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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 SUN NONG DAN FOODS, INC., a
11 California Corporation,

12 Plaintiff,

13 v.

14 KANGNAM1957, INC., a California
15 corporation; LA PARK'S MILPITAS,
16 INC., a California corporation; HAN
17 PAAN, INC., a California corporation;
18 JJIM, INC., a California corporation;
19 DAEHO LAS VEGAS, INC., a
California corporation; DAEHO
20 HWANG, an individual; IL PARK, an
individual; CHAN WON PARK, an
individual; DOES 1 through 10,
inclusive,

21 Defendants.
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Case No. 2:23-cv-09779-WLH-RAO

**ORDER RE DEFENDANTS'
MOTION TO DISMISS [35]**

Before the Court is the Motion to Dismiss Plaintiff’s Second Amended Complaint (the “Motion,” Docket No. 35) brought by Defendants Kangnam1957, Inc.; La Park’s Milpitas, Inc.; Han Paan, Inc.; Jjim, Inc.; and Daeho Las Vegas Inc. (collectively, “Daeho”), as well as Defendants Daeho Hwang, Il Park, and Chan Won Park (collectively with Daeho, “Defendants”). For the following reasons, the Motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

A. Factual Background

Since 2013, Plaintiff Sun Nong Dan Foods, Inc. (“SND”) has served authentic Korean food for the California market. (Second Amended Complaint (“SAC”), Docket No. 26 ¶ 16). SND’s “flagship” dish, “galbi jjim,” is comprised of braised short ribs, ddukbokki, vegetables, and cheese, which is then torched before customers. (*Id.*). The dish is presented on a black stone plate bordered by a silver metal rim, is set on a wooden base for serving, and is accompanied by three side dishes of kimchi, radish kimchi, and chives. (*Id.* ¶ 19). A soy sauce infused with jalapeno and onion is also served. (*Id.*).

In late 2017, Defendant Il Park (“I. Park”) approached SND seeking employment of his younger brother, Defendant Chan Won Park (“C. Park”). (*Id.* ¶ 28). SND hired C. Park and assigned him various roles during his tenure, including kitchen assistant. (*Id.* ¶ 29). After less than a year, Defendant C. Park left SND. (*Id.* ¶ 32).

In 2019, Daeho Kalbijjim opened in Japan Town, San Francisco, also serving authentic Korean food, including “Daeho Style” galbi jjim. (*Id.* ¶ 33). Daeho’s galbi jjim features braised short ribs, ddukbokki, vegetables, and cheese that is torched before customers. (*Id.* ¶ 58). The dish is served on a black stone plate bordered by a metal rim atop a wooden base. (*Id.*, Ex. E). Three sides dishes of kimchi, radish kimchi, and chives, and a soy sauce blend of jalapeno and onion are served alongside the galbi jjim. (*Id.*).

SND identifies its galbi jjim recipe and presentation, culinary processes, and business operations as trade secrets. (*Id.* ¶ 22). To protect its trade secrets, SND limits

1 access to trade secrets to essential employees, segments cooking processes into smaller
2 steps, and requires all employees to sign a non-disclosure agreement (“NDA”). (*Id.*
3 ¶¶ 25, 134).

4 SND alleges that C. Park and I. Park, who were both involved in the opening of
5 Daeho Kalbijjim, sought employment at SND with the intention of stealing and
6 misappropriating the restaurant’s trade secrets. (*Id.* ¶¶ 34, 59). SND believes that C.
7 Park obtained and stole SND’s proprietary recipes and business practices, the
8 confidentiality of which SND repeatedly emphasized. (*Id.* ¶ 34). SND also asserts that
9 Defendants Daeho Hwang, I. Park, and C. Park intended to open a “counterfeit” SND
10 under the name “Daeho Kalbijjim” in the San Francisco Bay area. (*Id.* ¶ 37).

