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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 N'GENUITY ENTERPRISES CO., an) No. 09-CV-00385-PHX-GMS
10 Arizona corporation,)

11 Plaintiff,)

ORDER

12 vs.)

13 PIERRE FOODS, INC., a foreign)
14 corporation; TIMOTHY DENNING;)
15 NORB WOODHAMS, SR.; NORB)
16 WOODHAMS, JR.,)

17 Defendants.)
18

19 Pending before the Court is Defendants' Motion to Dismiss. (Dkt. # 18.) For the
20 following reasons, the Court grants the motion in part and denies the motion in part.¹

21 **BACKGROUND**

22 This case is brought by Plaintiff N'Genuity Enterprises Company, an Arizona
23 corporation, which is a manufacturer and wholesaler of food products. N'Genuity sells these
24 products to a number of "prime vendors," who then market the products for sale to
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27 ¹Plaintiff has requested oral argument. That request is denied because the parties have
28 thoroughly discussed the law and the evidence, and oral argument will not aid the Court's
decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724,
729 (9th Cir. 1991).

1 consumers. Some of these prime vendors market the products for sale at American military
2 facilities. To satisfy the orders of these prime vendors, N’Genuity partners with other
3 manufacturers. One such manufacturing partner was Zartic, Inc., which contracted with
4 N’Genuity in 2003 to produce and supply N’Genuity’s chicken wing products. These
5 chicken wing products were eventually sold to prime vendors to be marketed at military
6 facilities.

7 In 2007, N’Genuity was contacted by Defendant Pierre Foods, Inc. Headquartered
8 in Ohio, Pierre Foods is also a manufacturer and wholesaler of food products. Pierre Foods
9 employs Defendants Timothy Denning, Norb Woodhams Sr., and Norb Woodhams Jr. (“the
10 Individual Defendants”), all of whom are residents of Indiana or Ohio. When it approached
11 N’Genuity, Pierre Foods allegedly represented that it was the successor-in-interest to Zartic,
12 which N’Genuity took to mean that, while ownership of Zartic may have changed hands,
13 there were no changes in operational personnel, manufacturing facilities, and other
14 production procedures. N’Genuity now alleges that this was a misrepresentation, and that
15 Pierre Foods simply purchased some of Zartic’s assets in order to capitalize on its name.

16 Apparently unsatisfied with Pierre Foods’ operations through the first half of 2007,
17 N’Genuity began to suggest that it would discontinue the relationship. At that point,
18 Denning allegedly “began making statements to the effect that Pierre Foods would go around
19 N’Genuity and market and sell chicken wing products directly to the military.” (Dkt. # 1 at
20 5.) To address those statements, N’Genuity and Pierre Foods arranged a conference call on
21 May 25, 2007. In that call, Woodhams Sr. “personally assured N’Genuity that Pierre Foods
22 would never go around N’Genuity and sell N’Genuity products directly to the military or any
23 other customers of N’Genuity.” (*Id.* at 6.) Woodhams Sr. is alleged to have made a
24 subsequent call to N’Genuity in which he reiterated that Pierre Foods would not circumvent
25 N’Genuity, acknowledged that doing so would violate Pierre Foods’ agreements with
26 N’Genuity, and stated that he was “embarrassed” that Pierre Foods had not been “following
27 through on their commitments and obligations.” (*Id.*) These assurances satisfied N’Genuity
28 enough for it to continue the relationship with Pierre Foods.

1 In November of 2007, N’Genuity and Pierre Foods began to negotiate a new contract.
2 Woodhams Jr. was part of Pierre Foods’ negotiating team, and on a conference call to
3 N’Genuity he “confirmed that Pierre Foods would provide a quality-assurance and customer-
4 service representative dedicated to representing N’Genuity’s interest,” with N’Genuity
5 writing the job description for this position. (*Id.* at 7.) N’Genuity did so, and Woodhams Jr.
6 confirmed that Pierre Foods would provide a representative according to its criteria.

7 Negotiations for a new contract continued through much of 2008. N’Genuity
8 contends that Pierre Foods did not act in good faith during these negotiations, altering draft
9 agreements and, through Woodhams Jr. and others, demanding that N’Genuity sign the
10 agreements. According to N’Genuity, the negotiations were merely a ruse to provide cover
11 for Pierre Foods to circumvent N’Genuity and market products directly to the military.
12 Eventually, Pierre Foods agreed to sign an indemnification agreement covering all
13 unresolved issues and questions regarding the draft agreement. It also promised to remedy
14 N’Genuity’s complaints about how its business was run.

15 Given these assurances, on August 27, 2008, N’Genuity signed an agreement (“the
16 Supplier Agreement”) providing for Pierre Foods’ continuing manufacture of the chicken
17 wing products. On the same date, the parties allegedly executed a Confidentiality and
18 Nondisclosure Agreement. Around this time, N’Genuity also committed to placing orders
19 for all of Pierre Foods’ existing inventory of the chicken wing products.

20 However, Pierre Foods allegedly failed to execute the indemnity agreement, failed to
21 provide a quality assurance and customer service representative according to N’Genuity’s
22 criteria, and failed to remedy the many complaints about its operations that N’Genuity has
23 made since 2007, including its failure to implement an effective inventory control system.
24 Pierre Foods is also alleged to have improperly maintained an oversupply of the chicken
25 wing products. Just before the Supplier Agreement was entered into, Woodhams Jr.
26 informed N’Genuity that Pierre Foods maintained roughly 34,000 cases of chicken wing
27 products, and in response N’Genuity said that it should maintain only 10,000 cases (because
28 overstocked inventory loses shelf life). The Supplier Agreement memorialized that

1 N’Genuity was to inform Pierre Foods of the amount of inventory to maintain, and
2 N’Genuity officially set this level at 10,000 cases of chicken wing products. Nevertheless,
3 Pierre Foods allegedly continued to maintain substantially excessive inventory.

4 On November 11, 2008, N’Genuity emailed Pierre Foods (including Woodhams Jr.)
5 about its alleged breaches, and Pierre Foods responded by suggesting that the two companies
6 discontinue their relationship pending an agreement on how to dispose of the remaining
7 inventory. N’Genuity agreed to work with Pierre Foods to sell the inventory, permitting it
8 to process an order from Agility, one of the prime vendors. Within a few days of the
9 shipment, Agility complained to N’Genuity about the quality of the chicken wing products
10 it had received. N’Genuity then investigated the shipments made by Pierre Foods since
11 entering the Supplier Agreement and allegedly discovered numerous violations, such as
12 improper shipping practices and the shipment of “shelf-life deficient” product (product that
13 has less than eighty-five percent of its shelf-life remaining). N’Genuity also discovered that
14 Pierre Foods had lied about when its oldest inventory had been manufactured.

