

1 COOLEY LLP
MICHAEL ATTANASIO (151529)
2 (mattanasio@cooley.com)
BARRETT J. ANDERSON (318539)
3 (banderson@cooley.com)
CRAIG E. TENBROECK (287848)
4 (ctenbroeck@cooley.com)
SOPHIA M. RIOS (305801)
5 (srios@cooley.com)
JAYME B. STATEN (317034)
6 (jstaten@cooley.com)
4401 Eastgate Mall
7 San Diego, CA 92121-1909
Telephone: (858) 550-6000
8 Facsimile: (858) 550-6420

9 *Attorneys for Plaintiff and Counter-Defendant*
ChromaDex, Inc.

10 *Counsel continued on following page*

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12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **(WESTERN DIVISION)**
16

17 ChromaDex, Inc.,
18 Plaintiff,
19 v.
20 Elysium Health, Inc., and Mark Morris
21 Defendants.

22 Elysium Health, Inc.,
23 Counterclaimant,
24 v.
25 ChromaDex, Inc.,
26 Counter-Defendant.
27
28

Case No. 8:16-cv-2277-CJC (DFMx)

**CHROMADEx, INC.’S SUPPLEMENTAL
BRIEF PURSUANT TO OCTOBER 9, 2019,
ORDER ON MOTIONS FOR SUMMARY
JUDGMENT**

Judge: Hon. Cormac J. Carney
Courtroom: 7C
Date: January 13, 2020
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Trial: TBD

1 COVINGTON & BURLING LLP
MITCHELL A. KAMIN (202788)
2 (mkamin@cov.com)
1999 Avenue of the Stars, Suite 3500
3 Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
4 Facsimile: (424) 332-4749

5 COVINGTON & BURLING LLP
PHILIP A. IRWIN (*admitted Pro Hac Vice*)
6 (pirwin@cov.com)
620 Eighth Avenue
7 New York, NY 10018-1405
Telephone: (212) 841-1000
8

9 *Attorneys for Plaintiff and Counter-Defendant*
10 *ChromaDex, Inc.*

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1 **I. INTRODUCTION**

2 ChromaDex, Inc. (“ChromaDex”) respectfully submits this supplemental brief to
3 address the two issues identified by the Court in its October 9, 2019, Order Regarding
4 Motions for Summary Judgment, Motions *in Limine*, and Trial (the “Order”). (Dkt.
5 369.) ChromaDex addresses causation first, then patent misuse.

6 **II. THERE IS A GENUINE MATERIAL FACTUAL DISPUTE ABOUT CAUSATION**

7 The Court’s questions about causation flow from the premise that “[t]he heart
8 and soul of this case is the breach of a sales contract.” (Order at 2.) It is not. The heart
9 of this case is Defendant Mark Morris’s breaches of fiduciary duty and the aiding and
10 abetting of those breaches by Eric Marcotulli and Dan Alminana, the co-founders of
11 Defendant Elysium Health, Inc. (“Elysium”). For months, this trio carried out a wide-
12 ranging scheme to “destroy” ChromaDex so they could, in their words, “get rid of the
13 scumbags holding this magnificent technology” (ChromaDex’s patented ingredient
14 nicotinamide riboside (“NR”). (Ex. 15 at 232, 249.)¹ The scheme these three cooked
15 up certainly *included* the theft of NR from ChromaDex through a brazen breach of
16 contract. But that was just part of it. Their plot also included stealing and misusing
17 numerous confidential and proprietary documents in violation of multiple contracts and
18 trade secrets laws, as well as other acts of deception and disloyalty that enabled the trio
19 to pull off their scheme. (See Dkt. 302-1 at 3–14.) The evidence presented by
20 ChromaDex shows that the conspiracy both harmed ChromaDex and unjustly enriched
21 the Defendants. At a minimum, it creates triable issues of fact for a jury to decide.

22 ChromaDex’s damages expert identified several buckets of damages arising from
23 this scheme.² (Ex. 101 at 1080.) While ChromaDex believes each category is supported

24 _____
25 ¹ All citations to “Ex.” refer to those Exhibits filed in support of ChromaDex’s
26 Opposition to Defendants’ Motion for Partial Summary Judgment, (Dkts. 297, 298,
27 324) (Exhibits 1–106), or the consecutively numbered Exhibits attached to the
28 concurrently filed Declaration of Barrett J. Anderson in Support of ChromaDex’s
Supplemental Brief, (Exhibits 107–147).

² We use the term “damages” loosely to refer to both money damages and restitution
(unjust enrichment). *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 56, 69 n.39
(2005) (distinguishing between these concepts but referring to both as “damages”).

1 by the facts and the law, it takes seriously the Court’s concern that damages might be
2 “overstated.” (Order at 3.)³ To alleviate that concern, ChromaDex only intends to
3 request a subset of readily provable damages from the jury. Those damages are:

- 4 • Elysium’s outstanding balance for the June 30 orders (about \$3 million);
- 5 • Elysium’s profits arising from its resale of ingredients from the
6 June 30 orders (about \$ [REDACTED]);
- 7 • Elysium’s avoided costs from its use of two confidential ChromaDex
8 documents, the NRCI Analytical Method and the pTeroPure GRAS
9 Report (\$110,000);
- 10 • Elysium’s wrongfully obtained price discount (\$600,000); and
- 11 • Morris’s compensation (\$684,781).⁴

12 ChromaDex will explain its theory of causation with respect to each category of
13 damages (except the first, as the Court has raised no questions about that one). Then,
14 for completeness, ChromaDex will address damages categories that it does not presently
15 intend to pursue at trial (but could).

16 **A. The Legal Standard for Causation at Summary Judgment**

17 Issues of causation are “intensely factual” and should “typically be resolved by a
18 jury.” *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th
19 Cir. 2013). “Indeed, it is jurors’ ‘common experience of living on a populated planet’
20 that renders them at least as reliable, if not more so, than a single judge at assessing
21 issues of causation.” *Id.* Causation should not be decided on summary judgment
22 unless, “under undisputed facts, there is no room for a reasonable difference of
23 opinion.” *Lawrence v. La Jolla Beach & Tennis Club, Inc.*, 231 Cal. App. 4th 11, 33
24 (2014) (internal quotations omitted); *see also BladeRoom Grp. Ltd. v. Emerson Elec.*
25 *Co.*, 331 F. Supp. 3d 977, 987 (N.D. Cal. 2018) (stating jury should decide causation
26 “unless the facts regarding causation are undisputed”).

27 ³ ChromaDex understands the Court’s questions to only concern causation, not the
28 *amount* of damages, because “[d]etermining amount of harm suffered is for the jury.”
Pyramid Techs., Inc. v. Hartford Cas. Ins., 752 F.3d 807, 820 (9th Cir. 2014).

⁴ ChromaDex will also request punitive damages.

1 “California applies a broad ‘substantial factor’ test for legal causation.”
2 *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 551 (9th Cir. 2018)
3 (citing *Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 79 (1999)). The test applies to
4 “both contract and tort claims.” *BladeRoom*, 331 F. Supp. 3d at 987. “Undue emphasis
5 should not be placed on the term ‘substantial.’” *Crowe v. City of San Diego*, 2005 WL
6 8156613, at *3 (S.D. Cal. Apr. 11, 2005) (quoting *Rutherford v. Owens-Illinois, Inc.*,
7 16 Cal. 4th 953, 969 (1997)). The standard “requir[es] only that the contribution of the
8 individual cause be more than negligible or theoretical.” *Rutherford*, 16 Cal. 4th at 978.
9 Even “a very minor force” that causes harm is a substantial factor. *Grancare, LLC v.*
10 *Thrower*, 2016 WL 1082780, at *4 (N.D. Cal. Mar. 21, 2016), *aff’d*, 889 F.3d 543.

11 A “substantial factor” need not be the *only* factor causing loss. *Yanez v. Plummer*,
12 221 Cal. App. 4th 180, 187 (2013). “[T]here may be multiple causes of a plaintiff’s
13 injury,” both tortious and nontortious. *Third Eye Blind, Inc. v. Near N. Entm’t Ins.*
14 *Servs.*, 127 Cal. App. 4th 1311, 1319 (2005). Merely because “other factors” may have
15 contributed to the harm “does not conclusively establish that there is no genuine issue”
16 for a jury. *Bulletin Displays, LLC v. Regency Outdoor Advert., Inc.*, 518 F. Supp. 2d
17 1182, 1190 (C.D. Cal. 2007) (Carney, J.). A plaintiff is not required to apportion
18 damages between multiple causes because “where a defendant’s [conduct] is a
19 concurring cause of an injury, the law regards it as a legal cause of the injury, *regardless*
20 *of the extent to which it contributes to the injury.*” *Espinosa v. Little Co. of Mary Hosp.*,
21 31 Cal. App. 4th 1304, 1317–18 (1995) (emphasis in original) (holding expert’s
22 “inability to pin down the exact extent to which defendants’ conduct contributed to the
23 outcome is immaterial for purposes of *causation*”).

24 Critically, causal links may be inferred from circumstantial evidence. *Oswalt v.*
25 *Resolute Indus., Inc.*, 642 F.3d 856, 863–64 (9th Cir. 2011). Circumstantial evidence
26 “is intrinsically no different from testimonial evidence.” *Holland v. U.S.*, 348 U.S. 121,
27 140 (1954); *see also* CACI No. 202. It is “particularly appropriate in trade secret cases,”
28 given the secretive nature of the misconduct. *UniRAM Tech. v. Taiwan Semiconductor*

1 *Mfg. Co.*, 617 F. Supp. 2d 938, 944 (N.D. Cal. 2007); *see also Astro-Med., Inc. v. Nihon*
2 *Kohden Am., Inc.*, 591 F.3d 1, 19 (1st Cir. 2009) (ruling “it is a logical inference that a
3 competitor who hires away a rival’s valued employee with access to inside information
4 has done so in order to use that inside information to compete with the rival”);
5 *Teleconnect Co. v. Ensrud*, 55 F.3d 357, 360 (8th Cir. 1995) (“[W]e reject the notion
6 that only a ‘smoking gun’ will suffice to defeat a motion for summary judgment in suits
7 predicated upon asserted disclosures of confidential information.”).

8 **B. Damages that ChromaDex Intends to Seek at Trial**

9 **1. Elysium’s Profits from the June 30 Orders**

10 ChromaDex seeks to recover approximately \$ [REDACTED] based on the profits
11 Elysium made from ingredients it stole from ChromaDex with Morris’s help (“the June
12 30 Orders”).⁵ California law permits disgorgement of illicit profits as a remedy for both
13 aiding-and-abetting breach of fiduciary duty and misappropriation of trade secrets. *Am.*
14 *Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1482–83 (2014)
15 (aiding and abetting); *BladeRoom*, 331 F. Supp. 3d at 990 (misappropriation).
16 Assessing the evidence, as the Court must, in the light most favorable to ChromaDex,
17 a jury could find that Marcotulli’s and Alminana’s scheming with Morris and/or
18 Defendants’ misappropriation of ChromaDex’s trade secrets were substantial factors
19 (*i.e.*, “more than negligible or theoretical”) in enabling Elysium’s ingredient theft (and
20 the profits therefrom). Such evidence is sufficient to survive summary judgment.

21 Evidence here shows that Elysium placed an unusual purchase order in late June
22 2016. Marcotulli and Alminana wanted to buy more product than ever before—
23 substantially more—and wanted to pay a lot less. (Jaksch Decl. ¶ 7; *see* Ex. 32.)⁶ For

24 ⁵ Elysium’s profit rates are shown in Schedule 5B of Lance Gunderson’s expert report.
25 (Ex. 107.) From [REDACTED]/2016 to 12/31/2017, Elysium’s weighted average profit rate was
26 approximately [REDACTED] of revenue. Applying the approximately [REDACTED] in revenue
27 Elysium received in the Basis program that used the unpaid [REDACTED] to the
28 Elysium profit rate of approximately [REDACTED] yields Elysium profits of \$ [REDACTED]. (*See*
id.; Ex. 141 at 128:8–18.)

⁶ References to “Jaksch Decl.” refer to the Declaration of Frank Jaksch in Support of
ChromaDex’s Supplemental Brief Pursuant to October 9, 2019, Order.

1 ChromaDex, this order was risky. (Jaksch Decl. ¶ 8.) ChromaDex paid its contract
2 manufacturer—W.R. Grace (“Grace”)—for ingredients before getting paid by its
3 customers for those same ingredients, and ChromaDex did not carry much cash on hand.
4 (*Id.*) Thus, if ChromaDex shipped a large quantity of ingredients to a single customer,
5 and the customer failed to pay, ChromaDex would be in significant financial peril. (*Id.*)
6 It was far from certain, therefore, that ChromaDex would have accepted the June 30
7 Orders in the ordinary course. It would have rejected them if it knew (as Morris did)
8 that Marcotulli and Alminana planned to stiff ChromaDex on the bill. (*Id.* ¶¶ 10, 13.)

9 Rather than warn ChromaDex of Elysium’s plan to get the ingredients without
10 paying, Morris facilitated it. Morris slipped ChromaDex trade secret information to
11 Elysium about a competitor’s purchases, (Ex. 15 at 224), and the price ChromaDex paid
12 Grace, (*id.* at 242 (“I verified—These guys paid ██████ for this inventory”). Alminana
13 was ecstatic. (*Id.* at 224 (“This is between us and you are the F’n man!!”).) Marcotulli
14 and Alminana then used this inside information to pressure ChromaDex during
15 negotiations; for example, Alminana “harp[ed]” repeatedly about ChromaDex’s
16 margins, and (wrongly) accused ChromaDex of breaching the parties’ supply
17 agreement. (Ex. 108 at 1160–61; Ex. 142 at 251:2–7.)⁷ At the same time, Marcotulli
18 sweetened the pot by falsely promising that Elysium would place further large orders
19 before the end of 2016. (Ex. 144 at 254:17–21.)

20 Internally, ChromaDex debated whether to take Elysium’s orders. But Morris
21 pushed to accept them as a way to resolve the very dispute with Elysium that Morris
22 had purposely helped instigate. (Jaksch Decl. ¶ 11; Ex. 33 at 347–48.)⁸ In the end,
23 ChromaDex reluctantly agreed. As CEO Frank Jaksch testified: “I think the one point
24 I said [to Elysium]. . . ‘what you guys are trying to do right now is harming us. The
25 negotiations that you are doing is not as a good partner, but we want to be a good partner

26 ⁷ Citations to deposition testimony refer to original deposition transcript pagination.

27 ⁸ The parties have extensively briefed their conflicting interpretations of the MFN
28 Provision of the supply agreement. (Dkt. 302-1 at 2–3, 23–25.) At a minimum, it is
(and was) heavily disputed whether that term entitled Elysium to a lower price.

1 regardless of that, and if we have to sell it to you at \$800 a kilo, then we'll do that. And
2 that's—that's essentially how . . . the whole thing ended.” (Ex. 142 at 252:18–25.)

3 What Jaksch did not know is that, contrary to their promises, Marcotulli and
4 Alminana never intended to pay and never intended to order ingredients from
5 ChromaDex again. ***But Morris knew.*** On July 1, 2016, the day ChromaDex began
6 shipping the ingredients, Morris and Alminana discussed Elysium's plan to accuse
7 ChromaDex of contractual breaches “the second our ingredients are at Tishcon”
8 (Elysium's contract manufacturer). (Ex. 15 at 247–49.) Morris told Alminana to “make
9 sure I am out of here first I want to destroy them!” (*Id.* at 249.) Two weeks later,
10 Morris sent Marcotulli and Alminana an email recommending manufacturers who could
11 provide Elysium a new (and infringing) source of NR, including the very company that
12 Elysium uses today: [REDACTED]. (Ex. 44 at 542.) When he sent that
13 email, on July 14, Morris was still a ChromaDex executive, and still owed his employer
14 a duty of undivided loyalty. (Ex. 86.) Morris's loyalty, however, already belonged to
15 his new benefactors, Marcotulli and Alminana. (Ex. 47 (“I also have unconditional
16 loyalty to you two.”); Ex. 145 at 325:19–329:11.)

17 Suffice it to say, Morris did not warn ChromaDex about the coming storm, and
18 events played out just as he, Marcotulli, and Alminana had planned. ChromaDex
19 shipped the large quantities of ingredients to Elysium on credit. (Ex. 34 at 420–24.) As
20 soon as those shipments were safely in Elysium's possession, Alminana accused
21 ChromaDex of wrongdoing as a pretext for nonpayment (as he and Morris had
22 discussed). (Ex. 36 at 433; Ex. 72 at 777–79.) Then Elysium made millions of dollars
23 in profits by selling the stolen ingredients as it searched for a new source of NR. (Ex.
24 Ex. 107; Ex. 141 at 128:8–18.) A jury could infer from this evidence that Defendants'
25 scheming and/or misappropriation of ChromaDex's trade secrets were substantial
26 factors in enabling this unjust enrichment. *See, e.g., Englebrick v. Worthington Indus.,*
27 *Inc.*, 2011 WL 13133751, at *2 (C.D. Cal. June 23, 2011) (denying motion for summary
28 judgment on causation because “genuine disputes . . . are more properly resolved by the

1 finder of fact at trial”) (Carney, J.); *Warner v. Berg, Inc.*, 2004 WL 68757, at *8 (Cal.
2 Ct. App. Jan. 16, 2004) (reversing grant of summary judgment on causation because
3 “despite defendants’ evidence,” plaintiff’s declaration he “would have” acted
4 differently was “sufficient to raise a material triable factual issue”).

5 2. **Elysium’s Avoided Costs**

6 ChromaDex also seeks to recover the money Elysium saved, or “avoided,” by
7 breaching its contracts. The theory is straightforward. Elysium had obligations to keep
8 certain ChromaDex documents confidential. Instead of complying with those
9 obligations, Elysium exploited two documents for its own benefit, disclosing them to
10 others. These documents are: (1) the NRCl Analytical Method and (2) the pTeroPure
11 GRAS Report. (Dkt. 153, Fifth Amended Complaint (“FAC”) ¶¶ 159, 175.)⁹ By
12 exploiting these documents, Elysium saved money on development, and was unjustly
13 enriched. (*Id.*) ChromaDex’s expert used the money ChromaDex spent developing the
14 documents—\$110,000—as a proxy for what Elysium saved. (Ex. 101 at 1091–92.)

15 “California law permits plaintiffs to seek disgorgement of a defendant’s unjust
16 enrichment as a restitutionary remedy for breach of contract.” *Alkayali v. Hoed*, 2018
17 WL 3425980, at *6 (S.D. Cal. July 16, 2018). “Thus, for example, a plaintiff may
18 require a defendant to ‘disgorg[e] its unjust enrichment’ as a remedy for breach of a
19 non-disclosure agreement in order to restore the plaintiff ‘to as good as a position as
20 that occupied by him before the contract was made.’” *Id.* (alteration in original)
21 (quoting *Ajaxo Inc. v. E*Trade Grp., Inc.*, 135 Cal. App. 4th 21, 56–57 (2005)). A party
22 can be unjustly enriched by avoiding the costs of development through wrongful acts.
23 *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 709–10 (9th Cir. 2003) (affirming award
24 in a trade secret action of \$9 million, measured by three years’ saved time at a “burn
25 rate” of \$3 million per year). The money that a plaintiff spent in development can be
26 used to approximate what the defendant saved. *See Finmeccanica S.p.A. v. Gen. Motors*

27 _____
28 ⁹ While ChromaDex believes there is support for its damages for Elysium’s disclosure
of a third document, the NR Study Data, it will not to present those damages at trial.

1 *Corp.*, 2008 WL 11336141, at *10 (C.D. Cal. Dec. 17, 2008) (denying summary
2 judgment based on evidence of avoided costs).

3 **NRCI Analytical Method.** The NRCI Analytical Method is a highly technical
4 document. (Erickson Decl. ¶ 10; Ex. 110 at 117881–81.)¹⁰ In the simplest terms, it
5 describes how to test a substance to determine if NR is present and, if so, how much.
6 (Erickson Decl. ¶ 10.) ChromaDex spent years and considerable money developing the
7 method described in the document. (*Id.* ¶¶ 11, 13.)¹¹

8 ChromaDex shared the NRCI Analytical Method, prominently marked
9 “CONFIDENTIAL,” under a confidentiality agreement with Elysium when it was a
10 ChromaDex ingredient customer. (Ex. 110 at 1174.) After the relationship soured,
11 however, Elysium disclosed the document to others to further its own goals. In August
12 2016, for example, Elysium needed to get a new source of NR—quickly—so it reached
13 out to the contract manufacturer [REDACTED]. (Ex. 111.) [REDACTED] had never made
14 NR, and doing so at scale would require significant time in research and development.
15 (*E.g.*, Ex. 62.) To save time, Morris gave [REDACTED] the NRCI Analytical Method—or, more
16 accurately, Morris gave [REDACTED] a version of the Method that he doctored to omit
17 ChromaDex’s name and to which he added the following footnote: “This document is
18 the property of Elysium Health and contains proprietary and confidential information.
19 No part of this document may be disclosed in any manner.” (Ex. 111 at 1186–87.) [REDACTED]
20 used ChromaDex’s Method for months to develop a manufacturing process before
21 developing a method of its own. (Ex. 147 at 81:2–82:12, 100:12–24, 106:23–107:9.)

22 Elysium argues that because it “incurred significant costs” to have [REDACTED] create its
23 own analytical method, Elysium did not “avoid” any costs. (DOSB at 15.) Elysium
24 can certainly make that argument at trial. But it is not a basis for summary judgment.

25 _____
26 ¹⁰ References to “Erickson Decl.” refer to the Declaration of Aron Erickson in Support
of ChromaDex’s Supplemental Brief Pursuant to October 9 2019 Order.

27 ¹¹ Elysium’s allegation (Defendants’ Opening Supplemental Brief, Dkt. No. 373
28 (“DOSB”) at 16) that the NRCI Analytical Method was not confidential because it
supposedly appeared on an obscure document hosting website in May 2019 (where it is
not accessible today) is a highly disputed fact.

1 Even if [REDACTED] eventually created an analytical method, after months of using
2 ChromaDex's, it did not start from scratch; it had the NRCI Analytical Method as a
3 reference because of Elysium's contractual breach. [REDACTED] CEO, [REDACTED],
4 acknowledged that having a reference "makes things easier and quicker for sure," (Ex.
5 146 at 83:23–24), and that ChromaDex's document contained "very good" information
6 that otherwise [REDACTED] would have had to develop "iteratively," (*id.* at 84:20–85:5).

7 This was not the last time Elysium used the NRCI Analytical Method. In October
8 2016, Elysium had an "urgent" need to test its product and solicited testing proposals
9 from two labs. (Ex. 112 at 1189; Ex. 113.) Elysium did not send [REDACTED] method to
10 these laboratories (it did not yet exist). (Ex. 114; Ex. 147 at 149, 153.) Instead, Elysium
11 circulated *ChromaDex's* Method. (Ex. 112 at 1190–93; Ex. 113 at 1211–14.) A month
12 later, Elysium also sent ChromaDex's document to a third company to get a quote for
13 encapsulation services. (Ex. 115.) It is a logical inference from such facts that Elysium
14 needed the NRCI Analytical Method during a critical window and was unjustly enriched
15 by exploiting it. At minimum, this evidence creates issues of fact for a jury.

16 **pTeroPure GRAS Report.** The story is the same with the pTeroPure GRAS
17 Report. This is a non-public document, paid for by ChromaDex, which established that
18 pTeroPure (ChromaDex's form of pterostilbene) was "generally recognized as safe" or
19 "GRAS." (Ex. 116 at 1258–86.) Elysium claims that because it eventually engaged
20 and paid its own consultants to prepare a GRAS Report for generic pterostilbene, which
21 it completed in 2018, there is no evidence that "Elysium avoided any costs" by using
22 ChromaDex's document earlier. (DOSB at 15.) Again, that is a factual dispute.
23 Evidence shows that Elysium used ChromaDex's Report repeatedly, both before and
24 after its own GRAS report was drafted—*e.g.*, to appease investors, (Ex. 117), to explore
25 regulatory options, (Ex. 118), to support a meeting with the U.S. Food and Drug
26 Administration, (Ex. 119; Ex. 116), and to assist its own consultants in preparing its
27 GRAS report, (Ex. 120; Ex. 121; Ex. 122; Ex. 123). A jury could reasonably infer that
28 Elysium used this document precisely because there was value in doing so. The amount

1 of Elysium’s unjust enrichment is a jury question. *See Pyramid Techs.*, 752 F.3d at 820.

2 **3. Elysium’s Price Discount**

3 ChromaDex also seeks to recoup the \$600,000 price discount that Elysium
4 obtained, in large part, through Morris’s fiduciary breaches and Elysium’s aiding-and-
5 abetting of those breaches. Respectfully, the theory of damages here is different than
6 the Court understands it to be, (Order at 6), and we appreciate the opportunity to clarify.

7 Prior to the June 30 Purchase Orders, ChromaDex had not sold NR to Elysium
8 for less than \$1,000/kg. (Jaksch Decl. ¶ 6; Ex. 34.) It had no plans to do so. (Ex. 124
9 at 1394.) Marcotulli and Alminana, however, wanted a better price. In order to get that
10 better price, they engaged in malfeasance. Specifically, they induced Morris to act as
11 Elysium’s inside source during the pricing dispute by dangling the prospect of a job
12 offer. (Ex. 15 at 216–18; Ex. 88 at 113:5–114:2.) Morris was eager to help. Morris
13 fed the duo information about a competitor’s purchases, (Ex. 15 at 224), and the price
14 ChromaDex paid to Grace for its NR, (*id.* at 242). And Morris texted Alminana insider
15 intelligence to inform Elysium’s negotiating posture. (*See, e.g., id.* at 229 (“Dan – Do
16 you want me to push for 2400kg at \$700? I think I can make a convincing argument
17 internally. Plus sales look like they will not exceed last quarter without this.”); *id.* at
18 230 (“These dudes are beyond desperate to make the number.”); *id.* at 237 (“Rumor is
19 Frank will offer 2000kg at \$900.”).)

20 Elysium quickly leveraged this information to its economic advantage. (*E.g., id.*
21 at 237; Ex. 94 at 96:8–97:15.) In late June 2016, at the precise moment ChromaDex
22 was responding to a short-seller attack that was hurting its share price, Elysium
23 submitted a large order at an extreme lowball price (\$400/kg). (Ex. 15 at 237–38, Ex.
24 32.) Morris knew the gambit was coming; in fact, he was gleeful. (Ex. 15. at 229 (“I
25 can’t wait for you to lob in that purchase order to add to their stress :).”); *id.* at 238
26 (“They are up against the ropes. This could get extremely ugly next week.”); *id.* at 236
27 (“[H]ere comes the knockout blow from Elysium!”); Ex. 145 at 282:11–287:24.)
28 Thanks to Morris, Marcotulli and Alminana also knew that their offer put ChromaDex

1 in an untenable spot. (Ex. 15 at 241 (“It’s going to be a tough quarter if they don’t take
2 an order.”). It bears emphasis that all of these events occurred while Morris remained
3 a senior ChromaDex executive, drawing his paycheck from the very company he was
4 trying to “destroy.”

5 Marcotulli and Alminana continued to negotiate in bad faith and Morris
6 continued to show them all of ChromaDex’s cards. (*Id.* (“These two knuckleheads are
7 yelling at each other about it. Troy is saying to not take an order this quarter. Frank is
8 talking about \$800/kg.”).) Ultimately, ChromaDex agreed to sell NR on that one
9 occasion to Elysium at \$800/kg based in part on Elysium’s false representation that
10 more large orders were coming in 2016. (Ex. 142 at 254:18–25; Jaksch Decl. ¶¶ 9–10.)
11 Morris knew that was a lie, too, but he said nothing to warn his employer. (Ex. 15 at
12 246.) He told Alminana: “I want to destroy them!” (*Id.* at 249.)

13 This is sufficient evidence to support a finding of causation—*i.e.*, that Morris’s
14 fiduciary breaches were a substantial factor in Elysium’s ability to negotiate a price
15 discount and ChromaDex’s decision to sell NR to Elysium at the reduced price of
16 \$800/kg. As participants in Morris’s breaches, Elysium is “accountable for all
17 advantages they gained thereby.” *Cty. of San Bernardino v. Walsh*, 158 Cal. App. 4th
18 533, 543 (2008). Thus, ChromaDex can recover Elysium’s illicit profit (\$600,000)
19 under an unjust enrichment theory. *See Am. Master Lease*, 225 Cal. App. 4th at 1481
20 (“[T]he restitutionary remedies of unjust enrichment and disgorgement are available for
21 aiding and abetting breach of fiduciary duty.”).

22 **4. Morris’s Compensation**

23 The Court asked on what basis ChromaDex seeks disgorgement Morris’s
24 compensation, and why that is a valid remedy. (Order at 6.) Up to July 15, 2016, Morris
25 was a fiduciary of ChromaDex. As a fiduciary, Morris owed a duty of loyalty. Morris
26 betrayed that duty by conspiring with Elysium to harm ChromaDex. (*E.g.*, Ex. 15; Ex.
27 38; Ex. 39; Ex. 44.) There is no ambiguity here: Morris declared “unconditional
28 loyalty” to Elysium and pledged “destroy” ChromaDex while still cashing

1 ChromaDex’s checks. (See Ex. 15 at 249; Ex. 47.) As a remedy for Morris’s breaches
2 of fiduciary duty, ChromaDex seeks “restitutionary disgorgement, which focuses on
3 [ChromaDex’s] loss, and nonrestitutionary disgorgement, which focuses on [Morris’s]
4 unjust enrichment. *Am. Master Lease*, 225 Cal. App. 4th at 1482.¹²

5 The restitutionary component is what ChromaDex paid to Morris during the
6 period of disloyalty, “a measure of damages that directly tracks the harm caused by
7 [Morris’s] tortious conduct.” *ProOne, Inc. v. Russell*, 2019 WL 4390577, at *5 (C.D.
8 Cal. Aug. 8, 2019). Evidence shows that Morris’s shift in loyalty began by February
9 20, 2016, (Ex. 15 at 214), and that ChromaDex paid him \$ [REDACTED] over the next five
10 months, (see Ex. 125; Ex. 126). Had ChromaDex known Morris was plotting against
11 its interests, it would not have continued paying him. (Jaksch Decl. ¶ 12.) Thus,
12 Morris’s compensation during this period are damages “directly flowing” from his
13 breach of fiduciary duty. *Serv. Emp. Int’l Union, Local 250 v. Colcord*, 160 Cal. App.
14 4th 362, 371 (2008).¹³ If a jury finds that Morris’s disloyalty began later than February
15 20, 2016, the amount is easily adjusted by simple arithmetic.

16 The nonrestitutionary component is the compensation paid by Elysium to induce
17 or reward Morris’s disloyalty, *i.e.*, a bribe. “Where a person profits from transactions
18 conducted by him as a fiduciary, the proper measure of damages is full disgorgement
19 of any secret profit made by the fiduciary regardless of whether the principal suffers
20

21 ¹² Relatedly, California law also permits disgorgement of Morris’s unjust gains arising
22 from his numerous and flagrant breaches of his confidentiality agreements with
ChromaDex. (Ex. 33 at 340–45); *Alkayali*, 2018 WL 3425980, at *6.

23 ¹³ ChromaDex does not have to prove that Morris’s work was “a complete loss or waste
24 of time” or that “Morris’s time from February to July 2016 was entirely spent working
25 on behalf of Elysium and against ChromaDex.” (DOSB at 12–13.) An employee who
26 violates his duty of loyalty “cannot recover even for the services he has rendered.”
27 *SEIU*, 160 Cal. App. 4th at 371. Thus, ChromaDex can seek disgorgement of all
28 compensation paid during the “period of his disloyal service.” *Neighborhood
Assistance Corp. of Am., v. Johnson*, 2012 WL 13008418, at *4 (C.D. Cal. Mar. 29,
2012); see also *Purolator Prods., Inc. v. Torite Indus.*, 413 F.2d 989, 990–91 (9th Cir.
1969) (affirming damages award including employees’ salary during period when they
were secretly competing with employer); *ProOne, Inc.*, 2019 WL 4390577, at *5; *SEIU*,
160 Cal. App. 4th at 371. Elysium cites to *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514
(1997), but that case did not involve a claim for breach of fiduciary duty.

1 any damage.” *Walsh*, 158 Cal. App. 4th at 543. The evidence shows that Elysium
2 floated a potential job offer to Morris on March 12, 2016. (Ex. 15 at 215–16.) Morris
3 then spent weeks funneling ChromaDex’s information to Marcotulli and Alminana,
4 currying favor. (*E.g., id.* at 215–42; Ex. 21; Ex. 24; Ex. 39; Ex. 127; Ex. 128; Ex. 129.)
5 They rewarded him with an offer—a “beyond generous” offer—of salary and stock and
6 salary in the last week of June 2016. (Ex. 144 at 200:5–204:1; Ex. 130.) In the *same*
7 *conversation*, Marcotulli, Alminana, and Morris agreed to work out an “exit strategy”
8 by the end of the week, *i.e.*, after the details of Elysium’s last purchase order for NR
9 from ChromaDex were finalized. (Ex. 130.)

10 Over the following weeks, Morris acted as Elysium’s agent as they schemed to
11 withhold payment from ChromaDex as soon as Elysium had the \$3 million of
12 ingredients in its possession. (Ex. 131; Ex. 15 at 247.) Morris notified ChromaDex that
13 he was quitting the *same day* the NR was delivered and a key part of the scheme was
14 complete. (Ex. 46; Ex. 132.) And Morris admits that when he walked out the door, he
15 took a thumb drive of confidential ChromaDex information to Elysium. (Ex. 145 at
16 34:8–40:12.) A jury could readily infer from this evidence that inducing Morris’s
17 disloyalty was “more than a negligible or theoretical factor” in Elysium’s “beyond
18 generous” offer. *Rutherford*, 16 Cal. 4th at 978. Morris should be required to disgorge
19 his illicit profit. *Walsh*, 158 Cal. App. 4th at 542.¹⁴

20 C. Alternative Damages Theories

21 If the Court finds that the above damages may go to the jury, ChromaDex will
22 not argue the following damages categories to the jury: (1) Elysium’s profits arising
23 from its alternative source of NR (about \$ [REDACTED]) and (2) ChromaDex’s lost profits
24 (about \$7.6 million).¹⁵ ChromaDex presents them here to address the Court’s questions
25 and preserve its rights. ChromaDex also discusses its entitlement to request a

26 ¹⁴ ChromaDex’s expert calculated Morris’s salary at Elysium for multiple time periods.
27 (Dkt. 249-10 at 605.) Thus, if a jury agrees that he made an illicit profit but that the
relief sought is too high, it can adjust accordingly.

28 ¹⁵ ChromaDex will not seek to recover its “Out-of-Pocket Financing Costs” at trial.

1 reasonable royalty on the trade secrets claims in the event damages are unprovable.

2 **1. Elysium’s Profits from its Alternative Source NR**

3 ChromaDex may ask the jury for approximately [REDACTED] in restitution based
4 on the profits Elysium made from the ingredients it obtained from its new, infringing
5 NR suppliers.¹⁶ “[A] claimant who is prepared to show a causal connection between
6 defendant’s wrongdoing and a measurable increase in the defendant’s net assets will
7 satisfy the burden of proof as ordinarily understood.” *Applied Gen. Agency, Inc. v.*
8 *Greenleaf Fin. & Ins. Servs.*, 2019 WL 5255271, *13 (Cal. Ct. App. Oct. 17, 2019).
9 There is, at a minimum, a factual dispute about whether Elysium—a single-product
10 company—could have both developed a new source of NR and survived long enough
11 to sell it without its cavalcade of wrongful acts, which included trade secret theft,
12 breaches of contract, and/or aiding-and-abetting of Morris’s breaches of fiduciary duty.
13 Assuming those claims are proven, the law permits disgorgement of Elysium’s unjustly
14 earned profits. *Id.* at *11–14 (misappropriation); *Am. Master Lease*, 225 Cal. App. 4th
15 at 1482–83 (aiding and abetting); *Alkayali*, 2018 WL 3425980, at *6 (contract).

16 **Financing.** In 2016, [REDACTED]
17 [REDACTED]. (Opp. at 11; Ex. 94 at 165:15–166:1; Ex. 52.) Before that
18 happened, however, Elysium obtained millions of dollars in extra cash, a life preserver
19 that kept it afloat long enough to get the first shipments of NR from [REDACTED]. (Opp. at 14;
20 Ex. 64.) It obtained this cash in three ways. *First*, as described above, Elysium
21 wrongfully acquired the June 30 Orders on credit, forcing ChromaDex to provide
22 Elysium a \$3 million interest-free bridge loan. *Second*, Elysium made at least \$ [REDACTED]
23 [REDACTED] in revenue from reselling those stolen ingredients. (Ex. 141 at 128.) *Third*, as
24 discussed below, Elysium raised an additional \$15 million on the prospect of usurping
25 ChromaDex’s NR patent rights and exclusive supplier and developing its own supply.
26

27 ¹⁶ Elysium’s total profits between October 1, 2016, and December 31, 2018, total
28 about [REDACTED]. (Ex. 107.) [REDACTED] ng the pro [REDACTED] sium earned from the
resale of [REDACTED] 0 Orders—\$ [REDACTED]—yields \$ [REDACTED].

1 Elysium’s efforts to solicit investment are well documented. In July 2016,
2 investors offered Elysium only \$5 million for its Series B financing. (Ex. 133.) But
3 Marcotulli pushed for \$20 million. (*Id.*) Investors repeatedly raised a “major concern”
4 about Elysium’s NR supply. (Opp. at 11; Ex. 51; Ex. 53 at 574; Ex. 134.) Marcotulli
5 alleviated those concerns by stating that he could “acquire some of [ChromaDex’s]
6 assets or patents” and “own[] the IP and supply chain.” (Ex. 135 at 1439; *see also* Ex.
7 51 at 567 (“We are also making some very important, strategic moves in the supply
8 chain to own (1) the molecular structure of NR and (2) broad use patents that will, if
9 successful, give us global control of the entire NR market.”); Opp. at 12.) Marcotulli
10 “peg[ged] probability of this at 75%,” (Ex. 51 at 567), and he repeatedly discussed these
11 efforts with investors, (*see, e.g.*, Ex. 135; Ex. 9 at 143 (Alminana: “Dartmouth meeting
12 is on”; Marcotulli: “Lemme talk to Roberts”); Ex. 40 at 474–75; Opp. at 12).

13 Morris assisted in these efforts to “get rid of the scumbags holding this
14 magnificent technology.” (Ex. 15 at 232.) While *still a ChromaDex fiduciary*, Morris
15 offered Alminana insights into ChromaDex’s patent portfolio to help with Elysium’s
16 “game changing” patent strategy. (Opp. at 8; Ex. 9 at 133; Ex. 15 at 231; Ex. 38; Ex.
17 145 at 241:2–252:24.) Alminana eagerly accepted his help. (Ex. 15 at 250 (“We need
18 those patents!”).) Morris also pilfered for Elysium the Ingredient Sales Spreadsheet,
19 (Opp. at 10–13; Ex. 26; Ex. 50), and texted Alminana ChromaDex’s cost of NR from
20 Grace, (Ex. 15 at 242), both ChromaDex trade secrets. Possession of this information
21 would have been very helpful to any company selling a consumer product with NR. It
22 would have, among other things, informed that company of the ingredient purchasing
23 trends and forecasts of its NR competitors, allowed it to evaluate the marketing and
24 overall success of those competitors, and adjust its efforts accordingly. (Jaksch Decl.
25 ¶ 5.) Elysium used it to soothe investors’ nerves and undermine ChromaDex’s
26 relationship with Grace. (Opp. at 12.) For example, Marcotulli told investors about the
27 NR inventory of another ChromaDex ingredient customer, Thorne. (Opp. at 12.) And
28 Alminana told Grace that Elysium was in pole position in “[t]he NR market” and that

1 “Elysium is NR.” (Opp. at 13.) It is logical to infer that Marcotulli’s and Alminana’s
2 intimate knowledge of the NR market came straight from the trade secrets pilfered by
3 Morris and that this information was more than a negligible or theoretical factor in
4 Elysium’s ability to bring in the extra \$15 million. *See Espinosa*, 31 Cal. App. 4th at
5 1317–18 (ruling “inability to pin down the exact extent to which defendants’ conduct
6 contributed to the outcome is immaterial for purposes of *causation*”).¹⁷

7 Those extra millions made all the difference to Elysium. Elysium’s financial
8 statements show that, by the end of 2016 (after the Series B closed), Elysium had a net
9 income of [REDACTED] and liabilities [REDACTED]
10 [REDACTED] in cash. (Ex. 137 at 1456–57.) And Elysium’s 2017 statement shows a net
11 income of [REDACTED]—including [REDACTED] to develop its new source of
12 NR using ChromaDex information—and liabilities [REDACTED]
13 [REDACTED] in cash. (*Id.* at 1459 (“6800 Research & Development”), 1460.) Simple
14 math would allow a jury to conclude that the millions obtained in part because of
15 Defendants’ misconduct was a substantial factor in keeping Elysium alive. *CTC Glob.*,
16 2019 WL 4148184, at *5 (finding recruitment of current employee of plaintiff, text
17 messages with trade secrets, and evidence that “company that had no previous
18 experience” began “manufacturing . . . competitive core products,” *inter alia*, “create[d]
19 a strong enough inference to show a genuine dispute of fact regarding the transfer of
20 trade secrets . . . and subsequent misuse of those trade secrets”); *UniRAM*, 617 F. Supp.
21 2d at 944 (ruling plaintiff’s circumstantial evidence showing “narrative” of defendant’s
22

23 ¹⁷ A jury would be within its rights to find that the documents, as damning as they are,
24 tell only part of the story. Morris’s destruction of relevant text messages, emails, and
25 documents—which he admitted deleting, (Ex. 145 at 31:10–14, 33:10–12, 34:8–40:12,
26 64:8–19; Ex. 109 at 1164–65, 1169–70)—is a basis to find that Defendants wrongfully
27 acquired and used ChromaDex’s information. *CTC Glob. Corp. v. Huang*, 2019 WL
28 4148184, at *5 (C.D. Cal. July 29, 2019) (denying defendant’s motion for summary
judgment when, *inter alia*, plaintiff’s damages theory was “sprawling and unclear—
perhaps in part because of Defendant’s spoliation of evidence”). And a jury could also
infer from Marcotulli’s perjury at his deposition, (Dkt. 284-1), as well as the “evasive”
demeanor of Marcotulli, Alminana, and Morris at their depositions, that they used
ChromaDex information, *U.S. v. Zhang*, 590 F. App’x 663, 666 (9th Cir. 2014).

1 misuse of trade secrets sufficed on summary judgment).¹⁸

2 **Ingredients.** Elysium’s ability to survive depended on its ability to sell product,
3 and that depended on obtaining ingredients. (Opp. at 14.) Elysium had only three ways
4 to get NR: purchase it from ChromaDex, get it from Grace, or develop a new source
5 from a new supplier, [REDACTED]. ChromaDex was not an option; given Elysium’s
6 nonpayment, ChromaDex was forced to cancel the supply relationship. (Ex. 142 at
7 180:20–24.) And Grace was not an option because, despite Marcotulli and Alminana’s
8 best efforts, they were unable to sever Grace’s exclusive relationship with ChromaDex
9 (although they did seriously strain it). (Opp. at 12–13.)

10 By late 2016, Elysium “had no other supply” of NR besides [REDACTED], which was then
11 only in development. (Ex. 146 at 39:23–25.) Marcotulli and Alminana planned to
12 stockpile the June 30 Orders in order to give Elysium the time and money to get [REDACTED] up
13 and running. (See Ex. 31.) Without that stockpile, as Marcotulli told his investors in
14 October 2016, “[t]he business wouldn’t exist anymore. Plain and simple.” (Ex. 54 at
15 578.) It was barely enough. By January 2017, Marcotulli, Alminana, and Morris were
16 “in panic mode” because Elysium’s “supply [of NR was] dwindling.” (Ex. 105; see
17 also Ex. 66 at 729.) Running out of NR would have “crush[ed]” Elysium. (Opp. at 14.)
18 With only *three weeks* to spare, Elysium finally obtained that NR from [REDACTED]. (*Id.*)
19 Testimony from [REDACTED] CEO, [REDACTED], shows that Morris—by then at Elysium—
20 told [REDACTED] that [REDACTED] had “saved the company” by “allow[ing Elysium] to continue their
21 business because they were in a desperate situation.” (Ex. 146 at 39:8–40:11.)

22 The record shows that Defendants used ChromaDex trade secrets and
23 confidential information as a shortcut. NR is a delicate and complex molecule to
24

25 ¹⁸ ChromaDex does not understand the Court’s requests for “any evidence that tends to
26 undercut” or “negate any links in this causal chain,” (Order at 5, 7), to suggest that it
27 intends to weigh conflicting evidence because that would not be appropriate at this stage
28 of the case. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (“[A] ‘judge’s function’ at
summary judgment is not ‘to weigh the evidence and determine the truth of the matter
but to determine whether there is a genuine issue for trial.’” (quoting *Anderson v.*
Liberty Lobby, Inc., 477 U.S. 242, 249 (1986))).

1 manufacture in pure form and then keep stable. (Erickson Decl. ¶ 4; Ex. 147 at 62:16–
2 63:14.) ChromaDex spent years and invested millions of dollars in developing and
3 perfecting the manufacturing techniques for NR. (Erickson Decl. ¶¶ 4, 7; Jaksch Decl.
4 ¶ 3.) For example, ChromaDex [REDACTED]
5 [REDACTED]. (Erickson Decl. ¶ 5.) Morris was privy to that work.
6 (*Id.* ¶ 6.) A jury could infer that is why Morris [REDACTED]
7 [REDACTED]. (Opp. at 13–14.) Morris further shared with [REDACTED] the NRCl
8 Analytical Method, a confidential document that took ChromaDex years of refinements
9 to develop. (Erickson Decl. ¶¶ 11, 14.) Ultimately, it took [REDACTED] only *one* year to develop
10 Elysium’s NR manufacturing process, (Ex. 147 at 64:1–3), compared to the *two* years
11 it took ChromaDex, (Erickson Decl. ¶ 4). A jury could reasonably find that Defendants
12 used ChromaDex’s trade secrets and confidential information to save *at least* three
13 weeks of time, and thus save Elysium’s business and enable it to profit. *See Pac. Shores*
14 *Props.*, 730 F.3d at 1168 (holding once plaintiff presents evidence it suffered “the sort
15 of injury that would be the expected consequence of the defendant’s wrongful conduct,”
16 it “has done enough to withstand summary judgment”).

17 2. ChromaDex’s Lost Profits

18 ChromaDex may ask the jury for approximately \$7.6 million in lost profits based
19 on Elysium’s minimum purchase obligations.¹⁹ Elysium’s survival and development of
20 an alternative source for NR, as described above, also enabled it to purchase NR from
21 suppliers other than ChromaDex. ChromaDex was therefore unable to profit from the
22 “additional large purchases” that, in June 2016, Marcotulli promised that Elysium
23 would make that year. (Ex. 144 at 254:17–21.) In September 2016, Alminana emailed
24 Marcotulli that Elysium could “place another order with [ChromaDex]” if it didn’t get
25 [REDACTED] NR in time. (Ex. 52 at 571.) In November 2016, with [REDACTED] work delayed,
26

27 ¹⁹ ChromaDex’s expert presented an alternative lost profits calculation for around \$25.5
28 million arising from Elysium’s projected ingredient purchases, which it believed was
“a very conservative estimate.” (Ex. 139 at 1471.)

1 Alminana emailed Magida that “[w]e can place order with ChromaDex if we hit Code
2 Red.” (Ex. 138.) Magida testified that Elysium “always had the option of placing an
3 order with ChromaDex, but if [REDACTED] is able to get the material out in December, we’re
4 going to use the [REDACTED] material.” (Ex. 143 at 197.) Based on the statements of Elysium’s
5 own employees, then, it is simple to conclude that Elysium’s development of its new
6 NR source deprived ChromaDex of NR sales.

7 So long as the damages are not duplicative, plaintiffs in trade secrets cases may
8 recover both “for the actual loss” and “for the unjust enrichment caused by
9 misappropriation that is not taken into account in computing damages for actual loss.”
10 Cal. Civ. Code § 3426.3(a); 18 U.S.C. § 1836(b)(3)(B)(i)(II). The same principle
11 applies for breach of fiduciary duty and contract claims. *See CTC Glob.*, 2019 WL
12 4148184, at *8 (finding “genuine dispute of fact” for fiduciary duty claim for both actual
13 damages and unjust enrichment); *BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 2018 WL
14 6169347, at *3 (N.D. Cal. Nov. 26, 2018) (ruling California law does not require offset
15 when “jury’s measure of” damages differentiated between defendant’s “profits” and
16 plaintiff’s “loss”). Here, ChromaDex’s lost profits arise from its lost sales of ingredients
17 to Elysium. Because Elysium’s ingredient *costs* are “not taken into account in
18 computing” its unjust *profits*, these damages do not overlap and are thus recoverable.

19 3. Reasonable Royalty

20 Absent provable damages for trade secret misappropriation, ChromaDex may
21 seek a reasonable royalty. “[T]he goal of trade secrets law is to maintain important
22 standards of commercial ethics.” *Ajaxo, Inc. v. E*Trade Fin. Corp.*, 187 Cal. App. 4th
23 1295, 1312 (2010). Thus, courts refuse to allow a defendant who stole trade secrets to
24 escape liability simply because damages are unprovable; otherwise, it “would place the
25 risk of loss on the wronged plaintiff, thereby discouraging innovation and potentially
26 encouraging corporate thievery where anticipated profits might be minimal but other
27 valuable nonmeasureable benefits could accrue.” *Id.* at 1313. If “actual loss and unjust
28 enrichment are not provable (as a matter of law) or not proved (as a matter of fact, such

1 as after a jury trial), a court may award a reasonable royalty.” *CTC Glob.*, 2019 WL
2 4148184, at *7; *see also* Cal. Civ. Code § 3426.3(b); 18 U.S.C.A. § 1836(b)(3)(B)(ii).
3 A “jury’s finding that Defendants did not proximately cause harm to Plaintiff is
4 therefore consistent with the availability of a royalty under [CUTSA].” *Atl. Inertial*
5 *Sys. v. Condor Pac. Indus. of Cal, Inc.*, 545 F. App’x 600, 601–02 (9th Cir. Oct. 30,
6 2013) (holding “district court erred in ruling, at the damages stage, that the jury’s
7 finding of no harm precluded a reasonable royalty” and remanding for determination of
8 reasonable royalty); *02 Micro Int’l v. Monolithic Power Sys.*, 399 F. Supp. 2d 1064,
9 1077–78 (N.D. Cal. 2005) (granting plaintiff’s request for reasonable royalty).

10 ChromaDex disclosed during discovery that it would request a reasonable royalty
11 if the Court or a jury finds that its damages are not provable. (Ex. 33 at 359.) If
12 necessary, ChromaDex can present evidence and testimony at trial that its trade secrets
13 have value supporting a royalty. (Jaksch Decl. ¶¶ 4–5.) That is sufficient at this stage.
14 *CTC Glob.*, 2019 WL 4148184, at *7; *see also Copart, Inc. v. Sparta Consulting, Inc.*,
15 277 F. Supp. 3d 1127, 1155–56 (E.D. Cal. 2017). For example, in *Ajaxo*, the trial court
16 dismissed as a matter of law the plaintiff’s only damages theory, but still “allow[ed] the
17 jury to determine liability under the CUTSA, recognizing that Ajaxo might be entitled
18 to reasonable royalties if defendants had indeed misappropriated the trade secrets.” 187
19 Cal. App. 4th at 1301. Following the jury’s determination on liability, a court may
20 request supplemental briefing to aid it in calculating the royalty. *See Atl. Inertial Sys.*
21 *v. Condor Pac. Indus. of Cal., Inc.*, 2015 WL 3825318, at *7–15 (C.D. Cal. June 18,
22 2005) (calculating royalty after further limited discovery and briefing).

23 **III. THE COURT SHOULD DISMISS ELYSIUM’S PATENT MISUSE COUNTERCLAIMS**

24 ChromaDex has never “misused” a patent. Nevertheless, to eliminate the
25 distraction of Elysium’s fourth counterclaim (which seeks a declaration of patent
26 misuse), ChromaDex took steps to erase, or “purge,” the alleged misuse. Specifically,
27 ChromaDex (i) abandoned the challenged contractual provisions and (ii) refunded or
28 (in Elysium’s case) covenanted to refund any royalties its ingredient customers paid

1 under those contracts. (FAC ¶¶ 145–48.) In light of this purge, the Court asked the
2 parties to brief what recovery is still available on Elysium’s “patent misuse claim.”
3 (Order at 8–9.) The answer is simple: there is none.

4 The Court should dismiss Elysium’s counterclaims based on patent misuse
5 because (a) they fail as a matter of law on the merits for the reasons stated in
6 ChromaDex’s summary judgment motion; and/or (b) there is no remedy available to
7 Elysium in light of the purge.²⁰ The Court should do so promptly, because the mere
8 existence of this counterclaim frustrates ChromaDex’s ability to enforce its patent
9 rights. The District Court in Delaware has stayed ChromaDex’s patent infringement
10 litigation against Elysium until this counterclaim is resolved. An indefinite delay
11 amounts to a daily running fine both on ChromaDex and the patent owners from whom
12 ChromaDex licenses NR patents (to which ChromaDex pays license fees and royalties),
13 and provides a windfall profit to Elysium (which pays *nothing* to the inventors).

14 Now to the Court’s question: what recovery is still available on Elysium’s “patent
15 misuse claim” and under what authority? (Order at 10.) It is important to be precise
16 because Elysium actually asserts two counterclaims related to the alleged misuse, and
17 they seek different relief. Elysium’s “fourth counterclaim” seeks a declaration that the
18 Dartmouth patents are *currently* unenforceable, whereas its “fifth counterclaim” seeks
19 restitution for *past* misuse. (DOSB at 20.) Each counterclaim is addressed in turn.

20 **Declaratory Relief.** In the fourth counterclaim, Elysium seeks a declaration that
21 the NR patents that ChromaDex licenses “are, and remain, unenforceable due to
22 ChromaDex’s patent misuse and its failure to abandon the misuse and dissipate its
23 effects.” (DOSB at 20.)²¹ There is no basis for such a declaration.

24 ²⁰ ChromaDex does not concede that the patent misuse doctrine even allows for a stand-
25 alone declaratory judgment claim. *See Haier Am. Trading, LLC v. Samsung Elecs., Co.*,
26 2018 WL 4288617, at *10 (N.D.N.Y. Sept. 7, 2018); *Broadband iTV, Inc. v. OpenTV,*
Inc., 2018 WL 4927935, at *6 (N.D. Cal. Feb. 22, 2018).

27 ²¹ Elysium seeks no monetary relief under this claim, nor could it. The “patent misuse
28 doctrine cannot be asserted for monetary relief.” *Cont’l Auto. GmbH v. iBiquity Digital*
Corp., 2015 WL 859569, at *7 (N.D. Ill. Feb. 26, 2015) (citing *B. Braun Med., Inc. v.*
Abbott Labs., 124 F.3d 1419, 1428 (Fed. Cir. 1997)).

1 *First*, as discussed in ChromaDex’s summary judgment motion, there is no
2 evidence that ChromaDex ever conditioned the sale of NR on a requirement that
3 Elysium or any other customer use the NIAGEN trademark.²² Elysium does not assert
4 that it was required to use the trademark and Elysium’s supplemental brief thus
5 acknowledges that Elysium was never a target of the alleged misuse: “Elysium can
6 assert misuse even if the conduct was directed at others and ChromaDex is able to prove
7 that it did not harm Elysium.” (DOSB at 21.) The core problem with Elysium’s claim
8 is that it also lacks any evidence that patent misuse “was directed at others.” There is
9 simply no evidence in the record regarding any illegal conditioning or coercion with
10 respect to ChromaDex’s other customers. The only evidence as to the other customers
11 is to the contrary, *i.e.*, that customers were free to contract to use the mark or not.
12 Accordingly, the Court should grant summary judgment on the ground that there never
13 was any patent misuse. (Dkt. 241-27 at 12–15.)²³

14 *Second*, even assuming there was past misuse (and there was not), that misuse
15 has been “purged.” The key inquiry under the patent misuse doctrine is whether, by
16 imposing a particular condition, the patentee has “impermissibly broadened the physical
17 or temporal scope of the patent grant and has done so in a manner that has
18 anticompetitive effects.” *Princo Corp. v. Int’l Trade Comm’n*, 616 F.3d 1318, 1328
19 (Fed. Cir. 2010). The doctrine is not meant to invalidate a patent, or hold a legitimate
20 claim for infringement at bay indefinitely; it is a temporary bar to enforcement of the
21 patent until the misuse is cured. *See C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340,
22 1372 (Fed. Cir. 1998) (holding that finding of misuse renders a patent unenforceable
23 “until the misuse is purged; it does not, of itself, invalidate the patent”); *Qualcomm Inc.*
24 *v. Broadcom Corp.*, 548 F.3d 1004, 1025 (Fed. Cir. 2008) (“[T]he successful assertion
25 of patent misuse may render a patent unenforceable until the misconduct can be purged;

26 _____
27 ²² (Dkt. 241-27 at 12–15; Dkt. 335 at 1–7.)

28 ²³ Further, since the sale of NR exhausted all rights in the patent, *see Quanta Comp., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 637 (2008), then *a fortiori* no patent rights were licensed via supply agreement and there can be no patent misuse.

1 it does not render the patent unenforceable for all time.”). A patentee “purges” its
2 misuse by abandoning the challenged practice and showing that the effects have
3 dissipated. *Morton Salt v. G.S. Suppiger Co.*, 314 U.S. 488, 494 (1942), *abrogated on*
4 *other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Once that
5 happens, a patentee is “entitled to have its valid and unexpired patents enforced against
6 infringement.” *McCullough Tool Co., v. Well Surveys, Inc.*, 343 F.2d 381, 410 (10th
7 Cir. 1965). Whether a purge has occurred is “largely within the trial court’s discretion.”
8 *In re Yarn Processing Patent Validity Litig.*, 472 F. Supp. 180, 183–84 (S.D. Fla. 1979).

9 There is no evidence of ongoing misuse. The supposedly abusive practice—
10 ChromaDex conditioning access to NR on the purchase of a trademark license—is
11 simply not occurring. It is undisputed that, nearly two-and-a-half years ago,
12 ChromaDex terminated the challenged provisions and refunded or (in Elysium’s case)
13 covenanted to refund any royalties its customers paid. (Ex. 140 at 156:7–157:17.)
14 Consequently, any “misuse” has been abandoned. *McCullough Tool*, 343 F.2d at 407–
15 08 (holding patentee abandoned misuse by eliminating tying contract provisions and
16 notifying its customers). Elysium does not and cannot contend that the challenged
17 practices are still ongoing.

18 Nor is there any evidence of lasting anticompetitive consequences. Ordinarily,
19 the burden of establishing purge is on the patent holder. But a patent holder is not
20 required to prove that the consequences of a misuse have dissipated unless the defendant
21 first shows that the misuse had anticompetitive consequences in the first place. *Cf. U.S.*
22 *Gypsum Co. v. Nat’l Gypsum Co.*, 352 U.S. 457, 465 (1957) (ruling district court erred
23 in holding that patent misuse had not been purged because the record contained no facts
24 about anticompetitive consequences); *White Cap Co. v. Owens-Illinois Glass Co.*, 203
25 F.2d 694, 698 (6th Cir. 1953) (“[I]t was unnecessary for the plaintiff to prove that the
26 consequences of the misuse had been dissipated because it was not shown that the
27 misuse had illegal consequences.”). If the defendant fails to show anticompetitive
28 consequences, merely terminating the challenged provision effects a purge. *White Cap*,

1 203 F.2d at 697–98; *In re Yarn Processing*, 472 F. Supp. at 190. Even when there are
2 anticompetitive consequences, courts have found that those effects dissipate over time.
3 *See Performed Line Prods. Co v. Fanner Mfg. Co.*, 328 F.2d 265, 278–79 (6th Cir.
4 1964) (affirming district court’s finding consequences of misuse fully dissipated one
5 year and five months after cessation). Here, ChromaDex terminated the challenged
6 provisions nearly *two-and-a-half years* ago. It also refunded or (in Elysium’s case)
7 covenanted to refund any royalties its customers paid. These actions were more than
8 sufficient to effect a purge. *McCullough Tool*, 343 F.2d at 407–08.

9 Elysium attempts to manufacture a factual dispute about anticompetitive effects
10 by having its expert claim that ChromaDex’s “misuse” so strengthened the value of its
11 brand, that competition is *forever* harmed. (DOSB at 23–24; Ex. 140 at 168:9–171:25
12 (“Q: [I]t’s your opinion that it’s impossible at this point for ChromaDex to ever purge
13 the effects of the alleged misuse? A: I don’t think the effect can ever be fully
14 dissipated....”).) That suggestion, however, is absurd on its face. Courts have *never*
15 applied patent misuse to *permanently* deprive a patent owner of the enforceability of its
16 patent, and Elysium offers no authority otherwise.

17 Moreover, the only “evidence” for that allegation is Elysium’s expert’s *ipse dixit*.
18 But he admitted that he conducted no analysis to quantify the value of the NIAGEN
19 brand, (Ex. 140 at 131:18–133:17, 166:8–167:2), and cannot point to a single example
20 of unpurgable misuse in all published literature, (*id.* at 171:20–25). Worse, his report
21 provides no evidence that *consumers* (as opposed to just competitors) suffered any
22 cognizable harm, *e.g.*, through higher prices or reduced quality. (Dkt. 262-1 at 13; Dkt.
23 335 at 6–7.) His opinions are of no help to a trier of fact. (Dkt. 262-1, 335.) Because
24 there is no evidence—let alone *admissible* evidence—of lasting anticompetitive
25 consequences from supposed misuse, the unprecedented remedy Elysium seeks (a
26 declaration of perpetual unenforceability) is unavailable as a matter of law.

27 **Restitution.** Elysium’s fifth counterclaim is for “unjust enrichment.” On this
28 counterclaim, Elysium seeks to recover the royalties it paid to ChromaDex, plus interest.

1 (DOSB at 20.) That is money that ChromaDex has already covenanted to repay. The
2 Court asks: “[W]hat restitution does Elysium seek beyond what ChromaDex has
3 promised to pay at the end of this case?” and “What unjust enrichment has ChromaDex
4 obtained beyond that which it has already paid or promised to repay?” (Order at 9.)
5 The answer to both questions is *none*.

6 Elysium argues that its counterclaim is not “moot” until it receives the money.
7 (DOSB at 22.) Even if that was correct, it does not entitle Elysium to waste this Court’s
8 time and resources on a bench trial for a dead claim “simply because [ChromaDex] has
9 not admitted liability.” *McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir.
10 2005); *see also Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000) (“[I]t is
11 always open to a defendant to default and suffer judgment to be entered against him
12 without his admitting anything.”). Once the jury renders its verdict on other issues, the
13 Court can enter a default judgment that accords complete relief to Elysium—just as
14 ChromaDex has promised—without the necessity of deciding liability.

15 **IV. CONCLUSION**

16 ChromaDex requests that the Court allow it to argue its claims to a jury, “[a] right
17 so fundamental and sacred” that it is enshrined in the Seventh Amendment, *Jacob v.*
18 *City of New York*, 315 U.S. 752, 752–53 (1942), and further requests that the Court
19 dismiss Elysium’s unsupported patent misuse counterclaim.

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COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
SOPHIA M. RIOS (305801)
JAYME B. STATEN (317034)

21
22
23
24
25
26 /s/ Michael A. Attanasio
Michael A. Attanasio (151529)

27 *Attorneys for Plaintiff and Counter-Defendant*
28 *ChromaDex, Inc.*