexo Financial LLC lists the address of Nexo  
9 Capital Inc. and Nexo Financial Services Ltd.’s principal place of business on its CFL license. *See*  
10 *Complaint*, ECF No. 1 ¶¶ 21, 23(h), 26. The Court finds that Plaintiff’s allegations regarding the  
11 shared principal place of business, employees working for Nexo “as a whole”, and an address shared  
12 among multiple Nexo entities provides some support for single-enterprise liability. However, the  
13 Court notes that courts have found similar facts not to weigh heavily in the single-enterprise liability  
14 analysis. *See Reynolds*, 481 F.Supp.3d at 1005-1006 (shared business address “is insufficient to  
15 demonstrate the entities’ requisite unity of interest”); *M.H. Pillars Ltd. v. Realini*, No.  
16 15-cv-1383-PJH, 2017 WL 916414, at \*12 (N.D. Cal. Mar. 8, 2017) (declining to find unity of  
17 interest where entities had same business address and same agent for service of process); *Gerritsen*  
18 *v. Warner Bros. Entm’t Inc.*, 116 F. Supp. 3d 1104, 1139 (C.D. Cal. 2015) (allegations of, *inter alia*,  
19 shared office location, common business departments, and shared employees are insufficient to  
20 indicate alter ego relationship).

21 Plaintiff additionally points to several public statements by Nexo and its co-founders  
22 referring to the Nexo entities as a single entity “Nexo” and characterizing the entities as part of a  
23 single “global enterprise.” *See Complaint*, ECF No. 1 ¶¶ 24, 25, 27; *see also id.* ¶¶ 23(b), 28. Nexo  
24 argues that such allegations are “legally immaterial.” *Motion*, ECF No. 27 at 9. The Court does not  
25 agree with Nexo that such allegations are completely immaterial to Plaintiff’s single-enterprise  
26 liability claim. Courts have found that such allegations support a finding of unity of interest. *See,*  
27 *e.g., Purdue Pharma*, 491 F. Supp. 3d at 636; *In re Packaged Seafood Prods. Antitrust Litig.*,  
28 242 F.Supp.3d 1033, 1061–62 (S.D. Cal. 2017); *Seiko Epson Corp. v. Print-Rite Holdings, Ltd.*,

1 No. CV 01–500–BR, 2002 WL 32513403, at \*23 (D. Or. Apr. 30, 2002) (finding public portrayal  
2 of entities as a single vertically integrated corporation was “some evidence of the way the parties  
3 relate to one another”). However, courts have found that such allegations provide only marginal  
4 support for unity of interest between entities. *See, e.g., Reynolds*, 481 F.Supp.3d at 1006 (collecting  
5 cases); *Packaged Seafood*, 242 F.Supp.3d at 1061 (marketing-related allegations are insufficient  
6 “standing alone” and only “slightly bolster[.]” unity of interest claim); *Seiko*, 2002 WL 32513403,  
7 at \*23; *Corcoran v. CVS Health Corp.*, 169 F.Supp.3d 970, 984 (N.D. Cal. 2016) (“[C]ourts  
8 recognize that separate corporate entities presenting themselves as one online does not rise to the  
9 level of unity of interest required to show companies are alter egos.”); *BBA Aviation PLC v. Superior*  
10 *Court*, 190 Cal.App.4th 421, 434–35 (2010) (“[T]he mere appearance of a parent’s logo on its  
11 subsidiary’s documents’ does not constitute[] pervasive control over day-to-day operations[.]”);  
12 *Gerritsen*, 116 F.Supp.3d at 1140 (“joint issuance of press releases” does not support unity of  
13 interest). Further, the specific statements Plaintiff points to are not especially supportive or  
14 suggestive of a unity of interest between the Nexo entities—the statements generally hinge on  
15 shorthand references to “Nexo” as if it were a single entity, as opposed to any specific statements  
16 about how the various entities are managed or organized. The Court adopts the shorthand “Nexo”  
17 to refer to Defendants throughout this order, but that does not have any bearing on the details of  
18 Defendants’ relationship. Accordingly, while the Court finds that Plaintiff’s allegations regarding  
19 Trenchev and Nexo’s public statements provide some support for a unity of interest finding, that  
20 support is minimal based on the caselaw and the content of the statements at issue.<sup>2</sup>

21 Considering Plaintiff’s alleged facts in support of the fifth, sixth, and ninth *Daewoo* factors,  
22 along with Plaintiff’s allegations regarding Nexo’s generalized statements about its single-entity or  
23 “global enterprise” character, the Court finds that Plaintiff’s allegations are insufficient to support a  
24 showing of unity of interest. *See Stewart v. Screen Gems-EMI Music, Inc.*, 81 F.Supp.3d 938, 956

---

25  
26 <sup>2</sup> The Court also agrees with Nexo that Plaintiff’s allegations regarding Credissimo have no bearing  
27 on the unity of interest between the Nexo entities. *See* Complaint, ECF No. 1 ¶ 23(a); Motion, ECF  
28 No. 27 at 9.

1 (N.D. Cal. 2015) (finding no single-enterprise liability where same three factors—equitable  
2 ownership, use of same offices and employees, and identical officers and directors—supported  
3 single-enterprise liability). Accordingly, the Court finds that Plaintiff has failed to plead sufficient  
4 facts to plausibly allege that there was a unity of interest between the Nexo entities for purposes of  
5 the first single-enterprise liability prong.

6 b. Inequitable Result

7 Where a plaintiff fails to satisfy the “unity of interest” prong, a court need not analyze the  
8 “fraud or injustice prong.” *Ranza*, 793 F.3d at 1075 n.9 (citing *Unocal*, 248 F.3d at 928). Since the  
9 Court finds that Plaintiff has failed to allege sufficient facts to satisfy the “unity of interest” prong  
10 here, the Court declines to consider the second prong of the test for single-enterprise liability.

11 \* \* \*

12 Finding that Plaintiff has failed to plead sufficient facts to support the unity of interest  
13 between the Nexo entities, the Court finds that Plaintiff has failed to adequately allege that any of  
14 the Nexo entities’ contacts with the forum should be considered to apply to all the Nexo entities  
15 collectively.

16 Since Plaintiff has failed to adequately plead that this Court has general or specific personal  
17 jurisdiction over Defendants Nexo Financial LLC, Nexo Financial Services Ltd., Nexo Services  
18 OÜ, or Nexo AG, the Court hereby GRANTS Nexo’s Rule 12(b)(2) motion to dismiss as to those  
19 Defendants for lack of personal jurisdiction.

20 **4. Request for Jurisdictional Discovery**

21 Plaintiff seeks leave to conduct jurisdictional discovery. *See* Opposition, ECF No. 35 at 8–9.  
22 “A district court is vested with broad discretion to permit or deny discovery, and a decision to deny  
23 discovery will not be disturbed except upon the clearest showing that the denial of discovery results  
24 in actual and substantial prejudice to the complaining litigant.” *Laub v. U.S. Dep’t of Interior*,  
25 342 F.3d 1080, 1093 (9th Cir. 2003) (quotation marks and citation omitted). The Ninth Circuit has  
26 stated that jurisdictional discovery “should ordinarily be granted where pertinent facts bearing on  
27 the question of jurisdiction are controverted or where a more satisfactory showing of the facts is  
28 necessary.” *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)

1 (quotation marks and citation omitted).

2 Courts require a plaintiff to establish a “colorable” basis for personal jurisdiction before  
3 granting jurisdictional discovery. *See, e.g., Mitan v. Feeney*, 497 F.Supp.2d 1113, 1119 (C.D. Cal.  
4 2007). “This ‘colorable’ showing should be understood as something less than a *prima facie*  
5 showing, and could be equated as requiring the plaintiff to come forward with ‘some evidence’  
6 tending to establish personal jurisdiction over the defendant.” *Id.* at 1119 (citations omitted). A  
7 court may deny a request to conduct jurisdictional discovery if, for example, “a plaintiff’s claim of  
8 personal jurisdiction appears to be both attenuated and based on bare allegations in the face of  
9 specific denials made by the defendants,” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir.  
10 2006), or “it is clear that further discovery would not demonstrate facts sufficient to constitute a  
11 basis for jurisdiction,” *Laub*, 342 F.3d at 1093 (9th Cir. 2003) (citation omitted).

12 In support of his jurisdictional discovery request, Plaintiff argues that since Nexo controverts  
13 his allegations supporting his single-enterprise liability theory, he is entitled to discovery to  
14 challenge Nexo’s assertions. *See* Opposition, ECF No. 35 at 8–9. Further, Plaintiff argues that he  
15 has shown more than what courts consider to be sufficient for jurisdictional discovery—namely, a  
16 “colorable basis,” which requires only “some evidence” tending to establish personal jurisdiction.  
17 *See id.* at 9 (citing *Tevra Brands LLC v. Bayer Healthcare LLC*, No. 19-cv-04312-BLF, 2020 WL  
18 6149714, at \*\*1–2 (N.D. Cal. Oct. 20, 2020)). Plaintiff additionally argues that Nexo has failed to  
19 establish that “further discovery would not demonstrate facts sufficient to constitute a basis for  
20 jurisdiction.” *See id.* (citing *Laub v. United States Dep’t of Interior*, 342 F.3d 1080, 1093 (9th Cir.  
21 2003)). In response, Nexo argues that the Court should rule similarly to the *Reynolds* court, which  
22 found that the plaintiff was not entitled to jurisdictional discovery where his single-enterprise theory  
23 was based on “no more than a hunch.” *See* Reply, ECF No. 41 at 8–9 (citing *Reynolds*, 481  
24 F.Supp.3d at 1009–10).