15 Based on its investigation, N’Genuity stopped placing orders with Pierre Foods. It
16 attempted to contact Pierre Foods, including by attempting to contact Woodhams Jr., but
17 N’Genuity’s calls and records requests were ignored. N’Genuity asserts that in February of
18 2009 Pierre Foods began shipping its remaining inventory, all of which was shelf-life
19 deficient, to the prime vendors. N’Genuity contends that these sales were unauthorized and
20 damaged N’Genuity’s business relationships.

21 N’Genuity also alleges that Pierre Foods, and specifically Defendant Denning, made
22 defamatory statements about N’Genuity to undermine its business relationships and
23 ultimately to permit Pierre Foods to market N’Genuity’s products directly to the prime
24 vendors. Specifically, Pierre Foods and Denning are alleged to have told various prime
25 vendors, as well as the Army Center of Excellence, Subsistence (“ACES”) (which approves
26 products sold to military installations) that N’Genuity wrongfully refused to place orders
27 with Pierre Foods. N’Genuity also alleges that Pierre Foods breached the Nondisclosure and
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1 Confidentiality Agreement by permitting Denning to obtain information about the
2 relationship between N’Genuity and Pierre Foods.

3 On February 25, 2009, N’Genuity filed the Complaint underlying this lawsuit.

4 N’Genuity advances twelve claims:

- 5 (1) breach of contract;
- 6 (2) breach of the duty of good faith and fair dealing;
- 7 (3) fraudulent misrepresentation;
- 8 (4) fraudulent concealment and nondisclosure;
- 9 (5) fraudulent inducement;
- 10 (6) interference with existing contractual relationships;
- 11 (7) interference with prospective business relationships;
- 12 (8) unfair competition;
- 13 (9) defamation, libel, and slander;
- 14 (10) trade libel and slander;
- 15 (11) misappropriation of trade secrets and proprietary
16 information; and
- 17 (12) a request for a declaratory judgment that N’Genuity
18 performed all of its obligations under its contracts, that it did not
breach or violate any obligations or duties to Pierre Foods, and
that Pierre Foods is not entitled to sell any N’Genuity product.

19 The claims are asserted against all Defendants, except for claim one, which is asserted
20 against Pierre Foods only. On April 10, 2009, Defendants filed the instant motion to dismiss.
21 (Dkt. # 18.)

22 DISCUSSION

23 I. The Individual Defendants

24 The Individual Defendants argue that they should be dismissed from this action
25 because: (A) the Court lacks personal jurisdiction over them, and (B) even according to the
26 Complaint, the Individual Defendants acted only on behalf of Pierre Foods and therefore
27 owed no duty or obligation to N’Genuity as individuals. The Court will address each
28 argument in turn.

1 **A. Personal Jurisdiction**

2 Once a defendant challenges a federal court’s personal jurisdiction pursuant to Federal
3 Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of demonstrating that
4 personal jurisdiction exists. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800
5 (9th Cir. 2004). Where, as here, the defendant’s motion is based on written materials and not
6 on an evidentiary hearing, “the plaintiff need only make a prima facie showing of
7 jurisdictional facts” from the plaintiff’s pleadings and affidavits. *Id.* (quoting *Caruth v. Int’l*
8 *Psychoanalytical Ass’n*, 59 F.3d 126, 128 (9th Cir. 1995)). Uncontroverted allegations in the
9 complaint must be taken as true, and conflicts between the parties over statements contained
10 in affidavits must be resolved in the plaintiff’s favor. *Id.*

11 Where no federal statute governs the exercise of personal jurisdiction, a federal court
12 generally applies the “long-arm” statute of the state in which it sits. *Omni Capital Int’l, Ltd.*
13 *v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104-05 (1987). In Arizona, the state in which this
14 Court sits, personal jurisdiction is available over a nonresident defendant “to the maximum
15 extent permitted by the Constitution [of Arizona] and the Constitution of the United States.”
16 Ariz. R. Civ. P. 4.2(a). These constitutions permit a court to exercise personal jurisdiction
17 if a defendant has “sufficient minimum contacts with the forum state such that the
18 maintenance of the suit does not offend traditional notions of fair play and substantial
19 justice.” *Williams v. Lakeview Co.*, 199 Ariz. 1, 3, 13 P.3d 280, 282 (2000) (citing *Int’l Shoe*
20 *Co. v. Washington*, 326 U.S. 310, 320 (1945)).

21 Although personal jurisdiction may be “general” or “specific,” “the constitutional
22 touchstone remains whether the defendant purposefully established ‘minimum contacts’ in
23 the forum State.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).
24 Thus, general jurisdiction may be exercised if a nonresident defendant’s contacts with the
25 forum state are “substantial or continuous and systematic enough that the defendant may be
26 haled into court in the forum, even for claims unrelated to the defendant’s contacts with the
27 forum.” *Id.* (citing *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414
28 (1984)). Specific jurisdiction, on the other hand, may be exercised if: “(1) the defendant

1 purposely avails himself of the privilege of conducting business in the forum; (2) the claim
2 arises out of or relates to the defendant's contact with the forum; and (3) the exercise of
3 jurisdiction is reasonable." *Id.* The plaintiff bears the burden of establishing the first two of
4 these prongs; if he does so, then the burden shifts to the defendant to "present a compelling
5 case" that the exercise of jurisdiction is not reasonable. *Schwarzenegger*, 374 F.3d at 802.

6 A plaintiff can establish the first prong of the specific jurisdiction test by showing
7 either "purposeful availment" or "purposeful direction." *Id.* "Purposeful availment" is most
8 often used in contract suits, and it typically requires "evidence of the defendant's actions in
9 the forum, such as executing or performing a contract there." *Id.* (citing *Hanson v. Denckla*,
10 357 U.S. 235, 253 (1958)). "Purposeful direction," on the other hand, is most often used in
11 tort suits, and it usually requires "evidence of the defendant's actions outside the forum state
12 that are directed at the forum, such as the distribution in the forum state of goods originating
13 elsewhere." *Id.* at 803 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75
14 (1984)). Specifically, "purposeful direction" is to be evaluated under a three-part "effects
15 test" that "requires that the defendant allegedly have (1) committed an intentional act, (2)
16 expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be
17 suffered in the forum state." *Id.* (citing *Calder v. Jones*, 465 U.S. 783, 788-89 (1984)).

18 A plaintiff establishes the second prong of the specific jurisdiction test by showing
19 that the plaintiff would not have been injured "but for" the defendant's forum-related
20 contacts. *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998). If a court
21 reaches the third prong, it must weigh seven factors:

- 22 (1) the extent of a defendant's purposeful interjection; (2) the
 - 23 burden on the defendant in defending in the forum; (3) the
 - 24 extent of conflict with the sovereignty of the defendant's state;
 - 25 (4) the forum state's interest in adjudicating the dispute; (5) the
 - 26 most efficient judicial resolution of the controversy; (6) the
 - 27 importance of the forum to the plaintiff's interest in convenient
 - 28 and effective relief; and (7) the existence of an alternative
- forum.