11 SND further alleges that Daeho disseminated false statements, such as claims that
12 SND opened a restaurant in the San Francisco Bay Area under the name Daeho
13 Kalbijjim; that Daeho purchased SND’s confidential recipes; and that the wife of SND’s
14 owner opened Daeho Kalbijjim. (*Id.* ¶¶ 45–49). According to SND, C. Park posted
15 employee hiring posts stating he was a former head chef of SND, and I. Park instructed
16 employees to spread statements on the two restaurants’ relationship. (*Id.* ¶¶ 45–49, 97).
17 SND contends that the combination of these false statements created confusion among
18 customers and influenced their purchasing decisions. (*Id.* ¶ 98). SND asserts that
19 consumers belief that the false statements were true is illustrated by reviews on Reddit
20 and Yelp in which customers assume a relation between the two restaurants. (*Id.* ¶¶ 68,
21 69, Exs. H, I).

22 **B. Procedural History**

23 On November 17, 2023, SND filed a complaint alleging the following seven
24 causes of action: (1) false designation of origin, false and fraudulent representation, and
25 unfair competition under the Lanham Act, 15 U.S.C. § 1125; (2) false advertising under
26 the Lanham Act; (3) trade dress infringement under the Lanham Act; (4) trade secret
27 misappropriation under the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. § 1836;
28 (5) unfair competition under California’s Unfair Competition Law (“UCL”), Cal. Bus.

1 & Prof. Code §§ 17200 *et seq.*; (6) false advertising under California’s False
2 Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; and (7) trade secret
3 misappropriation under the California Uniform Trade Secrets Act (“CUTSA”), Cal.
4 Civ. Code §§ 3426 *et seq.* (Comp., Docket No. 1).

5 After two rounds of meeting and conferring, SND filed its Second Amended
6 Complaint (“SAC”). Defendants then filed the instant Motion to Dismiss (the
7 “Motion,” Docket No. 35). Defendants’ Motion seeks to dismiss SND’s SAC in its
8 entirety under Federal Rule of Civil Procedure 12(b)(6) on the grounds that SND has
9 failed to state claims upon which relief can be granted and to sufficiently allege facts
10 supporting its purported claims. (*See generally id.*). On May 17, 2024, SND filed its
11 Opposition. (Docket No. 43). On May 24, 2024, Defendants filed their Reply. (Docket
12 No. 44).

13 **II. DISCUSSION**

14 The Court **DENIES** in part and **GRANTS** in part Defendants’ Motion.

15 **A. Legal Standard**

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss for
17 failure to state a claim upon which relief can be granted. A complaint may be dismissed
18 for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory;
19 or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*,
20 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d
21 1097, 1104 (9th Cir. 2008).

22 “To survive a motion to dismiss, the plaintiff’s complaint must contain sufficient
23 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
24 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The
25 court must construe the complaint in the light most favorable to the plaintiff, accept all
26 allegations of material fact as true, and draw all reasonable inferences from well-
27 pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002).
28 A claim is facially plausible “when the plaintiff pleads factual content that allows the

1 court to draw the reasonable inference that the defendant is liable for the misconduct
2 alleged.” *Iqbal*, 566 U.S. at 678. Pursuant to Federal Rule of Civil Procedure 15(a)(2),
3 when a motion to dismiss is granted, courts should “freely give leave [to amend] when
4 justice so requires.”

5 **B. False Designation of Origin (Counts I & V)**

6 SND brings claims for false designation of origin, false and fraudulent
7 representation, and federal unfair competition under the Lanham Act and unfair
8 competition under the UCL against all Defendants. Because “state common law claims
9 of unfair competition ... are ‘substantially congruent’ to claims made under the Lanham
10 Act,” the Court refers to Lanham Act authority to assess both claims. *Cleary v. News*
11 *Corp.*, 30 F.3d 1255, 1262–63 (9th Cir. 1994).

