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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JOLI GRACE, LLC, a Louisiana
Limited Liability Company,

Plaintiff,

v.

COUNTRY VISIONS, INC., a
California Corporation,

Defendant.

CIV. NO.: 2:16-1138 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
TO DISMISS FIRST AMENDED
COUNTERCLAIM AND MOTION FOR
PRELIMINARY INJUNCTION

AND RELATED COUNTERCLAIMS.

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Plaintiff Joli Grace, LLC ("Joli Grace") brought this
action against defendant Country Visions, Inc. ("Country
Visions") for breach of contract and declaratory relief arising
from a series of franchise agreements for plaintiff's use of
defendant's retail stores under the name "Apricot Lane." Country
Visions brought a counterclaim against Joli Grace, Stacie
Lancaster Children's Trust ("Trust"), Christine Thornhill, Arthur

1 Lancaster, Love Grace Holdings, Inc. ("Love Grace"), and Stacie
2 Lancaster (collectively "counter-defendants") for breach of
3 contract, declaratory relief, violations of the Lanham Act,
4 violations of California Unfair Competition Law, violations of
5 Louisiana Unfair Trade Practices and Consumer Protection Law
6 ("LUTPA"), tortious interference with contracts, fraud, and
7 accounting arising out of the same franchise agreements. Before
8 the court are counter-defendants' motion to dismiss pursuant to
9 Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6) and Country
10 Visions's motion for preliminary injunctive relief.

11 I. Factual and Procedural History

12 Country Visions is a California corporation that
13 operates and grants franchises for Apricot Lane, a women's
14 specialty clothing boutique. (First Am. Countercl. ¶¶ 1, 10
15 (Docket No. 14).) Joli Grace is a Louisiana corporation that the
16 Trust solely owns, Stacie Lancaster manages, and Stacie Lancaster
17 and her husband Arthur Lancaster founded. (Id. ¶¶ 1-2, 11, 13,
18 24.) Love Grace is a Delaware corporation that Arthur Lancaster
19 solely owns and the Lancasters allegedly founded after the
20 founding of Joli Grace. (Id. ¶¶ 4, 16, 44.)

21 Beginning in 2009, Joli Grace allegedly received
22 approval and began opening a series of Apricot Lane boutiques as
23 a franchisee. (Id. ¶ 2.) Stacie Lancaster, on behalf of Joli
24 Grace, executed Franchise Agreements for these Apricot Lane
25 stores, which contained non-compete clauses and held Stacie
26 Lancaster personally liable for breaches of the Franchise
27
28

1 Agreements.¹ (Id. ¶¶ 22-23.) Stacie Lancaster allegedly manages
2 the day-to-day tasks of Joli Grace on behalf of the Trust and
3 Arthur Lancaster is in charge of financial responsibilities for
4 Joli Grace. (Id. ¶ 25.)

5 By April 2015, Love Grace opened its first Blu Spero
6 store. (Id. ¶¶ 29, 41.) Blu Spero boutiques allegedly sell the
7 same brands and merchandise as Apricot Lane. (Id. ¶ 3.) Arthur
8 Lancaster manages Blu Spero and is the sole owner, but a press
9 release previously identified Stacie Lancaster as the founder of
10 Blu Spero. (Id. ¶¶ 39, 43.) Country Visions alleges that Joli
11 Grace and Stacie Lancaster have breached several aspects of the
12 Franchise Agreements since the opening of the Blu Spero stores.
13 (Id. ¶¶ 32-33, 35, 54(d).)

14 In August 2016, Country Visions specifically terminated
15 the Franchise Agreement for Joli Grace's Apricot Lane store in
16 Hattiesburg, Mississippi for failure to timely cure a default.
17 (Id. ¶¶ 57-59.) Pursuant to the Hattiesburg Franchise Agreement,
18 Country Visions allegedly informed Joli Grace that it intended to
19 exercise its right to take possession of the premises of the
20 Hattiesburg store. (Id. ¶ 59.) Joli Grace has not turned over
21 the Hattiesburg Lease to Country Visions. (Id. ¶ 60.)

22 Joli Grace initiated this action against Country
23 Visions, alleging breach of contract and seeking declaratory

24
25 ¹ The non-compete clauses prohibit Joli Grace and Stacie
26 Lancaster from owning, engaging in, or having any interest in any
27 business "that sells through any channel of distribution of [sic]
28 any of the types of merchandise that are the same as or similar
to the types of merchandise being sold through the Specialty
Stores, unless granted prior approval in writing" by Country
Visions. (Id. ¶ 28, Ex. K.)

1 relief regarding the enforceability of the non-compete clauses.
2 (See Docket No. 1.) Country Visions then filed a counterclaim
3 against Joli Grace and the other counter-defendants, alleging the
4 following causes of action: (1) breach of the Franchise
5 Agreements; (2) breach of the personal guarantees; (3) breach of
6 contract for failure to turn over the Hattiesburg Lease; (4)
7 breach of contract for failure to pay past due royalties; (5)
8 declaratory relief that the transfer of sole membership in Joli
9 Grace from Stacie Lancaster to the Trust is void; (6) violation
10 of the Lanham Act for the operation of Hattiesburg Apricot Lane
11 store; (7) violation of the Lanham Act for the operation of the
12 Blu Spero stores; (8) violation of California's Unfair
13 Competition Law; (9) violation of LUTPA; (10) tortious
14 interference with contracts; (11) fraud; and (12) accounting.

15 Counter-defendants move to dismiss all causes of action
16 against Love Grace, Arthur Lancaster, the Trust, and Thornhill
17 for lack of personal jurisdiction, and some causes of actions on
18 other grounds. Country Visions moves for preliminary injunctive
19 relief requiring Joli Grace and Stacie Lancaster to turn over the
20 Hattiesburg Lease, requiring counter-defendants to cease
21 operating the Blu Spero boutique at the Hattiesburg store
22 location, and preventing counter-defendants from using the
23 Apricot Lane mark at the Hattiesburg store.