25 The Court agrees with Nexo. As the Court outlined above, Plaintiff’s allegations supporting  
26 his specific jurisdiction and single-enterprise liability claims are “both attenuated and based on bare  
27 allegations in the face of specific denials made by the defendants.” *Pebble Beach*, 453 F.3d at 1160.  
28 The Court is not convinced by Plaintiff’s argument that he is entitled to discovery simply because

1 his allegations are controverted by Nexo. *See* Opposition, ECF No. 35 at 8–9. The Court does not  
2 consider it appropriate for Plaintiff to make bare, unsupported allegations like, “These Nexo entities  
3 commingle funds and assets, failing to segregate funds,” wait for Nexo to controvert these  
4 allegations, and then seek jurisdictional discovery because “pertinent facts bearing on the question  
5 of jurisdiction are controverted.” *See* Complaint, ECF No. 1 ¶ 23(c); Opposition, ECF No. 35 at 8  
6 (citing *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)). Such  
7 an approach smacks of a fishing expedition—in other words, it appears that Plaintiff is seeking  
8 jurisdictional discovery based on a mere “hunch,” which courts have found to be insufficient. *See*,  
9 *e.g.*, *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Further, the Court does not agree  
10 with Plaintiff that he has alleged a “colorable basis” for jurisdictional discovery—ignoring  
11 Plaintiff’s conclusory allegations, he has only alleged minimal facts supporting a small fraction of  
12 the factors relevant to single-enterprise liability, which is far removed from the “exceptional  
13 circumstances” necessary to invoke this “extreme remedy.” *Gonzalez*, 2008 WL 11338569, at \*1.  
14 Further, Plaintiff’s allegations in support of specific jurisdiction for Defendants individually are as  
15 minimal as pointing to a website operated by only one of the Defendants (for which Nexo concedes  
16 personal jurisdiction) and a CFL license granted after the events at issue in this case. *See* Opposition,  
17 ECF No. 35 at 3–5. Accordingly, it is clear to the Court that, based on Plaintiff’s alleged facts,  
18 “further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.”  
19 *Laub*, 342 F.3d at 1093.

20 Based on the above reasoning, Plaintiff’s request for jurisdictional discovery is hereby  
21 DENIED.

22 \* \* \*

23 Since Plaintiff has failed to meet his burden for showing personal jurisdiction over Nexo  
24 Financial Services Ltd., Nexo Services OÜ, Nexo AG, or Nexo Financial LLC, and the Court has  
25 denied his request for jurisdictional discovery, the Court finds that amendment would be futile.  
26 Accordingly, the Court DISMISSES all claims against Nexo Financial Services Ltd., Nexo Services  
27 OÜ, Nexo AG, and Nexo Financial LLC WITHOUT LEAVE TO AMEND. *See Eminence Capital*,  
28 316 F.3d at 1052.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28**C. 12(b)(6) Motion – Failure to State a Claim**

Nexo moves to dismiss Plaintiff’s claims of (1) breach of contract for suspension of XRP and failure to provide notice for that suspension; (2) declaratory judgment; (3) violation of the CLRA; and (4) violation of the UCL (a) unlawful, (b) unfair, and (c) unfair, deceptive, untrue or misleading advertising prongs. The Court considers each issue in turn.

**1. Breach of Contract**

Plaintiff alleges that Nexo violated various provisions of the Borrow Terms, which all users of Nexo Crypto Credit must agree to. *See* Complaint, ECF No. 1 ¶ 46. “To be entitled to damages for breach of contract, a plaintiff must plead and prove (1) a contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage to plaintiff.” *Walsh v. W. Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (1998). Plaintiff alleges that Nexo breached the Borrow Terms through (1) the suspension of XRP and (2) the failure to provide notice of that suspension. *See id.* ¶¶ 166–73. Plaintiff also pleads facts related to Nexo’s alleged breach of the Borrow Terms by failing to provide notice prior to liquidation of Plaintiff’s collateral, although it is unclear to what extent Plaintiff is asserting this as a separate theory. *See id.* ¶¶ 166–73, 83–84. Further, to the extent that Nexo did not literally breach the Borrow Terms, Plaintiff alleges in the alternative that Nexo breached the duty of good faith and fair dealing by suspending XRP without notice. *See id.* ¶¶ 65–81, 169. Defendant moves to dismiss Plaintiff’s breach of contract claim. *See* Motion, ECF No. 27 at 14–18.

The Court considers each of Plaintiff’s breach of contract theories in turn: (1) for suspension of XRP; (2) for the lack of notice of the suspension; (3) for the lack of notice of liquidation of Plaintiff’s collateral; and (4) for the breach of duty of good faith and fair dealing.

**a. Suspension of XRP Payments**

Plaintiff alleges that by suspending the use of XRP to repay a user’s loans, Nexo violated the following Borrow Terms provision:

You may repay at any time prior to the Maturity Date and any amount:  
(i) by transferring into the Nexo Account the same Digital Assets as the Nexo Crypto Credit granted, or other Digital Assets acceptable to Nexo; (ii) with the Collateral; or (iii) by combination of (i) and (ii).  
Certain rules may apply to repayments from time to time, as indicated

1 on the Nexo Platform.

2 Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § VIII.2; *see* Complaint, ECF No. 1 ¶ 61. In  
3 the Motion, Nexo argues that Plaintiff fails to point to any provisions of the Borrow Terms that  
4 Nexo breached in suspending XRP as a repayment option. *See* Motion, ECF No. 27 at 15. Nexo  
5 points to the language in the above provision that “[c]ertain rules may apply to repayments from  
6 time to time[.]” *Id.* (citing Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § VIII.2). Further,  
7 Nexo points to the following provisions from the Borrow Terms:

8  
9 At any time, at our sole and absolute discretion, without liability  
10 to you, we can . . . suspend the provision of the Nexo Crypto  
11 Credit or of all or part of the other Nexo services[.]

12 *Id.* (citing Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § III.3).

13 Nexo will grant you a Nexo Crypto Credit in Digital Assets, if you  
14 provide the required Digital Assets as collateral, by transferring  
15 them into the Nexo Account, or by using ones available thereinto  
16 (“Collateral”). All such Digital Assets are indicated on the Nexo  
17 Platform and in the Nexo Account and are subject to revision from  
18 time to time.

19 *Id.* (citing Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § IV.1).

20 The parties disagree on whether Plaintiff adequately alleges that Nexo breached any  
21 provision of the Borrow Terms by suspending XRP as a repayment option. The only provision of  
22 the Borrow Terms that Plaintiff points to provides that a user may repay their loan “with the  
23 Collateral” or with a combination of their collateral and a transfer of digital assets “acceptable to  
24 Nexo.” Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § VIII.2. By suspending the use of  
25 XRP, Plaintiff argues that Nexo prevented users with XRP collateral from repaying their loans with  
26 collateral or a combination of collateral and digital assets. *See* Opposition, ECF No. 35 at 12–13.  
27 However, as Nexo points out, the provision of the Borrow Terms Plaintiff relies on contains the  
28 following language: “Certain rules may apply to repayments from time to time, as indicated on the  
Nexo Platform.” Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § VIII.2.

Based on the language of the Borrow Terms, the Court finds that Plaintiff has not adequately

1 alleged that Nexo breached any provision of the Borrow Terms by suspending the use of XRP. The  
 2 Borrow Terms explicitly authorized rules applied to repayments. *See id.* Yet Plaintiff has failed to  
 3 allege how the XRP suspension did not constitute just such a rule. Further, other contractual  
 4 provisions Nexo points to appear to give Nexo considerable discretion to suspend and change  
 5 various aspects of the Nexo Crypto Credit and other aspects of its services, including the types of  
 6 cryptocurrency Nexo offers and accepts as collateral. *See id.* § IV.1 (“Nexo will grant you a Nexo  
 7 Crypto Credit in Digital Assets, if you provide the required Digital Assets as collateral. . . . All such  
 8 Digital Assets . . . are subject to revision from time to time.”); *id.* § III.3 (“At any time, at our sole  
 9 and absolute discretion, without liability to you, we can . . . (iii) suspend the provision of the Nexo  
 10 Crypto Credit or of all or part of the other Nexo services; or (iv) change, update, remove, cancel,  
 11 suspend, disable or discontinue any features, component, content . . . of the Nexo Crypto Credit.”).  
 12 Plaintiff fails to adequately allege why these provisions do not apply.

13 Given the express rights Nexo has under the Borrow Terms, which Plaintiff has failed to  
 14 adequately allege did not encompass Nexo’s suspension of XRP, the Court finds that Plaintiff has  
 15 failed to plead a plausible breach of the Borrow Terms based on the suspension of XRP as a  
 16 repayment option.

17 b. Lack of Notice of Suspension

18 Plaintiff alleges that Nexo breached the Borrow Terms by failing to provide notice of the  
 19 XRP suspension. *See* Complaint, ECF No. 1 ¶¶ 80–92. Plaintiff points to the following provisions  
 20 of the Borrow Terms as support:

21 If the LTV increases above certain thresholds, as indicated on the  
 22 Nexo Platform, you shall, at our request, provide additional Collateral  
 23 and/or make the required repayments to rebalance the Nexo Crypto  
 Credit.

24 *Id.* ¶ 82 (citing Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § VI.1).

25 If the LTV increases above the maximum permitted threshold, as  
 26 indicated on the Nexo Platform, Nexo shall, after notifying you,  
 liquidate the necessary amount of Collateral to rebalance your Nexo  
 Crypto Credit.

27 *Id.* ¶ 83 (citing Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § VI.2). Nexo moves to  
 28 dismiss this claim, arguing that there is nothing in the Borrow Terms requiring Nexo to provide



1 notice of the XRP suspension. *See* Motion, ECF No. 27 at 15–16. Further, Nexo argues that the  
 2 following provision of the Borrow Terms authorized it to suspend XRP without notice:

3           At any time, at our sole and absolute discretion, without liability  
 4           to you, we can . . . suspend the provision of the Nexo Crypto  
           Credit or of all or part of the other Nexo services[.]

