

1 COOLEY LLP
MICHAEL A. ATTANASIO (151529)
2 (mattanasio@cooley.com)
BARRETT J. ANDERSON (318539)
3 (banderson@cooley.com)
CRAIG E. TENBROECK (287848)
4 (ctenbroeck@cooley.com)
JASMIN F. MOTLAGH (311639)
5 (jmotlagh@cooley.com)
DYLAN K. SCOTT (332796)
6 (dscott@cooley.com)
RACHAEL M. HELLER (335636)
7 (rheller@cooley.com)
4401 Eastgate Mall
8 San Diego, CA 92121-1909
Telephone: (858) 550-6000
9 Facsimile: (858) 550-6420

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

12 *Counsel continued on following page*

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **(SOUTHERN DIVISION)**

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

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

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

**PARTIES' PROPOSED JURY
INSTRUCTIONS**

Judge: Hon. Cormac J. Carney
Courtroom: 9B

Trial: September 21, 2021
Pretrial Conf.: September 13, 2021

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

8 COVINGTON & BURLING LLP
9 PHILIP A. IRWIN (*admitted Pro Hac Vice*)
10 (pirwin@cov.com)
11 620 Eighth Avenue
12 New York, NY 10018-1405
13 Telephone: (212) 841-1000

14 LTL ATTORNEYS LLP
15 JOE H. TUFFAHA (253723)
16 (joe.tuffaha@ltlattorneys.com)
17 PRASHANTH CHENNAKESAVAN (284022)
18 (prashanth.chennakesavan@ltlattorneys.com)
19 300 South Grand Avenue, 14th Floor
20 Los Angeles, CA 90071
21 Telephone: (213) 612-8900
22 Facsimile: (213) 612-3773

23 *Attorneys for Plaintiff and Counter-Defendant*
24 *ChromaDex, Inc.*
25
26
27
28

1 Plaintiff and Counter-Defendant ChromaDex, Inc., Defendant and Counter-
2 Claimant Elysium Health, Inc., and Defendant Mark Morris hereby submit their
3 Proposed Jury Instructions. In accordance with the Court's standing Order Regarding
4 Settlement Procedures, Pretrial Conference and Trial, the Parties' stipulated instructions
5 appear first, followed by instructions propounded by Plaintiff and opposed by
6 Defendants, followed by the instructions propounded by Defendants and opposed by
7 Plaintiff. The Parties reserve the right to supplement and amend these proposed jury
8 instructions and to submit additional proposed instructions based on any rulings from
9 this Court before or at trial, or as otherwise deemed proper by this Court.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STIPULATED INSTRUCTIONS

1 **Stipulated Preliminary Jury Instruction No. 1**

2 **DUTY OF THE JURY**

3 Members of the jury: You are now the jury in this case. It is my duty to instruct
4 you on the law.

5 These instructions are preliminary instructions to help you understand the
6 principles that apply to civil trials and to help you understand the evidence as you listen
7 to it. You will be allowed to keep this set of instructions to refer to throughout the trial.
8 These instructions are not to be taken home and must remain in the jury room when you
9 leave in the evenings. At the end of the trial, these instructions will be collected and I
10 will give you a final set of instructions. It is the final set of instructions that will govern
11 your deliberations.

12 It is your duty to find the facts from all the evidence in the case. To those facts
13 you will apply the law as I give it to you. You must follow the law as I give it to you
14 whether you agree with it or not. And you must not be influenced by any personal likes
15 or dislikes, opinions, prejudices or sympathy. That means that you must decide the case
16 solely on the evidence before you. You will recall that you took an oath to do so.

17 Please do not read into these instructions or anything I may say or do that I have
18 an opinion regarding the evidence or what your verdict should be.

19
20 **[*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.2.]**

21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 3**

2 **BURDEN OF PROOF**

3 Each party has the “burden of proof” on their respective claims and affirmative
4 defenses.

5 When a party must prove something by a “preponderance of the evidence,” it
6 means you must be persuaded by the evidence that the claim or affirmative defense is
7 more probably true than not true.

8 When a party must prove something by “clear and convincing evidence,” it
9 means that the party must present evidence that leaves you with a firm belief or
10 conviction that it is highly probable that the factual contentions of the claim or defense
11 are true. This is a higher standard of proof than proof by a preponderance of the
12 evidence, but it does not require proof beyond a reasonable doubt.

13 You should base your decision on all of the evidence, regardless of which party
14 presented it.

15
16 [*Authority*: Ninth Circuit Model Civil Jury Instructions §§ 1.6, 1.7 (modified).]
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 4**

2 **MULTIPLE PARTIES**

3 You should decide the case as to each party separately. Unless otherwise stated,
4 the instructions apply to all parties.

5
6 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.8.]

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 5**

2 **WHAT IS EVIDENCE**

3 The evidence you are to consider in deciding what the facts are consists of:

4 (1) the sworn testimony of any witness;

5 (2) the exhibits that are admitted into evidence;

6 (3) any facts to which the lawyers have agreed; and

7 (4) any facts that I may instruct you to accept as proved.

8
9 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.9.]

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 6**

2 **WHAT IS NOT EVIDENCE**

3 In reaching your verdict, you may consider only the testimony and exhibits
4 received into evidence. Certain things are not evidence, and you may not consider them
5 in deciding what the facts are. I will list them for you:

6 (1) Arguments and statements by lawyers are not evidence. The lawyers are not
7 witnesses. What they may say in their opening statements, closing arguments,
8 and at other times is intended to help you interpret the evidence, but it is not
9 evidence. If the facts as you remember them differ from the way the lawyers
have stated them, your memory of them controls.

10 (2) Questions and objections by lawyers are not evidence. Attorneys have a duty
11 to their clients to object when they believe a question is improper under the rules
12 of evidence. You should not be influenced by the objection or by the court's
ruling on it.

13 (3) Testimony that is excluded or stricken, or that you are instructed to disregard,
14 is not evidence and must not be considered. In addition some evidence may be
15 received only for a limited purpose; when I instruct you to consider evidence only
16 for a limited purpose, you must do so and you may not consider that evidence for
any other purpose.

17 (4) Anything you may see or hear when the court was not in session is not
18 evidence. You are to decide the case solely on the evidence received at the trial.

19
20 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 1.10.]

1 **Stipulated Preliminary Jury Instruction No. 7**

2 **EVIDENCE FOR A LIMITED PURPOSE**

3 Some evidence may be admitted only for a limited purpose.

4 When I instruct you that an item of evidence has been admitted only for a limited
5 purpose, you must consider it only for that limited purpose and not for any other
6 purpose.

7
8 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 1.11.]
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Preliminary Jury Instruction No. 8

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

[*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.12.]

1 **Stipulated Preliminary Jury Instruction No. 9**

2 **RULING ON OBJECTIONS**

3 There are rules of evidence that control what can be received into evidence.
4 When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the
5 other side thinks that it is not permitted by the rules of evidence, that lawyer may object.
6 If I overrule the objection, the question may be answered or the exhibit received. If I
7 sustain the objection, the question cannot be answered, and the exhibit cannot be
8 received. Whenever I sustain an objection to a question, you must ignore the question
9 and must not guess what the answer might have been.

10 Sometimes I may order that evidence be stricken from the record and that you
11 disregard or ignore the evidence. That means when you are deciding the case, you must
12 not consider the stricken evidence for any purpose.

13
14 [***Authority:*** Ninth Circuit Model Civil Jury Instructions § 1.13.]

15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 10**

2 **CREDIBILITY OF WITNESSES**

3 In deciding the facts in this case, you may have to decide which testimony to
4 believe and which testimony not to believe. You may believe everything a witness says,
5 or part of it, or none of it.

6 In considering the testimony of any witness, you may take into account:

- 7 (1) the opportunity and ability of the witness to see or hear or know the things
8 testified to;
- 9 (2) the witness's memory;
- 10 (3) the witness's manner while testifying;
- 11 (4) the witness's interest in the outcome of the case, if any;
- 12 (5) the witness's bias or prejudice, if any;
- 13 (6) whether other evidence contradicted the witness's testimony;
- 14 (7) the reasonableness of the witness's testimony in light of all the evidence;
15 and
16 (8) any other factors that bear on believability.

17
18 Sometimes a witness may say something that is not consistent with something
19 else he or she said. Sometimes different witnesses will give different versions of what
20 happened. People often forget things or make mistakes in what they remember. Also,
21 two people may see the same event but remember it differently. You may consider
22 these differences, but do not decide that testimony is untrue just because it differs from
23 other testimony.

24 However, if you decide that a witness has deliberately testified untruthfully about
25 something important, you may choose not to believe anything that witness said. On the
26 other hand, if you think the witness testified untruthfully about some things but told the
27 truth about others, you may accept the part you think is true and ignore the rest.
28

1 The weight of the evidence as to a fact does not necessarily depend on the number
2 of witnesses who testify. What is important is how believable the witnesses were, and
3 how much weight you think their testimony deserves.

4
5 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.14.]
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 12**

2 **DEPOSITION IN LIEU OF LIVE TESTIMONY**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial.]

5 A deposition is the sworn testimony of a witness taken before trial. The witness
6 is placed under oath to tell the truth and lawyers for each party may ask questions. The
7 questions and answers are recorded.

8 Insofar as possible, you should consider deposition testimony, presented to you
9 in court in lieu of live testimony, in the same way as if the witness had been present to
10 testify.

11
12 **[Authority:** Ninth Circuit Model Civil Jury Instructions § 2.4 (modified).]

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 13**

2 **CONDUCT OF THE JURY**

3 I will now say a few words about your conduct as jurors.

4 First, keep an open mind throughout the trial, and do not decide what the verdict
5 should be until you and your fellow jurors have completed your deliberations at the end
6 of the case.

7 Second, because you must decide this case based only on the evidence received
8 in the case and on my instructions as to the law that applies, you must not be exposed
9 to any other information about the case or to the issues it involves during the course of
10 your jury duty. Thus, until the end of the case or unless I tell you otherwise:

11 Do not communicate with anyone in any way and do not let anyone else
12 communicate with you in any way about the merits of the case or anything
13 to do with it. This includes discussing the case in person, in writing, by
14 phone or electronic means, via email, text messaging, or any internet chat
15 room, blog, website or application, including but not limited to Facebook,
16 YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of
17 social media. This applies to communicating with your fellow jurors until
18 I give you the case for deliberation, and it applies to communicating with
19 everyone else including your family members, your employer, the media
20 or press, and the people involved in the trial, although you may notify your
21 family and your employer that you have been seated as a juror in the case,
22 and how long you expect the trial to last. But, if you are asked or
23 approached in any way about your jury service or anything about this case,
24 you must respond that you have been ordered not to discuss the matter and
25 report the contact to the court.

19 Because you will receive all the evidence and legal instruction you
20 properly may consider to return a verdict: do not read, watch or listen to
21 any news or media accounts or commentary about the case or anything to
22 do with it; do not do any research, such as consulting dictionaries,
23 searching the Internet, or using other reference materials; and do not make
24 any investigation or in any other way try to learn about the case on your
25 own. Do not visit or view any place discussed in this case, and do not use
26 Internet programs or other devices to search for or view any place
27 discussed during the trial. Also, do not do any research about this case,
28 the law, or the people involved—including the parties, the witnesses or
the lawyers—until you have been excused as jurors. If you happen to read
or hear anything touching on this case in the media, turn away and report
it to me as soon as possible.

27 These rules protect each party's right to have this case decided only on evidence
28 that has been presented here in court. Witnesses here in court take an oath to tell the

1 truth, and the accuracy of their testimony is tested through the trial process. If you do
2 any research or investigation outside the courtroom, or gain any information through
3 improper communications, then your verdict may be influenced by inaccurate,
4 incomplete or misleading information that has not been tested by the trial process. Each
5 of the parties is entitled to a fair trial by an impartial jury, and if you decide the case
6 based on information not presented in court, you will have denied the parties a fair trial.
7 Remember, you have taken an oath to follow the rules, and it is very important that you
8 follow these rules.

9 A juror who violates these restrictions jeopardizes the fairness of these
10 proceedings, and a mistrial could result that would require the entire trial process to
11 start over. If any juror is exposed to any outside information, please notify the court
12 immediately.

13
14 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 1.15.]
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 14**

2 **NO TRANSCRIPT AVAILABLE TO JURY / TAKING NOTES**

3 I urge you to pay close attention to the trial testimony as it is given. During
4 deliberations you will not have a transcript of the trial testimony.

5 If you wish, you may take notes to help you remember the evidence. If you do
6 take notes, please keep them to yourself until you go to the jury room to decide the case.
7 Do not let notetaking distract you. When you leave, your notes should be left in the
8 courtroom. No one will read your notes.

9 Whether or not you take notes, you should rely on your own memory of the
10 evidence. Notes are only to assist your memory. You should not be overly influenced
11 by your notes or those of other jurors.

12
13 [**Authority:** Ninth Circuit Model Civil Jury Instructions §§ 1.17, 1.18.]
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 15**

2 **STIPULATIONS OF FACT**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 The parties have agreed to certain facts to be placed in evidence as Exhibit [●].
6 You must therefore treat these facts as having been proved.

7
8 [Authority: Ninth Circuit Model Civil Jury Instructions § 2.2.]
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Preliminary Jury Instruction No. 16

USE OF INTERROGATORIES

[The parties propose that the Court issue this instruction the first time it becomes relevant at trial]

Evidence will now be presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

[Authority: Ninth Circuit Model Civil Jury Instructions § 2.11.]

1 **Stipulated Preliminary Jury Instruction No. 17**

2 **EXPERT OPINION**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 You are about to hear testimony from experts who will testify to opinions and the
6 reasons for his/her opinions. This opinion testimony is allowed, because of the
7 education or experience of this witness.

8 Such opinion testimony should be judged like any other testimony. You may
9 accept it or reject it, and give it as much weight as you think it deserves, considering
10 the witness's education and experience, the reasons given for the opinion, and all the
11 other evidence in the case.

12
13 [Authority: Ninth Circuit Model Civil Jury Instructions § 2.13.]
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 18**

2 **EXPERTS – QUESTIONS CONTAINING ASSUMED FACTS**

3 The law allows expert witnesses to be asked questions that are based on assumed
4 facts. These are sometimes called “hypothetical questions.”

5 In determining the weight to give to the expert’s opinion that is based on the
6 assumed facts, you should consider whether the assumed facts are true.

7
8 [*Authority:* Judicial Council of California, Civil Jury Instructions 220.]
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 20**

2 **CHARTS AND SUMMARIES NOT RECEIVED INTO EVIDENCE**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 Certain charts and summaries not admitted into evidence [may be] [have been]
6 shown to you in order to help explain the contents of books, records, documents, or
7 other evidence in the case. Charts and summaries are only as good as the underlying
8 evidence that supports them. You should, therefore, give them only such weight as you
9 think the underlying evidence deserves.

10
11 [Authority: Ninth Circuit Model Civil Jury Instructions § 2.14.]
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 21**

2 **CHARTS AND SUMMARIES IN EVIDENCE**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 Certain charts and summaries [may be] [have been] admitted into evidence to
6 illustrate information brought out in the trial. Charts and summaries are only as good
7 as the testimony or other admitted evidence that supports them. You should, therefore,
8 give them only such weight as you think the underlying evidence deserves.

9
10 [Authority: Ninth Circuit Model Civil Jury Instructions § 2.15.]
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 22**

2 **IMPEACHMENT EVIDENCE – WITNESS**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 The evidence that a witness lied under oath or gave inconsistent testimony on a
6 prior occasion may be considered, along with all other evidence, in deciding whether or
7 not to believe the witness and how much weight to give the testimony of the witness
8 and for no other purpose.

9
10 [Authority: Ninth Circuit Model Civil Jury Instructions § 2.9.]
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 23**

2 **BENCH CONFERENCES AND RECESSES**

3 From time to time during the trial, it may become necessary for me to talk with
4 the attorneys out of the hearing of the jury, either by having a conference at the bench
5 when the jury is present in the courtroom, or by calling a recess. Please understand that
6 while you are waiting, we are working. The purpose of these conferences is not to keep
7 relevant information from you, but to decide how certain evidence is to be treated under
8 the rules of evidence and to avoid confusion and error.

9 Of course, we will do what we can to keep the number and length of these
10 conferences to a minimum. I may not always grant an attorney's request for a
11 conference. Do not consider my granting or denying a request for a conference as any
12 indication of my opinion of the case or of what your verdict should be.

13
14 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.20.]
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Preliminary Jury Instruction No. 24

OUTLINE OF TRIAL

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

[*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.21.]

1 **Stipulated Preliminary Jury Instruction No. 25**

2 **DAMAGES – PROOF**

3 It is the duty of the Court to instruct you about the measure of damages. By
4 instructing you on damages, the Court does not mean to suggest for which party your
5 verdict should be rendered.

6 Both the plaintiff, ChromaDex, and the counterclaimant, Elysium, are alleging
7 affirmative claims for damages.

8 If you find for ChromaDex on its claims, you must determine ChromaDex’s
9 damages. ChromaDex has the burden of proving damages by a preponderance of the
10 evidence.

11 If you find for Elysium on its counterclaims against ChromaDex for which it
12 seeks damages, you must likewise determine Elysium’s damages. Elysium also has the
13 burden of proving damages by a preponderance of the evidence.

14 It is for you to determine what damages, if any, have been proved. Damages
15 means the amount of money that will reasonably and fairly compensate a party for any
16 injury you find was caused by the opposing party.

17 Your award must be based upon evidence and not upon speculation, guesswork
18 or conjecture.

19
20 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 5.1 (modified).]
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 26**

2 **PUNITIVE DAMAGES – AGAINST ELYSIUM AND MORRIS**

3 It you find for ChromaDex on its claims for breach of fiduciary duty, aiding-and-
4 abetting breach of fiduciary duty, and/or misappropriation of trade secrets under
5 California state law or federal law, you may, but are not required to, award “punitive”
6 damages. The purposes of punitive damages are to punish a defendant for their
7 misconduct and to deter similar acts in the future. Punitive damages may not be
8 awarded to compensate the party bringing the claim. ChromaDex has the burden of
9 proving by clear and convincing evidence that punitive damages should be awarded.

10 You may award punitive damages against Morris and/or Elysium on
11 ChromaDex’s claims for breach of fiduciary duty and/or aiding-and-abetting breach of
12 fiduciary duty only if you find that Morris and/or Elysium acted with malice,
13 oppression, or fraud.

14 You may award punitive damages on ChromaDex’s claims for misappropriation
15 of trade secrets under California state law and/or federal law only if you find that Morris
16 and/or Elysium acted willfully and maliciously.

17 Acting “maliciously” or with “malice” means that Morris and/or Elysium acted
18 with ill will, or spite, or for the purpose of injuring ChromaDex, or that Morris’s and/or
19 Elysium’s conduct was despicable and was done with a willful and knowing disregard
20 of ChromaDex’s rights.

21 Conduct is “despicable” when it is so vile, base, or wretched that it would be
22 looked down on and despised by ordinary decent people. Conduct is in “knowing
23 disregard of ChromaDex’s rights” if Morris and/or Elysium were aware of the probable
24 consequences of their conduct and deliberately failed to avoid those consequences.

25 Acting with “oppression” means that Morris’ and/or Elysium’s conduct was
26 despicable and subjected ChromaDex to cruel and unjust hardship in knowing disregard
27 of ChromaDex’s rights, or that Morris and/or Elysium otherwise violated ChromaDex’s
28 rights with unnecessary harshness or severity, such as by misusing or abusing authority

1 or power or by taking advantage of some weakness or disability or misfortune of
2 ChromaDex.

3 Acting with “fraud” means that Morris and/or Elysium intentionally
4 misrepresented or concealed a material fact and did so intending to harm ChromaDex.

5 Acting “willfully” means that Morris and/or Elysium acted with a purpose or
6 willingness to commit the act or engage in the conduct in question, and their conduct
7 was not reasonable under the circumstances at the time and was not undertaken in good
8 faith.

9 If you find that punitive damages are appropriate on ChromaDex’s claims for
10 breach of fiduciary duty and/or aiding-and-abetting breach of fiduciary duty, you will
11 be asked to determine the amount of any punitive damages. You must use reason in
12 setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill
13 their purposes but should not reflect bias, prejudice or sympathy toward any party. In
14 considering the amount of any punitive damages, consider the degree of reprehensibility
15 of the defendants’ conduct. You should also consider the defendants’ financial
16 condition and what amount is necessary to punish them and discourage future wrongful
17 conduct. You may not increase the punitive award above an amount that is otherwise
18 appropriate merely because a defendant has substantial financial resources.

19 If you find that exemplary damages are appropriate on ChromaDex’s claim for
20 trade secret misappropriation under federal law, you will be asked to determine the
21 amount of any punitive damages. Punitive damages may be awarded on this claim in
22 an amount not more than two (2) times the amount that you award to ChromaDex as
23 damages or for Morris and/or Elysium’s unjust enrichment.

24 If you find that punitive damages are appropriate on ChromaDex’s claim for trade
25 secret misappropriation under California state law, you will not be asked to determine
26 the amount of any punitive damages. I will calculate the amount later.

27 You may impose punitive damages against one or more of the parties and not
28 others, and may award different amounts against different parties. Punitive damages

1 may be awarded even if you award a party only nominal, and not compensatory,
2 damages.

3 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 5.5 (modified); Judicial
4 Council of California, Civil Jury Instructions 4411 (modified); Cal. Civ. Proc. Code
5 § 3426.3(c); Judicial Council of the United States Eleventh Judicial Circuit 11.5
(modified); see 18 U.S.C. § 1836(b)(3)(C); Judicial Council of California, Civil Jury
Instructions 3947 (modified).]

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 27**

2 **PUNITIVE DAMAGES – AGAINST CHROMADEx**

3 It you find for Elysium on its counterclaim for fraudulent inducement, you may,
4 but are not required to, award “punitive” damages. The purposes of punitive damages
5 are to punish a counter-defendant for the misconduct and to deter similar acts in the
6 future. Punitive damages may not be awarded to compensate the party bringing the
7 claim. Elysium has the burden of proving by clear and convincing evidence that
8 ChromaDex acted with malice, oppression or fraud.

9 Acting with “malice” means that ChromaDex acted with ill will, or spite, or for
10 the purpose of injuring Elysium, or that ChromaDex’s conduct was despicable and was
11 done with a willful and knowing disregard of Elysium’s rights.