24 II. Discussion

25 A. Rule 12(b)(2) Motion

26 A plaintiff has the burden of establishing that the
27 court has personal jurisdiction over a defendant. Doe v. Unocal
28 Corp., 248 F.3d 915, 922 (9th Cir. 2001). Where the court does

1 not hold an evidentiary hearing and the motion is based on
2 written materials, the plaintiff need only establish a prima
3 facie showing of personal jurisdiction. Schwarzenegger v. Fred
4 Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). In such a
5 case, “[u]ncontroverted allegations in the complaint must be
6 taken as true” and “[c]onflicts between parties over statements
7 contained in affidavits must be resolved in the plaintiff’s
8 favor.” Id.

9 If there is no applicable federal statute governing
10 personal jurisdiction, the court applies the law of the state in
11 which it sits. Love v. Associated Newspapers, Ltd., 611 F.3d
12 601, 608-09 (9th Cir. 2010). “California’s long-arm jurisdiction
13 statute is coextensive with federal due process requirements.”
14 Id.; see also Cal. Code Civ. Proc. § 410.10. Due process
15 requires that for a nonresident defendant to be subject to the
16 court’s jurisdiction, the defendant must “have certain minimum
17 contacts with [the forum state] such that the maintenance of the
18 suit does not offend traditional notions of fair play and
19 substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S.
20 310, 316 (1945) (citation omitted). The strength of contacts
21 required depends on which of the two categories of personal
22 jurisdiction a litigant invokes: specific jurisdiction or general
23 jurisdiction. Ranza v. Nike, Inc., 793 F.3d 1059, 1068 (9th Cir.
24 2015) (citing Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014)).

25 Specific jurisdiction exists when a case “aris[es] out
26 of or relate[s] to the defendant’s contacts with the forum.”
27 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408,
28 414 n.8 (1984). The focus is on the “relationship among the

1 defendant, the forum, and the litigation.” Shaffer v. Heitner,
2 433 U.S. 186, 204 (1977). “[T]he relationship must arise out of
3 contacts that the defendant himself creates with the forum
4 state.” Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014). The
5 court must thus “look[] to the defendant’s contacts with the
6 forum State itself, not the defendant’s contacts with persons who
7 reside there.” Id.

8 Counter-defendants do not contest that the court has
9 personal jurisdiction over Joli Grace and Stacie Lancaster. (See
10 Mot. 7:10-14:26 (Docket No. 17-1).) Thus, the question is
11 whether the court has personal jurisdiction over the remaining
12 counter-defendants.

13 1. Personal Jurisdiction over Arthur Lancaster
14 and Love Grace

15 Country Visions argues the court has personal
16 jurisdiction over Arthur Lancaster and Love Grace because they
17 are alter egos of Stacie Lancaster and Joli Grace or,
18 alternatively, in connection with their tortious actions directed
19 at Country Visions.²

20 The court can exercise personal jurisdiction over an
21 entity that would not ordinarily be subject to personal
22 jurisdiction when it is an alter ego of an entity that the court
23 has personal jurisdiction over. Ranza, 793 F.3d at 1070-71 (“As
24 in the context of corporate liability, the veil separating
25 affiliated corporations may also be pierced to exercise personal

26 ² Country Vision, as the party bearing the burden of
27 proving jurisdiction, does not distinguish between Arthur
28 Lancaster and Love Grace when discussing whether the court has
personal jurisdiction over them.

1 jurisdiction over a foreign defendant in certain limited
2 circumstances.”). This applies to individuals and corporations.
3 Transamerica Corp. v. Compana, LLC, Civ. No. 05-00549 MJJ, 2005
4 WL 2035594, at *4 (N.D. Cal. Aug. 22, 2005) (quoting Patin v.
5 Thoroughbred Power Boats Inc., 294 F.3d 640, 653 (5th Cir.
6 2002)). For a court to exercise personal jurisdiction over a
7 defendant under an alter ego theory, two conditions must exist:
8 “(1) there is such unity of interest and ownership that the
9 separate personalities [of the entities] no longer exist and (2)
10 that failure to disregard [their separate identities] would
11 result in fraud or injustice.” Ranza, 793 F.3d at 1073
12 (alteration in original) (quoting Unocal, 248 F.3d at 926).

13 The first prong looks for “pervasive control,” id., and
14 whether “the parent controls the subsidiary ‘to such a degree as
15 to render the latter the mere instrumentality of the former,’”
16 Unocal, 248 F.3d at 926 (quoting Calvert v. Huckins, 875 F. Supp.
17 674, 678 (E.D. Cal. 1995) (Whelan, J.)). Factors to be
18 considered include (1) commingling of funds and assets; (2)
19 observation of corporate formalities; (3) use of the same offices
20 and employees; (4) identity of directors and officers; (5) sole
21 ownership of all stock by one individual or members of a family;
22 (6) inadequate capitalization; (7) failure to maintain arm’s
23 length relationship; (8) use of the corporation as a shell for a
24 single venture or the business of an individual or another
25 corporation; and (9) manipulation of assets and liabilities
26 between entities. Hall-Magner Grp. v. Firsten, Civ. No. 11-312
27 JLS POR, 2011 WL 5036027, at *3 (S.D. Cal. Oct. 24, 2011);
28 Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d

1 825, 838-40 (1st Dist. 1962). This is a high standard, and
2 courts have found "no alter ego relationship [is] created [even
3 when a] parent company guaranteed loans for the subsidiary,
4 reviewed and approved major decisions, placed several of its
5 directors on the subsidiary's board, and was closely involved in
6 the subsidiary's pricing decisions." Ranza, 793 F.3d at 1074-75
7 (quoting Unocal, 248 F.3d at 928).