5 Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § III.3; *see also* Reply, ECF No. 41 at 10–11  
 6 (citing Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms §§ III.3, IV.1, VIII.2). Plaintiff fails  
 7 to respond to Nexo’s arguments in its Opposition, instead arguing only that the duty of good faith  
 8 and fair dealing required Nexo to provide notice of the XRP suspension. Opposition, ECF No. 35  
 9 at 12–15.

10           The Court agrees with Nexo. Plaintiff has failed to adequately allege that the Borrow Terms  
 11 contained any provision that required Nexo to provide notice of the XRP suspension. Neither of the  
 12 Borrow Terms provisions Plaintiff points to say anything about a notice requirement for a  
 13 suspension of a particular cryptocurrency or payment method. *See* Trenchev Decl., ECF No. 27-1,  
 14 Ex. D, Borrow Terms § VI.1, VI.2. Rather, they only describe notice requirements pertaining to  
 15 liquidation of a user’s collateral. *See id.*

16           Accordingly, the Court finds that Plaintiff has failed to state a claim for breach of contract  
 17 based on the lack of notice regarding the XRP suspension.<sup>3</sup>

18           c. Lack of Notice Before Liquidation

19           As outlined above, it is unclear whether Plaintiff is also asserting a breach of contract claim  
 20 based on Nexo’s alleged failure to provide notice prior to liquidation of Plaintiff’s collateral. *See*  
 21 Complaint, ECF No. 1 ¶¶ 166–73; *see also id.* ¶¶ 83–84; *Tinian Women*, 976 F.3d at 841 (9th Cir.  
 22 2020) (“[A] district court’s job is not to piece together a jigsaw puzzle of claims.”). Plaintiff points  
 23 to a provision in the Borrow Terms stating: “If the LTV increases above the maximum permitted  
 24 threshold, as indicated on the Nexo Platform, Nexo shall, after notifying you, liquidate the necessary  
 25 \_\_\_\_\_

26 <sup>3</sup> The parties also brief issues related to damages resulting from Nexo’s alleged breach of contract.  
 27 Motion, ECF No. 27 at 16–17; Opposition, ECF No. 35 at 14–15. Since the Court finds that Plaintiff  
 28 has failed to adequately allege breach of contract, the Court declines to address these issues.

1 amount of Collateral to rebalance your Nexo Crypto Credit.” *Id.* ¶ 83 (citing Trenchev Decl.,  
 2 ECF No. 27-1, Ex. D, Borrow Terms § VI.2). Since Plaintiff has inadequately pled facts supporting  
 3 Article III standing regarding his breach of contract claim based on a lack of notice of liquidation,  
 4 the Court declines to consider the merits of Plaintiff’s breach of contract claim under this theory.  
 5 *See Echevarria v. Aerotek, Inc.*, 814 Fed.Appx. 321, 322 (9th Cir. 2020).

6 d. Breach of the Duty of Good Faith and Fair Dealing

7 Plaintiff also alleges that Nexo violated the duty of good faith and fair dealing by suspending  
 8 XRP as a repayment option, since if Nexo had this right the contract would be illusory. *See*  
 9 Complaint, ECF No. 1 ¶¶ 60, 65–92. “Every contract imposes upon each party a duty of good faith  
 10 and fair dealing in its performance and its enforcement.” *Foley v. Interactive Data Corp.*, 47 Cal.3d  
 11 654, 683 (1988) (citation omitted). “[T]he covenant has both a subjective and an objective aspect—  
 12 subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks  
 13 belief in the validity of its act or if its conduct is objectively unreasonable.” *Carma Devs. (Cal.),*  
 14 *Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 372 (1992). The implied covenant does not alter a  
 15 party’s existing rights or duties under a contract. *See Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 327  
 16 (2000). Rather, the implied covenant supplements “the express contractual covenants, to prevent a  
 17 contracting party from engaging in conduct which (while not technically transgressing the express  
 18 covenants) frustrates the other party’s rights to the benefits of the contract.” *Avidity Partners, LLC*  
 19 *v. State*, 221 Cal.App.4th 1180, 1204 (2013) (citation omitted). Accordingly, “if defendants were  
 20 given the right to do what they did by the express provisions of the contract there can be no breach.”  
 21 *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal.App.4th 44, 56 (Cal. Ct. App. 2002)  
 22 (citation omitted). An agreement is illusory, and no enforceable contract has been created, if a  
 23 promisor is “free to perform or to withdraw from the agreement at his own unrestricted pleasure.”  
 24 *Mattei v. Hopper*, 51 Cal.2d 119, 122 (1958). Generally, “[a] contract is unenforceable as illusory  
 25 when one of the parties has the unfettered or arbitrary right to modify or terminate the agreement or  
 26 assumes no obligations thereunder.” *Harris v. Tap Worldwide, LLC*, 248 Cal.App.4th 373, 385  
 27 (2016).

28 Nexo argues that Plaintiff’s good faith and fair dealing claim is an attempt to improperly

1 rewrite the Borrow Terms, which gave Nexo the “express and unfettered” right to suspend XRP as  
2 a repayment option. *See* Motion, ECF No. 27 at 17–18. In response, Plaintiff argues that (1) courts  
3 use the duty of good faith and fair dealing to limit contractual provisions giving a party an  
4 “unfettered” right to modify the agreement and (2) Plaintiff has adequately alleged that Nexo acted  
5 in bad faith. *See* Opposition, ECF No. 35 at 12–14. On reply, Nexo argues that (1) the Borrow  
6 Terms were not illusory because of the benefits Plaintiff received under the contract that served as  
7 adequate independent consideration and (2) Plaintiff fails to adequately allege Nexo’s lack of  
8 “subjective good faith,” which is required for a duty of good faith and fair dealing claim. *See* Reply,  
9 ECF No. 41 at 13.

10 There are two main disputes underlying the parties’ disagreement: (1) whether Plaintiff has  
11 adequately alleged that the Borrow Terms were illusory if Nexo had the right to suspend XRP as a  
12 repayment option without notice under the Borrow Terms and (2) whether Plaintiff has adequately  
13 alleged Nexo’s bad faith in suspending XRP as a repayment option without notice. The Court  
14 considers each issue in turn.

15 i. Illusory Contract

16 First, the Court considers whether the Borrow Terms would be illusory if they gave Nexo  
17 the right to suspend XRP as a repayment option without notice. Nexo argues that Plaintiff is seeking  
18 to use the covenant of good faith and fair dealing to contradict the express terms of the contract,  
19 which gave it the unfettered right to suspend XRP as a repayment option. *See* Motion, ECF No. 17–  
20 18. In response, Plaintiff argues that courts apply the covenant of good faith and fair dealing to  
21 contradict the express terms of the contract when necessary to protect it from being illusory, which  
22 the Court should do here. *See* Opposition, ECF No. 35 at 13–14. On reply, Nexo argues that courts  
23 only invoke the duty of good faith and fair dealing in “rare instances” when a contractual provision  
24 granting a party express discretionary power would render the agreement illusory, *i.e.*, unsupported  
25 by “adequate independent consideration,” which Plaintiff has not shown here. *See* Reply, ECF No.  
26 41 at 11–12.

27 The Court agrees with Nexo. Plaintiff is correct that courts sometimes apply the covenant  
28 of good faith and fair dealing to contradict the express terms of a contract when it is necessary to

1 keep it from being illusory. *See, e.g., Third Story Music, Inc. v. Waits*, 41 Cal.App.4th 798, 806  
 2 (1995); *Storek & Storek, Inc. v. Citicorp Real Est., Inc.*, 100 Cal.App.4th 44, 57 (2002).  
 3 Accordingly, this issue cannot be resolved simply because the duty of good faith and fair dealing  
 4 might limit the “unfettered” discretion Nexo asserts the Borrow Terms expressly provide. *See*  
 5 Motion, ECF No. 27 at 18. However, courts only find the duty of good faith and fair dealing  
 6 contradicts an express grant of discretion to a party when necessary to maintain the mutuality of the  
 7 contract. *See Third Story*, 41 Cal. App. at 808; *Sweet v. Google Inc.*, No. 17–cv–03953–EMC, 2018  
 8 WL 1184777, at \*9 (N.D. Cal. Mar. 7, 2018); *Wolf v. Walt Disney Pictures & Television*,  
 9 162 Cal.App.4th 1107, 1122–24 (2008). If the contract is supported by “adequate consideration  
 10 regardless of the discretionary power,” then courts do not apply the duty of good faith and fair  
 11 dealing to limit that discretion. *See Storek*, 100 Cal.App.4th at 57; *Third Story*, 41 Cal.App.4th at  
 12 808–809.

13 Plaintiff has failed to adequately allege that the Borrow Terms would not be supported by  
 14 adequate independent consideration if Nexo had the right to suspend XRP as a repayment option  
 15 without notice. Plaintiff’s theory is that if Nexo were allowed to suspend XRP, then the Borrow  
 16 Terms would be illusory, because Nexo would have the “unfettered or arbitrary right to modify or  
 17 terminate the agreement[.]” *See* Opposition, ECF No. 35 at 13–14. Plaintiff’s argument appears to  
 18 be based on the notion that the only provision of the Borrow Terms under which Nexo could have  
 19 the right to suspend XRP is the provision granting Nexo the right to “suspend the provision of the  
 20 Nexo Crypto Credit or of all or part of the other Nexo services[.]” *See* Opposition, ECF No. 35  
 21 at 13. But this is not the only provision of the Borrow Terms that supports Nexo’s right to suspend  
 22 the use of particular cryptocurrencies on its platform. Even with XRP suspended, Plaintiff still had  
 23 a Nexo Crypto Credit loan that he could maintain and pay down using a variety of different types  
 24 of assets. Complaint, ECF No. 1 ¶¶ 16, 135. Further, regardless of how “unfettered” Nexo’s rights  
 25 under the Borrow Terms are generally, the contract appears to give Nexo broad authority to restrict  
 26 or suspend, without notice, the types of cryptocurrency accepted by Nexo. *See, e.g., Trenchev Decl.*,  
 27 ECF No. 27-1, Ex. D, Borrow Terms § IV.1 (digital assets that can be used as collateral “are subject  
 28 to revision from time to time”); *id.* (“Certain rules may apply to repayments from time to time, as

1 indicated on the Nexo Platform.”). As outlined above, Plaintiff has failed to adequately allege why  
2 these provisions conferring Nexo the right to choose the cryptocurrencies it accepts without notice  
3 of the Borrow Terms do not apply. Accordingly, Plaintiff has not adequately alleged that the Borrow  
4 Terms would be illusory if Nexo were able to suspend XRP without notice.