12 Conduct is “despicable” when it is so vile, base, or wretched that it would be
13 looked down on and despised by ordinary decent people. Conduct is in “knowing
14 disregard of Elysium’s rights” if ChromaDex was aware of the probable consequences
15 of its conduct and deliberately failed to avoid those consequences.

16 Acting with “oppression” means that ChromaDex’s conduct was despicable and
17 subjected Elysium to cruel and unjust hardship in knowing disregard of Elysium’s
18 rights, or otherwise violated Elysium’s rights with unnecessary harshness or severity,
19 such as by misusing or abusing authority or power or by taking advantage of some
20 weakness or disability or misfortune of Elysium.

21 Acting with “fraud” means that ChromaDex intentionally misrepresented or
22 concealed a material fact and did so intending to harm Elysium.

23 If you find that punitive damages are appropriate on Elysium’s counterclaim for
24 fraudulent inducement, you will be asked to determine the amount of any punitive
25 damages. You must use reason in setting the amount. Punitive damages, if any, should
26 be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice
27 or sympathy toward any party. In considering the amount of any punitive damages,
28 consider the degree of reprehensibility of the counter-defendant’s conduct. You should

1 also consider the counter-defendant's financial condition and what amount is necessary
2 to punish them and discourage future wrongful conduct. You may not increase the
3 punitive award above an amount that is otherwise appropriate merely because a
4 defendant has substantial financial resources.

5 You may impose punitive damages against one or more of the parties and not
6 others, and may award different amounts against different parties. Punitive damages
7 may be awarded even if you award a party only nominal, and not compensatory,
8 damages.

9 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 5.5 (modified); Judicial
10 Council of California, Civil Jury Instructions 4411 (modified); Cal. Civ. Proc. Code
11 § 3426.3(c); Judicial Council of the United States Eleventh Judicial Circuit 11.5
(modified); see 18 U.S.C. § 1836(b)(3)(C); Judicial Council of California, Civil Jury
Instructions 3947 (modified).]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Case-Specific Jury Instruction No. 30

INTERPRETATION OF CONTRACT – CONSTRUCTION AS A WHOLE

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

[*Authority*: Judicial Council of California, Civil Jury Instructions 317.]

1 **Stipulated Case-Specific Jury Instruction No. 31**

2 **INTERPRETATION OF CONTRACT – MEANING OF ORDINARY WORDS**

3 You should assume that the parties intended the words in their contract to have
4 their usual and ordinary meaning unless you decide that the parties intended the words
5 to have a special meaning.

6
7 [*Authority*: Judicial Council of California, Civil Jury Instructions 315.]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Case-Specific Jury Instruction No. 32**

2 **INTERPRETATION OF CONTRACT – CONSTRUCTION BY CONDUCT**

3 In deciding what the words in a contract meant to the parties, you may consider
4 how the parties acted after the contract was created but before any disagreement
5 between the parties arose.

6
7 [*Authority*: Judicial Council of California, Civil Jury Instructions 318.]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Case-Specific Jury Instruction No. 33
INTERPRETATION OF CONTRACT – CONSTRUCTION AGAINST
DRAFTER

In determining the meaning of the words of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the words, then you should interpret the contract against the party that drafted the disputed words.

[*Authority*: Judicial Council of California, Civil Jury Instructions 320.]

1 **Stipulated Case-Specific Jury Instruction No. 64**

2 **CONTRACT FORMATION**

3 ChromaDex claims that it entered into the Disputed July Confidentiality
4 Agreement with Morris. To prove that a contract was created, ChromaDex must prove
5 all the following by a preponderance of the evidence:

- 6 (1) That the contract terms were clear enough that the parties could understand
7 what each was required to do;
- 8 (2) That the parties agreed to give each other something of value; and
- 9 (3) That the parties agreed to the terms of the contract.

10 If ChromaDex did not prove all of the above, then a contract was not created.

11
12 [*Authority*: Judicial Council of California, Civil Jury Instructions 302.]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Case-Specific Jury Instruction No. 65

CONSIDERATION

To form a contract, the parties must agree to give each other something of value.
This value is referred to as “consideration.”

A party provides consideration for a contract if it:

- (1) Gives or promises to give the other party any benefit to which the receiving party is not lawfully entitled; or
- (2) Suffers or agrees to suffer any prejudice that it is not lawfully bound to suffer.

[*Authority*: Judicial Council of California, Civil Jury Instructions 302, CA CIVIL 1605.]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Case-Specific Jury Instruction No. 38

**REMEDY FOR BREACH OF CONTRACT – FAILURE TO PAY FOR JUNE 30
ORDERS – AGAINST ELYSIUM**

If you decide that ChromaDex has proved its claims against Elysium for breach of the NIAGEN Supply Agreement and/or pTeroPure Supply Agreement, with respect to Elysium not paying ChromaDex for the June 30 Orders placed under these Agreements, you also must decide how much money will reasonably compensate ChromaDex for the harm caused by the breach(es). This compensation is called “damages.” The purpose of such damages is to put ChromaDex in as good a position as it would have been if Elysium had performed as promised.

To recover damages for any harm for breach of contract, ChromaDex must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as a result of the breach of the contract.

ChromaDex also must prove the amount of its damages. In this case, ChromaDex must prove the amount due to it under the NIAGEN Supply Agreement and/or pTeroPure Supply Agreement.

ChromaDex does not have to prove the exact amount of damages but you must not speculate or guess in awarding damages.

[**Authority:** Judicial Council of California, Civil Jury Instructions 350 & 355 (modified); *see* Cal. Civ. Proc. Code § 3300.]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Stipulated Case-Specific Jury Instruction No. 28

NO PUNITIVE DAMAGES – BREACH OF CONTRACT

You must not include in any award for breach of contract any damages to punish or make an example of any party. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages, if any, that fairly compensate a party for its loss.

[**Authority:** Judicial Council of California, Civil Jury Instructions 3924; *see Myers Building Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 960 (1993) (“An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was [willful], fraudulent, or malicious.”).]

1 **Stipulated Case-Specific Jury Instruction No. 37**

2 **SUBSTANTIAL PERFORMANCE**

3 Elysium contends that ChromaDex did not perform all of the things that it was
4 required to do under the contract, and therefore Elysium did not have to perform its
5 obligations under the contract. To overcome this contention, ChromaDex must prove
6 both of the following:

7 (1) That ChromaDex made a good faith effort to comply with the contract;

8 (2) That Elysium received essentially what the contract called for because
9 ChromaDex’s failures, if any, were so trivial or unimportant that they could
10 have been easily fixed or paid for.

11
12 Likewise, ChromaDex contends that Elysium did not perform all of the things
13 that it was required to do under the contract, and therefore that ChromaDex did not have
14 to perform its obligations under the contract. To overcome this contention, Elysium
15 must prove both of the following:

16 (1) That Elysium made a good faith effort to comply with the contract;

17 (2) That ChromaDex received essentially what the contract called for because
18 Elysium’s failures, if any, were so trivial or unimportant that they could have
19 been easily fixed or paid for.

20
21 [**Authority**: Judicial Council of California, Civil Jury Instructions 312.]

22
23
24
25
26
27
28

1 **Stipulated Case-Specific Jury Instruction No. 44**

2 **MISAPPROPRIATION OF TRADE SECRETS - INTRODUCTION**

3 ChromaDex claims that it is the owner of two categories of information: (1) the
4 price that ChromaDex's customers paid for NR in specific volumes on specific dates;
5 and (2) the price ChromaDex paid to obtain NR from its manufacturer, W.R. Grace.

6 ChromaDex claims that this information is a trade secret and that Elysium and/or
7 Morris misappropriated it. "Misappropriation" means the improper use, acquisition, or
8 disclosure of a trade secret.

9 ChromaDex also claims that the misappropriation caused Elysium to be unjustly
10 enriched.

11 Elysium and Morris deny that the information is a trade secret, that they
12 misappropriated any information., and that any alleged misappropriation caused
13 Elysium to be unjustly enriched. Elysium and Morris also claim certain affirmative
14 defenses, which will be explained in a later instruction.

15
16 [**Authority:** Judicial Council of California, Civil Jury Instructions 4400; *see* Cal. Civ.
17 Proc. Code § 3426.1, *et seq.*]

18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Case-Specific Jury Instruction No. 47**

2 **SECURITY REQUIREMENT**

3 The secrecy required to prove that something is a trade secret does not have to be
4 absolute in the sense that no one else in the world possesses the information. It may be
5 disclosed to employees involved in ChromaDex’s use of the trade secret as long as they
6 are instructed to keep the information secret. It may also be disclosed to nonemployees
7 if they are obligated to keep the information secret. However, the trade secret must not
8 have been generally known to the public or to people who could obtain value from
9 knowing it.

10
11 [**Authority:** Judicial Council of California, Civil Jury Instructions 4403 (modified); *see*
12 *DVD Copy Control Assn., Inc. v. Bunner*, 31 Cal. 4th 864, 881 (2003) (“Trade secrets
13 are a peculiar kind of property. Their only value consists in their being kept private.”)
14 (internal citations and quotations omitted); *see also* *Courtesy Temporary Service, Inc.*
15 *v. Camacho*, 222 Cal. App. 3d 1278, 1288 (1990) (“[R]easonable efforts to maintain
16 secrecy have been held to include advising employees of the existence of a trade secret,
17 limiting access to a trade secret on ‘need to know basis,’ and controlling plant access.”)
18 (internal quotations and citation omitted).]

1 **Stipulated Case-Specific Jury Instruction No. 49**

2 **“INDEPENDENT ECONOMIC VALUE” EXPLAINED**

3 Information has independent economic value if it gives the owner an actual or
4 potential business advantage over others who do not know the information and who
5 could obtain economic value from its disclosure or use.

6 In determining whether information had actual or potential independent
7 economic value because it was secret, you may consider the following:

- 8 (1) The extent to which ChromaDex obtained or could obtain economic value
9 from the information in keeping it secret;
- 10 (2) The extent to which others could obtain economic value from the
11 information if it was not secret;
- 12 (3) The amount of time, money, or labor that ChromaDex expended in
13 developing or acquiring the specific information; and
- 14 (4) The amount of time, money, or labor that would be saved by a competitor
15 who used this information.

16 The presence or absence of any one or more of these factors is not necessarily
17 determinative.

18
19 [**Authority:** Judicial Council of California, Civil Jury Instructions 4412 (modified); *see*
20 Rest.3d, Unfair Competition, § 39 at 430, cmt. 3 (indicating that the business or
21 technical information should be sufficiently valuable and secret to afford an actual or
22 potential economic advantage over others; the advantage need not be great, but it must
23 be more than trivial).]

1 **Stipulated Case-Specific Jury Instruction No. 57**

2 **AFFIRMATIVE DEFENSE – INFORMATION WAS READILY**
3 **ASCERTAINABLE BY PROPER MEANS**

4 Elysium or Morris did not misappropriate a trade secret if Elysium or Morris
5 proves that the trade secret was readily ascertainable by proper means at the time of the
6 alleged disclosure or use.

7 There is no fixed standard for determining what is “readily ascertainable by
8 proper means.” In general, information is readily ascertainable if it can be obtained,
9 discovered, developed, or compiled without significant difficulty, effort, or expense.
10 For example, information is readily ascertainable if it is available in trade journals,
11 reference books, or published materials. On the other hand, the more difficult
12 information is to obtain, and the more time and resources that must be expended in
13 gathering it, the less likely it is that the information is readily ascertainable by proper
14 means.

15
16 [**Authority:** Judicial Council of California, Civil Jury Instructions 4420.]
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Case-Specific Jury Instruction No. 59**

2 **INTERSTATE OR FOREIGN COMMERCE**

3 ChromaDex claims that the information it alleges to be trade secrets relates to a
4 product or service used in, or intended for use in, interstate or foreign commerce. Use
5 or intended use of the product or service in interstate commerce means that the product
6 or service involves travel, trade, transportation, or communication between a place in
7 one state and a place in another state. Use of the product or service in foreign commerce
8 means that the product or service involves travel, trade, transportation, or
9 communication between a place in the United States and a place outside of the United
10 States.

11
12 [**Authority:** 18 U.S.C. § 1839; Pattern Civ. Jury Instr. 11th Cir. 11.1 (2019) (modified).]

1 **Stipulated Case-Specific Jury Instruction No. 43**

2 **DAMAGES ON MULTIPLE LEGAL THEORIES**

3 ChromaDex seeks damages from Elysium and Morris under more than one legal
4 theory. However, each item of damages may be awarded only once, regardless of the
5 number of legal theories alleged.

6 You will be asked to decide whether Elysium and Morris are liable to
7 ChromaDex under the following legal theories:

- 8 (1) Breach of contract as to Elysium;
- 9 (2) Breach of contract as to Morris;
- 10 (3) Breach of fiduciary duty as to Morris;
- 11 (4) Aiding and abetting breach of fiduciary duty as to Elysium
- 12 (5) Misappropriation of trade secrets as to Elysium; and
- 13 (6) Misappropriation of trade secrets as to Morris;

14 The following items of damages are recoverable only once under any of the above
15 legal theories:

- 16 (1) The amount due under the NIAGEN Supply Agreement;
- 17 (2) The amount due under the pTeroPure Supply Agreement;
- 18 (3) Elysium’s profits from the resale of ChromaDex’s ingredients;
- 19 (4) Elysium’s price discount for the purchase of NR; and
- 20 (5) Morris’s compensation from ChromaDex and Elysium.

21
22 [**Authority:** Judicial Council of California, Civil Jury Instructions 3934; *see Roby v.*
23 *McKesson Corp.*, 47 Cal. 4th 686, 702 (2009), *as modified* (Feb. 10, 2010) (finding that
24 it is necessary to identify items of damages with specificity, as double or duplicative
25 recovery for the same damage items is prohibited).]

Stipulated Case-Specific Jury Instruction No. 72

BREACH OF CONTRACT AGAINST CHROMADEx – INTRODUCTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Elysium claims that it and ChromaDex entered into a contract for the supply of NIAGEN®, referred to as the NIAGEN Supply Agreement.

Elysium claims that ChromaDex breached this contract by selling NIAGEN® to other customers at a lower price than the price at which ChromaDex sold it to Elysium, but did not give Elysium a refund or credit, even though Elysium purchased equal volumes or higher volumes of NIAGEN® than those other customers. Elysium claims that this conduct was prohibited by the contract’s “Most Favored Nation” or “MFN” provision.

Elysium also claims that ChromaDex’s breach of this contract caused harm to Elysium for which ChromaDex should pay.

ChromaDex denies that it breached the contract. ChromaDex also claims certain affirmative defenses, which will be explained in a later instruction.

[**Authority:** Judicial Council of California, Civil Jury Instructions 300.]

1 **Stipulated Case-Specific Jury Instruction No. 75**

2 **REMEDY FOR BREACH OF CONTRACT – AGAINST CHROMADEx**

3 If you decide that Elysium has proved its claim against ChromaDex for breach of
4 the NIAGEN Supply Agreement, you also must decide how much money will
5 reasonably compensate Elysium for the harm caused by the breach. This compensation
6 is called “damages.” The purpose of such damages is to put Elysium in as good a
7 position as it would have been if ChromaDex had performed as promised.

8 To recover damages for any harm for breach of contract, Elysium must prove that
9 when the contract was made, both parties knew or could reasonably have foreseen that
10 the harm was likely to occur in the ordinary course of events as result of the breach of
11 the contract.

12 Elysium also must prove the amount of its damages. It does not have to prove
13 the exact amount of damages but you must not speculate or guess in awarding damages.

14 Elysium seeks to recover for its actual damages.

15
16 [**Authority:** Judicial Council of California, Civil Jury Instructions 350; *see* Cal. Civ.
17 Proc. Code § 3300.]

1 **Stipulated Case-Specific Jury Instruction No. 77**

2 **FRAUDULENT INDUCEMENT – ESSENTIAL ELEMENTS**

3 Elysium claims that ChromaDex induced it to enter into the Trademark License
4 and Royalty Agreement by making a false representation on which Elysium reasonably
5 relied, and which harmed it. To establish this claim, Elysium must prove all of the
6 following by a preponderance of the evidence:

- 7 (1) That ChromaDex, through its then-CEO, represented to Elysium that a fact
8 was true;
- 9 (2) That ChromaDex's representation was false;
- 10 (3) That ChromaDex knew that the representation was false when it made it, or
11 that it made the representation recklessly and without regard for its truth;
- 12 (4) That ChromaDex intended that Elysium rely on the representation;
- 13 (5) That Elysium reasonably relied on the representation;
- 14 (6) That Elysium was harmed; and
- 15 (7) That Elysium's reliance on ChromaDex's representation was a substantial
16 factor in causing its harm.

17
18 [**Authority:** Judicial Council of California, Civil Jury Instructions 1900.]

1 **Stipulated Case-Specific Jury Instruction No. 78**

2 **RELIANCE**

3 Elysium relied on any given misrepresentation if:

4 (1) The misrepresentation substantially influenced it to sign a contract called the
5 Trademark License and Royalty Agreement, and;

6 (2) It probably would not have signed the Trademark License and Royalty
7 Agreement without the misrepresentation.

8 It is not necessary for a misrepresentation to be the only reason for Elysium's
9 conduct.

10
11 [**Authority:** Judicial Council of California, Civil Jury Instructions 1907.]

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Case-Specific Jury Instruction No. 79**

2 **DAMAGES FOR FRAUDULENT INDUCEMENT**

3 If you decide that Elysium has proved its claim against ChromaDex for fraudulent
4 inducement, you must also decide how much money will reasonably compensate
5 Elysium for the harm. This compensation is called “damages.”

6 The amount of damages must include an award for each item of harm that was
7 caused by ChromaDex’s wrongful conduct, even if the particular harm could not have
8 been anticipated.

9 Elysium does not have to prove the exact amount of damages that will provide
10 reasonable compensation for the harm. However, you must not speculate or guess in
11 awarding damages.

12 The following are the specific items of damages claimed by Elysium: royalties
13 that Elysium paid under the Trademark License and Royalty Agreement.

14
15 [*Authority*: Judicial Council of California, Civil Jury Instructions 3900.]
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Closing Jury Instruction No. 82**

2 **DUTY OF THE JURY**

3 Members of the Jury: Now that you have heard all of the evidence and the
4 arguments of the attorneys, it is my duty to instruct you on the law that applies to this
5 case.

6 Each of you has received a copy of these instructions that you may take with you
7 to the jury room to consult during your deliberations.

8 It is your duty to find the facts from all the evidence in the case. To those facts
9 you will apply the law as I give it to you. You must follow the law as I give it to you
10 whether you agree with it or not. And you must not be influenced by any personal likes
11 or dislikes, opinions, prejudices, or sympathy. That means that you must decide the
12 case solely on the evidence before you. You will recall that you took an oath to do so.

13 Please do not read into these instructions or anything that I may say or do or have
14 said or done that I have an opinion regarding the evidence or what your verdict should
15 be.

16
17 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 1.4.]
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Closing Jury Instruction No. 83**

2 **DUTY TO DELIBERATE**

3 Before you begin your deliberations, elect one member of the jury as your
4 presiding juror. The presiding juror will preside over the deliberations and serve as the
5 spokesperson for the jury in court.

6 You shall diligently strive to reach agreement with all of the other jurors if you
7 can do so. Your verdict must be unanimous.

8 Each of you must decide the case for yourself, but you should do so only after
9 you have considered all of the evidence, discussed it fully with the other jurors, and
10 listened to their views.

11 It is important that you attempt to reach a unanimous verdict but, of course, only
12 if each of you can do so after having made your own conscientious decision. Do not be
13 unwilling to change your opinion if the discussion persuades you that you should. But
14 do not come to a decision simply because other jurors think it is right, or change an
15 honest belief about the weight and effect of the evidence simply to reach a verdict.

16
17 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 3.1; *see* FED. R. CIV. P. 48(b);
18 *see also Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1451 (9th Cir. 1995)
19 (noting that a jury verdict in a federal civil case must be unanimous, unless the parties
stipulate otherwise) (citing *Johnson v. Louisiana*, 406 U.S. 356, 369-70 (1972)).]

1 **Stipulated Closing Jury Instruction No. 84**

2 **COMMUNICATIONS WITH COURT**

3 If it becomes necessary during your deliberations to communicate with me, you
4 may send a note through the clerk, signed by your presiding juror or one or more
5 members of the jury. No member of the jury should ever attempt to communicate with
6 me except by a signed writing; I will communicate with any member of the jury on
7 anything concerning the case only in writing, or here in open court. If you send out a
8 question, I will consult with the parties before answering it, which may take some time.
9 You may continue your deliberations while waiting for the answer to any question.
10 Remember that you are not to tell anyone—including me—how the jury stands,
11 numerically or otherwise, until after you have reached a unanimous verdict or have been
12 discharged. Do not disclose any vote count in any note to the court.

13
14 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 3.3; *see* Jury Instructions
15 Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures* § 5.1.A (2013).]
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Closing Jury Instruction No. 85**

2 **RETURN OF VERDICT**

3 A verdict form has been prepared for you. [*Explain verdict form as needed.*]
4 After you have reached unanimous agreement on a verdict, your presiding juror should
5 complete the verdict form according to your deliberations, sign and date it, and advise
6 the clerk that you are ready to return to the courtroom.

7
8 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 3.5.]

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Final Instruction No. 66**

2 **SUBSTANTIAL FACTOR**

3 A substantial factor in causing harm is a factor that a reasonable person would
4 consider to have contributed to the harm. It must be more than a remote or trivial factor.
5 It does not have to be the only cause of the harm.

6 Conduct is not a substantial factor in causing harm if the same harm would have
7 occurred without that conduct.

8
9 [*Authority*: Judicial Council of California, Civil Jury Instructions 430.]
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Preliminary Jury Instruction No. 29**

2 **LIABILITY OF CORPORATIONS**

3 Under the law, a corporation is considered to be a person. It can only act through
4 its employees, agents, directors, or officers. Therefore, a corporation is responsible for
5 the acts of its employees, agents, directors, and officers performed within the scope of
6 authority.

7
8 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 4.2.]
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Stipulated Case-Specific Jury Instruction No. 53**

2 **IMPROPER MEANS OF ACQUIRING TRADE SECRET**

3 Improper means of acquiring a trade secret or knowledge of a trade secret include,
4 but are not limited to, breach or inducing a breach of a duty to maintain secrecy.

5 However, it is not improper to acquire a trade secret or knowledge of the trade
6 secret by any of the following:

- 7 (1) Independent efforts to invent or discover the information;
- 8 (2) Reverse engineering; that is examining or testing a product to determine
9 how it works, by a person who has a right to possess the product;
- 10 (3) Obtaining the information as a result of a license agreement or other
11 agreement with the owner of the information;
- 12 (4) Observing the information in public use or on public display; or
- 13 (5) Obtaining the information from published literature, such as trade journals,
14 reference books, the Internet, or other publicly available sources.