Id. at 1323 (citing *Burger King*, 471 U.S. at 476-77). "No one factor is dispositive; a court
must balance all seven." *Id.*

1 Here, N’Genuity asserts that the Court has specific jurisdiction over the Individual
2 Defendants, and the Complaint describes no conduct by the Individual Defendants readily
3 susceptible to a purposeful availment analysis. Thus, the Court will determine whether any
4 of the Individual Defendants purposefully directed any of their actions at Arizona. The
5 uncontroverted allegations of the Complaint specific to each of the Individual Defendants are
6 as follows.

7 Denning is alleged to have engaged in two sets of acts. First, in 2007, Denning
8 “began making statements to the effect that Pierre Foods would go around N’Genuity and
9 market and sell chicken wing products directly to the military.” (Dkt. # 1 at 5.) Second,
10 Denning “made numerous false, defamatory, and slanderous statements about N’Genuity .
11 . . . in an effort to undermine N’Genuity’s ongoing business relationships . . . and to
12 circumvent [Pierre Foods’] contractual obligations to N’Genuity.” (*Id.* at 22.) Specifically,
13 Denning is alleged to have stated that “N’Genuity wrongfully refused to place orders with
14 Pierre Foods.” (*Id.*)

15 Woodhams Sr. is alleged to have made two calls to N’Genuity in mid-2007. On a
16 May 25, 2007, conference call with N’Genuity, Woodhams Sr. “personally assured
17 N’Genuity that Pierre Foods would never go around N’Genuity and sell N’Genuity’s
18 products directly to the military or any other customers.” (*Id.* at 6.) Woodhams Sr. also
19 made another call to N’Genuity around that time, reiterating that Pierre Foods would not
20 circumvent N’Genuity, acknowledging that doing so would violate Pierre Foods’ agreements
21 with N’Genuity, and stating that he was “embarrassed” that Pierre Foods had not been
22 “following through on their commitments and obligations.” (*Id.*)

23 Woodhams Jr.’s alleged acts all stem from the negotiations between N’Genuity and
24 Pierre Foods in 2007 and 2008. Specifically, Woodhams Jr. participated in a conference call
25 with N’Genuity in which he “confirmed that Pierre Foods would provide a quality assurance
26 and customer service representative dedicated to representing N’Genuity’s interests . . . and
27 committed that N’Genuity could write the job description and provide the specifications and
28 requirements for this representative.” (*Id.* at 7.) Woodhams Jr. also reviewed the job

1 description written by N’Genuity, “agreed that this was an appropriate set of specifications
2 and requirements,” and “confirmed that Pierre Foods would provide a representative whose
3 job duties would cover all of the identified specifications and requirements.” (*Id.*)
4 Woodhams Jr. was also involved in a conference call with N’Genuity in August 2008 in
5 which he “threatened that if N’Genuity did not immediately sign the current version [of the
6 proposed Supplier Agreement], incorrect and incomplete as it was, Pierre Foods would refuse
7 to fill its existing orders with N’Genuity.” (*Id.* at 8.)²

8 The Individual Defendants do not dispute that N’Genuity has alleged that they
9 engaged in intentional acts expressly aimed at N’Genuity’s operations in Arizona. The
10 Individual Defendants argue only that their contacts with Arizona were as employees of
11 Pierre Foods, and thus that none of the conduct can be imputed to them as individuals. (Dkt.
12 # 18 at 3-4.) The Individual Defendants seem to be channeling the “fiduciary shield
13 doctrine,” under which “a person’s mere association with a corporation that causes injury in
14 the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the
15 person.” *Davis v. Metro Prod.*, 885 F.2d 515, 520 (9th Cir. 1989) (applying Arizona law).

16 The Individual Defendants are correct that employees’ contacts with a forum state
17 “are not to be judged according to their employer’s activities there,” and “[e]ach defendant’s
18 contacts with the forum State must be assessed individually.” *Calder*, 465 U.S. at 790.
19 However, “their status as employees does not somehow insulate them from jurisdiction.” *Id.*
20 Where defendants are “primary participants in an alleged wrongdoing intentionally directed
21 at a [forum state] resident, [] jurisdiction over them is proper.” *Id.* Thus, as long as the
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24 ²The Complaint’s other mentions of Woodhams Jr. do not appear to be tied to any
25 alleged wrongdoing and thus are not relevant. Those other mentions provide that Woodhams
26 Jr. allegedly participated in a conference call with N’Genuity on August 26, 2008, in which
27 he stated that Pierre Foods had roughly 34,000 cases of chicken wing products in inventory,
28 a statement that is not alleged to be false. (Dkt. # 1 at 12.) Also, Woodhams Jr. was included
on an email sent by N’Genuity on November 11, 2008, but it was another Pierre Foods
employee that responded to the email. (*Id.* at 14.) Additionally, Woodhams Jr. did not
respond to N’Genuity’s attempts to contact him in November 2008. (*Id.* at 17.)

1 conduct causing an effect in the forum state is not “general untargeted negligence,” but rather
2 is “intentional, allegedly tortious actions by the defendants expressly aimed at the forum
3 state,” then the fiduciary shield doctrine will not divest the court of personal jurisdiction.
4 *Davis*, 885 F.2d at 520; *Click v. Dorman Long Tech., Ltd.*, No. C06-1936, 2006 WL
5 2644889, at *4-5 (N.D. Cal. Sept. 14, 2006) (holding that “in order for fiduciary shield
6 protections to be unavailable to defendants acting on behalf of their employer,” plaintiffs
7 “must make a prima facie showing that some theory of liability allows for [the employee’s]
8 contacts, which were conducted on [the employer’s] behalf, to be imputed to [the employee]
9 in his personal capacity,” such as by alleging “intentionally targeted activity by [the
10 employee] toward a [forum-state] resident” or “that [the employee] expressly aimed his
11 conduct at a [forum-state] resident”).

12 Here, each of the Individual Defendants is alleged to have engaged in intentional
13 tortious conduct targeted at harming N’Genuity in Arizona. Denning’s alleged defamatory
14 statements about N’Genuity, for instance, clearly present an allegation of intentional tortious
15 conduct designed to harm N’Genuity. Woodhams Sr.’s calls to N’Genuity, promising that
16 Pierre Foods would not seek to market to N’Genuity’s prime vendors, were made in the
17 course of reassuring N’Genuity about Pierre Foods’ business after it purchased Zartic assets.
18 This fits under the rubric of N’Genuity’s allegations of fraudulent inducement “to continue
19 with its ongoing contractual relationship and business activities with Pierre Foods.” (Dkt.
20 # 1 at 27.) Likewise, the allegations that Woodhams Jr. promised that Pierre Foods would
21 provide a representative as N’Genuity requested, and that he threatened that Pierre Foods
22 would stop working with N’Genuity if it did not sign a contract in 2008, are part of
23 N’Genuity’s claim that Woodhams Jr. fraudulently induced N’Genuity to sign the Supplier
24 Agreement.