8 Applying the nine factors and taking conflicts between
9 affidavits in favor of Country Visions, there are insufficient
10 allegations that Love Grace and Arthur Lancaster are alter egos
11 of Joli Grace and Stacie Lancaster. Most importantly, there is
12 no under-capitalization in this case. See Firstmark Capital
13 Corp. v. Hempel Fin. Corp., 859 F.2d 92, 94 (9th Cir. 1988) ("We
14 have held that under California law the 'kind of inequitable
15 result that makes alter ego liability appropriate is an abuse of
16 the corporate form, such as under-capitalization'"

17 (quoting Orloff v. Allman, 819 F.2d 904, 909 (9th Cir. 1987))).
18 If an entity is a shell without assets, the plaintiff is
19 effectively prevented from recovery. See id. Joli Grace has
20 assets in excess of \$2 million with a net worth in excess of
21 \$650,000. (Stacie Lancaster Decl. ("Stacie Decl.") ¶ 8, Ex. 1
22 (Docket No. 17-2).) Further, Country Visions has not alleged
23 that Arthur Lancaster or Love Grace treat Joli Grace's assets as
24 their own assets. Joli Grace's adequate capitalization weighs
25 strongly in favor of finding Joli Grace is not an alter ego of
26 Arthur Lancaster or Love Grace.

27 There is some evidence of commingling of assets,
28 however. Country Visions alleges at least three Apricot Lane

1 stores operated by Joli Grace sell Blu Spero merchandise. (First
2 Am. Countercl. ¶ 42; Liming Decl. ¶¶ 2, 6 (Docket No. 26); Liming
3 Decl. Exs. 2-4 (Docket Nos. 26-2 to -4).) Country Visions also
4 alleges at least two former Apricot Lane stores are now Blu Spero
5 stores operated by Arthur Lancaster and Love Grace, even though
6 the Blu Spero stores still sell Apricot Lane clothing inside.
7 (First Am. Countercl. ¶ 41; Petersen Decl. ¶ 21; Petersen Decl.
8 Exs. N-O (Docket No. 25-14 to -15); Martin Decl. ¶¶ 3, 5, Exs. A-
9 B (Docket No. 27).)

10 It is uncontroverted that Joli Grace maintains
11 corporate formalities and Joli Grace and Love Grace have separate
12 directors and officers. Stacie Lancaster, in her declaration,
13 stated that Joli Grace maintains separate books and records.
14 (Stacie Decl. ¶ 4.) Joli Grace's balance sheet also shows that
15 Arthur Lancaster loaned Joli Grace money, suggesting Joli Grace
16 is maintaining its corporate formalities. (See id. ¶ 6, Ex. 1);
17 cf. Kramer Motors, Inc. v. Britis Leyland, Ltd., 628 F.2d 1175,
18 1177 (9th Cir. 1980) (holding no alter ego relationship was
19 created when parent company guaranteed loans for subsidiary,
20 among other factors). Both Stacie Lancaster and Arthur Lancaster
21 affirm that there is no overlap between directors and officers in
22 Love Grace and Joli Grace. (Stacie Decl. ¶ 4; Arthur Lancaster
23 Decl. ("Arthur Decl.") ¶ 4 (Docket No. 17-3).) Both of these
24 factors favor a finding of no alter ego.

25 Counter-defendants do not contest that some employees
26 work for both Love Grace and Joli Grace. (Arthur Decl. ¶ 7.)
27 This includes Arthur Lancaster, who has been Joli Grace's primary
28 contact person with Country Visions for new stores, construction,

1 royalties, and financial matters. (Petersen Decl. ¶¶ 5-6.) At
2 Love Grace, Stacie Lancaster has her own phone extension where
3 there is a voicemail that states, "You have reached Stacie
4 Lancaster with Love Grace." (Petersen Decl. ¶ 13.) Counter-
5 defendants also concede that Love Grace and Joli Grace have the
6 same corporate address. (Arthur Decl. ¶ 7.) Such allegations,
7 however, are insufficient to justify viewing Joli Grace as Love
8 Grace and Arthur Lancaster's alter ego. See Ranza, 793 F.3d at
9 1074 (finding employees moving between entities is not enough to
10 undermine the entities' formal separation); Martinez v. Manheim
11 Cent. Cal., Civ. No. 1:10-1511 SKO, 2011 WL 1466684, at *6 (E.D.
12 Cal. Apr. 18, 2011) ("The fact that [a parent corporation] is
13 headquartered in the same place as its subsidiary and shares one
14 common director with [the subsidiary] does not indicate that the
15 two corporations have indistinct personalities.").

16 The ownership of Love Grace and Joli Grace also favors
17 a finding of no alter ego. The Trust solely owns Joli Grace, and
18 Stacie Lancaster manages Joli Grace as the trustor of the Trust.
19 (Stacie Decl. ¶ 3.) Arthur Lancaster solely owns Love Grace.
20 (Arthur Decl. ¶ 3.) While Stacie Lancaster, on at least one
21 occasion, represented to the public that she is the founder of
22 Blu Spero, (Petersen Decl. Ex. F (Docket No. 25-6)), her
23 management of Love Grace and Joli Grace would not be enough to
24 establish an alter ego relationship, Patterson v. Home Depot,
25 USA, Inc., 684 F. Supp. 2d 1170, 1178-79 (D. Ariz. 2010) (holding
26 that a parent and subsidiary having the same president was
27 insufficient to justify disregarding the corporate form).

28 The factor most indicative of an alter ego relationship

1 is the lack of an arm's length relationship. At least one
2 Apricot Lane store issues receipts stating "Follow us on Social
3 Media @ BluSpero." (Petersen Decl. ¶ 22, Ex. P (Docket No. 25-
4 16).) In one Blu Spero store that used to be an Apricot Lane
5 store, an employee informed all customers that the store
6 underwent a name change, "but everything else is the same."
7 (Martin Decl. ¶ 4.) When emailing Country Visions on Joli
8 Grace's behalf, Arthur Lancaster repeatedly represented that "we
9 are not opening and [sic] new stores." (Id. ¶ 7 (emphasis
10 added); Petersen Decl. Ex. C (Docket No. 25-3).) Viewed in
11 Country Visions's favor, Arthur Lancaster's use of "we"
12 demonstrates control and involvement in Joli Grace's operations.
13 Even after Arthur Lancaster informed Country Visions that he
14 would no longer be involved with the day-to-day operations of
15 Joli Grace, he continued to act as the primary point of contact
16 on financial and royalties matters. (See First Am. Countercl. ¶
17 27, Ex. M; Petersen Decl. ¶ 7, Ex. D (Docket No. 25-4).)