5 Accordingly, the Court finds that Plaintiff has not pled sufficient facts to indicate that Nexo’s  
6 right to suspend XRP as a repayment option under the Borrow Terms rendered the contract illusory.

7 ii. Bad Faith or Frustration of Common Purpose

8 The parties also disagree on whether Plaintiff has adequately pled that Nexo acted in bad  
9 faith or frustrated a common purpose. Plaintiff points to (1) Nexo’s suspension of XRP as a  
10 repayment option and subsequent selling off of XRP for substantial value; (2) Nexo’s suspension of  
11 XRP transactions for international users—not just US users; and (3) Nexo’s December 30 statement  
12 justifying its suspension of XRP for customers on the basis of legal uncertainty when Nexo was  
13 selling off XRP for substantial value. *See* Opposition, ECF No. 35 at 14. In response, Nexo argues  
14 that pleading a breach of the duty of good faith requires pleading (1) a lack of subjective good faith  
15 or (2) a frustration of common purpose. *See* Reply, ECF No. 41 at 13 (citing *Wolf*, 162 Cal.App.4th  
16 at 1123–24 (2008)). Nexo argues that Plaintiff has failed to adequately plead a lack of subjective  
17 good faith based on the alleged facts of (1) the SEC’s regulatory action against Ripple Labs and (2)  
18 the plummeting value of Ripple. *See id.* Further, Nexo argues that Plaintiff has failed to adequately  
19 plead a frustration of common purpose, because the common purpose of the Borrow Terms was to  
20 provide a secured credit line. *See id.*

21 Based on the Borrow Terms, Nexo’s alleged suspension of XRP without notice was  
22 expressly authorized, and Plaintiff has failed to adequately allege that the provisions of the Borrow  
23 Terms authorizing that suspension did not apply under the duty of good faith and fair dealing.  
24 Accordingly, the Court finds that Plaintiff has not adequately alleged bad faith or frustration of a  
25 common purpose, since as alleged, Nexo’s suspension of XRP without notice was within the terms  
26 of the contract. *See, e.g., Carma Devs.*, 2 Cal.4th at 372 (“A party violates the covenant if it  
27 subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable.”).

28 \* \* \*

1 Accordingly, the Court finds that Plaintiff has failed to adequately allege a claim for breach  
2 of the Borrow Terms or the duty of good faith and fair dealing. The Court GRANTS Nexo's Motion  
3 to Dismiss Plaintiff's breach of contract claim WITH LEAVE TO AMEND.

## 4 2. Declaratory Judgment

5 Nexo moves to dismiss Plaintiff's request for declaratory judgment under the Declaratory  
6 Judgment Act, 28 U.S.C. § 2201, *et seq.* See Motion, ECF No. 27 at 18–19. Under the Declaratory  
7 Judgment Act, the Court may “declare the rights and other legal relations of any interested party.”  
8 28 U.S.C. § 2201. “[T]he question in each case is whether the facts alleged, under all the  
9 circumstances, show that there is a substantial controversy, between parties having adverse legal  
10 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”  
11 *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Declaratory relief is appropriate  
12 when (1) “the judgment will serve a useful purpose in clarifying and settling the legal relations in  
13 issue,” and (2) “it will terminate and afford relief from the uncertainty . . . giving rise to the  
14 proceeding.” *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984) (citations omitted).  
15 The existence of another adequate remedy does not preclude a declaratory judgment.  
16 Fed. R. Civ. Proc. 57; 28 U.S.C. § 2201. However, “courts have dismissed companion claims for  
17 declaratory relief where the breach of contract claims resolved the dispute completely and rendered  
18 additional relief inappropriate.” *Davis v. Capitol Records, LLC*, No. 12-cv-1602,  
19 2013 WL 1701746, at \* \*3-4 (N.D. Cal. Apr. 18, 2013).

20 In the Complaint, Plaintiff seeks declaratory judgment on three issues. First, Plaintiff seeks  
21 declaratory judgment that “Nexo is not entitled to suspend customer use of XRP for payments.”  
22 Complaint, ECF No. 1 ¶ 178. Second, Plaintiff seeks declaratory judgment of the following:

23  
24 Nexo does not possess the unfettered right to change any material  
25 conditions for the use of the Nexo Crypto Credit; to suspend the  
26 provision of the Crypto Credit; or to change, suspend, disable, or  
27 discontinue any features or content of the Crypto Credit; and that  
28 Nexo may not take any such steps, even in good faith, without  
providing notice of such steps to its customers.

*Id.* ¶ 183. Third, Plaintiff seeks declaratory judgment that “under the applicable common law, with

1 respect to the collateral that Nexo’s customers have posted, Nexo does not acquire the ownership of  
2 the collateral while the Nexo Crypto Credit is outstanding.” *Id.* ¶ 189. Nexo argues that Plaintiff  
3 fails to state a claim for declaratory judgment under any of these theories. *See* Motion, ECF No. 27  
4 at 18–19.

5 a. Nexo’s Right to Suspend XRP

6 Nexo argues that Plaintiff’s claim for declaratory judgment regarding Nexo’s right to  
7 suspend XRP under the Borrow Terms fails because it is duplicative of Plaintiff’s breach of contract  
8 claim. *See* Motion, ECF No. 27 at 18. In response, Plaintiff argues that his breach of contract claim  
9 might be resolved without resolving issues on which he seeks declaratory relief. *See* Opposition,  
10 ECF No. 35 at 15–16.

11 The Court agrees with Nexo. As alleged, the question of whether Nexo is entitled to suspend  
12 customer use of XRP for payments is duplicative of Plaintiff’s breach of contract claim. *See, e.g.,*  
13 Complaint, ECF No. 1 ¶¶ 168–70. Plaintiff has failed to allege sufficient facts to support that a  
14 resolution of his breach of contract claim would not completely resolve the question of whether  
15 Nexo is entitled to suspend the use of XRP for payments.

16 Accordingly, the Court finds that Plaintiff has inadequately pled a claim for declaratory relief  
17 based on the question of whether Nexo had the right to suspend customer use of XRP for payments.  
18 *See, e.g., Tyler v. Travelers Com. Ins. Co.*, 499 F.Supp.3d 693, 702 (N.D. Cal. 2020) (“Where a  
19 claim for declaratory relief is merely duplicative of other causes of action asserted by a plaintiff,  
20 dismissal is proper.”)

21 b. Nexo’s “Unfettered” Rights

22 The parties raise the same arguments for Nexo’s declaratory judgment claim seeking to  
23 clarify that Nexo does not possess certain “unfettered” rights under the Borrow Terms. *See* Motion,  
24 ECF No. 27 at 18; Opposition, ECF No. 35 at 15–16. To support that this issue might not be resolved  
25 by the breach of contract claim, Plaintiff argues that the Court might find that Nexo breached the  
26 Borrow Terms by suspending XRP without resolving whether Nexo breached by failing to give  
27 notice of the XRP suspension. *See* Opposition, ECF No. 35 at 15–16.

28 The Court agrees with Plaintiff. As the Court outlined above, Nexo’s right to suspend the

1 use of particular cryptocurrencies on its platform without notice is supported by provisions of the  
2 Borrow Terms outside of the provision allegedly conferring Nexo with certain “unfettered” rights  
3 to modify the Nexo Crypto Credit. *See, e.g.*, Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms  
4 § IV.1 (“All such Digital Assets are indicated on the Nexo Platform and in the Nexo Account and  
5 are subject to revision from time to time.”); *id.* § VIII.2 (“Certain rules may apply to repayments  
6 from time to time, as indicated on the Nexo Platform.”). Accordingly, there is a possibility that the  
7 Court could resolve Plaintiff’s breach of contract claim without reaching the issue of whether Nexo  
8 had the “unfettered” rights provided in Section III.3 of the Borrow Terms. Courts decline to dismiss  
9 declaratory judgment claims “where a breach of contract claim will not settle all of the contractual  
10 issues concerning which plaintiff seeks declaratory relief.” *See Teague v. Biotelemetry, Inc.*,  
11 No. 16–cv–06527–TSH, 2018 WL 5310793, at \*13 (N.D. Cal. Oct. 25, 2018). Further, Nexo’s  
12 assertion in its briefing that it “can suspend all or part of the Nexo services that it provides on its  
13 platform” confirms that the parties have a dispute about Nexo’s rights under the Borrow Terms. *See*  
14 Motion, ECF No. 27 at 15; *Pac. Coal & Oil*, 312 U.S. at 273; *see also* Complaint, ECF No. 1  
15 ¶¶ 68–69.

16 Based on the above reasoning, the Court finds that Plaintiff has adequately pled a declaratory  
17 judgment claim regarding whether Nexo has certain “unfettered” rights regarding the Nexo Crypto  
18 Credit under the Borrow Terms.

19 c. Ownership

20 Nexo argues that none of the declarations Plaintiff seeks regarding Nexo’s “ownership” of  
21 users’ collateral has any connection to Plaintiff’s damages or claims. *See* Motion, ECF No. 27  
22 at 18–19. Accordingly, Nexo argues that the requested declarations would serve no purpose for  
23 settling or clarifying this case. *See id.* Further, Nexo argues that Plaintiff is improperly seeking a  
24 retrospective advisory opinion that his rights were violated. *Id.* at 19. In response, Plaintiff argues  
25 that the ownership of collateral issue is (1) relevant to his UCL deceptive and misleading advertising  
26 claim; (2) relevant to his CLRA claim regarding unconscionable contractual provisions; and (3)  
27 determinative of tax consequences for Plaintiff and Nexo’s customers. *See* Opposition, ECF No. 35  
28 at 16.