15 Mere possession of information is not enough to establish improper acquisition of a
16 trade secret.

17
18 [*Authority:* Judicial Council of California, Civil Jury Instructions 4408 (modified);
19 *Hooked Media Grp., Inc. v. Apple Inc.*, 55 Cal. App. 5th 323, 333 *reh'g denied* (June
20 19, 2020), *publication ordered* (Sept. 30, 2020), *review denied* (Dec. 30, 2020), *review*
21 *granted and cause transferred sub nom. Hooked Media Grp. v. Apple*, 472 P.3d 1064
22 (Cal. 2020).]
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**INSTRUCTIONS PROPOUNDED BY
PLAINTIFF, OPPOSED BY DEFENDANTS**

1 **BREACH OF FIDUCIARY DUTY AGAINST MORRIS (CLAIM 7)**

2 ChromaDex claims that Morris, while a manager and vice president of
3 ChromaDex, breached his duty of loyalty to the company by acting for the benefit of
4 Elysium and to the detriment of ChromaDex.

5 **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST ELYSIUM (CLAIM 8)**

6 ChromaDex claims Elysium knowingly helped or encouraged Morris to breach
7 his duty of loyalty to ChromaDex.

8
9 Elysium makes the following counterclaims for which it has the burden of proof:

10 **BREACH OF CONTRACT (COUNTERCLAIM 1)**

11 Elysium claims that ChromaDex breached the NIAGEN Supply Agreement by
12 overcharging Elysium for NIAGEN while giving a more favorable price to other
13 customers in violation of the contract.

14 **FRAUDULENT INDUCEMENT (COUNTERCLAIM 2)**

15 Elysium claims that ChromaDex defrauded Elysium into entering into a written
16 agreement obligating Elysium to license a trademark and pay royalties. This agreement
17 will be referred to as the “Trademark License and Royalty Agreement.”

18 ***

19 All parties deny the claims/counterclaims asserted against them. They also assert
20 a number of affirmative defenses for which they have the burden of proof.

21
22 [**Authority:** Ninth Circuit Model Civil Jury Instructions § 1.5.]
23
24
25
26
27
28

1 **ChromaDex’s position:** The parties agree and stipulate to this instruction except
2 for the following bolded language that ChromaDex included in the summary of its
3 breach of contract claims (Claims 1 and 2) against Elysium: “ChromaDex claims that
4 Elysium breached two written supply contracts with ChromaDex by ordering
5 ingredients and then refusing to pay for them **and by using or disclosing certain**
6 **ChromaDex confidential information in violation of Elysium’s contractual**
7 **obligations.”** (emphasis added.) The bolded languages references ChromaDex’s claim
8 that Elysium violated Section 4.1 of the NIAGEN Supply Agreement by disclosing
9 ChromaDex’s confidential document (the “NRCl Analytical Method”).

10 Elysium does not contest that this language is a proper statement of the law.
11 Rather, Elysium’s position is that the bolded language should not be included because
12 this claim was dismissed on summary judgment. Elysium is incorrect. At the threshold,
13 the Court expressly ruled that “ChromaDex points to sufficient evidence in the record
14 that Elysium used [the NRCl Analytical Method] for purposes not contemplated by the
15 contract.” (Dkt. 413 at 40.) There are thus grounds to allow the jury to decide whether
16 Elysium breached the agreement.

17 Defendants’ sole argument is that this entire claim must be dismissed because the
18 Court found that there was insufficient evidence to send ChromaDex’ avoided costs
19 claim to the jury. Not so. The Court’s order states only that “ChromaDex may not seek
20 avoided costs at trial.” (Dkt. 413 at 40.) To further highlight the point, one need only
21 glance at the final two pages of the Court’s order. There, the Court ruled that it
22 “**GRANTS** summary judgment in favor of ChromaDex on the following counterclaims
23 of Elysium,” and listed those that were outright dismissed (including Elysium’s
24 counterclaims premised on the exclusivity provision, which Elysium is now attempting
25 to reanimate under its unclean hands affirmative defense). (*Id.* at 47.) In obvious
26 contrast, the Court only granted summary judgment on “ChromaDex’s claim for
27 \$110,000 in avoided costs damages,” while not stating that the entire claim was
28 dismissed. (*Id.* at 48.) It was not.

1 As for damages, that is for the jury to decide. ChromaDex believes that the
2 evidence will show that Elysium breached the NIAGEN Supply Agreement by
3 disclosing the NRC1 Analytical Method in furtherance of Defendants’ overall plot to
4 obtain the June 30 Orders on credit, fraudulently accuse ChromaDex of wrongdoing to
5 get out of paying for those ingredients, and ultimately “destroy” ChromaDex. (*See*,
6 *e.g.*, Dkt. 413 at 29–34.) The jury will be best positioned to evaluate the testimony and
7 evidence presented at trial and decide if Elysium’s misuse of that document was a
8 substantial factor in its unjust enrichment, or if ChromaDex is entitled to only nominal
9 monetary damages. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142,
10 1168 (9th Cir. 2013) (holding issues of causation are “intensely factual” and should
11 “typically be resolved by a jury”).

12 Defendants’ cite to *Lambert v. Nutraceutical Corp.* is inapt; ChromaDex does
13 not offer an “alternative damages model.” 2015 WL 12655392, at *4 (C.D. Cal. June
14 24, 2015). And Defendants’ suggestion that nominal damages are not available is
15 incorrect. In the operative complaint, ChromaDex sought for this claim “monetary
16 damages in an amount to be proved at trial.” (Dkt. 153 at 48.) Nor does ChromaDex
17 contradict itself here; the possibility of nominal damages only arises *after* the jury finds
18 the evidence insufficient to support actual damages; under California law, “[w]hen a
19 breach of duty has caused no appreciable detriment to the party affected, *he may yet*
20 *recover nominal damages.*” Cal. Civ. Code § 3360 (emphasis added). It is thus well
21 established in California that “[n]ominal damages are properly awarded” when, among
22 other things, “there have been, real, actual injury and damages suffered by a plaintiff,
23 [but] the extent of plaintiff’s injury and damages cannot be determined *from the*
24 *evidence presented.*” *Avina v. Spurlock*, 28 Cal. App. 3d 1086, 1088 (Ct. App. 1972)
25 (emphasis added); *see also In re Google Referrer Header Priv. Litig.*, 465 F. Supp. 3d
26 999, 1011 (N.D. Cal. 2020) (“[A] plaintiff who proves a ‘breach of duty’ (including
27 breach of contract) but fails to show any ‘appreciable detriment’—i.e., damages—
28 nevertheless ‘may ... recover’ nominal damages.” (internal quotation marks omitted)).

1 On that basis, and in light of the testimony and evidence at trial, the jury can decide.

2 In any event, the Court should reserve judgment on this issue until it has the
3 opportunity to observe the trial unfold and view the issue in its full evidentiary context.
4 Accordingly, this preliminary instruction to the jury describing the parties' claims and
5 defenses should include language related to ChromaDex's claim that Elysium breached
6 Section 4.1 of the NIAGEN Supply Agreement.

7
8
9 **Defendants' position:** [Presented with competing instruction].

1 **Disputed Preliminary Jury Instruction No. 11, Offered Only by ChromaDex**
2 **WITNESS TESTIMONY - CREDIBILITY**

3
4 [The parties propose that the Court issue this instruction the first time it becomes
5 relevant at trial]

6 If you believe that a witness knowingly testified falsely concerning any important
7 matter, you may distrust the witness' testimony concerning other matters. You may
8 reject all of the testimony or you may accept such parts of the testimony that you believe
9 are true and give it such weight as you think it deserves.

10 [Authority: See *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1059 (9th Cir. 2005) (“Our
11 law has long recognized that a person who is deemed unbelievable as to one material
12 fact may be disbelieved in all other respects.”); see also *Hattem v. United States*, 283
13 F.2d 339, 343 (9th Cir. 1960) (approving, as a correct statement of the law, a jury
14 instruction stating that, “[i]f you find that any witness in this trial has wilfully testified
15 falsely as to any material fact in the case, then you are at liberty wholly to disregard all
16 of the testimony of that witness”).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s instruction
2 because it is a correct statement of the law in the Ninth Circuit. *See Hattem v. United*
3 *States*, 283 F.2d 339, 343 (9th Cir. 1960) (approving, as a correct statement of the law,
4 a jury instruction stating that, “[i]f you find that any witness in this trial has willfully
5 testified falsely as to any material fact in the case, then you are at liberty wholly to
6 disregard all of the testimony of that witness”).)

7 This instruction is also particularly relevant and applicable here, where Elysium’s
8 co-founders and top executives—CEO Eric Marcotulli and COO Daniel Alminana—
9 each admitted to brazenly lying under oath repeatedly and flagrantly in this very action.
10 (Dkt. 493 at 7–8.) Marcotulli and Alminana’s testimony will be of central importance
11 on each any every claim and counterclaim in this jury trial, and thus their credibility
12 will be intensely disputed before the jury. As the Court ruled, Marcotulli and
13 Alminana’s “lies are troubling, especially since their credibility is important in this
14 case.” It thus decided that “some of the text messages and testimony” that show their
15 lies “will be admissible at trial” because “[b]oth are relevant to Marcotulli and
16 Alminana’s credibility.” (*Id.*)

17 Defendants do not argue that this instruction is an incorrect statement of the law.
18 Rather, they only challenges this proposed instruction because there is a preliminary
19 instruction about general witness credibility. However, that preliminary instruction is
20 only given the by the Court at the beginning of the trial, while ChromaDex is proposing
21 that the Court give its proposed instruction at the time it becomes relevant in the trial.
22 It is thus not duplicative, but rather will be a helpful and timely reminder of the jury’s
23 duty to weigh the evidence when it learns about Marcotulli and Alminana’s admitted
24 lies under oath.

25
26 **Defendants’ position:** This instruction is wholly duplicative of Stipulated
27 Preliminary Jury Instruction No. 10 which includes the following language: “However,
28 if you decide that a witness has deliberately testified untruthfully about something

1 important, you may choose not to believe anything that witness said. On the other hand,
2 if you think the witness testified untruthfully about some things but told the truth about
3 others, you may accept the part you think is true and ignore the rest.” The parties also
4 stipulated to an impeachment instruction, which advises the jury that they may consider
5 whether a witness lied in determining the weight the testimony deserves. ChromaDex’s
6 proposed instruction is redundant and places undue emphasis on witness credibility.
7 *See Curtis v. City of Oakland*, 2016 WL 1138457 *4 (N.D.Cal. 2016) (“Jury instructions
8 should provide the relevant rules of law generally and avoid singling out or stressing
9 particular evidentiary items or legal theories; otherwise, the court's emphasis of certain
10 facts or issues may cause a juror to attach undue importance or credibility to the selected
11 matters”).

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 35, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST ELYSIUM AND MORRIS –**
3 **INTRODUCTION**

4 ChromaDex has asserted several claims for breach of contract against Elysium
5 and Morris. These claims are summarized below:

6 **(1) ChromaDex’s Claim Against Elysium for Breach of the NIAGEN**
7 **Supply Agreement**

8 ChromaDex claims that it and Elysium entered into a contract for the supply of
9 an ingredient called NIAGEN®, which is ChromaDex’s version of NR. This contract
10 is referred to as the NIAGEN Supply Agreement.

11 ChromaDex claims that Elysium breached this contract by failing to pay for
12 NIAGEN that ChromaDex delivered to Elysium in fulfillment of a purchase order.

13 ChromaDex also claims that Elysium breached this contract by disclosing a
14 document called the “NRCI Analytical Method,” which ChromaDex claims was shared
15 with Elysium under a confidentiality obligation in the NIAGEN Supply Agreement and
16 was not to be disclosed or used by Elysium in the way it was disclosed or used.

17 ChromaDex claims that Elysium’s breaches of this contract caused harm to
18 ChromaDex for which Elysium should pay.

19 Elysium denies that it breached its contract with ChromaDex. Elysium also
20 claims certain affirmative defenses, which will be explained in a later instruction.

21
22 **(2) ChromaDex’s Claim Against Elysium for Breach of the pTeroPure**
23 **Supply Agreement**

24 ChromaDex claims that it and Elysium entered into a contract for the supply of
25 an ingredient called pTeroPure®, which is ChromaDex’s version of PT. This contract
26 is referred to as the pTeroPure Supply Agreement.

27 ChromaDex claims that Elysium breached this contract by failing to pay for PT
28 that ChromaDex delivered to Elysium in fulfillment of a purchase order.

1 ChromaDex claims that Elysium’s breach of this contract caused harm to
2 ChromaDex for which Elysium should pay.

3 Elysium denies that it breached its contract with ChromaDex. Elysium also
4 claims certain affirmative defenses, which will be explained in a later instruction.

5
6 **(3) ChromaDex’s Claim Against Morris for Breach of February
7 Confidentiality Agreement**

8 ChromaDex claims that it entered into a contract with Morris in February 2016,
9 titled “Receipt & Acknowledgment of Employee Handbook,” which required Morris to
10 protect ChromaDex’s proprietary and/or confidential business information.

11 ChromaDex claims that Morris breached this contract by not protecting
12 ChromaDex’s proprietary and/or confidential information.

13 ChromaDex claims that Morris was unjustly enriched by his breach of contract.
14 Morris denies that he breached this contract.

15
16 **(4) ChromaDex’s Claim Against Morris for Breach of Alleged July
17 Confidentiality Agreement**

18 ChromaDex claims that it entered into a contract with Morris in July 2016, titled
19 “ChromaDex Inc. Confidentiality and Non-Solicitation Agreement,” which required
20 Morris to protect ChromaDex’s trade secrets and confidential information.

21 ChromaDex claims that Morris breached this contract by not protecting
22 ChromaDex’s trade secrets and confidential information.

23 ChromaDex claims that Morris was unjustly enriched by his breach of contract.

24 Morris denies that the document titled “ChromaDex Inc. Confidentiality and
25 Non-Solicitation Agreement” was a valid contract and denies that his conduct
26 constituted a breach.

27 [**Authority:** Judicial Council of California, Civil Jury Instructions 300 (modified).]
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The parties largely agree on this instruction, except for
2 ChromaDex’s single-sentence reference to its claim that Elysium breached the
3 NIAGEN Supply Agreement by disclosing and misusing a document called the “NRCI
4 Analytical Method.” The parties’ positions with respect to this issue are the same as
5 those on Disputed Jury Instruction No. 2. In the interest of avoiding needless repetition,
6 ChromaDex incorporates its position from that dispute here.

7
8
9 **Defendants’ position:** [Presented with competing instruction].
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 36, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST ELYSIUM AND MORRIS – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages for breach of contract, ChromaDex must prove the following
5 by a preponderance of the evidence for each of the contractual breaches it alleges that:

- 6 (1) The parties entered into a contract;
7
8 (2) ChromaDex did all, or substantially all, of the significant things that the
 contract required it to do;
9
10 (3) Elysium or Morris failed to do something that the contract required it or him
 to do, or did something that the contract prohibited it or him from doing;
11
12 (4) ChromaDex was harmed and/or Elysium and/or Morris were unjustly
 enriched, and
13
14 (5) That the breach of contract was a substantial factor in causing ChromaDex’s
 harm and/or Elysium’s and/or Morris’s unjust enrichment.

15
16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303 (modified); *see*
17 *also Richman v. Hartley*, 224 Cal. App. 4th 1182, 1186 (2014) (“To prevail on a cause
18 of action for breach of contract, the plaintiff must prove (1) the contract, (2) the
19 plaintiff’s performance of the contract or excuse for nonperformance, (3) the
20 defendant’s breach, and (4) the resulting damage to the plaintiff.”); *Foster Poultry*
21 *Farms, Inc. v. SunTrust Bank*, 377 F. App’x 665, 669 (9th Cir. 2010) (“We hold that,
22 under California law, a defendant’s unjust enrichment can satisfy the damages’ element
23 of a breach of contract claim, such that disgorgement is a proper remedy.”); *Ajaxo Inc.*
24 *v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 54–58 (2005) (disgorgement appropriate
25 where defendant was unjustly enriched by breaching a non-disclosure agreement);
26 *Young v. Wideawake Death Row Entm’t, LLC*, 2011 WL 13371881, at *2 (C.D. Cal.
27 May 16, 2011) (“In some circumstances, California courts have permitted disgorgement
28 of improperly obtained profits as a remedy for breach of contract.”).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction on the elements of its breach of contract claims against Elysium and Morris
3 because it accurately reflects the law, ChromaDex’s claimed harm, and the Court’s
4 ruling on summary judgment. While the parties were able to reach agreement on nearly
5 the entire instruction, Defendants have taken the position that the third element
6 (damages) should not include reference to Elysium’s and/or Morris’s unjust enrichment.
7 Rather, Elysium argues that the third element should state only that “ChromaDex was
8 harmed.” Defendants are incorrect.

9 It is blackletter law in California that “[a]n element of a breach of contract cause
10 of action is *damages* proximately caused by the defendant's breach.” *Copenbarger v.*
11 *Morris Cerullo World Evangelism, Inc.*, 29 Cal. App. 5th 1, 9 (2018) (emphasis added).
12 In addition to its actual damages under the contracts at issue, ChromaDex is claiming
13 that it has been damaged by Elysium’s and Morris’s unjust enrichment as a result of
14 their respective breaches of contracts. And “under California law, a defendant’s unjust
15 enrichment can satisfy the damages’ element of a breach of contract claim, such that
16 disgorgement is a proper remedy.” *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377
17 F. App’x 665, 669 (9th Cir. 2010).

18 ChromaDex is entitled to an instruction that accurately states what satisfies the
19 damages element because “‘juries are not clairvoyant’ and will not know to follow a
20 particular legal principle ‘unless they are told to do so.’” *Hunter v. Cnty. of Sacramento*,
21 652 F.3d 1225, 1235 (9th Cir. 2011) (rejecting plain model jury instruction as “‘an
22 incomplete, and therefore incorrect, statement of the law’” (quoting *Norwood v. Vance*,
23 591 F.3d 1062, 1066 (9th Cir. 2010)); *see also Norwood*, 591 F.3d. at 1067 (vacating
24 verdict because “court’s failure to give additional guidance on deference rendered the
25 instruction incomplete and misleading”). The Court’s standing Order Regarding
26 Settlement Procedures, Pre-Trial Conference and Trial recognizes and instructs that
27 “[t]he instructions should be tailored to the facts of each case.”
28

1 Removing Elysium’s and Morris’s unjust enrichment would only confuse the
2 jury by giving the inaccurate impression that their unjust enrichment cannot support
3 ChromaDex’s breach of contract claims. *See United States v. Anderson*, 741 F.3d 938,
4 947 (9th Cir. 2013) (district court properly rejected “confusing instruction” that would
5 be “misleading or inadequate to guide the jury’s deliberation”).

6
7 **Defendants’ position:** [Presented with competing instruction.]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Instruction No. 34, Offered Only by ChromaDex**
2 **INTERPRETATION OF CONTRACT – MEANING OF TECHNICAL WORDS**

3 You should assume that the parties intended technical words used in the contract
4 to have the meaning that is usually given to them by people who work in that technical
5 field, unless you decide that the parties clearly used the words in a different sense.

6
7 [*Authority*: Judicial Council of California, Civil Jury Instructions 316.]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction. First, it is faithful to the California state model instruction in CACI No.
3 316, and Defendants do not argue that it is an improper statement of the law. Second,
4 it is important that the Court instruct the jury on this issue because the parties dispute
5 the meaning of certain technical words in the MFN provision in the parties’ NIAGEN
6 Supply Agreement. For example, the disputed provision contains the words “supplied”
7 and “volumes,” which have a specific meaning to people who work in the business of
8 consumer products like dietary supplements and the ingredients for them. ChromaDex
9 is entitled to argue to the jury that the parties understood and intended these words in
10 the contract to have the meaning that is usually given to them in the industry.
11 Accordingly, this instruction is both proper and necessary.

12
13 **Defendants’ position:** ChromaDex’s proposed instruction is superfluous and
14 unnecessarily suggestive. The stipulated instructions concerning contract construction
15 accurately instruct the jury to look at the contract as a whole and to assume words have
16 their ordinary meaning unless the parties intended they have special meaning. Each of
17 the words in the contract provision can be easily understood by a juror. There is no
18 evidence that the parties used “technical words” or agreed to any technical meanings.
19 Indeed, no experts are testifying as to the common parlance of any industry.
20 ChromaDex can still make its arguments about what the language means and why. But
21 giving this instruction to the jury would be suggestive that the words do in fact have a
22 technical meaning, which is not supported by the contractual language or the evidence.

23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 74, Offered by ChromaDex**

2 **INTERPRETATION OF CONTRACT – DISPUTED WORDS**

3 Elysium and ChromaDex dispute the meaning of the following words in the
4 NIAGEN Supply Agreement:

5 If, at any time during the Term, ChromaDex supplies Niagen . . . to a
6 Third Party at a price that is lower than that at which Niagen is supplied
7 to Elysium Health under this Agreement, then the price of Niagen
8 supplied under this Agreement shall be revised to such Third Party price
9 with effect from the date of the applicable sale to such Third Party and
10 ChromaDex shall promptly provide Elysium Health with any refund or
11 credits thereby created; provided Elysium Health purchases equal
12 volumes or higher volumes than the Third Party.

13 This is referred to by the parties as the most-favored-nation or “MFN” provision.

14 Elysium claims that the words mean the following: If, at any time, ChromaDex
15 sold Niagen to a customer for a lower price than the price to Elysium, then Elysium was
16 entitled to that lower price, with effect from the date of the sale to the other customer,
17 provided the individual sale to Elysium was for equal or more Niagen than the
18 individual sale to the other customer. ChromaDex shall promptly provide Elysium with
19 any refund or credits as a result of the lower price.

20 ChromaDex claims that the words mean the following: Elysium was entitled to
21 purchase Niagen from ChromaDex at the lowest price charged to another Niagen
22 customer, but only if the amounts of Elysium’s purchases of Niagen in total were equal
23 or greater than the amounts of other customer’s purchases in total over a year. Elysium
24 would promptly receive a refund or credits totaling the difference between the price it
25 had paid on purchases of Niagen within that year and the new price.

26 Elysium must prove that its interpretation is correct.

27 In deciding what the words of a contract mean, you must decide what the parties
28 intended at the time the contract was created. You may consider the usual and ordinary

1 meaning of the language used in the contract as well as the circumstances surrounding
2 the making of the contract.

3 The following instructions may also help you interpret the words of the contract:
4

5 [*Authority*: Judicial Council of California, Civil Jury Instructions 314 (modified).]
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The parties largely agree on this instruction, except for
2 two things. First, Elysium insists on adding the first sentence of the MFN Provision
3 about the maximum price that ChromaDex could charge Elysium for NR. But the
4 maximum price is not disputed in this case, and including it risks misleading the jury
5 about the issues presented.

6 Second, Elysium’s proposed explanation of its interpretation of the MFN
7 Provision is not faithful to the one that it put forward in this litigation and risks
8 confusing or misleading the jury about the differences between the parties’ positions.
9 *United States v. Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (district court properly
10 rejected “confusing instruction” that would be “misleading or inadequate to guide the
11 jury’s deliberation”). For example, Dr. Iain Cockburn, Elysium’s expert witness who
12 calculated Elysium’s alleged damages from the MFN Provision, specifically wrote in
13 his expert report that he was instructed that “[t]he correct measure of economic damages
14 resulting from ChromaDex’s alleged breach of the MFN Provision is therefore simply
15 the difference between the total amount actually paid by Elysium for *specific purchases*
16 of NR and the total amount it would have paid had it purchased the same quantity of
17 NR during that period at the price provided for under the MFN provision.” (Dkt. 262-
18 3 at 66 ¶ 175.) To align with that stated interpretation, ChromaDex does not change the
19 bulk of Elysium’s language, but simply suggests adding the word “individual” before
20 the word “sale” to allow the jury to better comprehend the differences in the parties’
21 interpretations.

22
23 **Defendants’ position:** [Presented with competing instruction].
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 39, Offered Only by ChromaDex**
2 **REMEDY FOR BREACH OF CONTRACT – CONFIDENTIALITY**
3 **OBLIGATIONS - AGAINST ELYSIUM**

4 If you decide that ChromaDex has proved its claim against Elysium for breach of
5 the NIAGEN Supply Agreement, with respect to Elysium disclosing the “NRCl
6 Analytical Method” in violation of the contract, you also must decide if ChromaDex
7 should be compensated for the breach.

8 ChromaDex seeks to recover the amount of any “unjust enrichment” Elysium
9 obtained because of the breach of contract. Elysium was unjustly enriched if its breach
10 of its confidentiality obligation caused it to receive a benefit that it otherwise would not
11 have achieved. To decide the amount of any unjust enrichment, first determine the value
12 of Elysium’s benefit that would not have been achieved except for its breach of contract.
13 Then subtract from that amount Elysium’s reasonable expenses.

14 If you decide that Elysium breached the NIAGEN Supply Agreement by
15 disclosing the “NRCl Analytical Method” but also that Elysium was not unjustly
16 enriched by the breach, you may still award ChromaDex nominal damages such as one
17 dollar.

18
19 [**Authority:** *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App’x 665, 669 (9th
20 Cir. 2010) (“We hold that, under California law, a defendant’s unjust enrichment can
21 satisfy the damages’ element of a breach of contract claim, such that disgorgement is a
22 proper remedy.”); *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 54–58 (2005)
23 (disgorgement appropriate where defendant was unjustly enriched by breaching a non-
24 disclosure agreement); *Alkayali v. Hoed*, 2018 WL 3425980, at *6 (S.D. Cal. July 16,
25 2018) (“California law permits plaintiffs to seek disgorgement of a defendant’s unjust
26 enrichment as a restitutionary remedy for breach of contract.”); *Young v. Wideawake*
27 *Death Row Entm’t, LLC*, 2011 U.S. Dist. LEXIS 54631, at *5–6 (C.D. Cal. May 16,
28 2011)(“In some circumstances, California courts have permitted disgorgement of
improperly obtained profits as a remedy for breach of contract.”); Judicial Council of
California, Civil Jury Instruction 360; Judicial Council of California, Civil Jury
Instruction 4410 (modified).]

1 **ChromaDex’s position:** The parties largely agree on this instruction, except for
2 ChromaDex’s single-sentence reference to its claim that Elysium breached the
3 NIAGEN Supply Agreement by disclosing and misusing a document called the “NRCI
4 Analytical Method.” The parties’ positions with respect to this issue are the same as
5 those on Disputed Jury Instruction No. 2. In the interest of avoiding needless repetition,
6 ChromaDex incorporates its position from that dispute here.

7
8 **Defendants’ position:** ChromaDex’s claim for breach of the confidentiality
9 provision of the NIAGEN Supply Agreement did not survive summary judgment. (*See*
10 Dkt. 413 [Summary Judgment Order] and 515-1 [Memo. Of Points and Authority in
11 support of *Ex Parte* Application].) At a bare minimum, its only theory of damages—
12 costs avoided—was excluded. Therefore, this instruction is untethered to the claims at
13 issue and will only confuse the jury.

1 **Disputed Case-Specific Jury Instruction No. 73, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST CHROMADEx – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from ChromaDex for breach of contract, Elysium must
5 prove all of the following by a preponderance of the evidence:

- 6
- 7 (1) Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
- 8 (2) Elysium did all, or substantially all, of the significant things that the contract
9 required it to do;
- 10 (3) ChromaDex failed to do something that the contract required it to do, or did
11 something that the contract prohibited it from doing;
- 12 (4) Elysium was harmed; and
- 13
- 14 (5) ChromaDex’s breach of contract was a substantial factor in causing Elysium’s
15 harm.

16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303.]
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s instruction and
2 reject Elysium’s proposed instruction on several grounds.

3 First, Elysium asks to include the optional phrase in the second element that
4 would tell the jury it could find Elysium’s performance of its obligations under the
5 agreement “excused,” but that argument is not available to Elysium here. Elysium seeks
6 to argue that breaches that it has alleged against ChromaDex would allow it to be
7 excused from payment for the ingredient orders. Not so. The “Directions for Use” with
8 CACI No. 303 specifically note that “excuse” may only be argued to the jury after,
9 among other things, the Court has determined as a matter of law that “the two
10 obligations [are] *dependent*, meaning that the parties specifically bargained that the
11 failure to perform the one relieves the obligation to perform the other.” Here, the Court
12 has not made any such finding of dependent obligations with respect to the MFN
13 Provision, or any other contract term in any of the agreements between ChromaDex and
14 Elysium, and Elysium’s obligation to pay. “[E]lement 2 should not be given unless the
15 court has determined that dependent obligations are involved.” *Id.*

16 Second, no such legal determination would be possible in this case, because the
17 NIAGEN Supply Agreement does not provide Elysium the right to withhold payment
18 for product that it had already accepted or for any of the breaches alleged by Elysium.
19 In order for a dependent condition to exist, the parties must have “specifically bargained
20 that the failure to perform one relieves the obligation to perform the other.” CACI No.
21 303, Directions for Use (collecting cases). “[W]hether covenants are dependent or
22 independent is a matter of construing the agreement.” *Id.* Here, Elysium’s obligation
23 to pay is manifestly not conditioned on the MFN Provision, which only references
24 “refunds or credits,” obligations that by their very nature would occur after a payment,
25 not before. And, although the language of the contract is clear on this, Elysium has
26 pointed to no parol evidence from the time the MFN Provision was negotiated that
27 shows suggesting that Elysium specifically bargained for, or ChromaDex agreed that,
28 Elysium would be entitled to withhold payment for specific orders if it believed that it

1 was due a refund under the MFN Provision. And to the extent Elysium argues that its
2 other breach claims—which were all dismissed by the Court in its order on summary
3 judgment, (Dkt. 413)—it likewise has no support that those contract provisions would
4 allow Elysium to escape its obligation to pay for the ingredients it order, received, and
5 resold for a profit.

6 Third, in a brand-new argument never before raised in this case, Elysium
7 apparently intends to argue that it is entirely excused from payment under the pTeroPure
8 Supply Agreement for alleged breaches of the NIAGEN Supply Agreement. Not so.
9 An alleged breach of one contract cannot excuse performance of an obligation in an
10 entirely different contract. The authority Elysium cites is not to the contrary. For
11 example, in those cases, the court construed the relevant contracts as “part of one large
12 transaction” that all concerned the same piece of real property. *Corson v. Brown Motel*
13 *Invs., Inc.*, 87 Cal.App.3d 422, 425 (1978). Here, Elysium offers zero evidence in the
14 record that the NIAGEN Supply Agreement and pTeroPure Supply Agreement were
15 linked in that way; they involved two entirely different ingredients, each of which was
16 sold separately. Neither supply agreement references the other at all. And they were
17 also not linked temporally; the record shows that each was negotiated separately and
18 signed months apart. (*Compare* Dkt. 153-3, Ex. C at 61 (listing “February 3rd, 2014”
19 as “Effective Date” of NIAGEN Supply Agreement) *with* Dkt. 153-4 at 1 (listing “June
20 26, 2014” as “Effective Date” of pTeroPure Supply Agreement). And in the other
21 case—*Corbrus, LLC v. 8th Bridge Cap., Inc.*, 2021 WL 2781811 (C.D. Cal. July 1,
22 2021)—the court found that the contracts were actually a “bilateral contract” where the
23 obligations were “due at the same time” and thus “mutually dependent.” *Id.* at *14.
24 None of that is true with the supply agreements here. Elysium’s attempt to escape its
25 payment obligations under the pTeroPure Supply Agreement should be rejected.

26
27 **Defendants’ position:** [Presented with competing instruction].
28

1 **Disputed Case-Specific Jury Instruction No. 46, Offered by ChromaDex**

2 **“TRADE SECRET” DEFINED**

3 A trade secret may take many forms, including all forms and types of financial,
4 business, scientific, technical, economic, or engineering information. A trade secret
5 does not have to be stored, compiled, or memorialized.

6 A trade secret can include compilations of public information when combined or
7 compiled in a novel way, even if a portion or every individual portion of that
8 compilation is generally known. Combinations or compilations of public information
9 from a variety of different sources, when combined or compiled in a novel way, can be
10 a trade secret. In such a case, if a portion of the trade secret is generally known or even
11 if every individual portion of the trade secret is generally known, the compilation or
12 combination of information may still qualify as a trade secret if it meets the elements
13 set forth below.

14 In addition, facts and information acquired by an employee, whether by
15 memorization or some other means, in the course of his or her employment may
16 potentially be trade secrets, but only if they meet the definition of a trade secret set forth
17 below.

18 To prove that information was a trade secret, ChromaDex must prove all of the
19 following elements by a preponderance of the evidence:

- 20 (1) That the information was secret;
- 21 (2) That the information had actual or potential independent economic value
22 because it was secret; and
- 23 (3) That ChromaDex made reasonable efforts to keep the information secret.
- 24

25 [**Authority:** Judicial Council of California, Civil Jury Instructions 4402; *see also* Cal.
26 Civ. Proc. Code § 3426.1(d) (defining a trade secret as information that derives
27 independent economic value and that is the subject of reasonable efforts to maintain
28 secrecy); Judicial Council of the United States Eleventh Judicial Circuit 11.1
(modified); *see* 18 U.S.C. § 1839; Ninth Circuit Model Criminal Jury Instructions
§ 8.141C.]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on the definition of a trade secret,
3 particularly in light of the trade secrets at issue in this case.

4 It is a correct statement of the law that “a trade secret may take many forms,
5 including all forms and types of financial, business, scientific, technical, economic, or
6 engineering information.” In this case, ChromaDex’s trade secrets involve financial,
7 business, and economic information. Therefore, ChromaDex is entitled to include this
8 language in the instruction.

9 It is also a correct statement of the law that “a trade secret does not have to be
10 stored, compiled, or memorialized.” The trade secrets in this case were misappropriated
11 by Defendants through various means of communication, including orally and through
12 text messages. Accordingly, this statement is necessary because it helps the jury
13 understand that information can constitute a trade secret even if shared through these
14 mediums.

15 Further, ChromaDex is entitled to argue to the jury that a trade secret can include
16 compilations of public information when combined or compiled in a novel way. Aside
17 from the fact that this is a faithful statement of the law, it is also necessary as a result of
18 testimony that has come out in this action. Specifically, one of Defendants’ affirmative
19 defenses is that ChromaDex’s trade secrets are “readily ascertainable by proper means.”
20 Rather than rely on Elysium’s word about what the law is, the Court should instruct the
21 jury that even if some of the information in ChromaDex’s trade secrets was public, such
22 public information can constitute a trade secret under certain circumstances as
23 explained in the instruction. ChromaDex intends to argue the point.

24 Moreover, and once again, it is an accurate statement of the law that facts and
25 information acquired by an employee, whether by memorization or some other means,
26 in the course of his employment, may potentially be trade secrets. One of the
27 Defendants in this case that is accused of misappropriation is a former employee of
28 ChromaDex, and Defendants seek to argue that he did not improperly use the trade

1 secrets that he learned while employed at ChromaDex. Accordingly, the jury must be
2 given an instruction about how information obtained by an employee in the course of
3 their employment can still constitute a trade secret.

4
5 **Defendants' position:** [Presented with competing instruction].
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Instruction No. 45, Offered by ChromaDex**
2 **MISAPPROPRIATION OF TRADE SECRETS – ESSENTIAL FACTUAL**
3 **ELEMENTS**

4 ChromaDex claims that Elysium and/or Morris misappropriated one or more of
5 its trade secrets under state and federal law. To succeed on this claim under state law,
6 ChromaDex must prove all of the following by a preponderance of the evidence:

- 7 (1) That ChromaDex owned one or more of the following: (i) the price that
8 ChromaDex’s customers paid for NR in specific volumes on specific dates;
9 and/or (ii) the price that ChromaDex paid its manufacturer, W.R. Grace, for
10 NR;
11 (2) That this information was trade secret at the time of its misappropriation;
12 (3) That Elysium and/or Morris improperly acquired, used, or disclosed the trade
13 secret(s);
14 (4) That ChromaDex was harmed and/or Elysium was unjustly enriched; and
15 (5) That Elysium’s and/or Morris’s acquisition, use or disclosure was a
16 substantial factor in causing ChromaDex’s harm and/or Elysium’s unjust
17 enrichment.

18 To succeed on this claim under federal law, in addition to the above elements,
19 ChromaDex must prove the following by a preponderance of the evidence:

- 20 (6) That the trade secret(s) is (are) related to a product or service used in, or
21 intended for use in, interstate or foreign commerce.

22 [**Authority:** Judicial Council of California, Civil Jury Instructions 4401 (modified);
23 Pattern Civ. Jury Instr. 11th Cir. 11.1 (2020) (modified); *Auto. Data Sols., Inc. v.*
24 *Directed Elecs. Canada, Inc.* 2018 WL 4742289, at *3 (C.D. Cal. Aug. 15, 2018) (“The
25 elements of misappropriation under the DTSA are similar to those under the CUTSA.”);
26 *Veronica Foods Co. v. Ecklin*, 2017 WL 2806706, at *12 (N.D. Cal. June 29, 2017)
27 (noting the definitions of “trade secret,” “misappropriation” and “improper use” in
28 CUTSA are “substantially identical to the definitions of those terms in the DTSA”); 18
 U.S.C. § 1839.]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on every element essential to a
3 misappropriation claim. Elysium’s proposed instruction attempts to remove from the
4 jury’s consideration an entire theory of liability underlying ChromaDex’s
5 misappropriation claims—namely, that Morris *acquired* ChromaDex’s trade secrets by
6 improper means. Elysium takes the incorrect position that Morris could not have
7 improperly acquired ChromaDex’s trade secrets because he had access to them as an
8 employee.

9 Improper means of acquiring a trade secret include, among other things, a breach
10 of confidence or theft. CACI 4408; *Vacco Indus., Inc. v. Van Den Berg*, 5 Cal. App.
11 4th 34, 50 (1992) (“The protection which is extended to trade secrets fundamentally
12 rests upon the theory that they are improperly acquired by a defendant, usually through
13 theft or a breach of confidence.”). An employee is liable for trade secret
14 misappropriation if he or she “***downloaded, copied or otherwise transmitted***” the
15 alleged trade secret “***for purposes other than serving the interests of***” the employer.
16 *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859, 875 (N.D. Ill. 2001) (finding acquisition by
17 improper means by employee when, during his employment, he “downloaded, copied
18 or otherwise transmitted” the employer’s trade secrets “for purposes other than serving
19 the interests of” the employer) (emphasis added); *see also AUA Priv. Equity Partners,*
20 *LLC v. Soto*, 2018 WL 1684339, at *1 (S.D.N.Y. Apr. 5, 2018) (complaint plausibly
21 alleged improper acquisition where employee uploaded employer’s trade secrets from
22 her work laptop to her personal Google Drive account); *Liebert Corp. v. Mazur*, 827
23 N.E.2d 909, 926-27 (Ill. App. Ct. 2005) (finding acquisition by improper means when
24 employee downloaded trade secrets onto his laptop in violation of a confidentiality
25 policy hours before resigning and then “attempted to destroy any indication of his
26 downloading activities”); *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 855 (1989)
27 (finding misappropriation when employee resigned from his employment and took
28 without using his employer's secret formula without employer's permission).

1 That an employee may have access to an employer’s trade secrets does not equate
2 to proper acquisition. *See AUA Priv. Equity Partners, LLC v. Soto*, 2018 WL 1684339,
3 at *5 (S.D.N.Y. Apr. 5, 2018) (complaint plausibly alleged that former employee
4 “acquired [employer’s] trade secrets by improper means, *i.e.*, theft and in breach of her
5 duty to maintain secrecy” by uploading the trade secrets from her work laptop to
6 personal cloud-based storage—the employer “gave [the employee] access to its
7 confidential and proprietary information for the sole purpose of performing her job
8 duties”); *see also LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 314 (2004) (rejecting
9 former employee’s argument that he did not acquire the trade secrets improperly
10 because the employer provided the documents and had no procedure for collecting them
11 after employment).

12 As revealed by discovery in this case, Morris transmitted ChromaDex’s trade
13 secrets to Elysium in breach of confidence to ChromaDex and for purposes other than
14 serving the interests of ChromaDex. By his own admission, Morris also downloaded
15 ChromaDex’s trade secrets to a flash drive, took that flash drive with him on the day he
16 resigned from ChromaDex (despite his representation that he had returned, and no
17 longer had possession of, ChromaDex’s confidential information and trade secrets), and
18 then downloaded ChromaDex’s trade secrets from the flash drive to Elysium’s
19 computer shortly thereafter. That evidence supports an argument that Morris acquired
20 ChromaDex’s trade secrets by improper means and, therefore, ChromaDex’s proposed
21 instruction is proper.

22 Further, and contrary to Elysium’s assertion, ChromaDex’s operative complaint
23 does include allegations of Morris’s improper acquisition. *See, e.g.*, Dkt. 153 at ¶ 192
24 [“Morris misappropriated ChromaDex’s trade secrets when he sent the purchasing
25 history of Elysium’s largest NR competitor to Elysium via text message in May 2016.”];
26 ¶ 194 [“Morris further misappropriated ChromaDex’s trade secrets when he saved a
27 copy of the Ingredient Sales Spreadsheet before leaving ChromaDex for the purpose of
28 conveying the spreadsheet to Elysium. On information and belief, Morris deleted all

1 records revealing how he transmitted the Ingredient Sales Spreadsheet to Elysium.”]; ¶
2 200 [“Morris, by virtue of his senior sales position with ChromaDex, had access to the
3 Ingredient Sales Spreadsheet, which he agreed to maintain as confidential and not to
4 disclose or use that information in any way contrary to the interests of ChromaDex.”]
5 In any event, ChromaDex discovered ample evidence of Morris’s improper acquisition
6 of trade secrets during discovery, and thus Defendants cannot claim not to have been
7 on notice that ChromaDex would make this argument at trial.

8 Third, Defendants’ instruction inaccurately represents that Morris’s
9 misappropriation cannot even be considered as a substantial factor of Elysium’s unjust
10 enrichment. Elysium and Morris were joint tortfeasors in their misappropriation of
11 ChromaDex’s trade secrets. “All persons who are shown to have participated in an
12 intentional tort are liable for the full amount of the damages suffered.” *PMC, Inc. v.*
13 *Kadisha*, 78 Cal. App. 4th 1368, 1381 (2000). “It does appear that trade secret
14 misappropriation is considered an intentional tort, and thus joint tortfeasors are jointly
15 and severally liable.” *Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, 873 F. Supp.
16 2d 1192, 1217 (N.D. Cal. 2012); *see also JW Pharm. Corp. v. Michael Kahn & Prism*
17 *Pharma Co.*, 2013 WL 12125751, at *6 (C.D. Cal. Mar. 11, 2013) (“The four claims
18 for fraud, aiding and abetting fraud, conspiracy to commit fraud, and misappropriation
19 of trade secrets alleged against Prism are intentional torts for which Defendants are
20 jointly and severally liable.”). Morris’s misappropriation undoubtedly can be
21 considered as a substantial factor in causing Elysium’s unjust enrichment. *See Yanez*
22 *v. Plummer*, 221 Cal. App. 4th 180, 187 (2013) (a “substantial factor” need not be the
23 *only* factor causing loss); *Third Eye Blind, Inc. v. Near N. Entm’t Ins. Servs.*, 127 Cal.
24 App. 4th 1311, 1319 (2005) (“[T]here may be multiple causes of a plaintiff’s injury[.]”);
25 *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 978 (1997) (the standard “requir[es]
26 only that the contribution of the individual cause be more than negligible or
27 theoretical”).

28

1 As recognized by the Court, one of ChromaDex’s theories for recovering
2 Elysium’s resale profits is that:

3 “Mark Morris gave Elysium valuable trade secret information . . . Elysium
4 then used this information to pressure ChromaDex during negotiations,
5 and that pressure caused ChromaDex to accept the June 30 Orders.
6 Because ChromaDex accepted the June 30 orders, Elysium was able to sell
7 its products that included the NR From those orders, and make the \$8.3
8 million in profits from those sales.”

9 (Dkt. 413 at 29-30.) The Court has already ruled that “there is sufficient evidence
10 supporting ChromaDex’s misappropriation theory for recovery of resale profits to
11 permit this theory to go to the jury.” (*Id.* at 33.) Accordingly, ChromaDex is entitled
12 to the jury’s consideration of Morris’s misappropriation as a substantial factor in
13 causing Elysium’s unjust enrichment. *See Pac. Shores Props., LLC v. City of Newport*
14 *Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) (issues of causation are “intensely factual”
15 and should “typically be resolved by a jury”).

16 **Defendants’ position:** [Presented with competing instruction].
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 48, Offered by ChromaDex**
2 **REASONABLE EFFORTS TO PROTECT SECRECY**

3 To establish that information is a trade secret, ChromaDex must prove by a
4 preponderance of the evidence that it made reasonable efforts under the circumstances
5 to keep it secret. “Reasonable efforts” are the efforts that would be made by a
6 reasonable business in the same situation and having the same knowledge and resources
7 as ChromaDex, exercising due care to protect important information of the same kind.
8 This requirement applies separately to each item that ChromaDex claims to be a trade
9 secret.

10 In determining whether or not ChromaDex made reasonable efforts to keep the
11 information secret, you should consider all of the facts and circumstances. Among the
12 factors you may consider are the following:

- 13 (1) Whether documents or computer files containing the information were
14 marked with confidentiality warnings;
- 15 (2) Whether ChromaDex instructed its employees to treat the information as
16 confidential;
- 17 (3) Whether ChromaDex restricted access to the information to persons who
18 had a business reason to know the information;
- 19 (4) Whether ChromaDex kept the information in a restricted or secured area;
- 20 (5) Whether ChromaDex required employees or others with access to the
21 information to sign confidentiality or nondisclosure agreements;
- 22 (6) Whether ChromaDex took any action to protect the specific information,
23 or whether it simply relied on general measures taken to protect its
24 business information or assets;
- 25 (7) The extent to which any general measures taken by ChromaDex would
26 prevent the unauthorized disclosure of the information; and
27
28

1 (8) Whether there were other reasonable measures available to ChromaDex
2 that it did not take.

3 The presence or absence of any one or more of these factors is not necessarily
4 determinative.

5 [Authority: Judicial Council of California, Civil Jury Instructions 4404 (modified).]
6

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the CACI model.

3 Defendants’ proposed instruction, by contrast, is argumentative and misleading.
4 Defendants seeks to expand the CACI instruction by adding three irrelevant “factors”
5 that the jury can consider in weighing whether ChromaDex made reasonable efforts to
6 keep particular information secret. These factors reflect only the defense theories in the
7 case and are misleading. For example, Defendants’ proposed instruction invites the
8 jury to find that “disclosing information to others, including other customers” weighs
9 against a finding that ChromaDex took reasonable steps to keep information secret.
10 Absent context about how or why information was disclosed, however, merely
11 “disclosing information to others” says nothing about ChromaDex’s efforts to keep
12 information secret. For example, ChromaDex may have shared information under a
13 non-disclosure agreement, and Defendants’ proposed instruction improperly suggests
14 that the jury may ignore that possibility. Defendants’ other two “factors” are similarly
15 argumentative and unhelpful to the jury in that they have little to do with whether
16 ChromaDex made reasonable efforts to keep particular information secret.

17
18 **Defendants’ position:** [Presented with competing instruction].
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 50, Offered by ChromaDex**
2 **MISAPPROPRIATION BY DISCLOSURE**

3 Elysium or Morris misappropriated a trade secret by disclosure if Elysium or
4 Morris:

5 (1) disclosed the information without ChromaDex’s consent; and

6 (2) did any of the following:

7 a. acquired knowledge of the trade secret by improper means; or

8 b. **[in the case of Elysium]** at the time of disclosure, knew or had
9 reason to know, that its knowledge of ChromaDex’s trade secret
10 came from or through Morris, and that Morris had a duty to
11 ChromaDex to keep the information secret;

12 c. **[in the case of Elysium]** at the time of disclosure, knew or had
13 reason to know that its knowledge of ChromaDex’s trade secret
14 came from or through Morris, and that Morris had previously
15 acquired the trade secret by improper means.

16
17 **[Authority:** Judicial Council of California, Civil Jury Instructions 4406.]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the standard CACI model and applies to multiple potential
3 theories of liability. Elysium’s proposed instruction attempts to remove from the jury’s
4 consideration an entire theory of liability underlying ChromaDex’s misappropriation
5 claims—namely, that Morris *acquired* ChromaDex’s trade secrets by improper means.
6 Elysium takes the incorrect position that Morris could not have improperly acquired
7 ChromaDex’s trade secrets because he had access to them as an employee. The parties’
8 positions with respect to this issue are the same as those on Disputed Jury Instruction
9 No. 45. In the interest of avoiding needless repetition, ChromaDex incorporates its
10 position from that dispute here.

11 **Defendants’ position:** [Presented with competing instruction].
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 51, Offered by ChromaDex**
2 **MISAPPROPRIATION BY USE**

3 Elysium and/or Morris misappropriated ChromaDex's trade secret(s) by use if
4 Elysium and/or Morris:

5 (1) used the trade secret(s) without ChromaDex's consent; and

6 (2) did any one of the following:

- 7 • acquired knowledge of the trade secret(s) by improper means; or
- 8 • knew or had reason to know, at the time of use, that the knowledge
9 of the trade secret(s) was acquired under circumstances creating a
10 legal obligation to limit use of the information; or
- 11 • **[in the case of Elysium]** knew or had reason to know, at the time of
12 use, that its knowledge of ChromaDex's trade secret(s) came from
13 or through Morris, and that Morris had a duty to ChromaDex to limit
14 use of the information.

15
16 [**Authority:** Judicial Council of California, Civil Jury Instructions 4407 (modified).]
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the standard CACI model and applies to multiple potential
3 theories of liability. Elysium’s proposed instruction attempts to remove from the jury’s
4 consideration an entire theory of liability underlying ChromaDex’s misappropriation
5 claims—namely, that Morris *acquired* ChromaDex’s trade secrets by improper means.
6 Elysium takes the incorrect position that Morris could not have improperly acquired
7 ChromaDex’s trade secrets because he had access to them as an employee. The parties’
8 positions with respect to this issue are the same as those on Disputed Jury Instruction
9 No. 45. In the interest of avoiding needless repetition, ChromaDex incorporates its
10 position from that dispute here.

11
12 **Defendants’ position:** [Presented with competing instruction].
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 52, Offered Only by ChromaDex**

2 **MISAPPROPRIATION BY ACQUISITION**

3 Elysium and/or Morris misappropriated ChromaDex's trade secret(s) by
4 acquisition if Elysium and/or Morris acquired the trade secret(s) and knew or had reason
5 to know that it or he used improper means to acquire the trade secret(s).

6
7 [**Authority:** Judicial Council of California, Civil Jury Instructions 4405.]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the standard CACI model and applies to multiple potential
3 theories of liability. Elysium’s proposed instruction attempts to remove from the jury’s
4 consideration an entire theory of liability underlying ChromaDex’s misappropriation
5 claims—namely, that Morris *acquired* ChromaDex’s trade secrets by improper means.
6 Elysium takes the incorrect position that Morris could not have improperly acquired
7 ChromaDex’s trade secrets because he had access to them as an employee. The parties’
8 positions with respect to this issue are the same as those on Disputed Jury Instruction
9 No. 45. In the interest of avoiding needless repetition, ChromaDex incorporates its
10 position from that dispute here.

11
12 **Defendants’ position:** Defendants object to this instruction to the extent it
13 applies to Morris, and not just Elysium. ChromaDex has not alleged that Morris
14 acquired any trade secret through “improper means.” (*See generally* Dkt. 153 [Fifth
15 Amended Complaint].) Nor will the evidence support such a theory. Thus, any
16 reference to Morris should be excluded from the instruction.

1 **Disputed Case-Specific Jury Instruction No. 54, Offered by ChromaDex**
2 **REMEDIES FOR MISAPPROPRIATION OF TRADE SECRET**

3 If ChromaDex proves that Elysium and/or Morris misappropriated its trade
4 secret(s), then ChromaDex is entitled to recover damages if the misappropriation caused
5 Elysium’s unjust enrichment.

6 Elysium was unjustly enriched if the misappropriation of a trade secret caused it
7 to receive a benefit that it otherwise would not have achieved.

8 To decide the amount of any unjust enrichment, first determine the value of
9 Elysium’s benefit that would not have been achieved except for the misappropriation.
10 Then subtract from that amount Elysium’s reasonable expenses.

11
12 [Authority: Judicial Council of California, Civil Jury Instructions 4409 & 4410
13 (modified); see Cal. Civ. Proc. Code § 3426.3(a) (“A complainant may recover damages
14 for the actual loss caused by misappropriation. A complainant also may recover for the
15 unjust enrichment caused by misappropriation that is not taken into account in
16 computing damages for actual loss.”); see *Ajaxo Inc. v. E*Trade Financial Corp.*, 187
Cal. App. 4th 1295, 1305 (2010) (noting unjust enrichment in the context of
misappropriation of a trade secret is synonymous with restitution); see also 18 U.S.C.
§ 1836(b)(3)(B); Judicial Council of the United States Eleventh Judicial Circuit § 11.4
(modified).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the standard CACI model.

3 ChromaDex objects to Elysium’s proposed instruction because it removes Morris
4 from the instruction entirely and therefore misleads the jury by suggesting that Elysium
5 could not have been unjustly enriched by Morris’s misappropriation of ChromaDex’s
6 trade secrets. Elysium and Morris were joint tortfeasors in their misappropriation of
7 ChromaDex’s trade secrets and are therefore jointly and severally liable. *PMC, Inc. v.*
8 *Kadisha*, 78 Cal. App. 4th 1368, 1381 (2000) (“All persons who are shown to have
9 participated in an intentional tort are liable for the full amount of the damages
10 suffered.”); *Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, 873 F. Supp. 2d 1192,
11 1217 (N.D. Cal. 2012) (“[T]rade secret misappropriation is considered an intentional
12 tort, and thus joint tortfeasors are jointly and severally liable.”); *see also JW Pharm.*
13 *Corp. v. Michael Kahn & Prism Pharma Co.*, 2013 WL 12125751, at *6 (C.D. Cal.
14 Mar. 11, 2013) (misappropriation of trade secrets is an “intentional tort[] for which
15 Defendants are jointly and severally liable”); *Clark v. Bunker*, 453 F.2d 1006, 1010 (9th
16 Cir. 1972) (rejecting argument that no award of compensatory damages could be made
17 against defendants other than entity that was shown to have received profits from the
18 misappropriation where the record supported the district court’s finding that defendants
19 were “joint tortfeasors and hence jointly and severally liable for the damage sustained
20 by” plaintiff). Accordingly, ChromaDex’s proposed instruction is an accurate reflection
21 of law and appropriate.

22
23 **Defendants’ position:** [Presented with competing instruction].
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 40, Offered by ChromaDex**
2 **REMEDY FOR BREACH OF CONTRACT – AGAINST MORRIS**

3 If you decide that ChromaDex has proved its claims against Morris for breach of
4 the February Confidentiality Agreement and/or the Disputed July Confidentiality
5 Agreement, you also must decide whether ChromaDex should be compensated for the
6 breach(es).

7 ChromaDex seeks to recover the amount of any “unjust enrichment” Morris
8 obtained because of the breach(es).

9 To decide the amount of any unjust enrichment, first determine the value of
10 Morris’s benefit that would not have been achieved except for his breach(es) of contract.
11 Then subtract from that amount Morris’s reasonable expenses.

12 If you decide that Morris breached the February Confidentiality Agreement
13 and/or the Disputed July Confidentiality Agreement but also that Morris was not
14 unjustly enriched by the breach(es), you may still award ChromaDex nominal damages
15 such as one dollar.

16
17 **[Authority: *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App’x 665, 669 (9th**
18 **Cir. 2010) (“We hold that, under California law, a defendant’s unjust enrichment can**
19 **satisfy the damages’ element of a breach of contract claim, such that disgorgement is a**
20 **proper remedy.”); *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 54–58 (2005)**
21 **(disgorgement appropriate where defendant was unjustly enriched by breaching a non-**
22 **disclosure agreement); *Alkayali v. Hoed*, 2018 WL 3425980, at *6 (S.D. Cal. July 16,**
23 **2018) (“California law permits plaintiffs to seek disgorgement of a defendant’s unjust**
24 **enrichment as a restitutionary remedy for breach of contract.”); *Young v. Wideawake***
25 ***Death Row Entm’t, LLC*, 2011 U.S. Dist. LEXIS 54631, at *5–6 (C.D. Cal. May 16,**
26 **2011) (“In some circumstances, California courts have permitted disgorgement of**
27 **improperly obtained profits as a remedy for breach of contract.”); Judicial Council of**
28 **California, Civil Jury Instruction 360.]**

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on the remedies that ChromaDex seeks
3 on its breach of contract claims against Morris. Specifically, ChromaDex’s instruction
4 makes clear that it is seeking the amount of any unjust enrichment Morris obtained
5 because of the breaches and instructs the jury on the method for deciding the amount of
6 unjust enrichment.

7 Morris takes a different approach. Rather than simply inform the jury as
8 ChromaDex’s instruction does, Morris added the following unnecessary and inaccurate
9 “description” of what ChromaDex claims constitutes Morris’s unjust enrichment— “the
10 salary it paid Morris from February 2016 through July 2016 and the salary Elysium paid
11 Morris from August 2016 through December 2018 constitute unjust enrichment.”
12 Morris improperly attempts to include argument in the jury instructions. However, as
13 the Court emphasized in its Order Regarding Settlement Procedures, Pre-Trial
14 Conference and Trial, “INSTRUCTIONS WILL BE BRIEF, CLEAR, CONCISE,
15 WRITTEN IN PLAIN ENGLISH, [AND] FREE OF ARGUMENT[.]” (emphasis in
16 original.)

17 In addition to being argumentative, Morris’s proposed language is factually
18 inaccurate and misleading in at least two ways. First, the language represents that
19 ChromaDex is seeking only Morris’s “salary” when, in fact, it is seeking Morris’s
20 “compensation,” which includes, among other things, the value of the equity that
21 Elysium offered him to bribe him to participate in the scheme to destroy ChromaDex.
22 The value of that equity has been disclosed as a basis for damages against Morris since
23 ChromaDex’s opening expert damages report. Second, Defendants’ proposed language
24 states that Morris started at Elysium in August 2016, but the parties have stipulated that
25 he began on July 18, 2016. It should be rejected. *See United States v. Anderson*, 741
26 F.3d 938, 947 (9th Cir. 2013) (district court properly rejected “confusing instruction”
27 that would be “misleading or inadequate to guide the jury’s deliberation”).

28 **Defendants’ position:** [Presented with competing instruction].

1 **Disputed Case-Specific Jury Instruction No. 67, Offered by ChromaDex**

2 **“FIDUCIARY DUTY” EXPLAINED**

3 An officer of a corporation who participates in management and exercises some
4 discretionary authority owes what is known as a “fiduciary duty” to his corporation.
5 Participation in management does not require “top-level” control. So long as the officer
6 has some discretion in managing corporate affairs, he or she is a fiduciary of the
7 corporation.

8 A fiduciary duty imposes on a corporate officer a duty to act with the utmost good
9 faith in the best interests of his corporation. That means the officer cannot compete
10 with his employer or assist the employer’s competitors. That also means the officer
11 cannot acquire a material benefit from a third party in connection with actions taken
12 through his use of his position. The fiduciary duty also obligates the officer not to use
13 or communicate confidential information of his employer for the officer’s own purposes
14 or those of a third party.

15 Even after the officer resigns or is terminated, the officer has a continuing duty
16 to protect privileged and confidential information and not to take unfair advantage of
17 the former employer’s confidential and proprietary information.

18 [**Authority:** Judicial Council of California, Civil Jury Instructions 4100 (modified); *see*
19 *also GAB Bus. Servs., Inc. v. Lindsey & Newsome Claim Servs., Inc.*, 83 Cal. App. 4th
20 409, 420–21 (2000), *disapproved of on other grounds by Reeves v. Hanlon*, 33 Cal. 4th
21 1140 (2004), (“[A]n officer who participates in management of the corporation,
22 exercising some discretionary authority, is a fiduciary of the corporation as a matter of
23 law.”); *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 416 (2007) (“The duty of loyalty
24 embraces several subsidiary obligations, including the duty to refrain from competing
25 with the principal and from taking action on behalf of or otherwise assisting the
26 principal's competitors, the duty not to acquire a material benefit from a third party in
27 connection with ... actions taken ... through the agent's use of the agent's position, and
28 the duty “not to use or communicate confidential information of the principal for the
agent’s own purposes or those of a third party”); *Sonoma Pharm., Inc. v. Collidion Inc.*,
2018 WL 3398940, at *7 (N.D. Cal. June 1, 2018) (“officers are also charged with a
continuing duty to protect privileged and confidential information, which continues
even after they leave the company.”); *Language Line Servs., Inc. v. Language Servs.*
Assocs., LLC, 2011 WL 13153247, at *8 (N.D. Cal. Mar. 17, 2011) (“An employee
owes a fiduciary duty to its former employer post-termination not to take unfair
advantage of the former employer’s confidential and proprietary information.”) (citing
Morris v. Harris, 127 Cal. App. 2d 476, 478 (1954).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction. It is faithful to the letter and spirit of the model jury instruction cited as
3 authority by both ChromaDex and Defendants and is furthermore a correct and
4 complete statement of the law as held by the court in *GAB Business Services Inc. v.*
5 *Lindsey & Newsom Claim Services, Inc.*, 83 Cal. App. 4th 409 (2000), *as modified*
6 (Sept. 14, 2000), *as modified on denial of reh’g* (Sept. 26, 2000). In *GAB Business*
7 *Services*, the court concluded that “top level control” by a corporate officer—
8 specifically, a “regional vice-president”—was not required “to impose a fiduciary duty”
9 on that officer. *Id.* at 420. The instruction also sets forth the duties imposed on a
10 fiduciary as found in California law.

11 ChromaDex understands that Morris intends to argue to the jury that he did not
12 owe ChromaDex a fiduciary duty because he was a vice president of the company and
13 not in the “C-suite” of executive officers. In other words, Morris hopes to avoid liability
14 simply because he was a “vice president” rather than CEO of ChromaDex. But that is
15 not the law. *GAB Business Servs.*, 83 Cal. App. 4th at 420. ChromaDex’s proposed
16 instruction is thus proper because it is “vital to plaintiff[’s] case” and “cannot be readily
17 deduced from simply reading” the plain model jury instruction. *Hunter v. Cnty. of*
18 *Sacramento*, 652 F.3d 1225, 1234–35 (9th Cir. 2011).

19 ChromaDex is entitled to its instruction explaining the standard in more detail
20 because “‘juries are not clairvoyant’ and will not know to follow a particular legal
21 principle ‘unless they are told to do so.’” *Id.* at 1235 (rejecting plain model jury
22 instruction as “‘an incomplete, and therefore incorrect, statement of the law’” (quoting
23 *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010)); *see also Norwood*, 591 F.3d.
24 at 1067 (vacating verdict because “court’s failure to give additional guidance on
25 deference rendered the instruction incomplete and misleading”). For the same reasons,
26 the Court should reject Morris’s incomplete and misleading proposed instruction.

27 **Defendants’ position:** [Presented with competing instruction].
28

1 **Disputed Case-Specific Jury Instruction No. 68, Offered Only by ChromaDex**
2 **BREACH OF FIDUCIARY DUTY – ESSENTIAL FACTUAL ELEMENTS**

3 ChromaDex claims that Morris breached the fiduciary duty of loyalty. A
4 corporate officer owes his corporation undivided loyalty. To establish this claim,
5 ChromaDex must prove all of the following by a preponderance of the evidence:

- 6 (1) That Morris was ChromaDex’s corporate officer;
7 (2) That Morris knowingly acted against ChromaDex’s interests, or acted on
8 behalf of a party whose interests were adverse to ChromaDex, with respect
9 to ChromaDex’s ingredients business;
10 (3) That ChromaDex did not give informed consent to Morris’s conduct;
11 (4) That ChromaDex was harmed and/or Morris was unjustly enriched; and
12 (5) That Morris’s breach of fiduciary duty was a substantial factor in causing
13 ChromaDex’s harm and/or Morris’s unjust enrichment.

14
15 [**Authority:** Judicial Council of California, Civil Jury Instructions 4102 (modified);
16 *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 543 (2007) (“Disgorgement
17 of profits is particularly applicable in cases dealing with breach of a fiduciary duty, and
18 is a logical extension of the principle that ... fiduciaries cannot profit by a breach of their
19 duty. Where a person profits from transactions conducted by him as a fiduciary, the
20 proper measure of damages is full disgorgement of any secret profit made by the
21 fiduciary regardless of whether the principal suffers any damage.”).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction on the elements of its breach of fiduciary claim against Morris because it
3 accurately reflects the law, ChromaDex’s claimed harm, and the Court’s ruling on
4 summary judgment. While the parties were able to reach agreement on nearly the entire
5 instruction, Morris has taken the position that the fourth element (damages) should not
6 include reference to Morris’s unjust enrichment. Rather, Morris argues that the fourth
7 element can state only that “ChromaDex was harmed.” Not so.

8 ChromaDex is claiming that it has been damaged by Morris’s unjust enrichment
9 as a result of his breach of fiduciary duty. The law is clear that a “[p]laintiff may pursue
10 damages or unjust enrichment as remedies for breach of [defendant’s] continuing
11 fiduciary duties.” *Sonoma Pharms., Inc. v. Collidion, Inc.*, 2018 WL 3398940, at *8
12 (N.D. Cal. June 1, 2018); *see also County of San Bernardino v. Walsh*, 158
13 Cal. App. 4th 533, 543 (2007) (“Where a person profits from transactions conducted by
14 him as a fiduciary, the proper measure of damages is full disgorgement of any secret
15 profit made by the fiduciary regardless of whether the principal suffers any damage.”).]
16 This Court expressly ruled that ChromaDex may pursue this damages claim against
17 Morris at trial. (Dkt. 413 at 42–43.)

18 ChromaDex is entitled to an instruction that accurately states what satisfies the
19 damages element because “‘juries are not clairvoyant’ and will not know to follow a
20 particular legal principle ‘unless they are told to do so.’” *Hunter v. Cnty. of Sacramento*,
21 652 F.3d 1225, 1235 (9th Cir. 2011) (rejecting plain model jury instruction as “‘an
22 incomplete, and therefore incorrect, statement of the law’” (quoting *Norwood v. Vance*,
23 591 F.3d 1062, 1066 (9th Cir. 2010))); *see also Norwood*, 591 F.3d. at 1067 (vacating
24 verdict because “court’s failure to give additional guidance on deference rendered the
25 instruction incomplete and misleading”). The Court’s standing Order Regarding
26 Settlement Procedures, Pre-Trial Conference and Trial recognizes and instructs that
27 “[t]he instructions should be tailored to the facts of each case.”
28

1 Removing Morris’s unjust enrichment from the instruction would only confuse
2 the jury by giving the inaccurate impression that his unjust enrichment cannot support
3 ChromaDex’s breach of fiduciary duty claim. *See United States v. Anderson*, 741 F.3d
4 938, 947 (9th Cir. 2013) (district court properly rejected “confusing instruction” that
5 would be “misleading or inadequate to guide the jury’s deliberation”).

6
7 **Defendants’ position:** Defendants are generally fine with the inclusion of this
8 instruction and do not propose their own version. However, Defendants object to
9 ChromaDex’s modification of the model instruction in elements 4 and 5. The model
10 instruction only contemplates harm—not unjust enrichment—as an element. While
11 Defendants acknowledge unjust enrichment is a potential remedy for Plaintiff’s claim,
12 they do not believe it is an appropriate substitute for the element of harm with respect
13 to a breach of fiduciary duty claim. Accordingly, Defendants object to the conflation
14 of the two.

1 **Disputed Case-Specific Jury Instruction No. 70 Offered by ChromaDex**
2 **REMEDY FOR BREACH OF FIDUCIARY DUTY – AGAINST MORRIS**

3 If you decide that ChromaDex has proved its claim against Morris for breach of
4 fiduciary duty, you must also decide the appropriate remedy.

5 ChromaDex seeks to recover its actual damages and/or Morris’s “unjust
6 enrichment.” When a fiduciary personally profits by his disloyal actions, the fiduciary
7 may be required to give up the full amount of such profit, regardless of whether the
8 plaintiff suffered any damage.

9 To decide the amount of any unjust enrichment, first determine the value of
10 Morris’s benefit that would not have been achieved except for his breach of fiduciary
11 duty. Then subtract from that amount Morris’s reasonable expenses.

12 [**Authority:** *Sonoma Pharms., Inc. v. Collidion, Inc.*, 2018 WL 3398940, at *8 (N.D.
13 Cal. June 1, 2018) (“Plaintiff may pursue damages or unjust enrichment as remedies for
14 breach of [defendant’s] continuing fiduciary duties.”); *County of San Bernardino v.*
15 *Walsh*, 158 Cal. App. 4th 533, 543 (2007) (“Where a person profits from transactions
conducted by him as a fiduciary, the proper measure of damages is full disgorgement
of any secret profit made by the fiduciary regardless of whether the principal suffers
any damage.”).]

1 **ChromaDex’s position:** The Court should adopt this proposed instruction
2 because ChromaDex seeks damages, both actual and disgorgement of Morris’s unjust
3 enrichment, for its claim for breach of fiduciary duty. The proposed instruction is
4 consistent with CACI No. 3900 and with the law related to damages for breach of
5 fiduciary duty claims. *Sonoma Pharms., Inc. v. Collidion, Inc.*, 2018 WL 3398940, at
6 *8 (N.D. Cal. June 1, 2018) (“Plaintiff may pursue damages or unjust enrichment as
7 remedies for breach of [defendant’s] continuing fiduciary duties.”). ChromaDex’s
8 instruction makes clear that it is seeking its actual damages and the amount of any unjust
9 enrichment obtained because of Morris’s breach and instructs the jury on the method
10 for deciding the amount of unjust enrichment.

11 Morris takes a different approach. Rather than simply inform the jury as
12 ChromaDex’s instruction does, Morris added the following unnecessary and inaccurate
13 “description” of what ChromaDex claims constitutes Morris’s unjust enrichment— “the
14 salary it paid Morris from February 2016 through July 2016 and the salary Elysium paid
15 Morris from August 2016 through December 2018 constitute unjust enrichment.”
16 Morris improperly attempts to include argument in the jury instructions. However, as
17 the Court emphasized in its Order Regarding Settlement Procedures, Pre-Trial
18 Conference and Trial, “INSTRUCTIONS WILL BE BRIEF, CLEAR, CONCISE,
19 WRITTEN IN PLAIN ENGLISH, [AND] FREE OF ARGUMENT[.]” (emphasis in
20 original.)

21 In addition to being argumentative, Morris’s proposed language is factually
22 inaccurate and misleading in at least two ways. First, the language represents that
23 ChromaDex is seeking only Morris’s “salary” when, in fact, it is seeking Morris’s
24 “compensation,” which includes, among other things, the value of the equity that
25 Elysium offered him to bribe him to participate in the scheme to destroy ChromaDex.
26 The value of that equity has been disclosed as a basis for damages against Morris since
27 ChromaDex’s opening expert damages report. Second, Defendants’ proposed language
28 states that Morris started at Elysium in August 2016, but the parties have stipulated that

1 he began on July 18, 2016. It should be rejected. *See United States v. Anderson*, 741
2 F.3d 938, 947 (9th Cir. 2013) (district court properly rejected “confusing instruction”
3 that would be “misleading or inadequate to guide the jury’s deliberation”).

4 ChromaDex’s instruction should therefore be adopted as proposed. *Hunter v.*
5 *Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) (holding “each party is
6 entitled to an instruction about his or her theory of the case if it is supported by law and
7 has foundation in the evidence”).

8
9 **Defendants’ position:** [Presented with competing instruction].
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 69, Offered Only by ChromaDex**
2 **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY – ESSENTIAL**
3 **FACTUAL ELEMENTS**

4 ChromaDex claims that it was harmed by Morris’s breach of fiduciary duty, and
5 that Elysium is responsible for the harm because it aided and abetted Morris in his
6 breach of fiduciary duty.

7 If you find that Morris committed a breach of fiduciary duty that harmed
8 ChromaDex, then you must determine whether Elysium is also responsible for the harm.
9 Elysium is responsible as an aider and abettor if ChromaDex proves all of the following
10 by a preponderance of the evidence:

- 11 (1) That Elysium knew that Morris was breaching or was going to breach his
12 fiduciary duty to ChromaDex;
- 13 (2) That Elysium gave substantial assistance or encouragement to Morris; and
14
- 15 (3) That Elysium’s conduct was a substantial factor in causing harm to
16 ChromaDex and/or Elysium’s unjust enrichment.

17 Mere knowledge that a breach of fiduciary duty was being committed or was
18 going to be committed and the failure to prevent it do not constitute aiding and abetting.

19
20 [**Authority:** Judicial Council of California, Civil Jury Instructions 3610 (modified); *Am.*
21 *Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1482–83 (2014)
22 (“Disgorgement based on unjust enrichment is an appropriate remedy for aiding and
23 abetting a breach of fiduciary duty.”).]
24
25
26
27
28

1
2 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
3 instruction on the elements of its aiding and abetting breach of fiduciary claim against
4 Elysium because it accurately reflects the law, ChromaDex’s claimed harm, and the
5 Court’s ruling on summary judgment. While the parties were able to reach agreement
6 on nearly the entire instruction, Elysium has taken the position that the third element
7 (damages) should not include reference to Morris’s unjust enrichment. Rather, Elysium
8 argues that the third element can state only that “ChromaDex was harmed.” Not so.

9 ChromaDex is claiming that it has been damaged by Elysium’s unjust enrichment
10 as a result of its aiding and abetting Morris’s breach of fiduciary duty. The law is clear
11 that a “[d]isgorgement based on unjust enrichment is an appropriate remedy for aiding
12 and abetting a breach of fiduciary duty.” *Master Lease LLC v. Idanta Partners, Ltd.*,
13 225 Cal. App. 4th 1451, 1482–83 (2014). The Court expressly ruled that ChromaDex
14 may pursue unjust enrichment damages against Elysium for aiding-and-abetting. (Dkt.
15 413 at 28–34 (allowing Elysium’s resale profits damages), 40–41 (allowing Elysium’s
16 price discount damages).)

17 ChromaDex is entitled to an instruction that accurately states what satisfies the
18 damages element because “‘juries are not clairvoyant’ and will not know to follow a
19 particular legal principle ‘unless they are told to do so.’” *Hunter v. Cnty. of Sacramento*,
20 652 F.3d 1225, 1235 (9th Cir. 2011) (rejecting plain model jury instruction as “‘an
21 incomplete, and therefore incorrect, statement of the law’” (quoting *Norwood v. Vance*,
22 591 F.3d 1062, 1066 (9th Cir. 2010))); *see also Norwood*, 591 F.3d. at 1067 (vacating
23 verdict because “court’s failure to give additional guidance on deference rendered the
24 instruction incomplete and misleading”). The Court’s standing Order Regarding
25 Settlement Procedures, Pre-Trial Conference and Trial recognizes and instructs that
26 “[t]he instructions should be tailored to the facts of each case.”

27 Removing Elysium’s unjust enrichment from the instruction would only confuse
28 the jury by giving the inaccurate impression that its unjust enrichment cannot support

1 ChromaDex’s aiding and abetting breach of fiduciary duty claim. *See United States v.*
2 *Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (district court properly rejected “confusing
3 instruction” that would be “misleading or inadequate to guide the jury’s deliberation”).
4
5

6 **Defendants’ position:** Defendants are generally fine with the inclusion of this
7 instruction and do not propose their own version. However, Defendants object to
8 ChromaDex’s modification of the model instruction in elements 4 and 5. The model
9 instruction only contemplates harm—not unjust enrichment—as an element. While
10 Defendants acknowledge unjust enrichment is a potential remedy for Plaintiff’s claim,
11 they do not believe it is an appropriate substitute for the element of harm with respect
12 to aiding and abetting the breach of fiduciary duty claim. Accordingly, Defendants
13 object to the conflation of the two.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 71, Offered by ChromaDex**
2 **REMEDY FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY –**
3 **AGAINST ELYSIUM**

4 If you decide that ChromaDex has proved its claim against Elysium for aiding
5 and abetting Morris’s breach of fiduciary duty, you must also decide the appropriate
6 remedy.

7 ChromaDex seeks to recover for Elysium’s “unjust enrichment.” Elysium was
8 unjustly enriched if its aiding and abetting Morris’s breach of fiduciary duty caused it
9 to receive a benefit that it otherwise would not have achieved. A party that actively
10 participates in the breach of fiduciary duty by another should be required to give up all
11 money obtained through such conduct, regardless of whether the plaintiff suffered any
12 damage.

13 To decide the amount of any unjust enrichment, first determine the value of
14 Elysium’s benefit that would not have been achieved except for its aiding and abetting
15 a breach of fiduciary by Morris. Then subtract from that amount Elysium’s reasonable
16 expenses.

17
18 [**Authority:** *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451,
19 1482–83 (2014) (“Disgorgement based on unjust enrichment is an appropriate remedy
20 for aiding and abetting a breach of fiduciary duty.”); *County of San Bernardino v.*
21 *Walsh*, 158 Cal. App. 4th 533, 543 (2007) (“Where a person profits from transactions
22 conducted by him as a fiduciary, the proper measure of damages is full disgorgement
of any secret profit made by the fiduciary regardless of whether the principal suffers
any damage.”); *id.* at 1482 (“[A] person acting in conscious disregard of the rights of
another should be required to disgorge all profit . . .”); Judicial Council of California,
Civil Jury Instruction 4410 (modified).]

1 **ChromaDex’s position:** The Court should adopt this proposed instruction
2 because ChromaDex seeks Elysium’s unjust enrichment for its claim for aiding and
3 abetting breach of fiduciary duty. The proposed instruction is consistent with CACI
4 No. 4410 and with the law related to damages for aiding and abetting breach of fiduciary
5 duty claims. *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451,
6 1482–83 (2014) (“Disgorgement based on unjust enrichment is an appropriate remedy
7 for aiding and abetting a breach of fiduciary duty.”) ChromaDex’s instruction makes
8 clear that it is seeking the amount of any unjust enrichment obtained because of
9 Elysium’s aiding and abetting and instructs the jury on the method for deciding the
10 amount of unjust enrichment.

11 Elysium takes a different approach. Rather than simply inform the jury as
12 ChromaDex’s instruction does, Elysium added the following unnecessary and
13 inaccurate “description” of what ChromaDex claims constitutes Elysium’s unjust
14 enrichment— “profits Elysium made on sales using the ingredients from the June 30,
15 2016 order constitute unjust enrichment.” Elysium improperly attempts to include
16 argument in the jury instructions. However, as the Court emphasized in its Order
17 Regarding Settlement Procedures, Pre-Trial Conference and Trial, “INSTRUCTIONS
18 WILL BE BRIEF, CLEAR, CONCISE, WRITTEN IN PLAIN ENGLISH, [AND]
19 FREE OF ARGUMENT[.]” (emphasis in original.)

20 In addition to being argumentative, Elysium’s proposed language is factually
21 inaccurate and misleading. The statement represents that ChromaDex is seeking only
22 Elysium’s profits but fails to include the full scope of Elysium’s unjust enrichment,
23 including the \$600,000 price discount that Elysium was able to secure as a result of its
24 aiding and abetting. It should be rejected. *See United States v. Anderson*, 741 F.3d 938,
25 947 (9th Cir. 2013) (district court properly rejected “confusing instruction” that would
26 be “misleading or inadequate to guide the jury’s deliberation”).

27 ChromaDex’s instruction should therefore be adopted as proposed. *Hunter v.*
28 *Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) (holding “each party is

1 entitled to an instruction about his or her theory of the case if it is supported by law and
2 has foundation in the evidence”).

3
4
5 **Defendants’ position:** [Presented with competing instruction].
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**INSTRUCTIONS PROPOUNDED BY
DEFENDANTS, OPPOSED BY PLAINTIFF**

1 **Disputed Preliminary Jury Instruction No. 2, Offered by Elysium and Morris**

2 **CLAIMS AND DEFENSES**

3 To help you follow the evidence, I will give you a brief summary of the positions
4 of the parties:

5 The plaintiff in this case is ChromaDex, Inc. ChromaDex makes an ingredient
6 used in dietary supplements called nicotinamide riboside, or “NR.”

7 The defendants in this case are Elysium Health, Inc. and Mark Morris. Elysium
8 sells a dietary supplement called “Basis” that contains NR and another ingredient called
9 pterostilbene, or “PT.” ChromaDex used to supply Elysium with NR under the
10 tradename “NIAGEN®” and PT under the tradename “pTeroPure®.” Mark Morris is
11 a former ChromaDex employee who now works for Elysium.

12
13 ChromaDex makes the following claims for which it has the burden of proof:

14 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIMS 1 AND 2)**

15 ChromaDex claims that Elysium breached two written supply contracts with
16 ChromaDex by ordering ingredients and then refusing to pay for them. These
17 agreements will be referred to as the “NIAGEN Supply Agreement” and “pTeroPure
18 Supply Agreement.”

19 **MISAPPROPRIATION OF TRADE SECRETS AGAINST ELYSIUM AND MORRIS (CLAIMS 3
20 AND 4)**

21 ChromaDex claims that Elysium and Morris misappropriated ChromaDex’s trade
22 secrets under both California and federal law.

23 **BREACH OF CONTRACT AGAINST MORRIS (CLAIMS 5 AND 6)**

24 ChromaDex claims that Morris breached two confidentiality agreements with
25 ChromaDex by sharing ChromaDex’s confidential information with Elysium and by
26 using ChromaDex’s information for Elysium’s purposes. These agreements will be
27 referred to as the “February Confidentiality Agreement” and the “Disputed July
28 Confidentiality Agreement.”

1 **BREACH OF FIDUCIARY DUTY AGAINST MORRIS (CLAIM 7)**

2 ChromaDex claims that Morris, while a manager and vice president of
3 ChromaDex, breached his duty of loyalty to the company by acting for the benefit of
4 Elysium and to the detriment of ChromaDex.

5 **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST ELYSIUM (CLAIM 8)**

6 ChromaDex claims Elysium knowingly helped or encouraged Morris to breach
7 his duty of loyalty to ChromaDex.

8
9 Elysium makes the following counterclaims for which it has the burden of proof:

10 **BREACH OF CONTRACT (COUNTERCLAIM 1)**

11 Elysium claims that ChromaDex breached the NIAGEN Supply Agreement by
12 overcharging Elysium for NIAGEN while giving a more favorable price to other
13 customers in violation of the contract.

14 **FRAUDULENT INDUCEMENT (COUNTERCLAIM 2)**

15 Elysium claims that ChromaDex defrauded Elysium into entering into a written
16 agreement obligating Elysium to license a trademark and pay royalties. This agreement
17 will be referred to as the “Trademark License and Royalty Agreement.”

18 ***

19 All parties deny the claims/counterclaims asserted against them. They also assert
20 a number of affirmative defenses for which they have the burden of proof.

21
22 [*Authority*: Ninth Circuit Model Civil Jury Instructions § 1.5.]
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Defendants’ object to ChromaDex’s proposed version of

4 this instruction because it includes a claim for breach of the confidentiality provision of

5 the NIAGEN Supply Agreement (*see* description of Claims 1 and 2). During summary

6 judgment proceedings, ChromaDex specifically identified avoided costs as the only

7 damages it was seeking on that claim. (Dkt. 379 [ChromaDex’s Suppl. Br.] at 7-8.)

8 The Court granted summary judgment against ChromaDex on its cost avoided damages

9 (Dkt. 413 [Summary Judgment Order] at 24, 34-40.) ChromaDex now argues that

10 summary judgment did not dispose of its claim, and that it may seek Elysium’s resale

11 profits—which bear no relation to the specific breach alleged and which it already

12 represented to the court it was not seeking for this claim. (Dkt. 515 [*Ex Parte*

13 Application for Clarification of Summary Judgment Ruling].) ChromaDex should not

14 be entitled to proceed on this claim.

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **Disputed Preliminary Jury Instruction No. 19, Offered Only by Elysium and**
2 **Morris**

3 **CONFLICTING EXPERT TESTIMONY**

4 If the expert witnesses disagreed with one another, you should weigh each
5 opinion against the others. You should examine the reasons given for each opinion and
6 the facts or other matters that each witness relied on. You may also compare the
7 experts' qualifications.

8
9 [*Authority*: Judicial Council of California, Civil Jury Instructions 221.]
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed instruction
2 because it is duplicative and unnecessary. The parties have already stipulated to two
3 instructions concerning expert testimony. (Stipulated Preliminary Jury Instruction Nos.
4 17 and 18). Elysium seeks to add a third (CACI No. 221), which ChromaDex believes
5 to be cumulative and unnecessary. The jury will already have heard the Ninth Circuit’s
6 model instruction 2.13, which makes clear “opinion testimony should be judged like
7 any other testimony,” that jurors “may accept it or reject it, and give it as much weight
8 as [they] think it deserves, considering the witness’s education and experience, the
9 reasons given for the opinion, and all the other evidence in the case.” Elysium’s
10 proposal to add another, largely duplicative instruction, based on a California model, is
11 not needed. *See also Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002) (affirming
12 rejection of instruction where “the district court gave other instructions that enabled the
13 jury to consider th[e] issue adequately”); L.R. 51-2(c) (noting that “[e]ach requested
14 instruction shall . . . [n]ot repeat the principle of law contained in any other request.”).

15 Moreover, ChromaDex anticipates that the parties’ only experts in this case will
16 testify to mathematical calculations arising from the facts, and will not engage in a battle
17 of the experts that requires a tailored instruction. It should not be given.

18
19 **Defendants’ position:** This is an accurate statement of the law and a standard
20 form instruction. *See* Judicial Council of California, Civil Jury Instructions 221. It is
21 warranted here because both sides intend to introduce expert testimony, and the experts
22 are likely to offer conflicting testimony. While Stipulated Preliminary Jury Instruction
23 No. 17 instructs the jury that any one expert’s opinion testimony should be given weight
24 in a manner like any other testimony, Disputed Preliminary Jury Instruction No. 19
25 clarifies how the jury should weigh conflicting expert testimony. Thus, the instruction
26 is not duplicative.

1 **Disputed Case-Specific Jury Instruction No. 35, Offered by Elysium and Morris**
2 **BREACH OF CONTRACT AGAINST ELYSIUM AND MORRIS –**
3

4 **INTRODUCTION**

5 ChromaDex has asserted several claims for breach of contract against Elysium.
6 These claims are summarized below:

7 **(1) ChromaDex’s Claim Against Elysium for Breach of the NIAGEN**
8 **Supply Agreement**

9 ChromaDex claims that it and Elysium entered into a contract for the supply of
10 an ingredient called NIAGEN®, which is ChromaDex’s version of NR. This contract
11 is referred to as the NIAGEN Supply Agreement.

12 ChromaDex claims that Elysium breached this contract by failing to pay for
13 NIAGEN that ChromaDex delivered to Elysium in fulfillment of a purchase order.

14 ChromaDex claims that Elysium’s breaches of this contract caused harm to
15 ChromaDex for which Elysium should pay.

16 Elysium denies that it breached its contract with ChromaDex. Elysium further
17 denies that ChromaDex was harmed. Elysium also claims certain affirmative defenses,
18 which will be explained in a later instruction.

19
20 **(2) ChromaDex’s Claim Against Elysium for Breach of the pTeroPure**
21 **Supply Agreement**

22 ChromaDex claims that it and Elysium entered into a contract for the supply of
23 an ingredient called pTeroPure®, which is ChromaDex’s version of PT. This contract
24 is referred to as the pTeroPure Supply Agreement.

25 ChromaDex claims that Elysium breached this contract by failing to pay for PT
26 that ChromaDex delivered to Elysium in fulfillment of a purchase order.

27 ChromaDex claims that Elysium’s breach of this contract caused harm to
28 ChromaDex for which Elysium should pay.

1 Elysium denies that it breached its contract with ChromaDex. Elysium also
2 claims certain affirmative defenses, which will be explained in a later instruction.

3
4 **(3) ChromaDex’s Claim Against Morris for Breach of February
5 Confidentiality Agreement**

6 ChromaDex claims that it entered into a contract with Morris in February 2016,
7 titled “Receipt & Acknowledgment of Employee Handbook,” which is being referred
8 to as the February Confidentiality Agreement.

9 ChromaDex claims that Morris breached this contract by disclosing
10 ChromaDex’s proprietary and/or confidential information.

11 ChromaDex claims that Morris’s breach of contract caused harm to ChromaDex
12 for which Morris should pay.

13 Morris denies that he breached this contract. Morris also claims certain
14 affirmative defenses , which will be explained in a later instruction.

15
16 **(4) ChromaDex’s Claim Against Morris for Breach of Disputed July
17 Confidentiality Agreement**

18 ChromaDex claims that it entered into a contract with Morris on July 15, 2016,
19 titled “ChromaDex Inc. Confidentiality and Non-Solicitation Agreement,” which is
20 being referred to as the Disputed July Confidentiality Agreement.

21 ChromaDex claims that Morris breached this contract by disclosing
22 ChromaDex’s confidential information on or after July 15, 2016.

23 ChromaDex claims that Morris’s breach of contract caused harm to ChromaDex
24 for which Morris should pay.

25 Morris denies that he entered into a valid contract with ChromaDex on July 15,
26 2016.

27 Morris also denies that he breached any such contract. Morris also claims certain
28 affirmative defenses which will be explained in a later instruction.

1 [***Authority:*** Judicial Council of California, Civil Jury Instructions 300 (modified).]
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Defendants’ primary objection to ChromaDex’s proposed

4 instruction is again the inclusion of the breach of contract claim arising from the

5 confidentiality provision of the NIAGEN Supply Agreement, which was disposed of

6 during summary judgment, in Claim 1. (*See* Dkt. 413 and 515.) ChromaDex should

7 not be able to continue to argue that claim to the jury.

1 **Disputed Case-Specific Jury Instruction No. 36, Offered by Elysium and Morris**
2 **BREACH OF CONTRACT AGAINST ELYSIUM AND MORRIS– ESSENTIAL**
3 **ELEMENTS**

4 To recover damages for breach of contract, ChromaDex must prove the following
5 by a preponderance of the evidence for each of the contractual breach it alleges:

- 6 (1) That the relevant parties entered into a contract;
7
8 (2) That ChromaDex did all, or substantially all, of the significant things that the
9 contract required it to do;
10 (3) That the other party failed to do something that the contract required it to do,
11 or did something that the contract prohibited it from doing;
12 (4) That ChromaDex was harmed, and
13 (5) That the breach of contract was a substantial factor in causing that harm.

14 [**Authority:** Judicial Council of California, Civil Jury Instructions 303 (modified).]
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction.]

2
3 **Defendants’ position:** Defendants’ proposed instruction tracks the language of
4 the model instruction and accurately instructs the jury as to the law.

5 Defendants object to ChromaDex’s proposed instruction to the extent it conflates
6 the element of harm with the damages theory of unjust enrichment, as reflected in
7 elements 4 (“and/or Elysium and/or Morris were unjustly enriched”) and 5 (“and/or
8 Elysium’s and/or Morris’s unjust enrichment”).

9 Additionally, ChromaDex’s instruction incorrectly suggests to the jury that it has
10 a viable unjust enrichment claim for breach of contract with respect to Elysium. During
11 summary judgment proceedings, ChromaDex made it clear that, with respect to its
12 breach of contract claims, ChromaDex only sought unjust enrichment in the form of
13 costs avoided for Elysium’s violation of the confidentiality provisions of the supply
14 agreements. (And costs avoided were the only damages ChromaDex sought on those
15 claims.) The Court granted summary judgment on the issue of costs avoided damages
16 in favor of Elysium, who had moved for summary judgment on ChromaDex’s claims
17 for failure to prove damages. (*See* Dkt. 413.) ChromaDex now ignores the summary
18 judgment order, claiming it can still present a claim for the breach of the confidentiality
19 provision and also that it can seek a different form of unjust enrichment for this claim
20 that it did not previously identify. (*See generally* Dkt. 515-1 [Memorandum of Points
21 and Authority in support of Defendants’ *Ex Parte* Application for Order Clarifying
22 Summary Judgment Ruling].)

1 **Disputed Case-Specific Jury Instruction No. 74, Offered by Elysium**

2 **INTERPRETATION OF CONTRACT – DISPUTED WORDS**

3 Elysium and ChromaDex dispute the meaning of the following provision in the
4 NIAGEN Supply Agreement:

5 3.1 Price. With respect to all Niagen provided by ChromaDex to
6 Elysium Health under this Agreement Elysium Health shall pay to
7 ChromaDex a maximum price of one thousand three hundred US dollars
8 per kilogram (\$1,300 per kg) (“Maximum Price”); If, at any time during
9 the Term, ChromaDex supplies Niagen . . . to a Third Party at a price that
10 is lower than that at which Niagen is supplied to Elysium Health under this
11 Agreement, then the price of Niagen supplied under this Agreement shall
12 be revised to such Third Party price with effect from the date of the
13 applicable sale to such Third Party and ChromaDex shall promptly provide
14 Elysium Health with any refund or credits thereby created; provided
15 Elysium Health purchases equal volumes or higher volumes than the Third
16 Party.

17 This is referred to by the parties as the Most-Favored-Nation or “MFN”
18 provision.

19 Elysium claims that the words mean the following: If, at any time, ChromaDex
20 sold Niagen to a customer for a lower price than the price to Elysium, then Elysium was
21 entitled to that lower price, with effect from the date of the sale to the other customer,
22 provided the sale to Elysium was for equal or more Niagen than the sale to the other
23 customer. ChromaDex shall promptly provide Elysium with any refund or credits as a
24 result of the lower price.

25 ChromaDex claims that the words mean the following: Elysium was entitled to
26 purchase Niagen from ChromaDex at the lowest price charged to another Niagen
27 customer, but only if the amounts of Elysium’s purchases of Niagen in total were equal
28 or greater than the amounts of other customer’s purchases in total over a year. Elysium
would promptly receive a refund or credits totaling the difference between the price it
had paid on purchases of Niagen within that year and the new price.

1 Elysium must prove that its interpretation is correct.

2 In deciding what the words of a contract mean, you must decide what the parties
3 intended at the time the contract was created. You may consider the usual and ordinary
4 meaning of the language used in the contract as well as the circumstances surrounding
5 the making of the contract.

6 The following instructions may also help you interpret the words of the contract:

7

8 [*Authority*: Judicial Council of California, Civil Jury Instructions 314 (modified).]

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** ChromaDex’s proposed instruction excludes some of the

4 relevant language of the provision they claim is at issue. Specifically, it excludes the

5 first sentence, which is important to understanding the rest of the provision.

6 Additionally, ChromaDex seeks to add the word “individual” before “sale” in the

7 section describing what Elysium’s position is. ChromaDex should not be entitled to

8 determine the construction of Elysium’s position. Both parties will have the

9 opportunity to argue their positions at trial, but Elysium should not be limited to

10 language that ChromaDex chooses. Furthermore, the addition of the word “individual”

11 just complicates the interpretation, potentially confusing the jury.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **Disputed Case-Specific Jury Instruction No. 73, Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST CHROMADEx – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from ChromaDex for breach of contract, Elysium must
5 prove all of the following by a preponderance of the evidence:

- 6
- 7 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
- 8 (2) That Elysium did or was excused from doing all, or substantially all, of the
9 significant things that the contract required it to do;
- 10 (3) That ChromaDex failed to do something that the contract required it to do, or
11 did something that the contract prohibited it from doing;
- 12 (4) That Elysium was harmed; and
- 13
- 14 (5) That ChromaDex's breach of contract was a substantial factor in causing
15 Elysium's harm.

16

17 [*Authority*: Judicial Council of California, Civil Jury Instructions 303.]

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ChromaDex’s position: [Presented with competing instruction].

Defendants’ position: The sole difference between the parties’ proposed instructions is that ChromaDex’s second element omits the model instruction language “or was excused from doing.” ChromaDex seeks to write out of the instructions Elysium’s theory that it was excused from certain obligations under the contract. This is inconsistent with the pleadings and the facts, and Elysium objects to such an instruction.

1 **Disputed Case-Specific Jury Instruction No. 42, Offered Only by Elysium**
2 **AFFIRMATIVE DEFENSE – CONTRACT PERFORMANCE EXCUSED BY**
3 **BREACH**

4 Elysium claims that ChromaDex’s claims for relief under the NIAGEN and PT
5 Supply Agreements are barred because ChromaDex materially breached the NIAGEN
6 Supply Agreement. If you decide that ChromaDex materially breached the NIAGEN
7 Supply Agreement, then ChromaDex cannot recover from Elysium on its breach of
8 contract claims.

9
10 [*Authority: Cross v. Itron, Inc.*, 890 F.2d 420 (9th Cir. 1989) (“Cross correctly argues
11 that a party who breaches [an agreement] cannot recover for the nonperformance of the
12 other party.”); *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 1602 (2012) (holding that
13 one who breaches a contract “cannot recover for a subsequent breach by the other
14 party”).]

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed instruction
2 on several grounds. First, this is not a proper affirmative defense and would invite juror
3 confusion. “Excuse” is merely an element of ChromaDex’s affirmative breach of
4 contract claim, and “[a] defense which demonstrates that plaintiff has not met its burden
5 of proof is not an affirmative defense.” *Zivkovic v. S. California Edison Co.*, 302 F.3d
6 1080, 1088 (9th Cir. 2002); *see also Khosroabadi v. Mazgani Soc. Servs., Inc.*, 2017
7 WL 8236730, at *2 (C.D. Cal. Oct. 4, 2017) (Carney, J.) (“Defendants’ second, third,
8 and fourth affirmative defenses are invalid in that they merely negate an element of
9 Plaintiff’s claims.”); *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718
10 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (“[A]n affirmative defense, under the meaning
11 of Federal Rule of Civil Procedure 8(c), is a defense that does not negate the elements
12 of the plaintiff’s claim, but instead precludes liability even if all of the elements of the
13 plaintiff’s claim are proven.” (internal quotation marks omitted)).

14 Second, even if this affirmative defense did exist, it is not available to Elysium
15 here. The “excuse” defense arises from the element of an affirmative contract claim
16 related to substantial performance. As the “Directions for Use” with CACI No. 303
17 states, the “excuse” element “should not be given unless the court has determined that
18 dependent obligations are involved,” which has not occurred in this case. The parties’
19 positions with respect to this issue are otherwise the same as those on Disputed Jury
20 Instruction No. 73. In the interest of avoiding needless repetition, ChromaDex
21 incorporates its position from that dispute here.

22
23 **Defendants’ position:** Defendants have alleged material breaches by
24 ChromaDex of the NIAGEN Supply Agreement. If the jury credits the evidence
25 presented by Elysium, the jury will be entitled to find that Elysium’s performance was
26 excused by ChromaDex’s breaches. *Cross v. Itron, Inc.*, 890 F.2d 420 (9th Cir. 1989)
27 (“Cross correctly argues that a party who breaches [an agreement] cannot recover for
28 the nonperformance of the other party.”); *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590,

1 1602 (2012) (holding that one who breaches a contract “cannot recover for a subsequent
2 breach by the other party”). (ChromaDex erroneously argues that Elysium relies on
3 CACI Nos. 330 and 335 in support of the proposed instruction, but Elysium does not
4 cite to either.)

5 Elysium addresses each of ChromaDex’s above points in turn. First, California
6 law, which governs the breach of contract claim, supports the assertion of excuse as an
7 affirmative defense. *See, e.g., Corson v. Brown Motel Invs., Inc.*, 87 Cal.App.3d 422,
8 425 (1978) (“Although excuses for nonperformance, not apparent on the face of the
9 contract, must be set up as affirmative defenses”); *Aviointeriors Spa v. World*
10 *Airways, Inc.*, 181 Cal.App.3d 908, 912 (1986) (noting that defendant asserted
11 affirmative defense of excuse for nonperformance). Second, whether covenants are
12 dependent is only a question of law for the Court to determine if no extrinsic evidence
13 is presented that aids in the construction. *See* CACI No. 303 Directions for Use
14 (“[W]hether covenants are dependent or independent is a matter of construing the
15 agreement. If there is no extrinsic evidence in aid of construction, the question is one
16 of law for the court.”). Third, ChromaDex’s argument on this point is just that—
17 argument—which it will be free to present at trial. Moreover, it ignores the case law.
18 *See Corbrus, LLC v. 8th Bridge Cap., Inc.*, No. 219CV10182CASAFMX, 2021 WL
19 2781811, at *14 (C.D. Cal. July 1, 2021) (finding that concurrent obligations excusing
20 performance existed even where contract did not contain express condition precedent).
21 Fourth and finally, contrary to ChromaDex’s contention, there is precedent for excusing
22 performance under one contract in light of a plaintiff’s breaches under another. *See*
23 *Corson v. Brown Motel Invs., Inc.*, 87 Cal.App.3d 422, 425, 427-28 (1978) (finding
24 Plaintiff’s breaches of one agreement excused defendants from performing its
25 obligations under another). In this case, there is more than sufficient evidence from
26 which the jury could conclude that the two supply agreements were “part of one large
27 transaction, and each should be construed in light of the other[.]” *Id.* at 425.

28

1 **Disputed Case-Specific Jury Instruction No. 46, Offered by Elysium and Morris**

2 **“TRADE SECRET” DEFINED**

3 To prove that particular information was a trade secret, ChromaDex must prove
4 all of the following elements:

5 (1) That the information was secret;

6 (2) That the information had actual or potential independent economic value
7 because it was secret; and

8 (3) That ChromaDex made reasonable efforts to keep the information secret.
9

10
11 [**Authority:** Judicial Council of California, Civil Jury Instructions 4402; *see also* Cal.
12 Civ. Proc. Code § 3426.1(d) (defining a trade secret as information that derives
13 independent economic value and that is the subject of reasonable efforts to maintain
14 secrecy).]
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Defendants’ proposed instruction should be accepted

4 because it mirrors the language of the model instruction and accurately instructs the jury

5 on the law. In contrast, ChromaDex’s proposed instruction is argumentative and

6 suggestive and will confuse the jury. First, rather than beginning the instruction with

7 the elements of the definition of “trade secret,” ChromaDex begins by suggestively

8 providing the jury with different examples of information that may constitute trade

9 secrets. Moreover, those examples are not relevant to the two categories of information

10 that ChromaDex argues are trade secrets: (1) the price competitors paid for NR in

11 specific volumes on specific dates; and (2) the price ChromaDex paid to obtain NR

12 from its manufacturer, W.R. Grace. (*See* Dkt. 413 [Summary Judgment Order] at 29.)

13 ChromaDex has not alleged that Morris disclosed “compilations of public information

14 . . . compiled in a novel way.” They allege that Morris disclosed specific factual

15 information as to specific sales—not a novel compilation of public information.

16 Thus, as written, Plaintiff’s instruction is likely to mislead and confuse the jury.

17 This is especially true where, as here, the jury will hear about other alleged confidential

18 information that ChromaDex claims Morris disclosed as part of its breach of contract

19 and breach of fiduciary duty claims.

20

21

22

23

24

25

26

27

28

1 **Disputed Case-Specific Jury Instruction No. 45, Offered by Elysium and Morris**
2 **MISAPPROPRIATION OF TRADE SECRETS – ESSENTIAL FACTUAL**
3 **ELEMENTS**

4 ChromaDex claims that Elysium and/or Morris misappropriated one or more of
5 its trade secrets under state and federal law. To succeed on this claim under state law,
6 ChromaDex must prove all of the following by a preponderance of the evidence:

- 7 (1) That ChromaDex owned the following information: (i) the price that
8 ChromaDex’s customers paid for NR in specific volumes on specific dates;
9 and/or (ii) the price that ChromaDex paid to its manufacturer, W.R. Grace, for
10 NR;
11 (2) That these categories of information were trade secrets at the time of its
12 misappropriation;
13 (3) That Elysium and/or Morris improperly acquired, used, or disclosed the trade
14 secret(s);
15 (4) That ChromaDex was harmed and/or Elysium was unjustly enriched; and
16 (5)(a) **[With respect to Morris:]** That Morris’s use or disclosure was a
17 substantial factor in causing ChromaDex’s harm;
18 (b) **[With respect to Elysium:]** That Elysium’s acquisition, use, or disclosure
19 was a substantial factor in causing Elysium to be unjustly enriched.

20 To succeed on this claim under federal law, in addition to the above elements,
21 ChromaDex must prove the following by a preponderance of the evidence:

- 22 (6) That the trade secret(s) is (are) related to a product or service used in, or
23 intended for use in, interstate or foreign commerce.

24 **[Authority:** Judicial Council of California, Civil Jury Instructions 4401 (modified);
25 Pattern Civ. Jury Instr. 11th Cir. 11.1 (2020) (modified); *Auto. Data Sols., Inc. v.*
26 *Directed Elecs. Canada, Inc.* 2018 WL 4742289, at *3 (C.D. Cal. Aug. 15, 2018) (“The
27 elements of misappropriation under the DTSA are similar to those under the CUTSA.”);
28 *Veronica Foods Co. v. Ecklin*, 2017 WL 2806706, at *12 (N.D. Cal. June 29, 2017)
(noting the definitions of “trade secret,” “misappropriation” and “improper use” in
CUTSA are “substantially identical to the definitions of those terms in the DTSA”); 18
U.S.C. § 1839.]

1 **ChromaDex’s position:** [Presented with competing instruction].

2
3 **Defendants’ position:** The only difference between ChromaDex’s and
4 Defendants’ proposed instructions are found in element 5. ChromaDex’s proposed
5 instruction suggests that Morris can be found liable for trade secret misappropriation on
6 an improper acquisition theory. ChromaDex has not alleged that Morris acquired any
7 trade secret through “improper means.” (*See generally* Dkt. 153 [Fifth Amended
8 Complaint].) Nor do defendants believe the evidence will support such a theory, as any
9 trade secrets Morris acquired were acquired through his employment.

10 ChromaDex’s proposed instruction also improperly suggests both that Morris can
11 be liable for Elysium’s alleged unjust enrichment, and that Elysium’s alleged unjust
12 enrichment can be disgorged if the jury finds Morris guilty. This is not an accurate
13 statement of the law. *See* CACI 4410, Sources and Authorities (“Even where a person
14 has received a benefit from another, he is liable to pay therefor only if the circumstances
15 of its receipt or retention are such that, as between the two persons, it is unjust for him
16 to retain it. The mere fact that a person benefits another is not of itself sufficient to
17 require the other to make restitution therefor.” (citing Restatement of Restitution,
18 section 1, cmt. c)).

1 **Disputed Case-Specific Jury Instruction No. 48, Offered by Elysium and Morris**
2 **REASONABLE EFFORTS TO PROTECT SECRECY**

3 To establish that information is a trade secret, ChromaDex must prove that it
4 made reasonable efforts under the circumstances to keep it secret. “Reasonable efforts”
5 are the efforts that would be made by a reasonable business in the same situation and
6 having the same knowledge and resources as ChromaDex, exercising due care to protect
7 important information of the same kind. This requirement applies separately to each
8 item that ChromaDex claims to be a trade secret.

9 In determining whether ChromaDex made reasonable efforts to keep particular
10 information secret, you should consider all of the facts and circumstances. Among the
11 factors you should consider are the following:

- 12 (1) Whether documents or computer files containing the information were
13 marked with confidentiality warnings;
- 14 (2) Whether ChromaDex instructed its employees to treat the information as
15 confidential information;
- 16 (3) Whether ChromaDex restricted access to the information to persons who
17 had a business reason to know the information;
- 18 (4) Whether ChromaDex kept the information in a restricted or secured area;
- 19 (5) Whether ChromaDex required employees or others with access to the
20 information to sign confidentiality or nondisclosure agreements;
- 21 (6) Whether ChromaDex took any action to protect the specific information,
22 or whether it relied on general measures taken to protect its business
23 information and assets;
- 24 (7) The extent to which any general measures taken by ChromaDex would
25 prevent the unauthorized disclosure of the information;
- 26
27
28

- 1 (8) Whether there were other reasonable measures available to ChromaDex
2 that it did not take with respect to protecting the document;
- 3 (9) Whether ChromaDex disclosed the information to others, including other
4 customers;
- 5 (10) Whether the parties' agreements contemplated or required that this
6 information be disclosed to Elysium;
- 7 (11) Whether ChromaDex consented, explicitly or implicitly, to the disclosure.

8 The presence of absence of any one or more of these factors is not necessarily
9 determinative.

10
11 [**Authority:** Judicial Council of California, Civil Jury Instructions 4404.]
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2
3 **Defendants’ position:** ChromaDex objects to Defendants’ proposed instruction
4 because it includes three additional factors, beyond the eight listed in CACI 4404, that
5 the jury should consider in determining whether ChromaDex made reasonable efforts
6 to keep information secret. But CACI 4404 expressly contemplates more than the eight
7 such factors. (*See* CACI 4404 [(i.) Specify other factors.]). Indeed, the Directions
8 for Use specify: “Read only the factors supported by the evidence in the case. Use
9 factor i to present additional factors.” The three factors proposed by Defendants will
10 be supported by the evidence and should be considered by the jury in making its
11 determination as to whether reasonable efforts were made to keep information secret.

12 ChromaDex argues that the ninth factor proposed by Defendants (*i.e.*, “[w]hether
13 ChromaDex disclosed the information to others, including other customers”) indicates
14 to the jury that it can ignore the context of certain disclosures, such as whether a
15 customer signed a nondisclosure agreement. This concern has no merit. Other factors,
16 such as the fifth factor, expressly instruct the jury to consider such context.

17 The tenth and eleventh factors proposed by Defendants (*i.e.*, “Whether the
18 parties’ agreements contemplated or required that this information be disclosed to
19 Elysium” and “Whether ChromaDex consented, explicitly or implicitly, to the
20 disclosure”) are supported by the Most Favored Nation provision, which implies
21 Elysium’s right to know information about pricing and sales to other customers. (*See*
22 Dkt. 413 [Summary Judgment Order] at 30 [“Accordingly, the parties agree that
23 Elysium had a contractual right to know some information about what other customers
24 were paying. However, the parties dispute the amount of information Elysium had a
25 right under the contract to know.”].)

1 **Disputed Case-Specific Jury Instruction No. 50, Offered by Elysium and Morris**

2 **MISAPPROPRIATION BY DISCLOSURE**

3 If you find information to be a trade secret, Elysium or Morris misappropriated
4 ChromaDex's trade secret by disclosure if Elysium or Morris:

5 (1) disclosed the information without ChromaDex's consent; and

6 (2) did any of the following:

7 **[in the case of Morris]**

- 8 a. at the time of disclosure, knew or had reason to know that his
9 knowledge of ChromaDex's trade secret[s] was acquired under
10 circumstances giving rise to a duty to keep the information secret;

11 **[in the case of Elysium]**

- 12 a. acquired knowledge of the trade secret by improper means; or
13 b. at the time of disclosure, knew or had reason to know that its
14 knowledge of ChromaDex's trade secret came from or through
15 Morris and that Morris had a duty to ChromaDex to keep the
16 information secret.

17
18 **[Authority:** Judicial Council of California, Civil Jury Instructions 4406 (modified).]
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2
3 **Defendants’ position:** In this case, ChromaDex has made numerous allegations
4 related to use or disclosure of information it deems confidential, under numerous
5 different theories including breach of contract. Under these facts, it is crucial to remind
6 the jury that the misappropriation charge relates only to information that it finds to be a
7 “trade secret” and not to other information, such as information alleged or found to be
8 confidential information pursuant to a contract but that is not trade secret.