25 These are not allegations of mere negligence untargeted at N’Genuity, but rather are
26 allegations of intentional torts that had the purpose and effect of harming N’Genuity in
27 Arizona. Such allegations are sufficient to establish personal jurisdiction over the Individual
28 Defendants. *See Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111-12 (9th Cir. 2002)

1 (finding personal jurisdiction where two foreign employees were “alleged to have
2 communicated with Dole managers in California with the specific intent to cause injury to
3 Dole U.S. by means of those very communications” by attempting to “induce them to
4 implement a new importing system, and, as a consequence, to enter into significant and
5 detrimental contractual arrangements”); *compare Davis*, 885 F.2d at 522-53 (finding that an
6 Arizona district court had personal jurisdiction over officers of a California company that
7 communicated with an Arizona resident to discuss investment in the company because the
8 officers acted with tortious intent to fraudulently induce the Arizona resident to find
9 investors), *with Click*, 2006 WL 2644889, at *3-5 (finding that a foreign employee’s
10 communications with the California plaintiff’s employer were insufficient to create personal
11 jurisdiction in California because the allegations of tortious conduct were of mere negligence
12 not specifically targeted at the defendants).

13 There does not appear to be significant disagreement that, if the Individual Defendants
14 did “purposefully direct” their intentionally tortious conduct at N’Genuity, knowing that the
15 harm would be felt in Arizona, then the claims against the Individual Defendants would arise
16 out of or relate to each Defendant’s contacts with the forum. (*See* Dkt. # 18 at 4.) The Court
17 agrees that N’Genuity would not have suffered the alleged harm “but for” the Individual
18 Defendants’ contacts, *Panavision*, 141 F.3d at 1322, and thus the second prong of the
19 specific jurisdiction test is met, *see Dole*, 303 F.3d at 1114 (“It is obvious that Dole’s claims
20 against Watts and Boenneken arise directly out of their contacts with the forum. As
21 recounted above, the contacts between Watts and Boenneken and the forum state are integral
22 and essential parts of the alleged fraudulent scheme on which Dole bases its suit.”).

23 Likewise, the Individual Defendants do not seriously dispute that the exercise of
24 jurisdiction is reasonable, other than to argue that it is unreasonable in the absence of
25 “purposeful direction.” (*See* Dkt. # 18 at 4.) Nor does the Court, on its own review, “divine
26 any substantial concern” for any of the reasonableness considerations. *Davis*, 885 F.2d at
27 523. Thus, the Individual Defendants have not rebutted the presumption that the exercise of
28 personal jurisdiction over them is reasonable. *See id.* (finding the exercise of personal

1 jurisdiction reasonable in the absence of specific argument on the point and in the absence
2 of apparent offense to any of the seven factors).

3 Because N’Genuity has made a sufficient prima facie showing of specific jurisdiction,
4 and because the Individual Defendants have failed to rebut the presumption that jurisdiction
5 is reasonable, the Court has personal jurisdiction over the Individual Defendants.

6 **B. Duty to Plaintiff**

7 Similar to their argument under the personal jurisdiction test, the Individual
8 Defendants argue that they should be dismissed from this action because “[e]ach of the
9 allegations [against them] expressly recognizes that the statements [they made] were being
10 made on behalf of Pierre [Foods].” (Dkt. # 18 at 4-5.) However, the Complaint asserts that
11 Denning, Woodhams Sr., and Woodhams Jr. were individually liable for the asserted
12 intentional torts, not that they were liable simply as corporate employees. As explained
13 above, the fiduciary shield doctrine does not insulate the Individual Defendants from liability
14 if these allegations are true. *See Davis*, 885 F.2d at 521-22. Thus, the Individual Defendants
15 will not be dismissed.

16 **II. Pierre Foods**

17 Defendants’ next argument is that N’Genuity’s claims against Pierre Foods are barred
18 by its bankruptcy reorganization and discharge.³ (Dkt. # 18 at 5-7.) “[T]he confirmation of
19 a [bankruptcy] plan discharges the debtor from any debt that arose before the date of such
20 confirmation.” 11 U.S.C. § 1141(d)(1)(A). “Debt” includes “liability on a claim.” 11
21 U.S.C. § 101(12). Thus, the question of whether N’Genuity’s claims against Pierre Foods
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26 ³Defendants also argue that this issue may be decided by the bankruptcy court (Dkt.
27 # 18 at 7), but the parties agree that both courts have jurisdiction. In the interests of judicial
28 economy, and because the matter does not require the particular expertise of the bankruptcy
court, this Court will decide the issue.

1 were discharged depends on whether those claims arose before December 12, 2008, the date
2 on which Pierre Foods' bankruptcy plan was confirmed. (Dkt. # 18 Ex. E.)⁴

3 "[A] claim arises, for purposes of discharge in bankruptcy, at the time of the events
4 giving rise to the claim, not at the time [the] plaintiff is first able to file suit on the claim."
5 *O'Loughlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000). Even where post-
6 confirmation events giving rise to a claim are part of the same course of conduct as pre-
7 confirmation events, the continuing nature of any legal violation does not result in the
8 discharge of claims based on events occurring after the confirmation date. *Id.* at 874-75.
9 Therefore, any claims against Pierre Foods based on events occurring prior to December 12,
10 2008, have been discharged, while claims based on events after that date, even if those events
11 were part of a continuing course of conduct that spanned the confirmation date, are not
12 discharged.

13 N'Genuity musters several arguments as to why the Court should not adopt December
14 12, 2008, as the date of discharge. However, these arguments are not persuasive. N'Genuity
15 first argues that its fraud claims did not accrue for the purposes of bankruptcy discharge until
16 the claims accrued as a matter of state law. (Dkt. # 35 at 7-8.) While that may be the case
17 for courts in the Third Circuit, *see Jones v. Chemetron Corp.*, 212 F.3d 199, 206 (3d Cir.
18 2000), in the Ninth Circuit "a claim arises when a claimant can fairly or reasonably
19 contemplate the claim's existence even if a cause of action has not yet accrued under
20 nonbankruptcy law," *In re SNTL Corp.*, 571 F.3d 826, 839 (9th Cir. 2009). Thus,
21 N'Genuity's arguments about Arizona state law are inapposite.⁵

22
23 ⁴The Court may take judicial notice of the bankruptcy proceedings. *See In re*
24 *McGhan*, 288 F.3d 1172, 1180 (9th Cir. 2002).

25 ⁵N'Genuity does not challenge the notion that the Ninth Circuit test is satisfied, but
26 upon its own review the Court agrees that it is. There is no doubt that N'Genuity could have
27 fairly and reasonably contemplated its fraud claims against Pierre Foods before December
28 12, 2008, for N'Genuity alleges that it stopped ordering from Pierre Foods in November of
2008 based on the very fraudulent activity for which it now claims relief. Of course, to the
extent that any of the fraud claims rest on fraudulent events occurring after December 12,

1 N’Genuity next argues that the bankruptcy plan itself provides that “liability arising
2 under or from post-petition contracts, such as the Supplier Agreement here, was expressly
3 not discharged.” (Dkt. # 35 at 8.) N’Genuity bases that argument on the “Contracts and
4 Leases Entered Into After the Commencement Date” section of the reorganization plan,
5 which provides:

6 Contracts and leases entered into after the Commencement Date
7 by any Debtor, including any Executory Contracts and
8 Unexpired Leases assumed by such Debtor, will be performed
9 by the Debtor or Reorganized Debtor liable thereunder in the
10 ordinary course of business. Accordingly, such contracts and
11 leases (including any assumed Executory Contracts and
12 Unexpired Leases) will survive and remain unaffected by entry
13 of the Confirmation Order.