1 The Court agrees with Plaintiff. Since Plaintiff's CLRA claim is inadequately pled and this  
2 case has nothing to do with Plaintiff or Nexo's customers' tax liability, Plaintiff's proffered second  
3 and third grounds for his ownership-related declaratory judgment claim are inadequate. However,  
4 the Court agrees with Plaintiff that the ownership issue is relevant to Plaintiff's UCL unfair  
5 advertising claim, which the Court finds Plaintiff has properly pled, as outlined below. Accordingly,  
6 resolving the ownership issue "will serve a useful purpose in clarifying and settling the legal  
7 relations in issue[.]" *Bilbrey*, 738 F.2d at 1470.

8 Based on the above reasoning, the Court finds that Plaintiff has plausibly pled a declaratory  
9 judgment claim based on the issue of whether Nexo has ownership over Nexo Crypto Credit users'  
10 collateral.

11 \* \* \*

12 Accordingly, the Court DENIES Nexo's Motion to Dismiss the declaratory judgment claims  
13 based on Nexo's "unfettered" rights and the question of Nexo's ownership over users' collateral.  
14 *See* Complaint, ECF No. 1 ¶¶ 183, 189. The Court GRANTS WITHOUT LEAVE TO AMEND  
15 Nexo's Motion to Dismiss the declaratory judgment claim based on Nexo's right to suspend XRP,  
16 since amendment would be futile as to this duplicative claim. *See* Complaint, ECF No. 1 ¶ 178;  
17 *Eminence Capital*, 316 F.3d at 1052.

### 18 3. CLRA Claim

19 In Claim Four, Plaintiff pleads that Nexo violated the CLRA. *See* Complaint, ECF No. 1 ¶  
20 206–214. Nexo argues Plaintiff's CLRA claim should be dismissed because the CLRA does not  
21 apply to an extension of credit. *See* Motion, ECF No. 27 at 19–21. The CLRA prohibits "unfair  
22 methods of competition and unfair or deceptive acts or practices . . . undertaken by any person in a  
23 transaction intended to result or that results in the sale or lease of goods or services to any  
24 consumer[.]" Cal. Civ. Code § 1770(a). "Goods" means "tangible chattels bought or leased for use  
25 primarily for personal, family, or household purposes, including certificates or coupons  
26 exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are  
27 to be so affixed to real property as to become a part of real property, whether or not they are severable  
28 from the real property." Cal. Civ. Code § 1761(a). "Services" means "work, labor, and services for

1 other than a commercial or business use, including services furnished in connection with the sale or  
2 repair of goods.” Cal. Civ. Code § 1761(b). The CLRA “shall be liberally construed and applied  
3 to promote its underlying purposes, which are to protect consumers against unfair and deceptive  
4 business practices and to provide efficient and economical procedures to secure such protection.”  
5 Cal. Civ. Code § 1760.

6 Plaintiff alleges in the Complaint that the Nexo Crypto Credit is a “service” under the CLRA.  
7 See Complaint, ECF No. 1 ¶ 207. Nexo argues that since an extension of credit like it provides  
8 through Nexo Crypto Credit is not a “service” and no “ancillary services” exception applies, the  
9 CLRA is inapposite. See Motion, ECF No. 27 at 19–21. In response, Plaintiff argues that Nexo  
10 offers a “service” under the CLRA by providing and maintaining an online platform that Nexo  
11 continually updates. See Opposition, ECF No. 35 at 16–17. Plaintiff points to customers’ ability to  
12 use the Nexo platform to maintain their LTV ratios and to use a cryptocurrency exchange. See *id.*  
13 Further, Plaintiff points to statements on Nexo’s website referring to Nexo’s “service” and  
14 “services.” *Id.* at 17.

15 The Court agrees with Nexo. In *Berry*, the California Court of Appeal held that an extension  
16 of credit was neither a “good” nor a “service” under the CLRA. See *Berry v. Amer. Express Publ’g,*  
17 *Inc.*, 147 Cal.App.4th 224, 229, 233 (2007). In finding that an extension of credit was not a “good”  
18 under the CLRA, the court found that it was not a “tangible chattel” as the CLRA requires. *Id.*  
19 at 229 (citing Cal. Civ. Code § 1761(a)). While the Court acknowledged that a credit card is  
20 tangible, it “has no intrinsic value and exists only as indicia of the credit extended to the card holder,”  
21 so it is not a “good” under the CLRA. *Id.* In *Fairbanks*, the California Supreme Court took the  
22 *Berry* court’s holding a step further, finding that ancillary services offered by the sellers of intangible  
23 goods did not bring those goods within the purview of the CLRA. See *Fairbanks v. Super. Ct.*,  
24 46 Cal.4th 56, 65 (2009). Otherwise, courts would “defeat the apparent legislative intent in limiting  
25 the definition of ‘goods’ to include only ‘tangible chattels.’” *Id.* In light of *Berry* and *Fairbanks*,  
26 many courts have found that offering services in connection with loans does not bring a party within  
27 the purview of the CLRA. See, e.g., *Alborzian v. JPMorgan Chase Bank, N.A.*, 235 Cal.App.4th 29,  
28 40 (“Chase loaned plaintiffs money. A mortgage loan is not a ‘good’ because it is not a ‘tangible

1 chattel;’ it is not a ‘service’ because it is not ‘work, labor, or services . . . furnished in connection  
2 with the sale or repair of goods.’”) (quoting Cal. Civ. Code § 1761(a), (b)); *Mazonas v. Nationstar*  
3 *Mortgage LLC*, No. 16–cv–00660–RS, 2016 WL 2344196, at \*4 (N.D. Cal. May 4, 2016) (home  
4 loan servicer not subject to CLRA); *Consumer Sols. REO, LLC v. Hillery*, 658 F.Supp.2d 1002,  
5 1016 (N.D. Cal. 2009) (“Because [defendant] has challenged only the validity of the mortgage loan  
6 and not any nonancillary services related to the loan, the Court dismisses the CLRA claim with  
7 prejudice.”); *see also Meyer v. Capital All. Grp.*, No. 15–CV–2405–WVG, 2017 WL 5138316, at \*6  
8 (S.D. Cal. Nov. 6, 2017) (“Short-term business loans are not materially distinguishable from the  
9 mortgage loans at issue in *Alborzian*—at bottom, both are contractual obligations to lend money.”)  
10 (citing *Alborzian*, 235 Cal.App.4th 29). Courts have also found virtual currencies to be outside the  
11 purview of the CLRA, since they “exist only as an indicia of the credit extended” like in *Berry*. *See*  
12 *Doe v. Epic Games, Inc.*, 435 F.Supp.3d 1024, 1046 (N.D. Cal. 2020); *I.B. ex rel. Fife v. Facebook,*  
13 *Inc.*, 905 F.Supp.2d 989, 1007–1009 (N.D. Cal. 2012).

14 In light of the caselaw, the Court finds that Plaintiff has not alleged sufficient facts to support  
15 that the CLRA applies to the present case. Plaintiff alleges that Nexo violated the CLRA via  
16 unconscionable contractual provisions pertaining to Nexo Crypto Credit. *See* Complaint, ECF No. 1  
17 ¶¶ 211–12. Plaintiff has not alleged sufficient facts to show that the loans Nexo offers through Nexo  
18 Crypto Credit are a “service” under the CLRA. Under *Berry*, a loan is not a “good” under the CLRA  
19 because it is not a “tangible chattel.” *Berry*, 147 Cal.App.4th at 229; *Alborzian*, 235 Cal.App.4th  
20 at 40. Further, under *Fairbanks*, Plaintiff cannot bring an intangible good like a loan within the  
21 purview of the CLRA by pointing to Nexo’s ancillary services related to the loan. *Fairbanks*,  
22 46 Cal.4th at 65; *Hillery*, 658 F.Supp.2d at 1016. Here, Plaintiff points to Nexo’s online platform  
23 as the “service” that Nexo provides, which (1) allows users to maintain their LTV ratios through  
24 their own acts or through “automatic transfers that Nexo oversees and implements” and (2) allows  
25 users to use a cryptocurrency exchange. *See* Opposition, ECF No. 35 at 16. The Court finds that  
26 Plaintiff has failed to allege these features of Nexo’s website are anything more than ancillary  
27 services related to the offering of a loan. For example, based on Plaintiff’s allegations, the LTV  
28 ratio aspect of the website is merely a service to maintain a user’s eligibility for a loan. *See, e.g.,*

1 Complaint, ECF No. 1 ¶ 3–4. Further, the Court does not see how Nexo’s alleged “service” of  
2 allowing users to use a cryptocurrency exchange is related to Plaintiff’s CLRA allegations, which  
3 pertain exclusively to allegedly unconscionable contract provisions related to cash loans it provides  
4 through Nexo Crypto Credit. *See id.* ¶¶ 211–12. Additionally, just as with an extension of credit,  
5 the underlying “good” in a cryptocurrency exchange is not a “tangible chattel.” *See Epic Games*,  
6 435 F.Supp.3d at 1046; *Fife v.*, 905 F.Supp.2d at 1007–1009. Accordingly, the Court finds that  
7 Plaintiff has not pled sufficient facts regarding the services Nexo provides to show that the CLRA  
8 applies to Nexo’s alleged conduct.