18 Country Visions has presented a wealth of evidence in
19 support of a relationship between Love Grace and Joli Grace, but
20 this evidence does not show that there was such a unity of
21 interest that their separate corporate personalities no longer
22 existed. Unocal, 248 F.3d at 928; see Kramer Motors, 628 F.2d at
23 1177 (holding no alter ego relationship existed when parent
24 guaranteed loans for the subsidiary, reviewed and approved major
25 decisions, placed several of its directors on the subsidiary's
26 board, and was closely involved in the subsidiary's pricing
27 decisions). Country Visions has failed to show how the
28 relationship between the parties "is typified by [Arthur

1 Lancaster and Love Grace's] control of [Joli Grace]'s internal
2 affairs or daily operations." See Unocal, 248 F.3d at 926.
3 Because Country Visions has not met the unity of interest prong,
4 the court need not address the second prong--whether failure to
5 disregard the separate identities would result in fraud or
6 injustice. See Ranza, 793 F.3d at 1073. The court will not
7 exercise personal jurisdiction over Arthur Lancaster and Love
8 Grace on the basis of an alter ego relationship.

9 The court likewise does not have specific jurisdiction
10 over Arthur Lancaster and Love Grace for claims seven, eight,
11 nine, and ten. In its opposition to counter-defendants' motion
12 to dismiss, Country Visions argues Love Grace and Arthur
13 Lancaster's actions were intended to harm a California entity--
14 Country Visions--and thus they are subject to this court's
15 jurisdiction. (Counter-claimant's Opp'n 29:26-30:3 (Docket No.
16 24).) However, "injury to [Country Visions] is not a sufficient
17 connection to the forum." See Walden, 134 S. Ct. at 1125.
18 "[T]he plaintiff cannot be the only link between the defendant
19 and the forum." Id. at 1122. Country Visions has presented no
20 evidence that Love Grace and Arthur Lancaster directed their
21 actions to the forum state, and thus Country Visions has not met
22 its burden establishing that the court has specific jurisdiction
23 over Love Grace and Arthur Lancaster.

24 Accordingly, the court must grant counter-defendants'
25 12(b) (2) motion to dismiss Country Visions's claims against
26 Arthur Lancaster and Love Grace.³

27 ³ Because the court lacks personal jurisdiction over
28 Arthur Lancaster and Love Grace, the court need not consider

1 2. Personal Jurisdiction over Thornhill and the
2 Trust

3 Counter-defendants also argue that the court does not
4 have personal jurisdiction over the Trust or Thornhill. Country
5 Visions contends it has personal jurisdiction over the Trust and
6 Thornhill because of the forum selection clauses in the Franchise
7 Agreements.

8 It is well established that personal jurisdiction is a
9 waivable right. See, e.g., Burger King v. Rudzewicz, 471 U.S.
10 462, 472 n.14 (1985). Relevant here, a defendant may consent to
11 personal jurisdiction through the execution of a valid forum
12 selection clause. See id. (“[P]arties frequently stipulate in
13 advance to submit their controversies for resolution within a
14 particular jurisdiction.”); Nat’l Equip. Rental, Ltd. v.
15 Szukhent, 375 U.S. 311, 315-16 (1964) (“[P]arties to a contract
16 may agree in advance to submit to the jurisdiction of a given
17 court”).

18 Here, the language of the pertinent forum selection
19 clause is clear. The “Franchisee and Franchisor hereby submit
20 and consent to the exclusive jurisdiction of the state and
21 federal courts with proper subject matter jurisdiction located in
22 the county or the judicial district in which Franchisor maintains
23 its principal offices at the time of such litigation.” (Petersen
24 Decl. Ex. A (“Franchise Agreement”) § 23.C (Docket No. 25-1).)

25 Arthur Lancaster and Love Grace’s motion to dismiss the First
26 Amended Counterclaim under Rule 12(b)(6). See Fasugbe v. Willms,
27 Civ. No. 2:10-2320 WBS KJN, 2011 WL 2119128, at *4, *7 (E.D. Cal.
28 May 26, 2011) (holding defendant’s Rule 12(b)(6) motion was moot
once the court determined it did not have personal jurisdiction
over defendant pursuant to Rule 12(b)(2)).

1 It is undisputed that Joli Grace is the Franchisee, not the Trust
2 or Thornhill. (Id. at 1.) Neither the Trust nor Thornhill are
3 signatories to any agreement, let alone an agreement with a forum
4 selection clause binding more than only Joli Grace as the
5 Franchisee. Under the clear terms of the forum selection clause,
6 the Trust and Thornhill did not waive personal jurisdiction.

7 Country Visions does not argue there is any other basis
8 for the court to exercise personal jurisdiction over the Trust
9 and Thornhill. The Trust is a Louisiana entity and Thornhill is
10 a Louisiana resident, and there are no allegations that either
11 counter-defendant has sufficient minimum contacts with California
12 to justify the court exercising personal jurisdiction over the
13 Trust or Thornhill. (See Stacie Decl. ¶ 3.)

14 Accordingly, the court will grant counter-defendants'
15 Rule 12(b)(2) motion to dismiss Country Visions's claims against
16 the Trust and Thornhill.