14 (Dkt. # 18 Ex. D at 98.) N’Genuity’s reading of this section is untenable. This section
15 provides only that contracts entered into by Pierre Foods after the commencement of
16 bankruptcy proceedings are not terminated or otherwise affected by entry of the confirmation
17 order. This section does not suggest, much less does it “expressly” state, that liability for
18 civil claims that arise after the confirmation date is not discharged. Rather, under the
19 bankruptcy statutes “the confirmation of a [bankruptcy] plan discharges the debtor from *any*
20 debt that arose before the date of such confirmation.” 11 U.S.C. § 1141(d)(1)(A) (emphasis
21 added). The reorganization plan does not alter that statutory principle.

22 N’Genuity’s last argument is that the bankruptcy claims were not discharged because
23 “N’Genuity was not given sufficient statutory notice.” (Dkt. # 35 at 8.) Specifically,
24 N’Genuity argues that Pierre Foods sent the Notice of Confirmation Hearing and related
25 documents to N’Genuity’s old address – although, conspicuously, N’Genuity does not argue
26 that it did not receive the information. (*See id.* at 8-9.) Defendants respond with several
27 arguments, but the Court need not reach them all. Defendants have introduced ample
28 evidence from the bankruptcy records that N’Genuity maintained several addresses, that the
relevant notices were mailed to all of those addresses, and that, for each and every mailing,

2008, claims for such fraudulent activity were not discharged by the earlier confirmation
order.

1 at least one of the notices was not returned as undeliverable. (Dkt. # 42 Ex. A-M.) Mail
2 directed to an old address is generally presumed to have been forwarded to a new address if
3 it is not returned as undeliverable. *See In re R.H. Macy & Co., Inc.*, 161 B.R. 355, 359-60
4 (S.D.N.Y. 1993) (rejecting the argument that a party did not receive a bankruptcy notice
5 because the proof of claim package “was not returned as undeliverable” and thus was
6 “presumed to have been forwarded to [the party’s] new address”). Here, N’Genuity has
7 offered nothing to rebut the presumption of receipt or even to dispute that it was fully aware
8 of the bankruptcy proceedings. Thus, N’Genuity cannot avoid the discharge date of
9 December 12, 2008.⁶

10 However, this holding does not require complete dismissal of Pierre Foods from this
11 action. While Defendants identify a number of events in the Complaint that occurred prior
12 to December 12, 2008 (Dkt. # 18 at 6-7), N’Genuity points out that there are other events
13 alleged in the Complaint occurring after December 12, 2008, that could support at least some
14 of N’Genuity’s claims (Dkt. # 35 at 7). Specifically, N’Genuity alleges that Pierre Foods
15 solicited N’Genuity’s customers and began selling chicken wing products to them after
16 December 12, 2008, without regard to the agreements between N’Genuity and Pierre Foods
17 and the agreements between N’Genuity, prime vendors, and others. As part of doing so,
18 N’Genuity alleges, Pierre Foods acted fraudulently and made false and defamatory
19 statements about N’Genuity to prime vendors and others in order to undermine and co-opt
20 N’Genuity’s business relationships. To the extent that, after the confirmation date, Pierre
21 Foods improperly solicited or sold products to vendors, acted fraudulently, or made false and
22 defamatory statements about N’Genuity, claims based on those events remain viable. To the

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24
25 ⁶N’Genuity also seems to make an equitable argument, extolling the Court to ignore
26 the discharge statutes because enforcing them would “allow Pierre Foods to exploit the
27 bankruptcy code,” and “[t]his Court should not sanction such deliberate conduct.” (Dkt. #
28 35 at 8.) The Court, however, is not at liberty to ignore the bankruptcy statutes, and it will
not fail to enforce the discharge entered by the bankruptcy court.

1 extent that any of N’Genuity’s claims are based on events occurring before December 12,
2 2008, these claims have been discharged and are therefore dismissed.⁷

3 However, it is appropriate at this point to dismiss N’Genuity’s fraudulent inducement
4 claim against Pierre Foods in its entirety. N’Genuity’s Complaint states that Defendants
5 “fraudulently induced N’Genuity to enter into the N’Genuity Supplier Agreement and the
6 Confidentiality and Non Disclosure Agreement and to continue with its ongoing contractual
7 relationship and business activities with Pierre Foods.” (Dkt. # 1 at 27.) By definition, any
8 events that could have caused N’Genuity to maintain the contractual relationship with Pierre
9 Foods after it acquired Zartic, and later to sign the Supplier Agreement on August 27, 2008,
10 must have occurred prior to December 12, 2008, as N’Genuity itself alleges that it stopped
11 placing orders with Pierre Foods by November 25, 2008. Thus, no inducement could have
12 occurred after that date, and N’Genuity’s claim against Pierre Foods for fraudulent
13 inducement must be dismissed.

14 **III. Specific Claims⁸**

15 Defendants advance a host of specific challenges to N’Genuity’s claims, many of
16 which challenge the sufficiency of the factual allegations provided in the Complaint. As a
17 general matter, Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to set forth a
18 “short and plain statement of the claim showing that the [plaintiff] is entitled to relief,” in
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21 ⁷The parties do not make specific arguments about the factual theories underlying each
22 claim, and the scope of the Court’s ruling will not exceed the scope of the parties’ arguments.
23 Thus, the Court can do no more at this time than hold that N’Genuity’s claims against Pierre
24 Foods are dismissed to the extent that they are based on events occurring prior to the
25 confirmation date.

26
27 ⁸In an apparent attempt to keep their options open as to what the controlling law is,
28 the parties cite sporadically to both Ohio and Arizona law throughout this section. For
purposes of this motion, the state law necessary to resolve the parties’ arguments is either not
relevant, not disputed, or substantially the same in both Arizona and Ohio. However, the
Court is not inclined to continue to conduct parallel analyses under both Arizona and Ohio
law. Thus, any future motions should actually take a position on what law applies and cite
only to that law.

1 order to “give the defendant fair notice of what the claim is and the grounds upon which it
2 rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355
3 U.S. 41, 47 (1957)).