9 Plaintiff cites the *In re Yahoo* case in support of its position that the services Nexo offers via  
10 its online platform bring it within the purview of the CLRA. *See* Opposition, ECF No. 35 at 16–17  
11 (citing *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F.Supp.3d 1113 (N.D. Cal. 2017)).  
12 In the *Yahoo* case, the court found that Yahoo provides a “service” under the CLRA where  
13 “Plaintiffs have signed up for accounts on a web-based platform, maintained by Yahoo, where they  
14 can engage in activities ranging from private email communication to bank and stock trading to  
15 photo storage.” *Yahoo*, 313 F.Supp.3d at 1142. The Court finds the present case to be factually  
16 distinguishable. First, rather than pertaining to an extension of credit, which courts have repeatedly  
17 found to be an intangible good outside the purview of the CLRA, *Yahoo* pertained primarily to an  
18 email service. *Id.* at 1140. Second, the alleged violations at the heart of *Yahoo* constituted conduct  
19 that allegedly led to several data breaches that allowed access to users’ Yahoo accounts. *Id.* at 1122–  
20 24. Under these facts, the wide variety of services Yahoo offered to users who signed up for  
21 accounts was relevant to the underlying allegations. In the present case, the variety of alleged  
22 services Nexo offered users with accounts is irrelevant to the underlying allegations, which pertain  
23 exclusively to the offering of loans through Nexo Crypto Credit. Accordingly, the Court finds the  
24 *Yahoo* case to be inapposite.

25 Plaintiff further argues that the Court should find that Nexo offers a “service” under the  
26 CLRA in light of the CLRA provision that indicates it should be “liberally construed and applied to  
27 promote its underlying purposes[.]” *See* Opposition, ECF No. 35 at 17 (citing Cal. Civ. Code  
28 § 1760). This Court agrees with the many courts that have rejected this argument as an attempt to

1 rewrite the CLRA under the guise of a broad construction. *See, e.g., Berry*, 147 Cal.App.4th at 232  
2 (“Although CLRA has been interpreted broadly, courts have not expanded it beyond its express  
3 terms.”); *Fife*, 905 F.Supp.2d at 1008–1009; *Fairbanks*, 46 Cal.4th at 64.

4 Additionally, Plaintiff argues that Nexo has repeatedly represented itself as offering a  
5 “service.” *See* Opposition, ECF No. 35 at 17 (citing Complaint ¶ 208). Plaintiff argues that the *In*  
6 *re Yahoo* court found similar facts to support that Yahoo plausibly offered a “service” under the  
7 CLRA. *Id.* (citing *Yahoo*, 313 F.Supp.3d at 1142). While the *Yahoo* court found that Yahoo’s  
8 references to its “service” supported that the CLRA applied, this was in the context of a factually  
9 distinguishable case, as the Court outlined above. *See id.* at 1122–24. The Court finds that while  
10 Nexo’s representations about its “service” may marginally support Plaintiff’s position, they are not  
11 enough to overcome the fact that Plaintiff has failed to allege that Nexo offered anything more than  
12 intangible goods and ancillary services. *See, e.g., Mazonas*, 2016 WL 2344196, at \*4.

13 Accordingly, the Court finds that Plaintiff has not alleged sufficient facts to support that  
14 Nexo offered “services” under the CLRA. Nexo’s Motion to Dismiss Plaintiff’s CLRA claim is  
15 hereby GRANTED. Nexo argues that the appropriate outcome is dismissal of Plaintiff’s CLRA  
16 claim with prejudice. *See* Motion, ECF No. 27 at 21. The Court agrees. Given that the Nexo Crypto  
17 Credit comprises services related to two intangible goods (cryptocurrencies and loans), the Court  
18 does not see how Plaintiff could amend its claims to plausibly allege that Nexo offers anything other  
19 than intangible goods and ancillary services—neither of which courts consider to be within the  
20 purview of the CLRA. Finding that amendment would be futile, the Court DISMISSES Plaintiff’s  
21 CLRA claim WITHOUT LEAVE TO AMEND. *See Eminence Capital*, 316 F.3d at 1052.

#### 22 **4. UCL Claim**

23 Nexo seeks to dismiss Plaintiff’s UCL claim under the (1) unlawful, (2) unfair, and  
24 (3) unfair, deceptive, untrue, or misleading advertising prongs. Under the UCL, any person or entity  
25 that has engaged, is engaging or threatens to engage “in unfair competition may be enjoined in any  
26 court of competent jurisdiction.” Cal. Bus. & Prof. Code §§ 17201, 17203. “Unfair competition”  
27 includes “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or  
28 misleading advertising.” *Id.* § 17200. The UCL’s “coverage is sweeping, embracing anything that

1 can properly be called a business practice and that at the same time is forbidden by law.” *Cel-Tech*  
2 *Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999) (internal quotations and citation  
3 omitted). The UCL “borrows violations of other laws and treats them as unlawful practices that the  
4 unfair competition law makes independently actionable.” *Id.* (internal quotations and citation  
5 omitted). Further, the UCL creates “three varieties of unfair competition—acts or practices which  
6 are unlawful, or unfair, or fraudulent.” *Id.*

7 a. Unlawful Prong

8 For the unlawful prong of the UCL, Plaintiff argues that his breach of contract and CLRA  
9 claims serve as predicate violations for the UCL claim. *See* Complaint, ECF No. 1 ¶¶ 192–93;  
10 Opposition, ECF No. 35 at 18. Nexo argues that Plaintiff has not adequately alleged a predicate  
11 violation of the UCL, because his other claims fail. *See* Motion, ECF No. 27 at 22.

12 The Court agrees with Nexo. Since Plaintiff’s breach of contract and CLRA claims are  
13 insufficiently pled, the Court finds that Plaintiff has not adequately alleged a predicate violation for  
14 his UCL unlawful prong claim.

15 Accordingly, the Court GRANTS Nexo’s motion to dismiss as to Plaintiff’s UCL unlawful  
16 prong claim. Because leave to amend is allowed on the breach of contract claim, Plaintiff is granted  
17 leave to amend this claim as well.

18 b. Unfair Prong

19 For the unfair prong of the UCL, Plaintiff alleges that (1) Nexo’s suspension of XRP and  
20 (2) Nexo’s failure to provide notice of the suspension of XRP constituted unfair business practices.  
21 *See* Complaint, ECF No. 1 ¶¶ 194–95. Nexo argues that Plaintiff fails to state a claim for the same  
22 reasons he failed to state a claim for breach of contract. *See* Motion, ECF No. 27 at 22. Plaintiff  
23 argues that he has adequately alleged that Nexo’s suspension and failure to provide notice of that  
24 suspension was unfair, because it was substantially injurious to consumers and for Nexo’s own  
25 financial benefit. *See* Opposition, ECF No. 18.

26 The Court agrees with Nexo. Plaintiff failed to adequately plead that Nexo’s suspension of  
27 XRP or its lack of notice regarding that suspension was a breach of contract. Further, Plaintiff fails  
28 to adequately allege that Nexo was not explicitly authorized by the Borrow Terms to suspend XRP

1 without notice.

2 Accordingly, the Court finds that Plaintiff has failed to adequately allege that Nexo's  
3 suspension of XRP or its lack of notice regarding that suspension were unfair business practices  
4 under the UCL. The Court GRANTS Nexo's motion to dismiss as to Plaintiff's UCL unfair prong  
5 claim WITH LEAVE TO AMEND.

6 c. Unfair, Deceptive, Untrue, or Misleading Advertising

7 Plaintiff alleges that Nexo violated the UCL by engaging in unfair, deceptive, untrue, or  
8 misleading advertising. Complaint, ECF No. 1 ¶¶ 196–97. Courts have interpreted “advertising”  
9 broadly to include essentially any statement made in connection with the sale of goods or services.  
10 *See Chern v. Bank of America*, 15 Cal.3d 866, 875–876 (1976). The test for unfair, deceptive,  
11 untrue, or misleading advertising is whether “members of the public are likely to be deceived.” *In re*  
12 *Tobacco II Cases*, 46 Cal.4th 298, 312 (2009) (quotation marks and citation omitted). Whether the  
13 public is likely to be deceived is viewed through the lens of a “reasonable consumer.” *Davis v.*  
14 *HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1152, 1169 (9th Cir. 2012). Whereas a common law  
15 fraudulent deception must be (1) actually false, (2) known to be false by the perpetrator, and  
16 (3) reasonably relied upon by a victim (4) who incurs damages, none of these elements are required  
17 to state a claim for injunctive relief under the UCL. *Id.* (quoting *Day v. AT & T Corp.*,  
18 63 Cal.App.4th 325, 332 (1998)).

19 Plaintiff alleges that Nexo violated the unfair, deceptive, untrue, or misleading advertising  
20 prong of the UCL by “using language on its website, in its whitepaper, and in online interviews”  
21 indicating that it did not acquire ownership of users' collateral. Yet according to Plaintiff's  
22 allegations, Nexo then proceeded to claim a contractual right of “ownership” over its customers'  
23 collateral following the suspension of XRP and the liquidation of users' collateral. *See* Complaint,  
24 ECF No. 1 ¶¶ 196–97, 112–17; *see also id.* ¶¶ 72, 99–103. Plaintiff also points to the following  
25 provision from Nexo's Borrow Terms: “Unless prohibited by any Applicable Law, by virtue of this  
26 Agreement Nexo acquires the ownership of the Collateral while the Nexo Crypto Credit is  
27 outstanding.” *See* Trenchev Decl., ECF No. 27-1, Ex. D Borrow Terms § IV.5. Nexo seeks to  
28 dismiss this claim on the basis that none of Plaintiff's claims are predicated on and none of his

1 alleged damages flow from deceptive or misleading advertising about ownership. *See* Motion, ECF  
 2 No. 27 at 22. Nexo further argues that its Borrow Terms provide a carve-out if the “ownership”  
 3 provision is “prohibited by any Applicable Law.” *See id.* at 17. In response, Plaintiff argues he has  
 4 adequately pled that Nexo’s false advertising was a violation of the UCL and that he has pled  
 5 reliance and prospective damage. *See* Opposition, ECF No. 35 at 19. Plaintiff also argues that the  
 6 carve-out in the “ownership” provision is insufficient to cure Nexo’s false advertising violation,  
 7 because as a default the Borrow Terms provide for Nexo’s ownership of users’ collateral. *See id.*

8 The Court agrees with Plaintiff. The only requirement of a UCL false advertising claim is  
 9 that “members of the public are likely to be deceived.” *Tobacco II*, 46 Cal.4th at 312. Accordingly,  
 10 Nexo’s arguments about damages are irrelevant. Additionally, the Court notes that Plaintiff alleges  
 11 he “read and considered the Nexo whitepaper and description of the Nexo business and services on  
 12 the Nexo website before deciding to use the Nexo Crypto Credit service.” Complaint, ECF No. 1  
 13 ¶ 34; *see also id.* ¶ 115 (alleging that the whitepaper stated that “[c]lients retain 100% ownership of  
 14 their digital assets”). Further, Nexo’s argument about the “ownership” provision having a carveout  
 15 goes to the weight of the evidence, particularly considering that Plaintiff alleges Nexo invoked this  
 16 provision to justify its liquidation of users’ collateral. *See* Complaint, ECF No. 1 ¶¶ 72, 99–103.  
 17 Finding that Plaintiff has plausibly pled that a reasonable consumer would have been deceived by  
 18 Nexo’s public statements about lack of ownership over users’ collateral given its alleged invocation  
 19 of ownership to liquidate that collateral, the Court finds that Plaintiff has adequately pled a false  
 20 advertising claim under the UCL.