17 B. Rule 12(b)(6) Motion

18 On a motion to dismiss under Rule 12(b)(6), the court
19 must accept the allegations in the complaint as true and draw all
20 reasonable inferences in favor of the plaintiff. Scheuer v.
21 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
22 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.
23 319, 322 (1972). To survive a motion to dismiss, a plaintiff
24 must plead "only enough facts to state a claim to relief that is
25 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
26 544, 570 (2007). "The plausibility standard is not akin to a
27 'probability requirement,' but it asks for more than a sheer
28 possibility that a defendant has acted unlawfully." Ashcroft v.

1 Iqbal, 556 U.S. 662, 678 (2009). “A claim has facial
2 plausibility when the plaintiff pleads factual content that
3 allows the court to draw the reasonable inference that the
4 defendant is liable for the misconduct alleged.” Id. Under this
5 standard, “a well-pleaded complaint may proceed even if it
6 strikes a savvy judge that actual proof of those facts is
7 improbable.” Twombly, 550 U.S. at 556.

8 “Threadbare recitals of the elements of a cause of
9 action, supported by mere conclusory statements, do not suffice.”
10 Iqbal, 556 U.S. at 678; see also id. at 679 (“While legal
11 conclusions can provide the framework of a complaint, they must
12 be supported by factual allegations.”).

13 1. Violation of Lanham Act

14 In its seventh cause of action, Country Visions alleges
15 counter-defendants violated the Lanham Act by using the federally
16 registered “Apricot Lane” trademark, creating customer confusion
17 through its use, and falsely representing the relationship
18 between Apricot Lane and Blu Spero. Counter-defendants argue
19 claim seven is two separate Lanham Act claims--false designation
20 of origin and false advertising--which are subject to Rule 9(b)’s
21 heightened pleading standard. In its opposition, Country Visions
22 argues claim seven is a trademark infringement claim that is not
23 subject to Rule 9(b)’s heightened pleading standard. See Vess v.
24 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104-05 (9th Cir. 2003).

25 First, it is unclear what cause of action Country
26 Visions is alleging in claim seven. The claim is labeled
27 “[v]iolation of the Lanham Act.” (First Am. Countercl. 21:18.)
28 The claim contains allegations relating to false advertising and

1 misrepresentations--such as allegations that Blu Spero falsely
2 claimed it is a "sister store" of Apricot Lane and allegations
3 that Love Grace misrepresented the nature, characteristics, or
4 qualities of its goods, services, or commercial activities. (Id.
5 ¶ 108.) The claim also contains allegations relating to
6 trademark infringement, such as the allegation that Apricot Lane
7 is a federally registered trademark. (Id. ¶ 107.)

8 Second, even if the court construes this claim as a
9 trademark infringement claim as argued by Country Visions,
10 Country Visions fails to allege sufficient facts to meet the
11 standard pleading requirements. To allege a trademark
12 infringement claim, the plaintiff must allege (1) that it has a
13 valid, protectable trademark and (2) that the defendant's use of
14 the mark is likely to cause confusion. Applied Info. Scis. Corp.
15 v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007). Country
16 Visions sufficiently alleges it owns a federally registered
17 trademark in "Apricot Lane." (First Am. Countercl. ¶ 107.)

18 Country Visions does not sufficiently allege likelihood
19 of consumer confusion. Likelihood of confusion looks at "whether
20 use of the plaintiff's trademark by the defendants is 'likely to
21 cause confusion or to cause mistake, or to deceive as to the
22 affiliation, connection, or association' of the two products."
23 Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 807 (9th
24 Cir. 2003) (quoting Cairns v. Franklin Mint Co., 292 F.3d 1139,
25 1149 (9th Cir. 2002)). There can be a high risk of consumer
26 confusion when a terminated franchisee continues to use the
27 former franchisor's trademark. See Dunkin Donuts, Inc. v. All
28 Madina Corp., Civ. No. A 04-1399 (JAG), 2006 WL 842403, at *4

1 (D.N.J. Mar. 28, 2006); 4 McCarthy, supra, § 25:31. Here, the
2 only allegation regarding Joli Grace's use of the Apricot Lane
3 mark is that Joli Grace has "sold Blu Spero labeled merchandise
4 in at least three Apricot Lane stores, thereby causing confusion
5 amongst customers regarding the relationship between Apricot Lane
6 and Blu Spero."⁴ (Id. ¶ 108.) There are no allegations that
7 Joli Grace used the Apricot Lane mark after the termination of
8 any Franchise Agreement. Likewise, Country Visions alleges Joli
9 Grace sold Blu Spero products in Apricot Lane stores without its
10 permission, but Country Visions does not allege that such
11 permission was required under the Franchise Agreement. Absent an
12 allegation that Joli Grace and Stacie Lancaster used the mark in
13 an unpermitted manner, Country Visions does not adequately allege
14 Joli Grace and Stacie Lancaster committed trademark infringement.

15 It is unclear whether claim seven is a cause of action
16 for trademark infringement, false advertisement, or false
17 designation of origin. Even if claim seven is a cause of action
18 for trademark infringement, Country Visions fails to allege
19 sufficient facts. Accordingly, the court must grant counter-
20 defendants' motion to dismiss the Lanham Act claim.⁵

21 2. California Unfair Competition Law

22 In its eighth cause of action, Country Visions alleges

23 ⁴ Country Visions also alleges misuse of the Apricot Lane
24 mark by Love Grace and Arthur Lancaster at Blu Spero stores.
25 However, as discussed above, the court does not have personal
jurisdiction over Love Grace or Arthur Lancaster.

26 ⁵ Because the court will dismiss claim seven in its
27 entirety, the court need not address counter-defendants' motion
28 to dismiss claim seven as to Stacie Lancaster for failure to
properly allege Stacie Lancaster is an alter ego of Joli Grace.