4 To survive a dismissal for failure to state a claim, a complaint must contain more than
5 a “formulaic recitation of the elements of a cause of action”; it must contain factual
6 allegations sufficient to “raise the right of relief above the speculative level.” *Id.* “The
7 pleading must contain something more . . . than . . . a statement of facts that merely creates
8 a suspicion [of] a legally cognizable right of action.” *Id.* (quoting 5 Charles Alan Wright &
9 Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004)). While “a
10 complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to state
11 a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d
12 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial
13 plausibility when the plaintiff pleads factual content that allows the court to draw the
14 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
15 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility
16 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.
17 Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it
18 ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.*
19 (quoting *Twombly*, 550 U.S. at 555) (internal citations omitted).

20 When analyzing a complaint for failure to state a claim, “[a]ll allegations of material
21 fact are taken as true and construed in the light most favorable to the non-moving party.”
22 *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). In addition, the Court must assume
23 that all general allegations “embrace whatever specific facts might be necessary to support
24 them.” *Pelozza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994). Although
25 “a complaint need not contain detailed factual allegations,” *Clemens*, 534 F.3d at 1022, the
26 Court will not assume that the plaintiff can prove facts different from those alleged in the
27 complaint, see *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459
28 U.S. 519, 526 (1983); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407

1 F.3d 1027, 1035 (9th Cir. 2005). Similarly, legal conclusions couched as factual allegations
2 are not given a presumption of truthfulness, and “conclusory allegations of law and
3 unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*,
4 139 F.3d 696, 699 (9th Cir. 1998).

5 **A. Claim One**

6 Defendants argue that Claim One (breach of contract) must be dismissed because
7 N’Genuity has failed to sufficiently allege damages. (Dkt. # 18 at 8-9.) However, the
8 Complaint alleges damages in the form of lost profits on sales it has made and will make, the
9 loss of other sales in their entirety, and the disgorgement of profits Pierre Foods has
10 improperly garnered. (Dkt. # 1 at 32.) N’Genuity also alleges that its business reputation
11 has been damaged, that it has suffered consequential damages, and that it is entitled to
12 prejudgment interest on liquidated damages. (*Id.* at 33.) N’Genuity has made extensive
13 factual allegations regarding the business relationship between N’Genuity and Pierre Foods,
14 the asserted obligations between the companies, and how it believes those obligations were
15 violated. These allegations are sufficient to render the notion that N’Genuity has been
16 damaged plausible, and it need do no more to survive a motion to dismiss. *See Forte Capital*
17 *Partners v. Harris Cramer*, No. C07-01237, 2007 WL 1430052, at *7-8 (N.D. Cal. May 14,
18 2007) (finding a general averment of damages sufficient to survive a motion to dismiss
19 because the simplified pleading standard of Rule 8 applies to the pleading of damages and
20 because “ultimately [the plaintiff’s] damages is a question of fact subject to proof, and is
21 inappropriate to support [the] motion to dismiss”). Thus, Claim One is not deficient in this
22 respect.

23 Defendants also argue that N’Genuity has not sufficiently alleged a breach because
24 any oral promises it made cannot form the basis of a claim for breach. (Dkt. # 18 at 9-10.)
25 However, it is not clear from the Complaint that the breach of contract claim is premised on
26 unwritten promises. Rather, the Complaint refers to breaches of the Supplier Agreement and
27 the Confidentiality and Nondisclosure Agreement, both of which are alleged to be written
28

1 documents (*see* Dkt. # 1 at 9) to which Defendants' arguments are inapplicable. Thus, Claim
2 One need not be dismissed.⁹

3 **B. Claim Two**

4 Defendants argue that Claim Two (breach of the duty of good faith and fair dealing)
5 fails because such a claim cannot be premised on actions preceding any contractual
6 agreement. (Dkt. # 18 at 11.) N'Genuity defends this claim only by arguing that its
7 allegations rest on Defendants' conduct after entering the agreements, and not on pre-contract
8 actions. (Dkt. # 35 at 16-17.) By conceding that its claims rest solely on post-contract
9 activity, and by failing to defend the claim's viability if predicated upon pre-contract activity,
10 N'Genuity has abandoned the challenged aspect of this claim. *See Jenkins v. County of*
11 *Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005); *Foster v. City of Fresno*, 392 F. Supp.
12 2d 1140, 1147 n.7 (E.D. Cal. 2005) (citing *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th
13 Cir. 2000); *Doe v. Benicia Unified Sch. Dist.*, 206 F. Supp. 2d 1048, 1050 n.1 (E.D. Cal.
14 2002)). Claim Two is therefore dismissed to the extent that it is predicated on pre-contract
15 actions, but it remains viable as to any post-contract actions.

16 **C. Claims Three, Four, and Five**

17 Defendants argue that N'Genuity's fraud claims (Claims Three, Four, and Five) are
18 not pled with the requisite degree of particularity. (Dkt. # 18 at 11-12.) If a complaint
19

20 ⁹To the extent that the breach of contract claims are predicated on oral agreements,
21 the parties' arguments about those agreements are too fact-intensive to be disposed of on a
22 motion to dismiss. For instance, Defendants' argument that evidence of oral agreements is
23 prohibited by the parol evidence rule requires the Court to determine whether the Supplier
24 Agreement is "fully integrated," which in turn requires the consideration of extrinsic
25 evidence. *See Anderson v. Preferred Stock Food Mkts., Inc.*, 175 Ariz. 208, 211, 854 P.2d
26 1194, 1197 (Ct. App. 1993); *Nat'l City Bank v. Donaldson*, 642 N.E.2d 58, 61 (Ohio Ct.
27 App. 1994). On a motion to dismiss, however, the Court looks to the pleadings on file, not
28 to extrinsic evidence, unless it converts the motion to dismiss into a motion for summary
judgment and provides the opportunity for discovery. *See Inlandboatmens Union Pac. v.*
Dutra Group, 279 F.3d 1075, 1083 (9th Cir. 2002). The Court will therefore defer ruling on
the propriety of this particular theory of breach until there is a sufficient factual record to
permit doing so and it is challenged on a motion for summary judgment.

1 includes allegations of fraud, Federal Rule of Civil Procedure 9(b) requires the “party [to]
2 state with particularity the circumstances constituting fraud.” This requires that the party
3 alleging fraud include an account of the “time, place, and specific content of the false
4 representations as well as the identities of the parties to the misrepresentation.” *Edwards v.*
5 *Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). “Rule 9(b) does not allow a
6 complaint to merely lump multiple defendants together but require[s] plaintiffs to
7 differentiate their allegations when suing more than one defendant and inform each defendant
8 separately of the allegations surrounding his alleged participation in the fraud.” *Swartz v.*
9 *KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (citation and ellipsis omitted). “To
10 comply with Rule 9(b), allegations of fraud must be specific enough to give defendants
11 notice of the particular misconduct which is alleged to constitute the fraud charged so that
12 they can defend against the charge and not just deny that they have done anything wrong.”
13 *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal quotations omitted).