21 \* \* \*

22 Accordingly, the Court DENIES Nexo’s motion to dismiss Plaintiff’s UCL claim, because  
 23 Plaintiff has adequately pled a claim under the unfair, deceptive, untrue, or misleading advertising  
 24 prong. The Court GRANTS Nexo’s motion to dismiss Plaintiff’s UCL claim as to the unlawful and  
 25 unfair prongs WITH LEAVE TO AMEND.

### 26 **5. UCL and CLRA Claims Under *Sonner***

27 In the Complaint, Plaintiff seeks equitable relief under the UCL and CLRA in addition to  
 28 the legal remedies he seeks for breach of contract. *See, e.g.,* Complaint, ECF No. 1 ¶¶ 134–41.



1 Under the UCL, Plaintiff seeks restitutionary disgorgement for the value of collateral Nexo allegedly  
2 wrongfully liquidated. *See id.* ¶¶ 198–99. Further, under the UCL and CLRA, Plaintiff seeks an  
3 injunction precluding Nexo from invoking certain contractual provisions that purportedly allow it  
4 to suspend borrowing services without notice and to liquidate collateral on the basis that it owns the  
5 collateral. *See id.* ¶¶ 200, 210–13. Plaintiff alleges that without an injunction, UCL and CLRA  
6 Subclass members will suffer irreparable injury and lack an adequate legal remedy if Nexo invokes  
7 these contractual provisions against the interests of the Subclasses in the future. *See id.* ¶¶ 200–201,  
8 213–14.

9 Nexo argues that Plaintiff’s UCL and CLRA claims should be dismissed because (1) he  
10 cannot seek equitable remedies where he has not adequately alleged that legal remedies are  
11 inadequate under the *Sonner v. Premier Nutrition Corp.* case and its progeny and (2) he has not pled  
12 how his restitutionary disgorgement claim under the UCL is different from damages. *See* Motion,  
13 ECF No. 27 at 21–22 (citing *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020)). In  
14 response, Plaintiff argues that (1) the equitable remedies he seeks under the CLRA and UCL are in  
15 addition to any remedies at law, (2) his restitutionary disgorgement claim is brought in the  
16 alternative to contract damages, which courts allow at the pleading stage, and (3) the injunctive  
17 relief he claims is a distinct remedy from contract damages, because his injunctive relief claim is  
18 forward looking. *See* Opposition, ECF No. 35 at 17–18. On reply, Nexo argues that many courts  
19 have dismissed equitable relief claims under *Sonner* at the pleading stage. *See* Reply, ECF No. 41  
20 at 14–15.

21 *Sonner* pertained to a plaintiff with claims for both damages and equitable relief under the  
22 UCL and CLRA who dropped all claims for legal remedies on the eve of trial in the interest of  
23 securing a bench trial rather than trying her case before a jury. *See Sonner*, 971 F.3d at 837. The  
24 Ninth Circuit upheld the district court’s dismissal of her equitable restitution claim on the basis that  
25 the plaintiff “must establish that she lacks an adequate remedy at law before securing equitable  
26 restitution for past harm under the UCL and CLRA.” *Id.* at 844. Since *Sonner*, courts have held  
27 that it extends to claims for injunctive relief in addition to equitable restitution. *See, e.g., In re*  
28 *Macbook Keyboard Litig.*, No. 5:18–cv–02813–EJD, 2020 WL 6047253, at \*\*2–3 (N.D. Cal. Oct.

1 13, 2020).

2 As a threshold matter, the Court considers to what extent *Sonner* is applicable to the pleading  
3 stage. Courts in the Ninth Circuit are divided on how exacting of a standard *Sonner* imposes on  
4 plaintiffs who plead claims for equitable and legal remedies at the pleading stage. *See, e.g., Byton*  
5 *N. Am. Co. v. Breitfeld*, No. CV 19–10563–DMG (JEMx), 2020 WL 3802700, at \*9 (C.D. Cal.  
6 Apr. 28, 2020) (referencing an “intra-circuit split on the issue of whether courts may allow UCL  
7 claims to proceed past the pleading stage when other adequate remedies exist”) (citing *Eason v.*  
8 *Roman Catholic Bishop of San Diego*, 414 F. Supp. 3d 1276, 1282 (S.D. Cal. 2019)). The Court  
9 finds that *Sonner* has limited applicability to the pleading stage because it pertained to circumstances  
10 in which a plaintiff dropped all damages claims on the eve of trial. *See Sonner*, 971 F.3d at 837.  
11 Accordingly, *Sonner* provides limited guidance for pleading claims for legal and equitable relief.  
12 Therefore, the Court is more inclined to agree with those courts that do not consider *Sonner* to  
13 impose strict requirements at the pleading stage. *See, e.g., Freeman v. Indochino Apparel, Inc.*,  
14 443 F.Supp.3d 1107, 1114 (N.D. Cal. 2020) (“Plaintiff may allege claims in the alternative at the  
15 pleading stage. The equitable remedies afforded by the UCL and CLRA are expressly stated to be  
16 in addition to other available remedies at law.”); *Byton*, 2020 WL 3802700, at \*9 (“[T]he Ninth  
17 Circuit’s general rule is that plaintiffs may plead alternative claims, even if those claims are  
18 inconsistent.”). With this in mind, the Court proceeds to its analysis of Plaintiff’s UCL and CLRA  
19 claims.

20 Regarding Plaintiff’s claims for injunctive relief, as outlined above, the Court finds that  
21 Plaintiff has not alleged sufficient facts to show that Plaintiff has Article III standing. Accordingly,  
22 the Court declines to address whether Plaintiff’s allegations are sufficient to support his claim for  
23 injunctive relief alongside his claim for contract damages. Further, since the Court dismisses  
24 Plaintiff’s CLRA claim without leave to amend, it will not consider whether Plaintiff properly seeks  
25 equitable relief under that claim. Therefore, the only remaining issue related to *Sonner* and equitable  
26 relief before the Court is Plaintiff’s claim for equitable restitution under the UCL.

27 Regarding Plaintiff’s equitable restitution claim, the parties disagree as to whether Plaintiff  
28 can seek equitable restitution and contract damages in the alternative. Nexo points to district court

1 caselaw holding that a plaintiff cannot plead equitable restitution under the UCL in the alternative  
2 to damages. *See* Motion, ECF No. 27 at 21; Reply, ECF No. 41 at 14–15. Plaintiff points to  
3 countervailing district court case law finding that pleading an equitable restitution claim in the  
4 alternative is appropriate at the pleading stage. The Court finds that in light of *Sonner*’s limited  
5 applicability to the pleading stage, there is no binding precedent that holds that pleading equitable  
6 restitution in the alternative is improper. *See Freeman*, 443 F.Supp.3d at 1114; *Summit Est., Inc. v.*  
7 *United Healthcare Ins. Co.*, No. 4:19–cv–06724 YGR, 2020 WL 5436655, at \*9 (N.D. Cal. Sept.  
8 10, 2020); *Byton*, 2020 WL 3802700, at \*9; *Sagastume v. Psychomedics Corp.*, 2020 WL 8175597,  
9 at \*7 (C.D. Cal. Nov. 30, 2020) (“*Sonner* does not hold that plaintiffs may not seek alternative  
10 remedies at the pleading stage.”) (citations omitted); *Krause-Pettai v. Unilever United States, Inc.*,  
11 No 20cv1672 DMS (BLM), 2021 WL 1597931, at \*4 (S.D. Cal. Apr. 23, 2021). Further, given the  
12 general liberal policy courts have toward pleading in the alternative, this Court finds that Plaintiff  
13 may proceed with his equitable restitution claim at this stage even though he is also seeking contract  
14 damages. *See, e.g.*, Fed. R. Civ. Proc. 8(a)(3); *Byton*, 2020 WL 3802700, at \*9. While the Court  
15 may reassess at a later stage of the case, it declines to trim out Plaintiff’s equitable restitution claim  
16 at this early stage.

17 Accordingly, the Court finds that Plaintiff has adequately pled a claim for equitable  
18 restitution under the UCL.

19 **D. Motion to Dismiss Under the *Forum Non Conveniens* Doctrine**

20 Nexo seeks to dismiss Plaintiff’s breach of contract and declaratory judgment claims under  
21 the *forum non conveniens* (“FNC”) doctrine based on forum selection clauses in its Borrow Terms  
22 and Wallet Terms. *See* Motion, ECF No. 27 at 23; Reply, ECF No. 41 at 15. “[T]he appropriate  
23 way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine  
24 of forum non conveniens.” *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*,  
25 571 U.S. 49, 60 (2013). Federal law applies to interpretation of forum selection clauses. *Manetti-*  
26 *Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). A forum selection clause  
27 “must contain language that clearly designates a forum as the exclusive one.” *N. Cal. Dist. Council*  
28 *of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995). An ambiguous

1 forum selection clause should be interpreted against the drafter. *See Doe 1 v. AOL LLC*,  
2 552 F.3d 1077, 1082 n.10 (9th Cir. 2009); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*,  
3 817 F.2d 75, 78 (9th Cir. 1987); *see also Dodd v. iGATE Techs., Inc.*, No. 15-cv-00431-VC,  
4 2015 WL 1843036, at \* 1 (N.D. Cal. Apr. 8, 2015).