1 counter-defendants violated California's Unfair Competition Law
2 by engaging in "fraudulent and/or unfair competition" acts.
3 (First Am. Countercl. ¶ 116.) California Business and
4 Professions Code § 17200 et seq. prohibits unfair competition,
5 which is defined to include "any unlawful, unfair, or fraudulent
6 business act or practice." Cal. Bus. & Prof. Code § 17200.
7 "Each prong of the UCL is a separate and distinct theory of
8 liability" Kearns v. Ford Motor Co., 567 F.3d 1120, 1127
9 (9th Cir. 2009) (citing S. Bay Chevrolet v. Gen Motors Acceptance
10 Corp., 72 Cal. App. 4th 861, 886 (4th Dist. 1999)).

11 Country Visions does not state which prong of the UCL
12 it is relying upon. It alleges that counter-defendants were
13 engaged in "acts of fraudulent and/or unfair competition," (First
14 Am. Countercl. ¶ 116), while also alleging that counter-
15 defendants "misle[d] the general public" through such "fraudulent
16 business act or practice," (id. ¶ 117). The only specific
17 factual allegation identified in Country Visions's UCL claim is
18 that the counter-defendants actions will likely lead to public
19 into believing Blu Spero and Apricot Lane are sister stores.

20 (Id.) Country Visions does not allege which acts were fraudulent
21 or constituted unfair competition. Thus, Country Visions's claim
22 is vague and conclusory, regardless of which prong or pleading
23 standard applies. See Randhawa v. Skylux Inc., Civ. No. 2:09-
24 02304 WBS DAD, 2012 WL 5349403, at *2 (E.D. Cal. Oct. 26, 2012)
25 (dismissing plaintiffs' UCL claims where it was unclear which
26 prong of the UCL the plaintiffs rely upon).

27 Accordingly, the court will grant counter-defendants'
28 motion to dismiss the UCL claim.

1 3. Louisiana Unfair Trade Practices and Consumer
2 Protection Law

3 In its ninth cause of action, Country Visions alleges
4 counter-defendants violated LUTPA by engaging in "unfair methods
5 of competition or unfair or deceptive acts or practices in the
6 conduct of any trade or commerce." (First Am. Countercl. ¶ 126.)
7 LUTPA declares unlawful "[u]nfair methods of competition and
8 unfair or deceptive acts or practices in the conduct of any trade
9 or commerce." La. Stat. Ann. § 51:1405. The elements of a cause
10 of action under LUTPA are: "(1) an unfair or deceptive trade
11 practice declared unlawful; (2) that impacts a consumer, business
12 competitor, or other person to whom the statute grants a private
13 right of action; (3) which has caused ascertainable loss."
14 FloQuip, Inc. v. Chem Rock Techs., Civ. No. 6:16-0035, 2016 WL
15 4574436, at *16 (W.D. La. June 20, 2016). A practice is unfair
16 "when the practice is unethical, oppressive, unscrupulous, or
17 substantially injurious." Pinero v. Jackson Hewitt Tax Serv.
18 Inc., 594 F. Supp. 2d 710, 720-21 (E.D. La. 2009) (citing
19 Jefferson v. Chevron U.S.A. Inc., 713 So. 2d 785, 792 (La. App. 4
20 Cir. 1998)). A trade practice is deceptive when it amounts to
21 "fraud, deceit or misrepresentation." Id. Thus, "LUTPA claims
22 are not limited solely to allegations of fraud, but may be
23 independently premised on a range of non-fraudulent conduct."
24 Mabile v. BP, p.l.c., Civ. No. 11-1783, 2016 WL 5231839, at *24
25 (E.D. La. Sept. 22, 2016).

26 Similar to the UCL claim, Country Visions does not
27 clearly state which prong of the LUTPA it is relying upon. In
28 its nine line, five paragraph LUTPA claim, Country Visions

1 alleges that counter-defendants "engaged in unfair methods of
2 competition or unfair or deceptive acts or practices in the
3 conduct of any trade or commerce." (First Am. Countercl. ¶ 126.)
4 These allegations refer to conduct that is fraudulent and non-
5 fraudulent as a basis for Country Visions's LUTPA claim. Country
6 Visions has not provided notice of which basis it seeks to
7 recover against counter-defendants under LUTPA. Cf. Randhawa,
8 2012 WL 5349403, at *2 (dismissing UCL claims for failure to
9 identify which prong of the UCL the plaintiffs rely upon). This
10 claim only contains allegations that are mere recitations of the
11 elements of LUTPA and are vague and conclusory.

12 Accordingly, the court will grant counter-defendants'
13 motion to dismiss the LUTPA claim.

14 4. Fraud

15 In its eleventh cause of action, Country Visions
16 alleges Joli Grace and Stacie Lancaster fraudulently induced
17 Country Visions to enter into Franchise Agreements. Counter-
18 defendants seek to dismiss this cause of action because the
19 economic loss rule precludes recovery.

20 The economic loss "rule 'prevent[s] the law of contract
21 and the law of tort from dissolving one into the other.'" Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 988
22 (2004) (quoting Rich Prods. Corp. v. Kemutec, Inc., 66 F. Supp.
23 2d 937, 969 (E.D. Wis. 1999)). It precludes recovery for "purely
24 economic loss due to disappointed expectations, unless [the
25 plaintiff] can demonstrate harm above and beyond a broken
26 contractual promise." Id.

27 Conduct "amounting to a breach of contract becomes
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1 tortious only when it also violates a duty independent of the
2 contract arising from principles of tort law.” Id. at 989
3 (quoting Erlich v. Menezes, 21 Cal. 4th 543, 551 (1999)). The
4 California Supreme Court permits tort damages in contract cases
5 in several limited scenarios, including when a party procured the
6 contract through fraudulent inducement. Erlich, 21 Cal. 4th at
7 551-52. In such a case, “the duty that gives rise to tort
8 liability is either completely independent of the contract or
9 arises from conduct which is both intentional and intended to
10 harm.” Robinson, 34 Cal. 4th at 990 (quoting Erlich, 21 Cal. 4th
11 at 552). Thus, the economic loss rule does not bar a properly
12 pled fraudulent inducement claim. United Guar. Mortg. Indem. Co.
13 v. Countrywide Fin. Corp., 660 F. Supp. 2d 1163, 1188 (C.D. Cal.
14 2009) (“[I]t has long been the rule that where a contract is
15 secured by fraudulent representations, the injured party may
16 elect to affirm the contract and sue for fraud.” (quoting Lazar
17 v. Superior Court, 12 Cal. 4th 631, 645 (1996))).