14 Here, all of the allegations of fraudulent conduct are directed against “Defendants”
15 generally and are not differentiated such that each Defendant is apprised of the specific
16 misconduct with which he has been charged. (See Dkt. # 1 at 25-27.) This fails the Rule
17 9(b) test. See *Swartz*, 476 F.3d at 764-65. The fraud claims likewise do not sufficiently
18 plead the “time, place, and specific content of the false representations.” *Edwards*, 356 F.3d
19 at 1066. While some dates are provided for certain events that might be construed as
20 fraudulent (such as dates of some conference calls), most of the Complaint simply describes
21 a general course of conduct that could cover any number of fraudulent activities, and the
22 fraud claims themselves provide no specific discussion about what the actual fraud is that
23 N’Genuity is alleging. Rather, the fraud sections simply make general claims for fraud with
24 no specific explanation of what activity was allegedly fraudulent. This is insufficient under
25 Rule 9(b). See *SEC v. Patel*, No. 07-CV-39-SM, 2009 WL 2015794, at *1-2 (D.N.H. July
26 7, 2009) (explaining that “to reasonably determine that any particular claim should not be
27 dismissed would require the court to first comb the complaint in search of factual support for
28 each element of the multiple claims pled as to each defendant, and then evaluate the

1 adequacy of that factual support,” which “is, of course, plaintiff’s job in the first instance,
2 not the court’s”). The fraud claims are therefore dismissed.

3 Because it is not clear that amendment would be futile, this dismissal is without
4 prejudice to the claims’ reassertion in an amended complaint. *See Swartz*, 476 F.3d at 761
5 (explaining that a claim is properly dismissed with prejudice where amendment would be
6 futile). However, if N’Genuity elects to replead its fraud claims, it must plead the “time,
7 place, and specific content” of each misrepresentation as well as “the identities of the parties”
8 involved in each misrepresentation. *Edwards*, 356 F.3d at 1066.

9 **D. Claims Six and Seven**

10 Defendants argue that Claim Six (interference with existing contractual relationships)
11 and Claim Seven (interference with prospective business relationships) should be dismissed
12 because N’Genuity “does not allege the existence of any actual contract or business
13 relationship that has been subject to interference.” (Dkt. # 18 at 13-15.) This argument
14 strains credulity. The Complaint plainly alleges that N’Genuity had ongoing business
15 relationships with prime vendors, and it is these relationships that are the subject of the
16 interference claims. Defendants also seem to suggest that no contractual obligations between
17 Pierre Foods and N’Genuity have been breached, but for the reasons described elsewhere in
18 this order that argument is not persuasive. N’Genuity has alleged that Pierre Foods, through
19 the Individual Defendants, fraudulently insinuated itself into a business relationship with
20 N’Genuity for the purpose of sabotaging and co-opting N’Genuity’s relationships with prime
21 vendors. These are sufficient allegations to state claims for interference with existing and
22 prospective business and contractual relationships.

23 **E. Claim Eight**

24 Defendants argue that Claim Eight (unfair competition) must be dismissed because
25 N’Genuity “never alleges, and cannot allege, that any Defendant violated any agreement to
26 refrain from competition.” (Dkt. # 18 at 12.) However, in Arizona “[t]he common law
27 doctrine of unfair competition is based on principles of equity,” and thus “[t]he doctrine
28 encompasses several tort theories, such as trademark infringement, false advertising,

1 ‘palming off,’ and misappropriation.” *Fairway Constructors, Inc. v. Ahern*, 193 Ariz. 122,
2 124, 970 P.2d 954, 956 (Ct. App. 1998). Defendants never attempt to dispute these tort-
3 based theories of unfair competition, which have factual support in the Complaint’s
4 allegation that Pierre Foods was attempting to pass off N’Genuity’s chicken wing products
5 as its own.

6 In any event, N’Genuity defends the contract-based theory of unfair competition by
7 arguing that an underlying agreement not to compete is part of both the written
8 Confidentiality and Nondisclosure Agreement and an express oral agreement between the
9 parties. (Dkt. # 35 at 17-18.) To the extent this claim rests on the oral agreement, for the
10 reasons described above in footnote nine the validity of that agreement (and thus this claim)
11 can only be determined in light of an evidentiary record. As for the written Confidentiality
12 and Nondisclosure Agreement, Defendants have made no attempt to rebut N’Genuity’s
13 argument that section two of that agreement constitutes a covenant not to compete using
14 N’Genuity’s products. (*See id.* at 14, 17.) That section provides that neither party would
15 make use of any confidential information given by the other party without consent. (Dkt. #
16 35 Ex. 3 at 1 (“The parties agree that neither Party, its agents, employees nor representatives,
17 will use the Confidential Information of the other Party except as agreed upon in writing by
18 the Parties.”).) In the absence of any argument to the contrary, the Court finds that this
19 section could be read as an agreement not to compete using confidential information. Thus,
20 N’Genuity has sufficiently stated a claim for unfair competition at this stage in the litigation.

21 **F. Claims Nine and Ten**

22 Defendants argue that Claim Nine (defamation) and Claim Ten (trade libel and
23 slander) are not pled with particularity. (Dkt. # 18 at 13.) However, Defendants provide no
24 persuasive authority that defamation, libel, and slander claims are required to be pled with
25 particularity. The Federal Rules of Civil Procedure do not include these claims among the
26 list of allegations that must be pled with particularity, and “[a] requirement of greater
27 specificity for [pleading] particular claims is a result that must be obtained by the process of
28 amending the Federal Rules, and not by judicial interpretation.” *Swierkiewicz v. Sorema*

1 N.A., 534 U.S. 506, 515 (2002); see *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125
2 (9th Cir. 2002) (“[N]early all of the circuits have now disapproved any heightened pleading
3 standard in cases other than those governed by Rule 9(b).”).

4 The case upon which Defendants’ argument to the contrary relies, *Athans v. Starbucks*
5 *Coffee Co.*, No. CV-06-1841, 2007 WL 899130, at *1-2 (D. Ariz. Mar. 23, 2007), is readily
6 distinguishable. In *Athans*, the district court had dismissed a pro se plaintiff’s complaint
7 because of “a complete lack of factual detail and any articulated legal basis for Defendant’s
8 alleged liability.” *Id.* at *1. In dismissing the complaint’s purported defamation claim, the
9 court instructed the plaintiff to “identify what was said or written, by whom, when, and how
10 [the plaintiff] was injured” if the plaintiff chose to file an amended complaint. *Id.* at *2. The
11 plaintiff did file an amended complaint, but its allegations were “still so vague and
12 conclusory that they fail[ed] to provide [the defendant] with fair notice of the claim against
13 it.” *Id.* Therefore, the court dismissed the amended complaint. *Id.*

14 Contrary to Defendants’ reading of the case, the court did not dismiss the defamation
15 claim because it was not pled with particularity. In fact, the *Athans* court explicitly
16 “recognize[d] that this claim is governed by the notice pleading standards of Rule 8, not the
17 more demanding standards of Rule 9.” *Id.* The court’s initial order was meant simply to
18 instruct a pro se plaintiff on the type of factual detail that would enable him to meet the
19 pleading requirements and was not announcing a broader requirement that the “who, what,
20 when, where, and how” of every specific defamatory statement be set out in a complaint.
21 The court’s ultimate dismissal, likewise, was predicated upon a failure to provide more than
22 “vague and conclusory” allegations, not upon a failure to plead defamation with particularity.