5 Plaintiff alleges that the terms that govern the Nexo Crypto Credit are the Borrow Terms.  
6 *See* Complaint, ECF No. 1 ¶¶ 8, 39; Opposition, ECF No. 35 at 20. Plaintiff alleges that the forum  
7 selection clause in Nexo’s Borrow Terms indicates that any dispute shall be referred to a court as  
8 determined by the procedural law of “Nexo jurisdiction,” which is an undefined term. *See*  
9 Complaint ¶ 40; *see also id.* ¶ 43 (general terms and conditions cite “Website Owner’s jurisdiction”).  
10 Plaintiff alleges that the undefined term “Nexo jurisdiction” renders the forum selection clause  
11 unenforceable, or it should be interpreted to mean that Nexo consents to jurisdiction in California,  
12 given the business Nexo does in the state. *See id.* ¶¶ 40–42.

13 Nexo argues that the Court should dismiss Plaintiff’s breach of contract and declaratory  
14 judgment claims because of a forum selection clause found in a separate agreement—Nexo’s Wallet  
15 Terms, which Nexo asserts that all users of the Nexo platform agree to. *See* Motion, ECF No. 27  
16 at 3. Nexo argues that the Wallet Terms indicate that any disputes “shall be referred to the  
17 competent court in London, England, determined as per the procedural law of England and Wales”  
18 and governed by the substantive law of England and Wales. *Id.* at 23–25 (citing Trenchev Decl.,  
19 ECF No. 27-1, Ex. B, Wallet Terms § XVIII.1-.2). In response, Plaintiff argues that (1) the Borrow  
20 Terms, not the Wallet Terms, apply to this dispute; (2) the Borrow and Wallet Terms do not cross-  
21 reference each other; and (3) this is underscored by Nexo’s attempt to add a definitional cross-  
22 reference between the Borrow and Wallet Terms since December 2020. *See* Opposition,  
23 ECF No. 35 at 19–21. On reply, Nexo argues that since all Nexo users must agree to the Wallet  
24 Terms in signing up for an account, and since the Wallet Terms contain various references to the  
25 Nexo Crypto Credit service as part of its “Wallet Services,” the Court should interpret “Nexo  
26 jurisdiction” in the Borrow Terms to refer to the U.K. jurisdiction laid out in the Wallet Terms. *See*  
27 Reply, ECF No. 41 at 15.

28 The Court agrees with Plaintiff. The Borrow Terms—not the Wallet Terms—are at issue in

1 this case. Plaintiff’s allegations pertain to Nexo’s lending practices through its Nexo Crypto Credit  
 2 service, which is governed by the Borrow Terms. *See* Trenchev Decl., ECF No. 27-1, Ex. D, Borrow  
 3 Terms § I.1 (“These Nexo Crypto Credit General Terms and Conditions govern...your use of  
 4 cryptocurrency credit facilities granted by Nexo[.]”). While the Complaint references the Borrow  
 5 Terms throughout, it does not reference the Wallet Terms at all. Even Nexo cites almost exclusively  
 6 to the Borrow Terms in its briefing supporting the Motion, citing the Wallet Terms only for the  
 7 forum selection clause and some stray references to other clauses in the “Factual Background”  
 8 section of the Motion. *See* Motion, ECF No. 27 at 4, 23–25; Reply, ECF No. 41 at 1, 15. Further,  
 9 since the Borrow Terms provide the more specific provisions governing the Nexo Crypto Credit  
 10 service, they should govern over the more general provisions of the Wallet Terms. *Shivkov v. Artex*  
 11 *Risk Sols., Inc.*, 974 F.3d 1051, 1063 (9th Cir. 2020).

12 The forum selection clause in the Borrow Terms provides the following:

13  
 14 XV. GOVERNING LAW AND JURISDICTION

15 1. The Agreement shall be governed exclusively by the substantive  
 law of Nexo jurisdiction.

16 2. Any dispute arising out of or in connection with the Agreement (the  
 17 General Terms), unless amicably settled between the Parties, shall be  
 referred to the competent court or other dispute resolution authority,  
 18 determined as per the procedural law of Nexo jurisdiction. You agree  
 that any dispute resolution proceeding subject to the Applicable Law  
 19 under the preceding sentence shall be conducted only on an individual  
 basis and not as a plaintiff or class member in any purported class,  
 20 consolidated or representative action or proceeding. No court or other  
 dispute resolution authority can consolidate or join more than one  
 21 claim and can otherwise preside over any form of a consolidated,  
 representative, or class proceeding. Any relief awarded cannot affect  
 22 other Clients of Nexo.

23 Trenchev Decl., ECF No. 27-1, Ex. D, Borrow Terms § XV.1–2. The term “Nexo jurisdiction” is  
 24 not defined in the Borrow Terms. *See id.* § II (“Definitions”). Since this clause does not “clearly  
 25 designate[] a forum as the exclusive one,” the Court finds that it is not enforceable as a mandatory  
 26 forum selection clause. *See Pittsburg-Des Moines Steel*, 69 F.3d at 1037. Moreover, to the extent  
 27 this clause is ambiguous, it should be construed against Nexo as the drafter of the contract. *See*  
 28 Complaint, ECF No. 1 ¶¶ 40–41; *AOL*, 552 F.3d at 1082 n.10.

1 Nexo argues that “Nexo jurisdiction” in the Borrow Terms should be interpreted to mean the  
2 U.K. jurisdiction referred to in the Wallet Terms, which all Nexo customers must agree to. Reply,  
3 ECF No. 41 at 15. Nexo points to the fact that the Wallet Terms list “Nexo Crypto Credit” and the  
4 “Digital Asset Wallet” necessary to obtain a Nexo credit line as examples of “Nexo Wallet  
5 Services.” *Id.* (citing Trenchev Decl., ECF No. 27-1, Ex. B, Wallet Terms § III.1). Nexo further  
6 points to sections of the Wallet Terms generally describing a user’s ability to use the Nexo Crypto  
7 Credit service to borrow against digital assets. *Id.* (citing Trenchev Decl., ECF No. 27-1, Ex. B,  
8 Wallet Terms §§ V.1, VI.1). The Court does not consider the Wallet Terms’ minimal, generalized  
9 references to the Nexo Crypto Credit service (rather than the Borrow Terms themselves) sufficient  
10 to incorporate the exclusive forum from the Wallet Terms’ forum selection clause into the Borrow  
11 Terms’ forum selection clause. Nexo apparently did not consider these cross-references to be  
12 sufficient either—Plaintiff submits evidence that Nexo added a clause to the Borrow Terms since  
13 December 2020 incorporating definitions from the Wallet Terms into the Borrow Terms. *See* Decl.  
14 of Edward Normand, ECF No. 35-1 ¶¶ 3–4. Even if the Borrow Terms are read in light of the Wallet  
15 Terms, “Nexo jurisdiction” is still an undefined term. *See* Trenchev Decl., ECF No. 27-1, Ex. B,  
16 Wallet Terms § II (“Definitions”). Accordingly, the Court finds that the forum selection clause in  
17 the Wallet Terms does not change its interpretation of the Borrow Terms’ forum selection clause.

18 Nexo’s only basis for dismissal under the FNC doctrine is the forum selection clause in the  
19 Borrow Terms. *See* Motion, ECF No. 27 at 23. Since the Court finds that the Borrow Terms do not  
20 contain an enforceable forum selection clause, the Court declines to reach Nexo’s public policy  
21 arguments in support of dismissal under the FNC doctrine. *Id.* at 23–25.

22 Accordingly, the Court DENIES Nexo’s motion to dismiss Plaintiff’s breach of contract and  
23 declaratory judgment claims under the FNC doctrine.

#### 24 **IV. ORDER**

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

- 26 1. Nexo’s Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction is  
27 GRANTED WITH LEAVE TO AMEND as to (1) the breach of contract claim based on  
28 Nexo’s failure to provide notice of liquidation and (2) the claims for injunctive relief and

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DENIED as to all other claims;

2. Nexo’s Rule 12(b)(2) Motion to Dismiss for lack of personal jurisdiction for Nexo Financial Services Ltd., Nexo Services OÜ, Nexo AG, and Nexo Financial LLC is GRANTED WITHOUT LEAVE TO AMEND;

3. Plaintiff’s request for jurisdictional discovery is DENIED;

4. Nexo’s Rule 12(b)(6) Motion to Dismiss Plaintiff’s breach of contract claim is GRANTED WITH LEAVE TO AMEND;

5. Nexo’s Rule 12(b)(6) Motion to Dismiss Plaintiff’s declaratory judgment claim is GRANTED WITHOUT LEAVE TO AMEND as to Plaintiff’s claim related to Nexo’s right to suspend XRP and DENIED as to Plaintiff’s other claims;

6. Nexo’s Rule 12(b)(6) Motion to Dismiss Plaintiff’s CLRA claim is GRANTED WITHOUT LEAVE TO AMEND;

7. Nexo’s Rule 12(b)(6) Motion to Dismiss Plaintiff’s UCL claim is GRANTED WITH LEAVE TO AMEND as to the unlawful and unfair prongs and DENIED as to the unfair, deceptive, untrue, or misleading advertising prong;

8. Nexo’s Motion to Dismiss under the *forum non conveniens* doctrine is DENIED; and

9. Plaintiff SHALL have 21 days from the date of this Order to file an Amended Complaint.

Dated: January 19, 2022



BETH LABSON FREEMAN  
United States District Judge