

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PERIMETER SOLUTIONS L.P.,

Plaintiff,

v.

FORTRESS NORTH AMERICA, L.L.C.,

Defendant.

No. 2:24-cv-01276-DAD-CSK

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

(Doc. No. 19)

This matter is before the court on the motion to dismiss filed on behalf of defendant Fortress North America, L.L.C. ("Fortress") on June 25, 2024. (Doc. No. 19.) On July 17, 2024, the pending motion was taken under submission to be decided on the papers pursuant to Local Rule 230(g). (Doc. No. 26.) For the reasons explained below, the court will grant defendant's motion to dismiss, with leave to amend.

BACKGROUND

Plaintiff Perimeter Solutions L.P. ("Perimeter Solutions") brings this action alleging violations of trade secret laws against defendant Fortress. (Doc. No. 1.) Plaintiff alleges the following in its complaint.

Generally, sales of aerial fire retardant systems are based on government contracts, for which there is a competitive market. (Doc. No. 1 at ¶¶ 16, 82.) These government contracts involve significant amounts of money. (*Id.* at ¶ 19.) An aerial fire retardant must be approved by

1 the U.S. Forest Service before it can be sold to the U.S. government, and such approval is also
2 important in selling the product to state governments and to other countries. (*Id.* at ¶¶ 16–17.)
3 The “timeline for qualifying a product” with the U.S. Forest Service is “long and complicated.”
4 (*Id.* at ¶¶ 18, 76.) Qualification occurs in stages. (Doc. No. 1-6 at 2.) Interim qualification
5 means the product complies with certain requirements, but final laboratory results and a field
6 evaluation have yet to be conducted. (*Id.*) A product is then conditionally qualified when it
7 complies with all requirements in a laboratory evaluation, but a field evaluation has yet to be
8 conducted. (*Id.*) A product is fully qualified when it complies with all requirements, including in
9 a field evaluation. (*Id.*)

10 Plaintiff produces a phosphate-based fire retardant that is fully qualified by the U.S. Forest
11 Service. (Doc. No. 1 at ¶ 23.) Until recently, plaintiff was the only producer of phosphate-based
12 fire retardant systems. (*Id.* at ¶ 4.) Plaintiff formerly employed Thomas Davis as its Vice
13 President of Operations. (*Id.* at ¶ 37.) In that position, Davis had responsibility for, and access
14 to, all aspects of the design, formulation, and manufacture of plaintiff’s phosphate-based fire
15 retardant product. (*Id.*) Davis signed a confidentiality agreement, which required him to keep
16 plaintiff’s trade secrets confidential. (*Id.* at ¶ 42.) Plaintiff requires employees who have access
17 to trade secrets, confidential, sensitive, and proprietary information to sign confidentiality
18 agreements. (*Id.* at ¶ 92.)

19 Defendant Fortress is a company that was founded in 2014. (*Id.* at ¶ 52.) Defendant
20 previously worked to develop a magnesium chloride-based fire retardant, and “for years”
21 criticized phosphate-based fire retardants. (*Id.* at ¶ 2.) In May 2021, defendant’s magnesium
22 chloride fire retardant was conditionally qualified by the U.S. Forest Service. (*Id.* at ¶ 57.)
23 However, magnesium-based fire retardants have long experienced issues with corrosion. (*Id.* at
24 ¶ 59.) On January 10, 2022, defendant announced that it was hiring Davis, plaintiff’s former
25 employee. (*Id.* at ¶ 69.) After joining defendant, Davis contacted the third-party engineer that
26 helped design plaintiff’s production line. (*Id.* at ¶ 72.) In December 2022, defendant’s
27 magnesium-based fire retardant was fully qualified by the U.S. Forest Service. (*Id.* at ¶ 60.) In
28 2023, trials of defendant’s magnesium chloride fire retardant continued. (*Id.* at ¶ 61.) As of

1 January 5, 2024, another one of defendant's products was interim qualified with the U.S. Forest
2 Service. (*Id.* at ¶ 74.) On March 22, 2024, the U.S. Forest Service informed defendant that it was
3 unable to offer defendant a contract for its fully qualified magnesium chloride fire retardant due
4 to safety concerns. (*Id.* at ¶ 64.) On March 25, 2024, defendant's parent company announced
5 defendant was working to achieve full qualification of proprietary non-magnesium chloride-based
6 aerial fire-retardant products. (*Id.* at ¶ 66.)

7 Based on the foregoing, plaintiff further alleges that defendant's interim qualified product
8 is a phosphate-based fire retardant. (*Id.* at ¶ 3.) "On information and belief, based on the timeline
9 for qualifying a product . . . , Fortress's development of its new non-magnesium chloride based
10 retardant likely started at or around the same time that Davis was hired by Fortress." (*Id.* at ¶ 76.)
11 Given this inferred timeline, defendant developed a product similar to plaintiff's product quickly
12 when formerly plaintiff was the only company capable of developing a phosphate-based fire
13 retardant. (*Id.* at ¶ 75.) "Perimeter Solutions believes that Davis has provided Perimeter
14 Solutions' Trade Secrets to allow his new employer, Fortress, to shortcut the development process
15 for a phosphate-based aerial fire retardant system." (*Id.* at ¶ 75.) "On information and belief,
16 Davis has used other Confidential Information and Trade Secrets of Perimeter Solutions, or it is
17 inevitable that he will use other Confidential Information of Perimeter Solutions, as Fortress tries
18 to find a substitute fire retardant product for its primary customer[,]" the U.S. Forest Service. (*Id.*
19 at ¶ 73.)

20 "Perimeter Solutions' Trade Secrets . . . includes the formulations for phosphate-based fire
21 retardants, the production and blending processes, demand planning, distribution channels,
22 vendors, and suppliers from whom Perimeter Solutions purchases materials and services, and the
23 raw material specifications which are crucial to the retardant's performance[.]" (*Id.* at ¶ 35.)

24 Based on the foregoing allegations, plaintiff Perimeter Solutions brings three claims
25 against defendant Fortress in its complaint: (1) violation of the federal Defend Trade Secrets Act
26 ("DTSA"); (2) violation of the Missouri Uniform Trade Secrets Acts ("MUTSA"); and (3)
27 violation of the California Uniform Trade Secrets Act ("CUTSA"). (Doc. No. 1 at ¶¶ 77–100.)

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On June 25, 2024, defendant filed the pending motion to dismiss plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and an accompanying request for judicial notice. (Doc. No. 19.) Plaintiff filed an opposition to the motion on July 9, 2024. (Doc. No. 23.) Defendant filed its reply thereto on July 24, 2024. (Doc. No. 27.)

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, the court need not assume the truth of legal conclusions cast in the form of factual allegations. *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 676 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). It is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

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1 In ruling on a motion to dismiss under Rule 12(b)(6), the court is permitted to consider
 2 material that is properly submitted as part of the complaint, documents that are not physically
 3 attached to the complaint if their authenticity is not contested and the plaintiff's complaint
 4 necessarily relies on them, and matters of public record. *Lee v. City of Los Angeles*, 250 F.3d.
 5 668, 688–89 (9th Cir. 2001).

6 ANALYSIS

7 For the reasons explained below, the court will grant defendant's request for judicial
 8 notice in part and will grant defendant's motion to dismiss plaintiff's complaint, with leave to
 9 amend.

10 A. Request for Judicial Notice

11 Defendant requests that the court take judicial notice of four exhibits—three patents and
 12 one patent application. (Doc. No. 19-1 at 10 n.4; 19-2; 19-3; 19-4; 19-5.) Defendant seeks to use
 13 the three patents, exhibits 1–3, to establish that “publicly available patents have provided
 14 extensive technical information about phosphate-based fire retardants for decades[,]” and
 15 plaintiff's “own patents disclose copious amounts of technical information about phosphate-based
 16 retardants” including “purportedly novel phosphate-based fire retardant compounds and the
 17 existing phosphate-based fire retardants they allegedly improve upon[,]” and “(1) specific
 18 concentrations of phosphates and other components that Perimeter states are effective,
 19 (2) complete raw material lists and concentrations thereof, (3) methods of making the retardants,
 20 and (4) the results of detailed tests of the retardants.” (Doc. No. 19-1 at 10, 14.) Defendant
 21 argues from this information that plaintiff has failed to distinguish between its trade secrets and
 22 the information publicly available in its patents. (Doc. No. 19-1 at 14.) Defendant seeks to use
 23 the patent application, exhibit 4, to establish that “before Mr. Davis started work at Fortress[,]
 24 Fortress filed a lengthy, comprehensive patent application for phosphate-based fire retardants, the
 25 contents of which show that samples of Fortress' phosphate-based retardant had already been
 26 produced and tested long before Mr. Davis arrived.” (Doc. No. 19-1 at 10.) Based on this,
 27 defendant argues that it started working on its phosphate-based fire retardant before Davis started

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1 working for defendant. (Doc. No. 19-1 at 24.) Plaintiff disputes the import of all four exhibits.
2 (Doc. No. 23 at 13 & n.3.)

3 “A court may take judicial notice of matters of public record without converting a motion
4 to dismiss into a motion for summary judgment.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d
5 988, 999 (9th Cir. 2018) (citation omitted). “But a court cannot take judicial notice of disputed
6 facts contained in such public records.” *Id.* (citation omitted).

7 As to all four exhibits, the court takes judicial notice “that the information exists and is
8 available to the public.” *MACOM Tech. Sols. Inc. v. Litrinium, Inc.*, No. 19-cv-00220-JVS-JDE,
9 2019 WL 4282906, at *1 (C.D. Cal. June 3, 2019) (“[P]atents are matter[s] of public record and
10 the proper subject of judicial notice[,]” but “the Court does not take judicial notice that Plaintiffs’
11 alleged trade secrets were publicly disclosed in these documents[.]”); *see also Novation Sols., Inc.*
12 *v. Issuance Inc.*, No. 2:23-cv-00696-WLH-KS, 2023 WL 5505908, at *4 (C.D. Cal. June 27,
13 2023) (“The Court **GRANTS** Defendants’ request to take notice of the content of the [patent]
14 application and the fact that it is available to the public, but it does not take notice that the
15 application disclosed DealMaker’s trade secrets.”). The court also takes judicial notice of the
16 filing date of exhibit 4. *See Khoja*, 899 F.3d at 1001 (taking judicial notice of the filing date of an
17 international patent application).

18 The court does not, however, take judicial notice that plaintiff’s “alleged trade secrets
19 were publicly disclosed in” exhibits 1–3 because that issue is disputed. *MACOM Tech. Sols.*,
20 2019 WL 4282906, at *1 (“[T]hat issue is disputed in this case, and therefore is not properly
21 subject to judicial notice; rather, the Court takes notice that the content of the [patent] is public.”);
22 (Doc. No. 23 at 13) (disputing the import of exhibits 1–3). Nor does the court take judicial notice
23 of defendant’s disputed interpretation of its exhibit 4. (Doc. No. 23 at 13 n.3.) Evaluating
24 defendant’s proposed interpretations of the patents or patent application would involve “a
25 summary judgment-like review” that the court cannot undertake on a motion to dismiss.
26 *MACOM Tech. Sols.*, 2019 WL 4282906, at *7.

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B. Trade Secrets Act

“California has adopted the Uniform Trade Secrets Act [], which codifies the basic principles of common law trade secret protection.” *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993). “To state a claim for trade secret misappropriation under the . . . CUTSA, a plaintiff must allege that: (1) the plaintiff owned a trade secret; (2) the defendant misappropriated the trade secret; and (3) the defendant’s actions damaged the plaintiff.” *Emergy Inc. v. The Better Meat Co.*, No. 2:21-cv-02417-KJM-CKD, 2022 WL 7101973, at *7 (E.D. Cal. Oct. 12, 2022) (internal quotation marks and citation omitted).

At the federal level, the DTSA similarly permits the “owner of a trade secret that is misappropriated” to bring a civil action, 18 U.S.C. § 1836(b), and includes substantially similar definitions of both “trade secret” and “misappropriation,” 18 U.S.C § 1839(3), (5); *see also IntelIClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020). The court can therefore analyze plaintiff’s California and federal trade secret claims jointly. *IntelIClear*, 978 F.3d at 657. The requirements of the Missouri equivalent, MUTSA, are substantially identical to the DTSA as well, and the Eighth Circuit has likewise treated DTSA and MUTSA claims as standing and falling together. *See Ahern Rentals, Inc. v. EquipmentShare.com, Inc.*, 59 F.4th 948, 955 (8th Cir. 2023) (“Because [the DTSA and MUTSA] are essentially identical, we can analyze the claims together.”).

C. Ownership of Trade Secrets

A “trade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public . . ., and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Cal. Civ. Code § 3246.1(d). In other words, “‘the test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret.’” *Amgen Inc. v. Health Care Servs.*, 47 Cal. App. 5th 716, 734 (2020) (quoting *DVD Copy Control Assn., Inc. v. Bunner*, 116 Cal. App. 4th 241, 251 (2004)). “To adequately plead a trade secret, it must be described with sufficient particularity to separate it

1 from matters of general knowledge in the trade or of special knowledge of those persons who are
2 skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which
3 the secret lies.” *Bladeroom Grp. Ltd. v. Facebook, Inc.*, No. 5:15-cv-01370-EJD, 2015 WL
4 8028294, at *3 (N.D. Cal. Dec. 7, 2015) (citation omitted). “The plaintiff, however, is not
5 required to define every minute detail of its claimed trade secret at the outset of the litigation.”
6 *Id.* (citation omitted).

7 Defendant argues that plaintiff has failed to plead its alleged trade secrets with sufficient
8 particularity to ascertain the boundaries within which the secret purportedly lies. (Doc. No. 19-1
9 at 12–15.) “Perimeter Solutions’ Trade Secrets” as defined in plaintiff’s complaint “includes the
10 formulations for phosphate-based fire retardants, the production and blending processes, demand
11 planning, distribution channels, vendors, and suppliers from whom Perimeter Solutions purchases
12 materials and services, and the raw material specifications which are crucial to the retardant’s
13 performance[.]” (Doc. No. 1 at ¶ 35.) Defendant argues this is “precisely the sort of ‘generic list
14 of categories of various types of information’ that California courts have routinely rejected as
15 insufficient at the pleading stage.” (Doc. No. 19-1 at 13) (quoting *Bladeroom*, 2015 WL
16 8028294, at *3).

17 Plaintiff responds by characterizing the alleged trade secret as “(1) a *formulation* for
18 Perimeter Solutions’ PHOS-CHEK® line of phosphate-based aerial fire-retardant systems; and
19 (2) a *manufacturing process* for its PHOS-CHEK® line of phosphate-based aerial fire-retardant
20 systems[.]” (Doc. No. 23 at 12.) Defendant in reply argues this description constitutes an
21 impermissible departure from plaintiff’s complaint. (Doc. No. 27 at 3) (quoting *Fabbrini v. City*
22 *of Dunsmuir*, 544 F. Supp. 2d 1044, 1050 (E.D. Cal. 2008)) (“Plaintiff’s statements in his
23 opposition brief cannot amend the Complaint under Rule 15.”).

24 The court agrees with defendant that where a “[p]laintiff attempts to . . . narrow” its
25 “definition” of the alleged trade secret “in its opposition” to the defendant’s motion to dismiss,
26 the court “cannot consider” this “extrinsic evidence outside” the complaint. *CleanFish, LLC v.*
27 *Sims*, No. 19-cv-03663-HSG, 2020 WL 1274991, at *9 (N.D. Cal. Mar. 17, 2020); *see also*
28 *Khachatryan v. Blinken*, 4 F.4th 841, 845 (9th Cir. 2021) (When ruling on a motion to dismiss,

1 the court considers “only allegations contained in the pleadings, exhibits attached to the
2 complaint, and matters properly subject to judicial notice.”).

3 Here, the categories listed in plaintiff’s complaint are too vague to define the “boundaries
4 within which the secret lies.” *E. & J. Gallo Winery v. Instituut Voor Landbouw-En*
5 *Visserijonderzoek*, No. 1:17-cv-00808-DAD-EPG, 2018 WL 2463869, at *4 (E.D. Cal. June 1,
6 2018) (citation omitted); *see also id.* at *4 n.2 (distinguishing this analysis from the
7 “particularity” required by California Civil Procedure Code § 2019.210, which is not relevant in
8 evaluating a motion to dismiss). Instead, plaintiff’s alleged trade secrets are analogous to those
9 cases where the alleged trade secrets were found to be “more descriptive of the types of
10 information that generally *may* qualify as protectable trade secrets than as any kind of listing of
11 particular trade secrets [the plaintiff] has a basis to believe actually were misappropriated[.]”
12 *Vendavo, Inc. v. Price f(x) AG*, No. 17-cv-06930-RS, 2018 WL 1456697, at *4 (N.D. Cal. Mar.
13 23, 2018) (finding the plaintiff’s purported trade secrets too “broad” where the plaintiff alleged its
14 trade secrets “include[] its source code, customer lists and customer related information, pricing
15 information, vendor lists and related information, marketing plans and strategic business
16 development initiatives, ‘negative knowhow’ learned through the course of research and
17 development, and other information related to the development of its price-optimization software,
18 including ideas and plans for product enhancements”); *Space Data Corp. v. X*, No. 16-cv-03260-
19 BLF, 2017 WL 5013363, at *2 (N.D. Cal. Feb. 16, 2017) (“[T]he FAC and Exhibits D and E
20 thereto merely provide a high-level overview of Space Data’s purported trade secrets, such as
21 ‘data on the environment in the stratosphere’ and ‘data on the propagation of radio signals from
22 stratospheric balloon-based transceivers.’ These allegations do not satisfy the Rule 8 pleading
23 requirements, as they do not even give the Court or Defendants notice of the boundaries of this
24 case.”); *Rescue 1 Fin., LLC v. Complete Debt Relief, LLC*, No. 23-cv-00982-CJC-KES, 2023 WL
25 6373884, at *4 (C.D. Cal. Aug. 24, 2023), *order clarified*, No. 23-cv-00982-CJC-KES, 2024 WL

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3081923 (C.D. Cal. Jan. 29, 2024) (collecting cases where courts found “vendors and suppliers” to be insufficiently particular). For this reason alone, plaintiff’s complaint must be dismissed.¹

D. Misappropriation

The CUTSA defines “misappropriation” as, *inter alia*, the acquisition of a trade secret by “improper means,” which includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy.” Cal. Civ. Code § 3246.1(a), (b)(1). “Misappropriation” also means disclosure or use of a trade secret without the owner’s consent.” *PEO Experts CA, Inc. v. Engstrom*, No. 2:17-cv-00318-KJM-CKD, 2017 WL 4181130, at *5 (E.D. Cal. Sept. 21, 2017) (citing Cal. Civ. Code § 3246.1(b)(2)). “Use” includes “soliciting customers through the use of trade secret information.” *Id.* (citation omitted). “Use” also includes “accelerated progress” due to “access” to the trade secret. *EchoSpan, Inc. v. Medallia, Inc.*, No. 22-cv-01732-NC, 2024 WL 3431337, at *11 (N.D. Cal. July 2, 2024).

1. What Was Misappropriated

Defendant argues that plaintiff’s allegations regarding what defendant misappropriated are impermissibly vague. (Doc. No. 19-1 at 18.) “A trade secret claim must allege facts as to . . . what was misappropriated by the defendant.” *Flexpand, LLC v. CREAM, Inc.*, No. 19-cv-00878-SBA, 2020 WL 13504975, at *6 (N.D. Cal. Sept. 9, 2020). Here, plaintiff alleges in its complaint that “Perimeter Solutions believes that Davis has provided Perimeter Solutions’ Trade Secrets to allow his new employer, Fortress, to shortcut the development process for a phosphate-based aerial fire retardant system.” (Doc. No. 1 at ¶ 75.) As discussed above, plaintiff defines “Perimeter Solutions’ Trade Secrets” broadly as “includ[ing] the formulations for phosphate-

¹ The court notes, however, that it is unpersuaded by defendant’s remaining arguments regarding the insufficiency of plaintiff’s allegations to support its ownership of a trade secret. A plaintiff is not required to affirmatively plead the difference between information publicly available in its patents and its trade secrets. *E. & J. Gallo Winery*, 2018 WL 2463869, at *6. Moreover, “the presence of a [non-disclosure] contract is an allegation that may support a finding of reasonable measures” to maintain secrecy, particularly at the pleading stage. *Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868, 880 (N.D. Cal. 2018). Here, plaintiff has sufficiently alleged the economic value of its purported trade secrets due to the “competitive advantage[]” these purported trade secrets allegedly provide plaintiff “in the marketplace” for aerial fire retardant government contracts. *Tri Tool, Inc. v. Hales*, No. 22-cv-01515-DAD-KJN, 2023 WL 7130610, at *4 (E.D. Cal. Oct. 30, 2023).

1 based fire retardants, the production and blending processes, demand planning, distribution
 2 channels, vendors, and suppliers from whom Perimeter Solutions purchases materials and
 3 services, and the raw material specifications which are crucial to the retardant's performance[.]”
 4 (Doc. No. 1 at ¶ 35.)

5 To adequately allege what was misappropriated, plaintiff's specific factual allegations
 6 would need to “work in concert to provide insight into which trade secrets were used and how
 7 [d]efendant used the trade secrets.” *Applied Biological Lab's, Inc. v. Diomics Corp.*, No. 3:20-
 8 cv-02500-AJB-LL, 2021 WL 4060531, at *5 (S.D. Cal. Sept. 7, 2021). The allegations of
 9 plaintiff's complaint provide no such specificity, instead appearing to assume that because
 10 defendant purportedly took some unspecified shortcut when developing its phosphate-based fire
 11 retardant, defendant must have made use of plaintiff's laundry list of trade secrets. This
 12 “everything-but-the-kitchen-sink assertion” regarding “the particular trade secrets that
 13 [d]efendant misused” is too conclusory to sufficiently allege misappropriation. *Veronica Foods*
 14 *Co. v. Ecklin*, No. 16-cv-07223-JCS, 2017 WL 2806706, at *14 (N.D. Cal. June 29, 2017) (“Here,
 15 Veronica Foods' allegations of the particular trade secrets that Defendants misused are largely
 16 conclusory—an everything-but-the-kitchen-sink assertion that Defendants ‘have made improper
 17 and unauthorized use of Veronica Foods's Customer List, Supplier List, and Confidential
 18 Business Information’ to solicit customers.”).

19 2. Inevitable Disclosure

20 Defendant argues that plaintiff impermissibly relies on an inevitable disclosure theory.
 21 California has rejected the inevitable disclosure doctrine, under which the plaintiff proves “a
 22 claim of trade secret misappropriation by demonstrating that defendant's new employment will
 23 inevitably lead him to rely on the plaintiff's trade secrets.” *Whyte v. Schlage Lock Co.*, 101 Cal.
 24 App. 4th 1443, 1458 (2002). Plaintiff responds by arguing that its allegations amount to an actual
 25 use theory because plaintiff's complaint alleges that defendant has misappropriated plaintiff's
 26 trade secrets, not that defendant will inevitably misappropriate plaintiff's trade secrets. (Doc. No.
 27 23 at 17.)

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As defendant highlights, (Doc. No. 19-1 at 21), plaintiff’s complaint alleges “[o]n information and belief, Davis has used other Confidential Information and Trade Secrets of Perimeter Solutions, or it is *inevitable* that he *will* use other Confidential Information of Perimeter Solutions, as Fortress tries to find a substitute fire retardant product for its primary customer,” (Doc. No. 1 at ¶ 73) (emphasis added). The court agrees with defendant that this allegation plainly relies on the rejected inevitable disclosure doctrine. However, the remainder of plaintiff’s complaint relies on circumstantial allegations in asserting that defendant *has* misappropriated plaintiff’s trade secrets to develop its latest interim-qualified product. (*Id.* at ¶ 6.) Such allegations do not rely on the inevitable disclosure doctrine and merit closer attention. *Bambu Franchising, LLC v. Nguyen*, 537 F. Supp. 3d 1066, 1075 (N.D. Cal. 2021) (“Here, however, Plaintiff does not allege that there will be inevitable disclosure; Plaintiff alleges and has presented circumstantial evidence that there has already been disclosure and use of its trade secrets.”).

3. Circumstantial Allegations of Misappropriation

As noted, plaintiff relies on several circumstantial allegations in support of its claim that defendant must have used plaintiff’s trade secrets to shortcut development of its phosphate-based fire retardant. First, plaintiff alleges that Davis, a former employee of plaintiff who had access to plaintiff’s trade secrets by virtue of his position with plaintiff, started working for defendant. (Doc. No. 1 at ¶¶ 37, 47.) Second, plaintiff alleges that defendant developed a product very similar to plaintiff’s very quickly. (*Id.* at ¶ 6.) Third, plaintiff alleges that until defendant developed its phosphate-based fire retardant, only plaintiff had managed to do so. (*Id.* at ¶ 4.) Fourth, plaintiff alleges that after Davis joined defendant, he contacted the third-party engineer who had built plaintiff’s production line. (*Id.* at ¶¶ 40, 72.) The court will consider each of these allegations in turn, then in combination.

a. *Davis’s Employment with Defendant*

Defendant argues that Davis’s decision to pursue employment with defendant is insufficient to allege misappropriation. (Doc. No. 19-1 at 19.) The court agrees. A defendant employee’s “mere knowledge of [the p]laintiff’s alleged trade secrets is insufficient to constitute misappropriation.” *Power Integrations, Inc. v. De Lara*, No. 20-cv-00410-MMA-MSB, 2020 WL

1 1467406, at *19 (S.D. Cal. Mar. 26, 2020); *Bitglass, Inc. v. Netskope, Inc.*, No. 20-cv-05216-RS,
 2 2020 WL 11563099, at *4 (N.D. Cal. Dec. 21, 2020) (distinguishing the allegations there from
 3 the type of obviously deficient pleadings “where a plaintiff has merely alleged in conclusory
 4 terms that an ex-employee now working for a competitor had access to a whole panoply of
 5 company information and can be inferred to be using trade secrets in his or her new position”);
 6 *M/A-COM Tech. Sols., Inc. v. Litrinium, Inc.*, No. 19-cv-00220-JVS-JDE, 2019 WL 6655274, at
 7 *9 (C.D. Cal. Sept. 23, 2019) (“The allegation that Garez had knowledge of trade secret
 8 information and was then recruited to Litrinium describes a change in employment, but not
 9 wrongful conduct.”).

10 b. *Development of Similar Product Quickly*

11 Plaintiff also alleges that defendant developed a new phosphate-based fire retardant, the
 12 same type of fire retardant plaintiff produces, so quickly that it must have been based on
 13 plaintiff’s trade secrets. (Doc. Nos. 1 at ¶¶ 6, 75; 19-1 at 23.) To substantiate this conclusion,
 14 plaintiff alleges that although defendant was founded in 2014, defendant “likely” didn’t start
 15 working on its new phosphate-based fire retardant until Davis started working for defendant in
 16 early 2022. (Doc. No. 1 at ¶¶ 52, 76.)

17 Defendant argues that it filed a patent application for a phosphate-based fire retardant
 18 prior to Davis commencing employment with defendant, which proves that defendant had been
 19 working on its phosphate-based fire retardant prior to Davis joining defendant. (Doc. No. 19-1 at
 20 23–24.) Plaintiff responds by arguing that defendant’s former patent application may not be the
 21 basis for defendant’s current efforts, or Davis may have started working for defendant earlier than
 22 publicly announced. (Doc. No. 23 at 13 n.3, 15.) As discussed above in ruling on defendant’s
 23 request for judicial notice, at the motion to dismiss stage, the court cannot interpret the patent
 24 application at issue to resolve the parties’ factual dispute. *MACOM Tech. Sols.*, 2019 WL
 25 4282906, at *7. The court therefore turns to plaintiff’s allegations since “[a]t this stage of the
 26 proceedings, the party claiming trade secret misappropriation . . . must plead facts showing it is
 27 entitled to relief.” *Pellerin v. Honeywell Int’l, Inc.*, 877 F. Supp. 2d 983, 989 (S.D. Cal. 2012);
 28 *see also id.* at 990 (“Whether [the opposing party has] produced sufficient evidence to

1 demonstrate that they independently developed their processes is irrelevant at this stage of
2 proceedings.”).

3 Defendant argues plaintiff’s allegation that defendant developed its product quickly is
4 conclusory and without factual basis because this allegation in turn relies on a “baseless
5 assumption” that defendant started developing its phosphate-based fire retardant at or around the
6 time Davis joined defendant. (Doc. No. 19-1 at 25.)

7 Plaintiff’s complaint alleges “[o]n information and belief, *based on the timeline for*
8 *qualifying a product . . .*, Fortress’s development of its new non-magnesium chloride based
9 retardant likely started at or around the same time that Davis was hired by Fortress.” (Doc. No. 1
10 at ¶ 76) (emphasis added). However, according to plaintiff’s complaint “the timeline for
11 qualifying a product” is “long and complicated.” (*Id.* at ¶¶ 18, 76.) Therefore, plaintiff’s
12 allegation that defendant started developing its phosphate-based fire retardant at or around the
13 same time Davis was hired by Fortress, rather than earlier, is “conclusory,” if not inconsistent
14 with its alleged factual basis. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.),
15 *opinion amended on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001) (“The court need not,
16 however, accept as true allegations that contradict matters properly subject to judicial notice or by
17 exhibit. [citation] Nor is the court required to accept as true allegations that are merely
18 conclusory, unwarranted deductions of fact, or unreasonable inferences.”); *see also Jones v.*
19 *Pollard*, No. 21-cv-00162-MMA-RBM, 2022 WL 706926, at *5 (S.D. Cal. Mar. 9, 2022)
20 (Generally, the court “need not accept inconsistent allegations in a complaint as true on a motion
21 to dismiss[.]”) (citation omitted).

22 Plaintiff’s complaint also suggests that because defendant was developing a magnesium
23 chloride fire retardant until recently, defendant must not have started developing a phosphate-
24 based fire retardant until it became clear the magnesium chloride fire retardant was unworkable.
25 (Doc. No. 1 at ¶ 52.) However, plaintiff also appears to concede that defendant, by seeking to
26 develop a magnesium chloride fire retardant, was not precluded from simultaneously developing
27 a non-magnesium-based fire retardant. (*Id.* at ¶¶ 61, 76) (alleging defendant started developing
28 its phosphate-based fire retardant in early 2022 and that trials of defendant’s magnesium chloride

1 fire retardant continued in 2023). Because plaintiff's complaint provides no factual basis for its
2 conclusory allegation that defendant started developing its phosphate-based fire retardant only
3 recently, plaintiff's allegation that defendant developed its phosphate-based fire retardant quickly
4 is also without factual basis. *Sprewell*, 266 F.3d at 988.

5 All then that remains is plaintiff's allegation that defendant's new product is similar to
6 plaintiff's product by virtue of the fact that both products are phosphate-based fire retardants.
7 "[M]erely alleging similarity between two products, without more, is insufficient to support a
8 claim of misappropriation." *E. & J. Gallo Winery*, 2018 WL 2463869, at *7.

9 c. *Plaintiff's Former Lack of Competition*

10 Plaintiff further alleges that until now it has been the only producer of phosphate-based
11 fire retardants due to the failure of others to develop a competing version of the product. (Doc.
12 No. 1 at ¶ 4.) That plaintiff enjoyed a lack of competition does not plausibly allege that no
13 competitor could ever, through independent means, develop a competing product. Where the sole
14 producer of a product with "monopoly power" newly faces competition from a defendant
15 developing a similar product, the plaintiff "must allege facts that are not merely consistent with
16 both a theory of innocent market entry and the theory that [the d]efendant[] used [the plaintiff's
17 trade secrets], but rather tend to exclude an innocent explanation." *Veronica Foods*, 2017 WL
18 2806706, at *14 (citation omitted); *see also Eclectic Properties E., LLC v. Marcus & Millichap*
19 *Co.*, 751 F.3d 990, 996 (9th Cir. 2014) ("[P]laintiffs cannot offer allegations that are merely
20 consistent with their favored explanation but are also consistent with the alternative
21 explanation.").

22 d. *Third-Party Engineer*

23 Plaintiff next alleges that "Davis contacted the [third-party] engineer that helped design
24 [plaintiff's] production line[.]" (Doc. No. 1 at ¶ 72.) Defendant argues this bare allegation does
25 not amount to misappropriation because plaintiff does not allege the contents of the purported
26 conversation. (Doc. No. 19-1 at 21.) In its opposition, plaintiff argues that in a separate pleading
27 before a different court, plaintiff alleged that Davis asked the engineer to build a similar
28 manufacturing facility for defendant. (Doc. No. 23 at 15.) Once again, the court may not

1 consider factual allegations outside the plaintiff's operative complaint when ruling on a motion to
 2 dismiss. *Khachatryan*, 4 F.4th at 845 (The court considers "only allegations contained in the
 3 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.").
 4 Nevertheless, the court notes that even such an allegation would not amount to misappropriation
 5 because it would not tend to exclude the innocent explanation that Davis sought the third-party
 6 engineer's "general knowledge in the trade or . . . special knowledge of those persons who are
 7 skilled in the trade[.]" *E. & J. Gallo Winery*, 2018 WL 2463869, at *3. Seeking out a plaintiff's
 8 qualified former employee or contractor to develop "competitive products with similar features
 9 does not [constitute] wrongful conduct, but instead describes a market competitor." *M/A-COM*
 10 *Tech. Sols.*, 2019 WL 6655274, at *9; *see also Brown v. Adidas Int.*, 938 F. Supp. 628, 634 (S.D.
 11 Cal. 1996) ("Allegations of similarity, without more, do not support a claim of misappropriation
 12 of trade secrets.").

13 e. *Circumstantial Allegations Considered Together*

14 Separately insufficient circumstantial allegations may plausibly allege misappropriation
 15 when considered together. *See e.g., E. & J. Gallo Winery*, 2018 WL 2463869, at *7. For
 16 instance, while product similarity alone is an insufficient basis upon which to allege
 17 misappropriation, where the defendant allegedly admitted in a press release that production on its
 18 nearly identical product had started one year after the defendant viewed a presentation containing
 19 the plaintiff's trade secrets, it was found that the plaintiff plausibly alleged that the defendant
 20 misappropriated the plaintiff's trade secrets. *Id.*

21 In contrast, another district court has found that where the plaintiff alleged the defendant
 22 was a competing business founded by the plaintiff's former employee, that former employee
 23 recruited another former employee who had extensive knowledge of the plaintiff's trade secrets,
 24 and shortly thereafter the competing business began marketing products with the same or similar
 25 features as the plaintiff's products, the plaintiff had failed to allege misappropriation. *M/A-COM*
 26 *Tech. Sols.*, 2019 WL 6655274, at *8. Plaintiff's allegations here are similar—that a former
 27 employee of plaintiff started working for defendant, the same former employee contacted an
 28 engineer who formerly worked for plaintiff, and shortly thereafter defendant obtained preliminary

1 approval of a product similar to plaintiff's product. (Doc. No. 1 at ¶ 6, 37, 40, 47, 72.) In both
2 cases, plaintiff's purported circumstantial allegations of wrongful conduct "instead describe[] a
3 market competitor." *M/A-COM Tech. Sols.*, 2019 WL 6655274, at *8 ("The allegation that
4 Litrinium did not begin marketing their products until shortly after Garex began his employment
5 there or that they developed competitive products with similar features does not allege wrongful
6 conduct, but instead describes a market competitor.").

7 Because the circumstantial allegations of plaintiff's complaint here do not tend to exclude
8 the innocent explanation—that a competitor in the fire retardant industry sought to develop a
9 phosphate-based fire retardant to compete with plaintiff and to do so recruited qualified
10 individuals for their general or specialized knowledge—plaintiff has not plausibly alleged
11 misappropriation. *CleanFish*, 2020 WL 1274991, at *11 ("Given the risk that trade secret claims
12 can be misused for anti-competitive purposes, the Court agrees that it is appropriate for a plaintiff
13 to be required to allege facts that tend to exclude general knowledge or innocuous (*i.e.*,
14 competitive marketplace) explanations.").

15 Because plaintiff has failed to allege the purported trade secrets with sufficient
16 particularity, and because plaintiff fails to allege that defendant misappropriated plaintiff's
17 alleged trade secrets, the court will grant defendant's motion to dismiss plaintiff's claims, all
18 three of which require the plaintiff to allege ownership of a trade secret and misappropriation.
19 *Ahern Rentals*, 59 F.4th at 955; *InteliClear*, 978 F.3d at 657. Given these grounds for dismissal,
20 the court need not address defendant's argument regarding the insufficiency of plaintiff's
21 allegations to support its claim of damages.²

22 ////

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25 ² Nevertheless, the court draws the parties' attention to "head start" damages, which are a form of
26 unjust enrichment damages that the parties did not address in the section of their briefing devoted
27 to the sufficiency of plaintiff's allegations with respect to damages. See *EchoSpan*, 2024 WL
28 3431337, at *11. Should plaintiff opt to amend its complaint, and should defendant file a
subsequent motion to dismiss that amended complaint for failure to adequately plead damages,
the court instructs the parties to address whether plaintiff's amended complaint adequately pleads
head start damages.

E. Leave to Amend

Leave to amend should be granted “freely” when justice so requires. Fed. R. Civ. P. 15(a). The Ninth Circuit maintains a policy of “extreme liberality generally in favoring amendments to pleadings.” *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406, 406 (9th Cir. 1960). Reasons “such as undue delay, bad faith or dilatory motive . . . repeated failure to cure deficiencies . . . undue prejudice to the opposing party . . . [or] futility” may support denial of leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court “should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Servs.*, 911 F.2d 242, 247 (9th Cir. 1990). “Facts raised for the first time in [a] plaintiff’s opposition papers should be considered by the court in determining whether to grant leave to amend or to dismiss with or without prejudice.” *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

Here, plaintiff has requested leave to amend if defendant’s motion to dismiss is granted, (Doc. No. 23 at 18–19), plaintiff’s original complaint is pending before this court, (Doc. No. 1), and it is possible the pleading deficiencies the court has identified in this order may be cured by the allegation of additional facts, *Cook*, 911 F.2d at 247. Accordingly, plaintiff will be granted leave to amend its complaint.

CONCLUSION

For the reasons explained above,

1. Defendant’s request for judicial notice (Doc. No. 19-1 at 10 n.4) is GRANTED IN PART;
2. Defendant’s motion to dismiss (Doc. No. 19) is GRANTED;
3. Plaintiff’s complaint (Doc. No. 1) is DISMISSED due to plaintiff’s failure to state a cognizable claim, with leave to amend; and

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4. Plaintiff shall file its first amended complaint, or alternatively, a notice of its intent to not file a first amended complaint, within fourteen (14) days from the date of entry of this order.

IT IS SO ORDERED.

Dated: **February 18, 2025**

Dale A. Drozd
DALE A. DROZD
UNITED STATES DISTRICT JUDGE