18 Here, claim eleven alleges Joli Grace and Stacie
19 Lancaster breached the Franchise Agreements by fraudulently
20 inducing Country Visions to enter into the Franchise Agreements.
21 (First Am. Countercl. ¶¶ 142-45.) Since fraudulent inducement is
22 the violation of “a duty independent of the contract arising from
23 the principles of tort law,” the economic loss rule does not
24 apply. Robinson, 34 Cal. 4th at 989, 991 (“We hold the economic
25 loss rule does not bar Robinson’s fraud and intentional
26 misrepresentation claims because they were independent of Dana’s
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1 breach of contract.”).⁶

2 Accordingly, the court must deny counter-defendants’
3 motion to dismiss the fraud claim.

4 5. Accounting

5 In its twelfth cause of action, Country Visions alleges
6 counter-defendants failed to properly account to Country Visions
7 using Country Visions’s point of sale system as required by the
8 Franchise Agreements and must therefore account for all missing
9 sales in Joli Grace’s Apricot Lane stores. (First Am. Countercl.
10 ¶ 157.) Under California law, a claim for accounting is not a
11 stand-alone claim. Batt v. City & County of S.F., 155 Cal. App.
12 4th 65, 82 (1st Dist. 2007) (noting accounting “is not an
13 independent cause of action but merely a type of remedy, an
14 equitable remedy at that”). “Because [Country Visions’s]
15 accounting claim is related to [one of its] breach of contract
16 claim[s], which [counter-defendants] do[] not address in [their]
17 motion to dismiss, the court will interpret this claim as a
18 prayer for relief attached to [its] breach of contract claim and
19 will not dismiss it at this time.” Rose v. J.P. Morgan Chase,
20 N.A., Civ. No. 2:12-225 WBS CMK, 2012 WL 892282, at *5 (E.D. Cal.
21 Mar. 14, 2012).

22 Accordingly, the court must deny counter-defendants’

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24 ⁶ Counter-defendants rely on Multifamily Captive Group,
25 LLC v. Assurance Risk Managers, Inc., 629 F. Supp. 2d 1135, 1145-
26 46 (E.D. Cal. 2009) (Damrell, J.), to argue that the economic
27 loss rule will always preclude recovery of fraud claims when the
28 misrepresentations arose from the underlying contract and caused
the injured party to enter into a contract. However, such a view
ignores the California Supreme Court’s position that the economic
loss rule does not preclude recovery for fraudulent inducement.
Erlich, 21 Cal. 4th at 551-52; see Robinson, 34 Cal. 4th at 990.

1 motion to dismiss the accounting claim.

2 C. Preliminary Injunction

3 Country Visions also seeks preliminary injunctions
4 against counter-defendants. In order to obtain a preliminary
5 injunction, the moving party must establish (1) it is likely to
6 succeed on the merits, (2) it is likely to suffer irreparable
7 harm in the absence of preliminary relief, (3) the balance of
8 equities tips in its favor, and (4) an injunction is in the
9 public interest. Winter v. Nat. Res. Def. Council, Inc., 555
10 U.S. 7, 20-21 (2008); Humane Soc. of the U.S. v. Gutierrez, 558
11 F.3d 896, 896 (9th Cir. 2009). Injunctive relief is “an
12 extraordinary and drastic remedy, one that should not be granted
13 unless the movant, by a clear showing, carries the burden of
14 persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per
15 curiam).

16 1. Preliminary Injunction Requiring the Turn-Over of
17 Hattiesburg Store or Prohibiting Blu Spero from
18 Operating in the Hattiesburg Store

19 Country Visions first seeks a preliminary injunction
20 against Stacie Lancaster and Joli Grace that requires them to
21 turn over the Hattiesburg store and lease pursuant to the terms
22 of the Hattiesburg Franchise Agreement or, in the alternative, a
23 preliminary injunction that prevents counter-defendants from
24 operating the Blu Spero store that is currently operating at the
25 Hattiesburg store location.

26 The court need not reach the merits of Country
27 Visions’s requests. Country Visions first seeks a mandatory
28 injunction--which is subject to a higher standard--ordering Joli

1 Grace and Stacie Lancaster to turn over the Hattiesburg Lease.
2 See Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir.
3 1994) ("A mandatory injunction goes well beyond simply
4 maintaining the status quo pendent lite [and] is particularly
5 disfavored." (alteration in original) (citations omitted)).
6 Stacie Lancaster and Joli Grace already signed a document turning
7 over the Hattiesburg Lease to Country Visions when they signed
8 the Collateral Assignment of the Hattiesburg Lease. (Stacie
9 Decl. Ex. 1, at 3-4 (Docket No. 32-1).)

10 The parties note that the Hattiesburg landlord did not
11 accept the Collateral Assignment, but Country Visions contends
12 that the landlord will accept a lease assignment upon an order by
13 the court. The Hattiesburg landlord is not before the court,
14 however. The court is unable to inquire into what will satisfy
15 the landlord and cannot compel the landlord's actions. See
16 Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d
17 1058, 1061 (9th Cir. 1985) (vacating district court's order
18 granting preliminary injunction for lack of personal
19 jurisdiction); 11A Charles Alan Wright & Arthur R. Miller,
20 Federal Practice and Procedure § 2956 (3d ed.) (noting a court
21 does not have power to enjoin a non-party). The court is not
22 going to draft, or order Joli Grace and Stacie Lancaster to
23 draft, an order or assignment of the Hattiesburg Lease that
24 satisfies the landlord. Absent the landlord's presence in this
25 action, the court will not issue an affirmative preliminary
26 injunction requiring the assignment of the lease.