12 *i. The Scope of Claims*

13 As a preliminary matter, Defendants argue that SND’s claim fails, as a matter of
14 law, to meet the threshold element that the defendant “uses a designation (any word,
15 term, name, device, or any combination thereof) or false designation of origin.” *R & A*
16 *Synergy LLC v. Spanx, Inc.*, 2019 WL 4390564, at *13 (C.D. Cal. May 1, 2019).
17 Defendants assert that “the term ‘origin’ in section 43(a) lends itself to two causes of
18 action for ‘passing off’ based on false designation of origin: passing off and reverse
19 passing off.” *OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016
20 (9th Cir. 2018) (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23,
21 27 (2003)). “Passing off occurs when a producer misrepresents his own goods or
22 services as someone else’s,” whereas reverse passing off occurs when the producer
23 misrepresents someone else’s goods or services as his own. *Dastar*, 539 U.S. at 27 n.1.
24 Defendants argue, based on the assumption that SND’s claim is brought under a reverse
25 passing off theory, that SND failed to allege the critical element of bodily
26 appropriation—i.e., that Daeho acquired and then re-sold SND’s products. *See Summit*
27 *Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1438 (9th Cir. 1993)

1 (holding that allegation of “bodily appropriation” is necessary to support reverse
2 passing off claim).

3 In the opposition to this Motion, SND contends Defendants incorrectly limited
4 the scope of the unfair competition claims to passing off and reverse passing off.
5 (Opp’n at 4). The Court agrees. In the SAC, SND does not make use of this theory and
6 instead argues under a false association theory, which is also a cognizable claim under
7 the Lanham Act. As discussed below in parts B.ii and B.iii, SND properly brings a false
8 designation of origin claim under a false association theory and, after meeting the
9 standards of Rule 9(b), need not allege bodily appropriation.

10 *ii. False Designation of Origin Elements*

11 The Court finds that SND has fulfilled the threshold elements of a false
12 designation of origin claim. To prevail on a false designation of origin claim based on
13 a false association theory, a plaintiff must demonstrate that the “(1) defendant uses a
14 designation (any word, term, name, device, or any combination thereof) or false
15 designation of origin; (2) the use was in interstate commerce; (3) the use was in
16 connection with goods or services; (4) the designation or false designation is likely to
17 cause confusion, mistake, or deception as to (a) the affiliation, connection, or
18 association of defendant with another person, or (b) as to the origin, sponsorship, or
19 approval of defendant’s goods, services, or commercial activities by another person;
20 and (5) the plaintiff has been or is likely to be damaged by these acts.” *Zamfir v.*
21 *Casperlabs, LLC*, 528 F. Supp. 3d 1136, 1143 (S.D. Cal. 2021). Here, SND pleads that
22 (1) Daeho disseminated misleading descriptions and false representations (2) in
23 interstate commerce (3) regarding the origin of its flagship dish, galbi jjim; (4) that these
24 descriptions and representations caused confusion among customers; and (5) that
25 SND’s goodwill and reputation has been harmed and its market share has been reduced.

26 *iii. Rule 9(b)’s Heightened Pleading Standard*

27 Federal Rule of Civil Procedure 9(b) requires a plaintiff alleging fraud claims to
28 “state with particularity the circumstances constituting fraud.” The “circumstances”

1 required by Rule 9(b) are the “who, what, when, where, and how” of the fraudulent
2 activity. *United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047,
3 1055 (9th Cir. 2011).

4 The heightened pleading standard applies to claims that “sound in” or are
5 “grounded in” fraud. *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1102–06 (9th Cir.
6 2003); *Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*, 404 F. Supp. 2d 1214,
7 1219–20 (E.D. Cal. 2005) (“It is well-settled in the Ninth Circuit that misrepresentation
8 claims are a species of fraud, which must meet Rule 9(b)’s particularity requirement”).
9 Further, “in cases where fraud is not a necessary element of a claim, a plaintiff may
10 choose nonetheless to allege in the complaint that the defendant has engaged in
11 fraudulent conduct,” and Rule 9(b) would then apply. *Vess*, 317 F.3d at 1103. Although
12 the Ninth Circuit has not concluded that Rule 9(b) applies to all Lanham Act claims,
13 district courts in this circuit have applied Rule 9(b) to Lanham Act claims grounded in
14 fraud. *See, e.g., EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp.
15 2d 1074, 1085 (C.D. Cal. 2010) (applying Rule 9(b) to a false advertising claim under
16 Lanham Act); *Julian Bakery, Inc. v. Healthsource Int’l, Inc.*, No. 16CV2594-JAH
17 (KSC), 2018 WL 1524499, at *4 (S.D. Cal. Mar. 28, 2018) (finding that Rule 9(b)
18 applied to a plaintiff’s false designation of origin claim).

19 Defendants argue that Rule 9(b) applies to SND’s first claim and that it fails to
20 satisfy the heightened pleading standard. (Mem. of Ps & As in Supp. of Mot. (“Mem.”),
21 Docket No. 35-1 at 6). Defendants state that SND’s false designation claim sounds in
22 fraud because it alleges Defendants collectively “intentionally and willfully
23 disseminated various false statements, such as claims that Sun Nong Dan opened a
24 restaurant in the San Francisco Bay Area under the name Daeho Kalbijjim; Daeho
25 purchased Sun Nong Dan’s confidential recipes; the head chef from Sun Nong Dan
26 opened Daeho Kalbijjim; the wife of Sun Nong Dan’s owner opened Daeho Kalbijjim;
27 and others.” (SAC ¶ 45). Defendants further contend that, because SND did not specify
28

1 which of the defendants made these purported statements the claim fails to satisfy Rule
2 9(b). (Mem. at 7).

3 The Court follows the weight of authority and applies Rule 9(b) to SND's first
4 claim. While fraud is not an element of a false designation claim, SND nonetheless
5 alleges that Defendants engaged in fraudulent conduct by allegedly disseminating false
6 statements to their customers.

7 Applying Rule 9(b), the Court finds that SND has met its burden in pleading the
8 allegations that C. Park disseminated misleading job postings and that I. Park instructed
9 employees to mislead customers. SND identifies I. Park as the party that instructed
10 Daeho employees to spread false statements that the two restaurants are related during
11 employee meetings. (SAC ¶ 47). The Court also finds that the allegation regarding the
12 misrepresentations presented in the job postings do satisfy Rule 9(b). SND sufficiently
13 pleads with particularity that "C. Park falsely represented himself as a former head chef
14 of Sun Nong Dan" in job postings to "deceive or mislead consumers into believing that
15 their dishes and offerings originate from Sun Nong Dan." (*Id.* ¶¶ 86, 97). The
16 remaining false statements SND alleges—for example, that Daeho purchased SND's
17 recipes and that Daeho employees made false statements to customers—have not been
18 pled with sufficient particularity, however, because the specific parties to the
19 misrepresentation, the when, and the where are not identified. (*Id.* ¶ 45).

20 Defendants' Motion to Dismiss SND's Lanham Act false designation of origin
21 claim and UCL claim is **DENIED** insofar as the claim rests on allegations that C. Park
22 disseminated misleading job postings and that I. Park instructed employees to mislead
23 customers; otherwise, the Motion is **GRANTED** as to this claim. SND is permitted
24 leave to amend the claim in conformity with Rule 9(b) and this Order.

25 **C. False Advertising (Counts II & VI)**

26 SND brings claims for false advertising under the Lanham Act and the FAL. Like
27 UCL claims, "[c]laims under the FAL are substantially congruent to those under the
28 Lanham Act." *Allergan USA, Inc. v. Prescribers Choice, Inc.*, 364 F. Supp. 3d 1089,

1 1108 (C.D. Cal. 2019). A Lanham Act false advertising claim requires that the alleged
2 false statements be part of a “commercial advertisement about [defendant’s] own or
3 another’s product.” *BHRS Grp., LLC v. Brio Water Tech., Inc.*, 553 F. Supp. 3d 793,
4 799 (C.D. Cal. 2021) (citation omitted). Commercial advertising, in turn, is
5 “(1) commercial speech, (2) by the defendant who is in commercial competition with
6 the plaintiff, (3) for the purpose of influencing consumers to buy defendant’s goods or
7 services, and (4) that is sufficiently disseminated to the relevant purchasing public.”
8 *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1114–15 (9th Cir. 2021) (citing
9 *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir.
10 1999)). For the purposes of the last prong, for dissemination to be “sufficient,” it must
11 “be part of an organized campaign to penetrate the relevant market, which typically
12 involves widespread dissemination within the relevant industry.” *Id.* at 1121 (citation
13 and quotations omitted).

14 Once again, Rule 9(b)’s heightened pleading standard applies here. *See, e.g.*,
15 *Epicor Software Corp. v. Alternative Tech. Solutions, Inc.*, No. SACV 13-00448, 2013
16 WL 2382262, at *4 (C.D. Cal. May 9, 2013) (applying Rule 9(b) to false advertising
17 claim). Like the unfair competition claims, the false advertising claims are based on
18 the common allegations that Defendants intentionally misrepresented to customers that
19 Daeho and SND were affiliated. As discussed above, though, the general allegation that
20 Daeho employees made false statements to customers does not meet the 9(b) pleading
21 standard.

22 Even as to the factual allegations that do meet the 9(b) standard, SND fails to
23 plead all the elements of a false advertising claim. as Defendants assert, the categories
24 of statements highlighted by SND—job postings and social media comments made by
25 members of the public—do not constitute actionable false advertising. As to the job
26 postings, SND does not allege how the job postings sufficiently disseminated the
27 misrepresentation that C. Park was a former SND head chef to the relevant purchasing
28 public. (SAC ¶ 97). These postings were originally written in Korean and targeted at

1 the Korean working population in San Francisco, and thus do not appear to have been
2 “disseminated sufficiently to the relevant purchasing public”; rather, the postings were
3 disseminated to potential and prospective employees.

4 The social media posts also do not constitute false advertising. In the SAC, SND
5 provides statements from members of the public through review services like Yelp to
6 illustrate how customers mistakenly associated SND with the newly opened Daeho,
7 demonstrating the extent of the influence of the alleged false advertising. (SAC ¶ 68,
8 69). Although this may provide evidence of Daeho’s intent to influence consumers to
9 make a connection between SND and Daeho, SND does not allege that Defendants
10 posted or are responsible for the content of the allegedly misleading reviews. *Cf. BHRS*
11 *Grp., LLC*, 553 F. Supp. at 800 (dismissing false advertising claim based on misleading
12 reviews because plaintiff did “not allege any facts plausibly to show that [defendant]
13 itself posted or is responsible for the content of the allegedly misleading reviews”).
14 Thus, neither the reviews nor their implication provides support to SND’s false
15 advertising claim. Accordingly, the Court **GRANTS** the motion as to the false
16 advertising claims with leave to amend.

17 **D. Trade Dress Infringement (Count III)**

18 SND also brings a claim for trade dress infringement under the Lanham Act. “To
19 recover for trade dress infringement, a plaintiff must prove that (1) the design is
20 inherently distinctive or acquired distinctiveness through a secondary meaning, (2) the
21 design is nonfunctional, and (3) there is a likelihood that the defendant’s use of the
22 plaintiff’s trade dress [will] cause consumer confusion.” *Green Crush LLC v. Paradise*
23 *Splash I, Inc.*, 2018 WL 4940824, at *3 (C.D. Cal. Mar. 8, 2018) (citing *Disc Golf Ass’n,*
24 *Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1005 (9th Cir. 1998)). Trade dress refers
25 to the total image, design, and appearance of a product and “may include features such
26 as size, shape, color, color combinations, texture or graphics.” *Int’l Jensen, Inc. v.*
27 *Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). The total visual appearance
28 of the trade dress is also included in this definition. *Id.* at 822. “[T]rade dress acquires

1 a secondary meaning when the purchasing public associates it with a single producer or
2 source rather than with the product itself.” *Id.* at 824.

3 In the SAC, SND details its trade dress as the visual presentation of its galbi jjim,
4 created by braised short ribs, combined with ddukbokki and vegetables, and topped with
5 cheese. (SAC ¶¶ 19, 116). Defendants argue that SND’s claimed trade dress is generic
6 because each of the *elements* of the purported trade dress is generic. (Mem. at 12).
7 Defendants cite *Big Island Candies, Inc. v. Cookie Corner*, 269 F. Supp. 2d 1236, 1247
8 (D. Haw. 2003), as support for the assertion that a trade dress is generic if it is “a
9 nondistinctive combination of a few basic, common design elements.”

10 In focusing their analysis on “common design elements,” Defendants do not
11 address the emphasis the court in *Big Island Candies* placed on the combination of those
12 elements. *Id.* The court in *Big Island Candies* did not hold that there is no protectable
13 trade dress if the individual elements are generic. Rather, that opinion stresses that the
14 *combination* of those elements must be nondistinctive to render a trade dress
15 unprotectable. *See id.* at 1248 (stating that, if plaintiff’s “particular combination of ...
16 generic elements is not unique, and [plaintiff] offers no additional evidence that there
17 is something distinctive about that combination or that consumers use those features as
18 an indicator of source, then the court cannot conclude that that combination deserves
19 protection”).

20 Here, the trade dress SND alleges is not the individual elements of the black stone
21 plate, the food, or the three side dishes. Rather, SND alleges that the unique
22 combination and visual presentation that arises from putting the specific elements
23 together is the protectable trade dress. Thus, the Court agrees that SND sufficiently
24 pled that the trade dress is not generic. (SAC ¶ 116). Furthermore, SND successfully
25 pleads its trade dress acquired secondary meaning, as evidenced by media coverage and
26 Yelp reviews associating the visual presentation of SND’s galbi jjim with SND. (*Id.*
27 ¶ 117).

1 SND also successfully pleads the trade dress is non-functional, meaning it is
2 essential for neither its use nor its purpose. (*Id.* ¶ 116). When evaluating functionality,
3 “it is crucial [to] focus not on the individual elements, but rather on the overall visual
4 impression that the combination and arrangement of those elements create.” *Clicks*
5 *Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001). Despite
6 Defendants’ argument that each element is functional because pots and side dishes are
7 needed to hold food and because food and flavor are functional, SND sufficiently pleads
8 this element by describing how, as a whole, the trade dress is non-functional, even if
9 the individual elements such as the stone pot and wooden plate are functional. (Mem.
10 at 13).

11 SND’s reliance on *Clicks* is not inapposite, as the Defendants contend. (Reply at
12 9). In *Clicks*, the plaintiff, an operator of billiards establishments, alleged that
13 Sixshooters, a competing billiards establishment, had infringed its trade dress by
14 copying various features and furnishings of Clicks’ interiors to achieve the same overall
15 look as Clicks. *Clicks*, 251 F.3d at 1256. The trial court granted summary judgment
16 for the competitor, but the Ninth Circuit reversed. *Id.* In doing so, the Ninth Circuit
17 found that even though Clicks could not “claim a monopoly” on, for example, “the
18 particular type of lamps or counters with which it furnished its pool halls,” it could
19 “claim as its mark the particular combination and arrangement of design elements that
20 distinguish it from others using the same concept.” *Id.* at 1259 (citation and quotation
21 omitted). Here, SND pleads that its trade dress includes the visual presentation of its
22 galbi jjim created by the food, the torching of the cheese, the silver metal-rimmed black
23 stone plate, and three side dishes. SND is not claiming the food or the individual serving
24 plates on their own constitutes the trade dress. Instead, SND alleges the trade dress,
25 viewed as a whole, creates a visual appearance that is “distinctive” but not “essential
26 for its use or purpose.” (SAC ¶¶ 116, 117). Defendants’ argument against functionality
27 thus fails for the same reasons as their genericness argument.
28

1 Finally, SND sufficiently pleads the likelihood that Daeho’s use of SND’s trade
2 dress caused confusion. (*Id.* ¶¶ 120, 121). The Yelp reviews show actual confusion,
3 with numerous reviews indicating that they recognized Daeho as being affiliated,
4 associated, or connected to SND.

5 **E. Trade Secret Misappropriation Under DTSA & CUTSA (Counts IV**
6 **& VII)**

7 SND claims trade secret misappropriation under the DTSA and the CUTSA.
8 Under both statutes, “a plaintiff must allege that: (1) the plaintiff owned a trade secret;
9 (2) the defendant misappropriated the trade secret; and (3) the defendant’s actions
10 damaged the plaintiff.” *Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868, 877
11 (N.D. Cal. 2018) (citation and quotation omitted). A trade secret has three elements:
12 “(1) information, (2) that is valuable because it is unknown to others, and (3) that the
13 owner has attempted to keep secret.” *InteliClear, LLC v. ETC Glob. Holdings, Inc.*,
14 978 F.3d 653, 657 (9th Cir. 2020). “Under both the DTSA and the CUTSA,
15 ‘misappropriation’ means either (1) the ‘[a]cquisition of a trade secret by another person
16 who knows or has reason to know that the trade secret was acquired by improper
17 means;’ or (2) the ‘[d]isclosure or use of a trade secret of another without express or
18 implied consent.’” *Alta Devices*, 343 F. Supp. 3d at 877.

19 SND adequately pleads the existence of a trade secret. SND alleges that its
20 recipes are “confidential” and “known to only a select few individuals.” (SAC ¶ 134).
21 SND also alleges that Defendants benefitted from creating “strikingly” similar dishes,
22 which illustrates the value of the purported trade secrets. (*Id.* ¶¶ 78, 122). Further,
23 although SND does not plead that it required C. Park specifically to sign an NDA, SND
24 pleads it enforced its NDA policy and that it did take additional measures to maintain
25 secrecy by limiting access to trade secrets to essential employees, segmenting cooking
26 processes into smaller steps, and reminding C. Park of the confidentiality of SND’s
27 trade secrets. (*Id.* ¶¶ 25, 30, 32).
28

1 SND, however, does not adequately allege misappropriation by stating that the
2 Defendants illegally obtained and used SND's trade secrets. (*Id.* ¶¶ 58, 158). SND
3 makes conclusory allegations that C. Park "obtained and stole Sun Nong Dan's various
4 confidential proprietary recipes and business practices" but does not allege any other
5 facts supporting that allegation. (*Id.* ¶¶ 29).

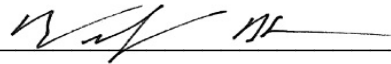
6 Finding, therefore, that SND did not adequately plead its trade secret
7 misappropriation claim, the Court **GRANTS** Defendant's Motion as to that claim with
8 leave to amend.

9 **III. CONCLUSION**

10 Based on the foregoing, Defendants' Motion to Dismiss is **DENIED** in part and
11 **GRANTED** in part, with leave to amend the claims that are dismissed. If SND wishes
12 to amend, it shall file an amended Complaint within 21 days of the date of this Order.
13

14 **IT IS SO ORDERED.**

15
16 Dated: August 29, 2024



HON. WESLEY L. HSU
UNITED STATES DISTRICT JUDGE