23 Here, the defamation claims are adequately pled. The Complaint alleges that during
24 the course of its business relationship with N’Genuity, Pierre Foods and Defendant Denning
25 repeatedly told prime vendors and ACES that N’Genuity wrongfully refused to place orders
26 with Pierre Foods, placing it in an untenable business position, when Pierre Foods knew that
27 this was untrue. (Dkt. # 1 at 22-24.) N’Genuity explains at length why it believes it had
28 every right to stop placing orders with Pierre Foods (*id.* at 14-17), and further explains how

1 it was damaged (*id.* at 24). Accompanied by the factual background provided above, these
2 are sufficient allegations to state claims for defamation, libel, and slander. Claims Nine and
3 Ten will therefore not be dismissed.¹⁰

4 **G. Claim Eleven**

5 Defendants argue that Claim Eleven (misappropriation of trade secrets and proprietary
6 information) should be dismissed because N’Genuity provides insufficient detail about what
7 the trade secret is and how it was misappropriated. (Dkt. # 18 at 15-16.) This argument is
8 unpersuasive. The Complaint provides that the unauthorized misappropriation of
9 N’Genuity’s trade secrets and proprietary information is “Pierre Foods’ unauthorized sale
10 of N’Genuity’s product,” that being the chicken wing products at the center of this litigation.
11 (Dkt. # 1 at 21.) While the Complaint does not explicitly say that “the trade secret is the
12 chicken wing product,” that is the clear implication of the Complaint given N’Genuity’s
13 allegation that it has “specially developed [the] chicken wing product, with N’Genuity’s
14 formula and specifications for taste, quality, and safety.” (*Id.* at 4.) Defendants have thus
15 been fairly put on notice that the trade secret at issue is the formula for the chicken wing
16 products, which N’Genuity alleges was misappropriated through overproduction and
17 unauthorized sales in violation of Pierre Foods’ agreements with N’Genuity. Defendants’
18 argument that N’Genuity “know[s] this is not the case,” and that the recipe actually belongs
19 to Pierre Foods (Dkt. # 42 at 16), is unavailing. On a motion to dismiss, the Court must
20 accept the allegations in the Complaint as true and construe them in the light most favorable
21 to N’Genuity. *Smith*, 84 F.3d at 1217. The Complaint alleges that the formula and
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23

24 ¹⁰It is clear from the Complaint, however, that only Pierre Foods and Denning are
25 alleged to be liable on these claims. (*See* Dkt. # 1 at 22-24 (alleging only that “Pierre Foods
26 and its employee and representative Tim Denning have made numerous false, defamatory,
27 and slanderous statements about N’Genuity”).) Thus, Claims Nine and Ten are dismissed
28 to the extent that they are asserted against Defendants Woodhams Sr. and Jr. It is not clear,
however, that N’Genuity could not amend its Complaint to add these Defendants, and thus
the dismissal is without prejudice. *See Swartz*, 476 F.3d at 761.

1 specifications for the chicken wing products belong to N’Genuity. (Dkt. # 1 at 4.) Thus,
2 Claim Eleven need not be dismissed.

3 **H. Claim Twelve**

4 Defendants’ last argument is that N’Genuity cannot seek a declaratory judgment
5 (Claim Twelve). (Dkt. # 18 at 16-17.) Defendants first argue that this claim should be
6 dismissed because N’Genuity is also seeking money damages. However, the mere fact that
7 N’Genuity is seeking monetary damages does not mean that it cannot seek a declaratory
8 judgment. “[W]hen other claims are joined with an action for declaratory relief (e.g., bad
9 faith, breach of contract, breach of fiduciary duty, rescission, or claims for other monetary
10 relief), the district court should not, as a general rule, remand or decline to entertain the claim
11 for declaratory relief.” *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1112 (9th
12 Cir. 2001) (quoting *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998)).
13 Defendants have not provided the Court any reason to depart from this general rule.

14 The declaratory claim in this case is not coextensive with the other claims, and thus
15 N’Genuity has not “sought coercive relief on the issue,” as Defendants argue. Rather,
16 N’Genuity requests a declaration that it performed all of its obligations under its contracts,
17 that it did not breach or violate any obligations or duties to Pierre Foods, and that Pierre
18 Foods is no longer entitled to sell any N’Genuity product. The first two requests are
19 designed to insulate N’Genuity from any counterclaims Pierre Foods may intend to assert,
20 and are not elements of N’Genuity’s other claims. The third request is designed to stop any
21 future sales of chicken wing products, actions which (since they have not yet occurred) are
22 also not the subject of N’Genuity’s other claims.

23 Defendants also argue, very briefly, that the request for declaratory relief should be
24 dismissed because there are no facts in the Complaint to support a claim that Pierre Foods
25 is prohibited from selling excess chicken wing products. This argument seems to be based
26 on the notion that N’Genuity has not alleged that such sale would violate its contractual
27 obligations. However, N’Genuity has directly alleged that the sale of these products without
28 authorization violates the Confidentiality and Nondisclosure Agreement and other contractual

1 obligations. (Dkt. # 1 at 21.) Thus, the Court will not dismiss the declaratory claim under
2 this reasoning.

3 **CONCLUSION**

4 For the reasons described above:

5 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (Dkt. # 18) is
6 **GRANTED IN PART** and **DENIED IN PART**.

7 **IT IS FURTHER ORDERED** that Claim Five (fraudulent inducement) against
8 Pierre Foods is **DISMISSED WITH PREJUDICE**.

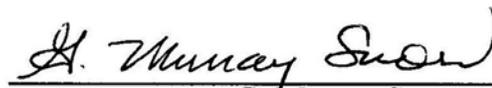
9 **IT IS FURTHER ORDERED** that all claims against Pierre Foods based on events
10 occurring prior to December 12, 2008, are **DISMISSED WITH PREJUDICE**.

11 **IT IS FURTHER ORDERED** that Claim Two (breach of the duty of good faith and
12 fair dealing) against all Defendants is **DISMISSED WITH PREJUDICE** to the extent that
13 it relies on pre-contract actions.

14 **IT IS FURTHER ORDERED** that Claim Three (fraudulent misrepresentation)
15 against all Defendants, Claim Four (fraudulent concealment and nondisclosure) against all
16 Defendants, and Claim Five (fraudulent inducement) against the Individual Defendants are
17 **DISMISSED WITHOUT PREJUDICE**.

18 **IT IS FURTHER ORDERED** that Claim Nine (defamation, libel, and slander) and
19 Claim Ten (trade libel and slander) are **DISMISSED WITHOUT PREJUDICE** to the
20 extent that they are asserted against Defendants Woodhams Sr. and Woodhams Jr.

21 DATED this 9th day of September, 2009.

22 
23 _____
24 G. Murray Snow
25 United States District Judge
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