27 The court will also not enjoin the operation of the Blu
28 Spero store at the Hattiesburg store location. A district court

1 has no authority to grant relief in the form of a preliminary
2 injunction where it has no personal jurisdiction over the
3 parties. Paccar Int'l, 757 F.2d at 1061; see Ruhrgas AG v.
4 Marathon Oil Co., 526 U.S. 574, 584 (1999) ("Personal
5 jurisdiction, too, is an essential element of the jurisdiction of
6 a district . . . court, without which the court is powerless to
7 proceed to an adjudication." (alteration in original)). "A
8 federal court may issue an injunction if it has personal
9 jurisdiction over the parties and subject matter jurisdiction
10 over the claim; it may not attempt to determine the rights of
11 persons not before the court." Zepeda v. U.S. Immigration and
12 Naturalization Serv., 753 F.2d 719, 727 (9th Cir. 1985).

13 Here, in order to grant Country Visions's desired
14 relief--preventing the operation of a Blu Spero store at the
15 Hattiesburg store location--the court must have jurisdiction over
16 Love Grace. Both parties agree that Love Grace, not Joli Grace,
17 currently possesses the Hattiesburg Lease and operates the Blu
18 Spero store at that location. (Martin Decl. ¶¶ 3-5, Exs. A-B;
19 Stacie Decl. ¶ 5.) The court cannot stop Joli Grace's operation
20 of a store it does not operate. The court can only grant Country
21 Visions's injunction by enjoining Love Grace. However, the
22 court's jurisdictional reach fails to extend to Love Grace and
23 the court cannot enjoin Love Grace. The court therefore cannot
24 direct Love Grace either to turn over the Hattiesburg Lease or
25 cease operating the Blu Spero store.

26 Even if Country Visions could satisfy all the Winter
27 factors justifying extraordinary injunctive relief under Rule 65,
28 the court simply lacks jurisdiction over Arthur Lancaster and

1 Love Grace--whom Country Visions seeks to enjoin. See Carranza
2 v. Brown, Civ. No. 3:14-0773 GPC BLM, 2016 WL 4376852, at *4-5
3 (S.D. Cal. Aug. 17, 2016) (refusing to issue an injunction where
4 the court lacks jurisdiction over the parties plaintiff seeks to
5 enjoin). Accordingly, the court will deny Country Visions's
6 motion for a preliminary injunction requiring Stacie Lancaster
7 and Joli Grace to turn over the Hattiesburg Lease or preventing
8 counter-defendants from operating the Blu Spero store at the
9 Hattiesburg location.

10 2. Preliminary Injunction Preventing Use of Apricot
11 Lane Mark

12 Country Visions also seeks a preliminary injunction
13 against Joli Grace, Love Grace, Stacie Lancaster, and Arthur
14 Lancaster that prevents them from using the Apricot Lane mark in
15 connection with the Hattiesburg store.

16 A plaintiff "must establish that irreparable harm is
17 likely, not just possible, in order to obtain a preliminary
18 injunction." All. for the Wild Rockies v. Cottrell, 632 F.3d
19 1127, 1131 (9th Cir. 2011) (emphasis in original) (citing Winter,
20 555 U.S. at 22). "[A]ctual irreparable harm must be demonstrated
21 to obtain a permanent [or preliminary] injunction in a trademark
22 infringement action." Herb Reed Enters., LLC v. Fla. Entm't
23 Mgmt., Inc., 736 F.3d 1239, 1249-50 (9th Cir. 2013). Courts do
24 not presume irreparable harm once plaintiffs have shown a
25 likelihood of success on the merits. Id. at 1250 ("Gone are the
26 days when once the plaintiff in an infringement action has
27 established a likelihood of confusion, it is ordinarily presumed
28 that the plaintiff will suffer irreparable harm if injunctive

1 relief does not issue.”).

2 Here, there is no evidence that Joli Grace and Stacie
3 Lancaster continue to use the Apricot Lane mark at the
4 Hattiesburg store. Stacie Lancaster and Joli Grace have stopped
5 operating the Hattiesburg Apricot Lane store, have assigned the
6 lease to Love Grace, and thus lack the ability to use the Apricot
7 Lane mark at the Hattiesburg store. (Stacie Decl. ¶¶ 4-6.)
8 Country Visions has not shown that Stacie Lancaster and Joli
9 Grace are able to use the Apricot Lane mark in a way that would
10 likely cause irreparable injury to Country Visions.

11 Additionally, the court does not have personal
12 jurisdiction over Arthur Lancaster and Love Grace, so the court
13 will not enjoin them from selling products with the Apricot Lane
14 mark at the Blu Spero Hattiesburg store.

15 Country Visions has failed to meet the second prong for
16 a preliminary injunction. The court does not need to address the
17 remaining prongs. See Winter, 555 U.S. at 20-21 (holding a
18 plaintiff must establish that all four prongs are met and
19 irreparable harm is likely, not just possible).

20 IT IS THEREFORE ORDERED that Arthur Lancaster and Love
21 Grace’s motion to dismiss be, and the same hereby is, GRANTED on
22 the ground of lack of personal jurisdiction.

23 IT IS FURTHER ORDERED that the Trust and Thornhill’s
24 motion to dismiss be, and the same hereby is, GRANTED on the
25 ground of lack of personal jurisdiction.

26 IT IS FURTHER ORDERED that Stacie Lancaster and Joli
27 Grace’s Rule 12(b)(6) motion to dismiss counter-claimant’s first
28 amended counterclaim be, and the same hereby is:

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(1) GRANTED with respect to claims seven, eight, and
nine; and

(2) DENIED in all other respects.

IT IS FURTHER ORDERED that counter-claimant's motion
for preliminary injunction be, and the same hereby is, DENIED.

Counter-claimant has twenty days from the date of this
Order to file an amended counterclaim, if it can do so consistent
with this Order.

Dated: November 30, 2016



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE