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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LA MICHOACANA PLUS ICE CREAM  
PARLOR CORP, a California  
corporation,  
  
Plaintiff,  
  
v.  
  
WINDY CITY PALETAS, INC., a  
California corporation; ECUAMEX  
PALETAS, INC., a California  
corporation; SKY LIMIT ENTERPRISES  
II, INC., a Nevada corporation; KJAM  
PALETAS, INC., a California  
corporation; ARTURO MIRANDA, an  
individual; KAYLA RINCON, an  
individual; DIGMEY JARAMILLO, an  
individual; and DOES 1 through 50,  
  
Defendants.

Case No.: 24-cv-00631-H-MMP

**ORDER GRANTING DEFENDANTS’  
PARTIAL MOTION TO DISMISS  
WITH LEAVE TO AMEND**

[Doc. No. 32.]

On April 15, 2024, Defendants Windy City Paletas (“Windy City”), Ecuamex Paletas, Inc., Sky Limit Enterprises II, Inc., KJAM Paletas, Inc., Arturo Miranda, Digmey Jaramillo, and Kayla Rincon filed a partial motion to dismiss Plaintiff La Michoacana Plus Ice Cream Parlor Corp (“LMP”)’s complaint pursuant to Federal Rule of Civil Procedure

1 12(b)(6) for failure to state a claim. (Doc. No. 32.) On May 6, 2024, Plaintiff filed a  
2 response in opposition to Defendant’s motion to dismiss. (Doc. No. 33.) On June 3, 2024,  
3 Defendants filed a reply. (Doc. No. 36.) On June 3, 2024, the Court took the matter under  
4 submission (Doc. No. 35.) For the reasons below, the Court grants Defendants’ partial  
5 motion to dismiss with leave to amend.

### 6 **Background**

7 The following factual background is taken from the allegations in Plaintiff’s  
8 complaint. Plaintiff LMP is a producer and manufacturer of paletas – a frozen treat native  
9 to Mexico made by freezing fresh natural fruit and/or cream. (Doc. No. 6, FAC ¶¶ 1-2,  
10 29.) Plaintiff owns nine registered United States trademarks and eight pending United  
11 States trademark applications, among others, associated with paletas, retail stores, and ice  
12 cream parlors, and Plaintiff manufactures and sells its goods under those trademarks. (Id.  
13 ¶¶ 26-37.)

14 In 2020, a multistate family enterprise comprised of the Defendants approached  
15 Plaintiff to license Plaintiff’s trademarks and other intellectual property to brand their own  
16 paleta and ice cream storefronts. (Id. ¶¶ 3-4.) Eventually, on February 6, 2020, Plaintiff  
17 entered into two written licensing agreements with Defendant Windy City for the opening  
18 of two LMP branded locations: (1) a location in Oceanside, California; and (2) a location  
19 in Escondido, California. (Id. ¶¶ 5, 40, 47; see Doc. No. 6-18, Ex. 18; Doc. No. 6-20, Ex.  
20 20.) Plaintiff alleges that under the terms of these licensing agreements, Defendant Windy  
21 City would maintain control of each location and determine the best means to operate each  
22 location, and, in exchange for a license to use Plaintiff’s trademarks and intellectual  
23 property, Defendant Windy City would pay Plaintiff royalties and would also purchase  
24 LMP paletas from Plaintiff for sale at the stores. (Doc. No. 6, FAC ¶ 4.)

25 Plaintiff alleges that Defendant Windy City breached both licensing agreements by  
26 failing to pay certain royalty fees and invoices for Plaintiff’s goods and services. (See id.  
27 ¶¶ 40-53.) In addition, Plaintiff alleges that following the establishment of the Oceanside  
28 and Escondido stores, starting in January 2021, Defendants engaged in knowing trademark

1 infringement by opening six additional stores and utilizing Plaintiff’s trademarks, “know-  
2 hows,” and intellectual property at those six stores without Plaintiff’s written permission.  
3 (Id. ¶¶ 54, 57-81.) Plaintiff further alleges that once it discovered Defendants’  
4 infringement, Defendants “promised to rectify their infringement at the six additional  
5 stores by paying royalties for the previous infringed use, agreeing to pay royalties for the  
6 future use, agreeing to pay invoices for future delivery of paletas and products supplied to  
7 the stores, and agreeing to sign a licensing agreement for each of the six additional stores.”  
8 (Id. ¶ 55.) Plaintiff alleges that despite these promises, Defendants never signed the  
9 additional licensing agreements, and Defendants failed to pay all outstanding royalty fees  
10 owed.<sup>1</sup> (Id. ¶ 56.) In addition, Plaintiff alleges that Defendants committed fraud when  
11 they opened these six unauthorized stores. (See id. ¶¶ 82-91.)

12 On February 22, 2023, Plaintiff filed a complaint against Defendants in the United  
13 States District Court for the District of Nevada. (Doc. No. 1, Compl.) On March 17, 2023,  
14 Plaintiff filed a first amended complaint – the operative complaint – against Defendants,  
15 alleging claims for: (1) infringement of federally registered trademarks and service marks,  
16 15 U.S.C. § 1114; (2) false designation of origin, false description, and unfair competition  
17 under the Lanham Act § 43(a), 15 U.S.C. § 1125(a); (3) trademark dilution under th  
18 Lanham Act § 43(c), 15 U.S.C. § 1125(c); (4) infringement of federally pending trademark  
19 applications, 15 U.S.C. § 1125(a); (5) fraud under California law; (6) unfair competition  
20 under the Nevada Deceptive Trade Practices Act (“NDTPA”); and (7) unfair competition  
21 under California Business & Professions Code § 17200. (Doc. No. 6, FAC ¶¶ 92-143.)

22 On March 31, 2024, the Nevada district court granted Defendants’ motion to transfer  
23 and transferred the action to the United States District Court for the Southern District of  
24 California. (Doc. Nos. 29, 30.) By the present motion, Defendants move pursuant to  
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27 <sup>1</sup> Plaintiff alleges that for some of the stores, Defendants made a partial payment of  
28 \$25,000 for the infringing use of Plaintiff’s trademarks. (Doc. No. 6, FAC ¶¶ 57, 62, 66,  
70.)

1 Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff’s claim for fraud under  
2 California law for failure to state a claim. (Doc. No. 32-1 at 1.)

### 3 Discussion

#### 4 **I. Legal Standards for a Rule 12(b)(6) Motion to Dismiss**

5 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal  
6 sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has  
7 failed to state a claim upon which relief can be granted. See Conservation Force v. Salazar,  
8 646 F.3d 1240, 1241 (9th Cir. 2011) (citing Navarro v. Block, 250 F.3d 729, 732 (9th Cir.  
9 2001)). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading that states a claim  
10 for relief contain “a short and plain statement of the claim showing that the pleader is  
11 entitled to relief.” The function of this pleading requirement is to “give the defendant fair  
12 notice of what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp. v.  
13 Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

14 A complaint will survive a Rule 12(b)(6) motion to dismiss if it contains “enough  
15 facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has facial  
16 plausibility when the plaintiff pleads factual content that allows the court to draw the  
17 reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.  
18 Iqbal, 556 U.S. 662, 678 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a  
19 formulaic recitation of the elements of a cause of action will not do.” Id. (quoting  
20 Twombly, 550 U.S. at 555). “Threadbare recitals of the elements of a cause of action,  
21 supported by mere conclusory statements, do not suffice.” Id. “While legal conclusions  
22 can provide the framework of a complaint, they must be supported by factual allegations.”  
23 Id. at 679. Accordingly, dismissal for failure to state a claim is proper where the claim  
24 “lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”  
25 Mendondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008); see Los  
26 Angeles Lakers, Inc. v. Fed. Ins. Co., 869 F.3d 795, 800 (9th Cir. 2017).

27 In reviewing a Rule 12(b)(6) motion to dismiss, a district court must “accept the  
28 factual allegations of the complaint as true and construe them in the light most favorable

1 to the plaintiff.” Los Angeles Lakers, 869 F.3d at 800 (quoting AE ex rel. Hernandez v.  
2 Cty. of Tulare, 666 F.3d 631, 636 (9th Cir. 2012)). But a court need not accept “legal  
3 conclusions” as true. Iqbal, 556 U.S. at 678. “Further, it is improper for a court to assume  
4 the claimant “can prove facts which it has not alleged or that the defendants have violated  
5 the . . . laws in ways that have not been alleged.” Associated Gen. Contractors of Cal., Inc.  
6 v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

7 In addition, a court may consider documents incorporated into the complaint by  
8 reference and items that are proper subjects of judicial notice. See Coto Settlement v.  
9 Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). If the court dismisses a complaint for  
10 failure to state a claim, it must then determine whether to grant leave to amend. See Doe  
11 v. United States, 58 F.3d 494, 497 (9th Cir. 1995); Telesaurus VPC, LLC v. Power, 623  
12 F.3d 998, 1003 (9th Cir. 2010).

## 13 **II. Analysis**

14 In the first amended complaint, Plaintiff alleges a claim for fraud under California  
15 law against Defendants. (Doc. No. 6, FAC ¶¶ 125-31.) Defendants argue that Plaintiff’s  
16 claim for fraud should be dismissed because the purported misrepresentations at issue are  
17 too vague and speculative to constitute actionable misrepresentations as a matter of law.  
18 (Doc. No. 32-1 at 4-5; Doc. No. 36 at 1.)

19 Under California law, the elements of a claim for fraud are: (1) a misrepresentation  
20 (false representation, concealment, or nondisclosure); (2) knowledge of falsity; (3) intent  
21 to induce reliance; (4) actual and justifiable reliance; and (5) resulting damage. Lazar v.  
22 Superior Ct., 12 Cal. 4th 631, 638 (1996); Aton Ctr., Inc. v. United Healthcare Ins. Co., 93  
23 Cal. App. 5th 1214, 1245 (2023). “‘Promissory fraud’ is a subspecies of the action for  
24 fraud and deceit. A promise to do something necessarily implies the intention to perform;  
25 hence, where a promise is made without such intention, there is an implied  
26 misrepresentation of fact that may be actionable fraud.” Lazar, 12 Cal. 4th at 638. “A  
27 plaintiff asserting a promissory fraud claim must plead and prove that the defendant made  
28 a promise to him that it had no intention of performing.” UMG Recordings, Inc. v. Glob.

1 Eagle Ent., Inc., 117 F. Supp. 3d 1092, 1109 (C.D. Cal. 2015); see Tarmann v. State Farm  
2 Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 159 (1991). “[I]ntent not to perform cannot be  
3 proved simply by showing a subsequent failure to perform.” UMG Recordings, 117 F.  
4 Supp. 3d at 1109 (citing Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30–31 (1985); Magpali  
5 v. Farmers Group, Inc., 48 Cal. App. 4th 471, 481 (1996)).

6 In addition, Federal Rule of Civil Procedure “9(b)’s particularity requirement applies  
7 to state-law causes of action.” Vess v. Ciba–Geigy Corp. USA, 317 F.3d 1097, 1103 (9th  
8 Cir. 2003). Under Federal Rule of Civil Procedure 9, a plaintiff must plead fraud with  
9 particularity. “Averments of fraud must be accompanied by ‘the who, what, when, where,  
10 and how’ of the misconduct charged.” Vess, 317 F.3d at 1106 (quoting Cooper v. Pickett,  
11 137 F.3d 616, 627 (9th Cir. 1997)). “[A] plaintiff must set forth more than the neutral  
12 facts necessary to identify the transaction. The plaintiff must set forth what is false or  
13 misleading about a statement, and why it is false.” Id. (quoting In re GlenFed, Inc. Sec.  
14 Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)). “While statements of the time, place and nature  
15 of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud” are  
16 not. Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989).

17 Plaintiff asserts that the first amended complaint alleges the following two separate  
18 theories of fraud against the Defendants:

19 (1) Defendants defrauded Plaintiff when they entered into licensing  
20 agreements for the Oceanside and Escondido stores on February 6, 2020  
21 knowing that they had no intention of carrying through on the promises within  
22 those agreements; and

23 (2) Defendants defrauded Plaintiff when Defendants verbally agreed to  
24 enter into licensing agreements for six additional stores after Plaintiff  
25 discovered that Defendants operated six additional stores using Plaintiff’s  
26 intellectual properties without Plaintiff’s permission. These false promises  
27 were made to delay enforcement by Plaintiffs against Defendants’ intellectual  
28 property infringements.

(Doc. No. 33 at 2.) Both of these purported theories of promissory fraud fail to adequately  
state a claim for fraud under California law and Rule 9(b).

1 Plaintiff's first theory of fraud is based on the following allegations: "The Jaramillo  
2 Defendants committed fraud on LMP by entering into license agreements for only two  
3 locations in California with the full knowledge that they intended to open a total of 8  
4 locations in Nevada and California." (Doc. No. 6, FAC ¶ 82; see also Doc. No. 6, FAC ¶¶  
5 5, 83-86; Doc. No. 33 at 2, 5-7.) In order for this particular theory of fraud to be actionable,  
6 there would need to be a specific representation by Defendants at or around the time that  
7 Windy City entered into the two licensing agreements stating that Defendants would not  
8 open any additional locations other than two locations specified in the licensing  
9 agreements. But the allegations in the first amended complaint fail to identify any specific  
10 representation by any of the Defendants in the licensing agreements or elsewhere stating  
11 that Defendants would not open any additional locations other than the Oceanside and  
12 Escondido locations in the future. (See generally Doc. No. 6, FAC.) As such, for its first  
13 theory of fraud, Plaintiff has failed to adequately allege the misrepresentation element of  
14 its claim for fraud.

15 Plaintiff's first theory of fraud is also defective because the first amended complaint  
16 fails to contain sufficient factual allegations to support Plaintiff's contention that  
17 Defendants intended to open the additional locations at the time Defendant Windy City  
18 entered into the two licensing agreements at issue. "A plaintiff asserting a promissory  
19 fraud claim must plead and prove that the defendant made a promise to him that it had no  
20 intention of performing." UMG, 117 F. Supp. 3d at 1109. "[A]lthough intent may be  
21 alleged generally, a plaintiff must allege facts to demonstrate that the defendant harbored  
22 an intention not to be bound by terms of the contract." Aton Ctr., Inc. v. Premera Blue  
23 Cross, No. 3:20-CV-00501-WQH-BGS, 2021 WL 615048, at \*9 (S.D. Cal. Feb. 16, 2021).  
24 The only facts alleged in the first amended complaint to support Defendants' intent is that  
25 Defendants opened six additional stores one to two years later and used Plaintiff's  
26 intellectual property without permission. (See Doc. No. 6, FAC ¶¶ 5, 82, 84, 86; see also  
27 Doc. No. 33 at 6 ("This misrepresentation is supported by the allegations that Defendants  
28 opened six additional stores using Plaintiff's intellectual properties without Plaintiff's

1 permission.”.) But allegations of nonperformance alone are insufficient to support a claim  
2 for promissory fraud. See Aton, 2021 WL 615048, at \*10 (“[E]vidence of fraudulent  
3 intent [consisting of only] nonperformance of an oral promise’ is insufficient to support a  
4 finding of intentional misrepresentation.”); UMG Recordings, 117 F. Supp. 3d at 1110  
5 (“The only allegation in the complaint that might give rise to an inference that the promise  
6 was made with no intention of performing is the fact that plaintiffs allegedly did not honor  
7 it. As noted, nonperformance alone will not support a finding of promissory fraud.”). As  
8 such, for the first theory of fraud, Plaintiff has also failed to adequately allege sufficient  
9 facts to support an inference that Defendants’ purported promise was made with no  
10 intention of performing.<sup>2</sup> See id.

11 Similarly, as to Plaintiff’s second theory of fraud, the first amended complaint fails  
12 to contain sufficient factual allegations from which it can be inferred that Defendants had  
13 no intent to enter into licensing agreements for the six additional stores at the time they  
14 made the alleged promise at issue. The only facts alleged in the first amended complaint  
15 to support Defendants’ intent is that Defendants never ultimately entered into the additional  
16 licensing agreements. These again are mere allegations of nonperformance, and they are  
17 insufficient to support a claim for promissory fraud. See UMG Recordings, 117 F. Supp.  
18 3d at 1109–10; Aton, 2021 WL 615048, at \*9–10. As such, Plaintiff’s second theory of  
19 fraud is also defective and insufficiently pleaded.

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23 <sup>2</sup> Indeed, the first amended complaint not only contains insufficient facts to support  
24 an inference that Defendants’ purported promise to enter into the additional licensing  
25 agreements was made with no intention of performing, the first amended complaint  
26 contains facts that support the opposite – that Defendants did intend to enter into the  
27 additional agreements. For example, Plaintiff alleges around August 2022, Defendant  
28 attempted to rescind or terminate all “eight” licensing agreements. (Doc. No. 6, FAC ¶¶  
90-91.) These factual allegations suggest that Defendants believed they had entered into  
the six additional licensing agreements, which would support an inference that they did  
intent to enter into those additional agreements when the promise at issue was made.



1           Moreover, both theories of fraud fail to satisfy Rule 9(b)'s particularly requirements.  
2 Under Federal Rule of Civil Procedure 9, a plaintiff must provide “‘the who, what, when,  
3 where, and how’ of the” fraudulent conduct alleged. Vess, 317 F.3d at 1106. Plaintiff fails  
4 to provide these required details in the first amended complaint. For example, for either  
5 theory of fraud, Plaintiff fails to identify “who” specifically made the misrepresentation  
6 (false promise) at issue. In addition, Plaintiff fails to explain “when” and “where” the  
7 misrepresentations at issue were made.<sup>3</sup>

8           In sum, Plaintiff has failed to adequately state a claim for fraud under California law  
9 against Defendants. As a result, the Court dismisses Plaintiff's claim for fraud. Because  
10 the defects in Plaintiff's claim for fraud can possibly cured by amendment of the pleadings,  
11 the Court will grant Plaintiff leave to amend. See Doe, 58 F.3d at 497 (“A district court  
12 should grant leave to amend . . . unless it determines that the pleading could not possibly  
13 be cured by the allegation of other facts.”).

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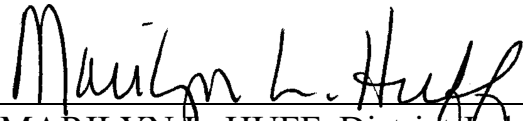
23  
24 <sup>3</sup> In its briefing, Plaintiff contends that in cases of corporate fraud, a plaintiff cannot  
25 be expected to have personal knowledge of the facts constituting the wrongdoing. (Doc.  
26 No. 33 at 4 (citing Falco v. Nissan N. Am. Inc., 96 F. Supp. 3d 1053, 1062 (C.D. Cal.  
27 2015)).) The Court disagrees here. Although that might be true in some cases, based on  
28 the allegations in the first amended complaint, Plaintiff engaged in arm's length  
negotiations with the Defendants. As such, Plaintiff should be expected to have a personal  
knowledge of the relevant facts (for example, who specifically made the statements at  
issue) and should be expected to provide those facts in the operative complaint.

1 Conclusion

2 For the reasons above, the Court grants Defendants’ partial motion to dismiss, and  
3 the Court dismisses Plaintiff’s claim for fraud. The Court’s dismissal of the fraud claim is  
4 without prejudice and with leave to amend. Plaintiff may file a second amended complaint  
5 within **thirty (30) days** from the date of this order to cure the deficiencies in the first  
6 amended complaint if it can do so.

7 **IT IS SO ORDERED.**

8 DATED: June 4, 2024

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11 MARILYN L. HUFF, District Judge  
12 UNITED STATES DISTRICT COURT  
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