9 Additionally, ChromaDex’s proposed instruction contemplates that Elysium
10 could be held liable on a theory of misappropriation of a trade secret by disclosure if, at
11 the time of the disclosure, it knew that the trade secret had come from Morris and that
12 Morris had utilized “improper means” to acquire it. ChromaDex has not alleged that
13 Morris acquired any trade secret through “improper means.” (*See generally* Dkt. 153
14 [Fifth Amended Complaint].) The language concerning such a theory of liability should
15 thus be excluded from the instruction.

1 **Disputed Case-Specific Jury Instruction No. 51, Offered by Elysium and Morris**
2 **MISAPPROPRIATION BY USE**

3 Elysium and/or Morris misappropriated ChromaDex's trade secret(s) by use if
4 Elysium and/or Morris:

- 5 (1) used the trade secret(s) without ChromaDex's consent; and
6 (2) did any one of the following:

7 **[in the case of Morris]**

- 8 a. at the time of use, knew or had reason to know that the knowledge
9 of the trade secret(s) was acquired under circumstances creating a
10 legal obligation to limit use of the information; or

11 **[in the case of Elysium]**

- 12 b. acquired knowledge of the trade secret by improper means; or
13 c. at the time of use, knew or had reason to know that its knowledge of
14 ChromaDex's trade secret(s) came from or through Morris, and that
15 Morris had a duty to ChromaDex to limit use of the information.
16

17 [**Authority:** Judicial Council of California, Civil Jury Instructions 4407 (modified).]
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** ChromaDex’s proposed instruction contemplates that

4 Elysium could be held liable on a theory of misappropriation of a trade secret by use if,

5 at the time of the disclosure, it knew that the trade secret had come from Morris and that

6 Morris had utilized “improper means” to acquire it. ChromaDex has not alleged that

7 Morris acquired any trade secret through “improper means.” (*See generally* Dkt. 153

8 [Fifth Amended Complaint].) The language concerning such a theory of liability should

9 thus be excluded from the instruction.

1 **Disputed Case-Specific Jury Instruction No. 55, Offered Only by Elysium and**
2 **Morris**

3 **PROOF FOR MISAPPROPRIATION OF TRADE SECRET**

4 California public policy strongly favors employee mobility. ChromaDex
5 *cannot* prove a claim of trade secret misappropriation by demonstrating that Morris's
6 employment with Elysium would inevitably lead him to rely on ChromaDex's trade
7 secrets.

8
9 [**Authority:** *Globespan, Inc. v. O'Neill*, 151 F. Supp. 2d 1229, 1235 (C.D. Cal. 2001);
10 *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1462-63 (2002); *see also* Cal. Bus.
& Prof. Code § 16600.]

1 **ChromaDex’s position:** The Court should reject Elysium’s and Morris’s
2 proposed instruction because it is unnecessary and would invite juror confusion.
3 Elysium and Morris want to instruct the jury that California public policy strongly
4 favors employee mobility and that ChromaDex cannot prove a claim for trade secret
5 misappropriation based on inevitable disclosure. Neither of these statements are
6 relevant to this case. ChromaDex is not claiming—and has never claimed—that Morris
7 could not have worked for Elysium or another employer. Rather, ChromaDex’s claims
8 against Morris are premised on his improper actions and breaches of contract while he
9 was still employed with ChromaDex and thereafter. In addition, ChromaDex is not
10 attempting to prove its claims for trade secret misappropriation by demonstrating that
11 Morris’s employment with Elysium would inevitably lead him to rely on ChromaDex’s
12 trade secrets. Defendants have not—and cannot—point to one instance where
13 ChromaDex relied on this “inevitable disclosure” theory in support of its
14 misappropriation claims.

15 Defendants’ instruction suggests to the jury that ChromaDex’s claims are based
16 on these premises, and that the jury should reject them. Accordingly, this instruction
17 would only serve to confuse and mislead a jury. *See United States v. Anderson*, 741
18 F.3d 938, 947 (9th Cir. 2013) (district court properly rejected “confusing instruction”
19 that would be “misleading or inadequate to guide the jury’s deliberation”).
20

21 **Defendants’ position:** Defendant’s proposed instruction accurately instructs the
22 jury with respect to the law as it relates to trade secrets and California’s public policy
23 favoring employee mobility. To avoid any confusion as to what is a viable theory of
24 trade secret misappropriation in light of the various claims related to Morris’s
25 employment and ChromaDex’s confidential information, Defendants believe the jury
26 should be instructed on this point of law.
27
28

1 **Disputed Case-Specific Jury Instruction No. 54, Offered by Elysium and Morris**
2 **REMEDIES FOR MISAPPROPRIATION OF TRADE SECRET**

3 If ChromaDex proves that Elysium misappropriated its trade secrets, then
4 ChromaDex is entitled to recover damages if the misappropriation caused Elysium to
5 be unjustly enriched.

6 Elysium was unjustly enriched if its misappropriation of a trade secret caused it
7 to receive a benefit that it otherwise would not have achieved. Here, ChromaDex claims
8 that the profits Elysium made on sales using the ingredients from the June 30, 2016
9 order constitute unjust enrichment.

10 To decide the amount of any unjust enrichment, first determine the value of
11 Elysium's benefit that would not have been achieved except for its misappropriation.
12 Then subtract from that amount Elysium's reasonable expenses.

13
14 [**Authority:** Judicial Council of California, Civil Jury Instructions 4409 & 4410
15 (modified); *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 702 (2009), *as modified* (Feb.
16 10, 2010) (finding that it is necessary to identify items of damages with specificity, as
double or duplicative recovery for the same damage items is prohibited).]

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Chromadex’s proposed instruction improperly seeks
4 recovery from Morris on the theory that Elysium was unjustly enriched. (*See* CACI
5 4410, Sources and Authorities (“Even where a person has received a benefit from
6 another, he is liable to pay therefor only if the circumstances of its receipt or retention
7 are such that, as between the two persons, it is unjust for him to retain it. The mere fact
8 that a person benefits another is not of itself sufficient to require the other to make
9 restitution therefor.” (citing Restatement of Restitution, section 1, cmt. c)).

10 Separately, Defendants’ proposed instruction specifies the harm sought for the
11 offense, which is not otherwise reflected in the instructions. As the Court witnessed
12 during summary judgment proceedings, there are a number of claims with overlapping
13 damages theories and potentially overlapping facts. To mitigate any risk of potential
14 juror confusion, Defendants maintain that it is critical that the instructions inform the
15 jury with specificity what damages are being sought with respect to each claim. *See*
16 *Roby*, 47 Cal. 4th at 702 (finding that it is necessary to identify items of damages with
17 specificity, as double or duplicative recovery for the same damage items is prohibited).

1 **Disputed Final Instruction No. 40, Offered by Morris**

2 **REMEDY FOR BREACH OF CONTRACT – AGAINST MORRIS**

3 If you decide that ChromaDex has proved its claims against Morris for breach of
4 the February Confidentiality Agreement and/or the Disputed July Confidentiality
5 Agreement, you also must decide whether ChromaDex should be compensated for the
6 breach(es).

7 ChromaDex seeks to recover the amount of any “unjust enrichment” Morris
8 obtained because of the breach(es). ChromaDex claims that the salary it paid Morris
9 from February 2016 through July 2016 and the salary Elysium paid Morris from August
10 2016 through December 2018 constitute unjust enrichment.

11 To decide the amount of any unjust enrichment, first determine the value of
12 Morris’s benefit that would not have been achieved except for his breach(es) of contract.
13 Then subtract from that amount Morris’s reasonable expenses.

14 If you decide that Morris breached the February Confidentiality Agreement
15 and/or the Disputed July Confidentiality Agreement but also that Morris was not
16 unjustly enriched by the breach(es), you may still award ChromaDex nominal damages
17 such as one dollar.

18
19 [**Authority:** Judicial Council of California, Civil Jury Instructions 360 & 4410
20 (modified); *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 702 (2009), *as modified* (Feb.
21 10, 2010) (finding that it is necessary to identify items of damages with specificity, as
22 double or duplicative recovery for the same damage items is prohibited).]

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Morris’ proposed instruction differs from ChromaDex’s

4 in that it specifies the harm sought for the offense, which is not otherwise reflected in

5 the instructions. As the Court witnessed during summary judgment proceedings, there

6 are a number of claims with overlapping damages theories and potentially overlapping

7 facts. To mitigate any risk of potential juror confusion, Defendants maintain that it is

8 critical that the instructions inform the jury with specificity what damages are being

9 sought with respect to each claim. *See Roby*, 47 Cal. 4th at 702 (finding that it is

10 necessary to identify items of damages with specificity, as double or duplicative

11 recovery for the same damage items is prohibited). The damages specified are exactly

12 the damages the Court recognized ChromaDex was seeking for this claim. See Dkt.

13 413 [Summary Judgment Order] at 41: “As a remedy for Morris’ alleged breaches of

14 fiduciary duty, ChromaDex seeks from Morris the compensation it paid him from

15 February to July 2016 (totaling \$77,137) and the compensation Elysium paid Morris

16 from August 2016 through December 2018 (totaling \$607,644).”

1 **Disputed Case-Specific Jury Instruction No. 67, Offered by Elysium and Morris**

2 **“FIDUCIARY DUTY” EXPLAINED**

3 An officer of a corporation who participates in management of the corporation,
4 exercising some discretionary authority, is a fiduciary of the corporation.

5 A nominal officer with no management authority is not a fiduciary.

6 A “fiduciary duty” is a duty that a corporate officer owes to his corporation. A
7 fiduciary duty imposes on a corporate officer a duty to act with the utmost good faith in
8 the best interests of his corporation.

9
10 [*Authority*: California Forms of Jury Instruction MB300C.08; Judicial Council of
11 California, Civil Jury Instructions 4100.]

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** ChromaDex’s version of the instruction is argumentative

4 to the extent that it invites the jury to draw inferences favorable to ChromaDex and is

5 redundant. *See Curtis v. City of Oakland*, 2016 WL 1138457 *4 (N.D.Cal. 2016) (“Jury

6 instructions should provide the relevant rules of law generally and avoid singling out or

7 stressing particular evidentiary items or legal theories; otherwise, the court's emphasis

8 of certain facts or issues may cause a juror to attach undue importance or credibility to

9 the selected matters”). For example, ChromaDex states: “Participation in management

10 does not require ‘top-level’ control. So long as the officer has some discretion in

11 managing corporate affairs, he or she is a fiduciary of the corporation.” Not only is this

12 cumulative of the first sentence—which already references “some discretionary

13 authority” it is meant to be suggestive that just because Morris, who was not a “top

14 level” officer, is still a fiduciary. Defendants’ proposed instruction, which follows the

15 language of the model instructions cited by both parties, specifically references the

16 exercise of “some discretionary authority,” which encompasses non-top-level control,

17 rendering ChromaDex’s additional language unnecessary. *See Jones*, 297 F.3d at 935

18 [“affirming rejection of instruction where ‘the district court gave other instructions that

19 enabled the jury to consider th[e] issue adequately”]; *Anderson*, 741 F.3d at 947

20 (“district court properly rejected ‘confusing instruction’ that would be ‘misleading or

21 inadequate to guide the jury’s deliberation”).

22 ChromaDex’s instruction also includes language about “competing” with one’s

23 employer. Such language is misleading and prejudicial where, as here, the individual

24 at issue left his employer to join another company. It is even more prejudicial when

25 ChromaDex argues that other company is a competitor, and that actions taken *after*

26 Morris left ChromaDex injured ChromaDex.

1 While ChromaDex cites *Hunter* in support of its position that the model
2 instruction is insufficient, the model instruction relied upon by Defendants in this case
3 does not suffer from the same flaw as the one in *Hunter*. In *Hunter*, the model
4 instruction was deficient because, by not incorporating plaintiff’s suggested
5 modification, it precluded the jury from considering plaintiff’s theory of how a failure
6 to investigate or punish can constitute a “practice or custom.” 652 F.3d 1225. In this
7 case, ChromaDex is *not* precluded from establishing a fiduciary duty based on the
8 exercise of some discretionary authority; rather, ChromaDex is admittedly trying to add
9 language to argue against an alleged *defense* theory (*i.e.*, Morris was not in the C-suite
10 of executive officers), the viability of which is already encompassed by the model
11 instruction.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 76, Offered Only by Elysium and**
2 **Morris**

3 **AFFIRMATIVE DEFENSE – UNCLEAN HANDS**

4 Elysium claims as a defense that ChromaDex’s misconduct precludes its
5 enforcements of ChromaDex’s claims. To establish this defense, Elysium must prove
6 that ChromaDex’s conduct was unconscionable and resulted in prejudice to Elysium.

7 ChromaDex’s misconduct must be related to the subject matter of ChromaDex’s
8 claims and of such a prejudicial nature that it would be unfair to allow ChromaDex to
9 rely on its claims for breach of contract, breach of fiduciary duty, aiding and abetting
10 breach of fiduciary duty, and trade secret misappropriation. If that is established by
11 Elysium, then ChromaDex is barred from claiming breach of contract, breach of
12 fiduciary duty, aiding and abetting breach of fiduciary duty, and trade secret
13 misappropriation.

14
15 [**Authority:** 1-3F California Forms of Jury Instruction MB300F.29 (2017);
16 *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987) (holding
17 that, to establish unclean hands, “the defendant must demonstrate that the plaintiff’s
18 conduct is inequitable and that the conduct relates to the subject matter of its claims”).]

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed instruction
2 on several grounds.

3 At the threshold, this affirmative defense should not be decided by the jury, but
4 rather by the Court. “Since the doctrine of unclean hands is an equitable defense,
5 [Defendants are] not entitled to have a jury decide its applicability.” *Out of the Box*
6 *Enterprises, LLC v. El Paseo Jewelry Exch., Inc.*, 2012 WL 12893524, at *8 n.6 (C.D.
7 Cal. June 27, 2012); *see also A-C Co. v. Sec. Pac. Nat. Bank*, 173 Cal. App. 3d 462,
8 473–74 (1985); *Learning Technology Partners v. University of the Incarnate Word*,
9 Case No. 14-cv-4322-PJH, Dkt. 151 (N.D. Cal. Feb. 11, 2016) (“[B]ecause there is no
10 CACI instruction or Ninth Circuit model instruction on the issue, and because unclean
11 hands is an issue properly decided by the court, the jury will not be given an instruction
12 on unclean hands.”). “A litigant is not entitled to have a jury resolve a disputed
13 affirmative defense if the defense is equitable in nature.” *Granite States Ins. Co. v.*
14 *Smart Modular Techs., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996). Just so here.

15 The only time a party may insist that any part of an equitable affirmative defense
16 should go to a jury is when the defense “involve[s] common issues” with a legal claim
17 that is properly before the jury, *id.*, but even then the jury’s findings are limited to the
18 *factual predicates*, but not the *applicability*, of the defense, *see FLIR Sys., Inc. v. Sierra*
19 *Media, Inc.*, 965 F. Supp. 2d 1184, 1192–93 (D. Or. 2013). Applying that principle
20 here shows that Defendants’ unclean hands defense misses the mark for two reasons.

21 First, one of Defendants’ grounds for their unclean hands defense—an alleged
22 breach of the exclusivity provision, (Dkt. 510 at 21)—was entirely dismissed by the
23 Court on summary judgment, (Dkt. 413 at 14–19), and thus is not a “common issue”
24 with the any claim properly before the jury. Defendants’ attempt to revive those
25 exclusivity provision arguments now should be rejected as a trial tactic to shoehorn in
26 evidence that is irrelevant to any claim or defense properly before the jury. *Dairy Emps.*
27 *Union Loc. No. 17 v. Poel*, 2014 WL 12884088, at *6 n.4 (C.D. Cal. Sept. 15, 2014)
28 (striking defense because it was “subject to dismissal on the same grounds” as other

1 dismissed defenses). In short, “Defendants’ equitable affirmative defense[] do[es] not
2 overlap with Plaintiff’s claims in a way that overcomes the unfair prejudice that would
3 likely result by allowing Defendants to present its unclean hands and misuse evidence
4 to the jury.” *Classical Silk, Inc. v. Dolan Grp., Inc.*, 2016 WL 7638112, at *5 (C.D.
5 Cal. Mar. 21, 2016).

6 Second, the only other asserted grounds for Defendants’ unclean hands defense—
7 alleged breaches of the MFN Provision and fraudulent inducement, (Dkt. 510 at 21)—
8 are already being put to the jury as Elysium’s counterclaims. The factual predicates of
9 those issues will thus already be decided, and allowing Defendants to *also* argue an
10 equitable defense on the same grounds risks misleading and confusing the jury about its
11 duty. Therefore, the ultimate question of *applying* the unclean hands defense here
12 should rest with the Court alone. *FLIR Sys.*, 965 F. Supp. 2d at 1192–93. In any event,
13 if the Court allows Defendants’ unclean hands defense to go to the jury, ChromaDex
14 reserves the right to argue its unclean hands defense as well.

15 Defendants’ brand-new unclean hands theory also suffers from serious
16 deficiencies on its merits for at least three reasons. First, the grounds that Defendants
17 intend to argue for this defense are entirely duplicative of Elysium’s counterclaims. A
18 defense cannot be maintained when it is entirely “redundant” of other claims or
19 defenses. *See Rosen v. Masterpiece Mktg. Grp., LLC*, 2016 WL 7444698, at *6 (C.D.
20 Cal. May 3, 2016) (striking “unclean hands defense” that was “redundant” to other
21 defenses). For instance, as revealed for the first time in Defendants’ Memorandum of
22 Contentions of Fact and Law, Defendants claim in support of this affirmative defense
23 that “ChromaDex intentionally violated the MFN Provision of the NIAGEN Supply
24 Agreement and then attempted to conceal and misrepresent information relevant to
25 these violations[.]” (Dkt. 510 at 21.) Defendants further claim that ChromaDex
26 “fraudulently induced Elysium to enter into the Trademark License and Royalty
27 Agreement[.]” (*Id.*) These bases for Defendants’ unclean hands affirmative defense
28

1 are of the same as Elysium’s counterclaims and Defendants’ attempt to re-purpose their
2 unclean hands defense to argue duplicative issues should not be permitted.

3 Second, as noted above and recently revealed in Defendants’ Memorandum of
4 Facts and Law, Elysium apparently intends on arguing that ChromaDex “knowingly
5 sold both NIAGEN and ingredients similar to PT to other customers in violation of the
6 exclusivity provision of the NIAGEN Supply Agreement.” (Dkt. 510 at 21.) Again,
7 Elysium’s counterclaim for alleged breach of the Exclusivity Provision was dismissed
8 by this Court in its order on summary judgment. (Dkt. 413 at 14–19). Defendants
9 should not be permitted to revive it—and use it as a hook to offer evidence accusing
10 ChromaDex of alleged breaches entirely unrelated to the issues left in this case—under
11 the guise of an affirmative defense. *Classical Silk, Inc. v. Dolan Grp., Inc.*, 2016 WL
12 7638112, at *5 (C.D. Cal. Mar. 21, 2016) (“Defendants’ equitable affirmative defenses
13 do not overlap with Plaintiff’s claims in a way that overcomes the unfair prejudice that
14 would likely result by allowing Defendants to present its unclean hands and misuse
15 evidence to the jury.”).

16 Third, this defense cannot bar ChromaDex’s statutory trade secret
17 misappropriation claims, because unclean hands is inapt when it “would result in
18 permitting an act declared by statute to be void or against public policy.” *Brown v. TGS*
19 *Mgmt. Co., LLC*, 57 Cal. App. 5th 303, 320 (2020); *see also McKennon v. Nashville*
20 *Banner Pub. Co.*, 513 U.S. 352, 360 (1995) (rejecting unclean hands defense “where a
21 private suit serves important public purposes”). California and the federal government
22 have adopted specific statutes prohibiting the misappropriation of trade secrets, and
23 allowing an “unclean hands” defense to bar enforcement should not be allowed.

24 Fourth, Elysium’s instruction misstates the law. For the doctrine of unclean
25 hands to apply, the “conduct must be so intimately connected to the injury of another
26 with the matter for which he seeks relief, as to make it inequitable to accord him such
27 relief.” *CFM Commc’ns, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1238
28 (E.D. Cal. 2005) (*Estate of Blanco*, 86 Cal. App. 3d 826, 833 (1978)). Even the model

1 instruction Elysium cites uses the phrase “intimately connected.” Elysium’s instruction,
2 however, simply states that the conduct must be “related to,” rendering it inaccurate and
3 misleading. In light of these defects, this instruction would only serve to confuse and
4 mislead a jury. *See United States v. Anderson*, 741 F.3d 938, 947 (9th Cir. 2013)
5 (district court properly rejected “confusing instruction” that would be “misleading or
6 inadequate to guide the jury’s deliberation”).

7 **Defendants’ position:** Elysium’s proposed instruction on the affirmative defense
8 of unclean hands follows jury instruction MB300F.29 in California Forms of Jury
9 Instructions (Mathew Bender). Pursuant to the authorities cited in the comments to that
10 instruction, it is appropriate to submit the equitable defense of unclean hands to the jury
11 when the “theories in support of the unclean hands defense [are] intertwined with the
12 parties’ legal causes of action and raise[] questions of fact and credibility properly
13 submitted to a jury.” *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 623
14 (1992); *cf. Kendall-Jackson Winery, Ltd. v. Superior Ct.*, 76 Cal. App. 4th 970, 978
15 (1999), *as modified on denial of reh’g* (Jan. 3, 2000) (“Whether the doctrine of unclean
16 hands applies is a question of fact.”). Here, Defendants have alleged and produced
17 evidence showing that ChromaDex fraudulently induced Elysium to enter into a
18 contractual relationship with ChromaDex, and that it breached numerous key provisions
19 of that contractual relationship, while taking action to replace Elysium in the direct-to-
20 consumer market Elysium had created. The defense is therefore intertwined with the
21 legal and factual issues to be decided by the jury, making the proposed instruction on
22 unclean hands proper.

23 Defendants’ proposed instruction accurately reflects the law. To prevail on an
24 unclean hands defense, “the defendant must demonstrate that the plaintiff’s conduct is
25 inequitable and that the conduct *relates* to the subject matter of its claims.”
26 *Fuddruckers*, 826 F.2d at 847 (emphasis added); *see also Peregrine Funding, Inc. v.*
27 *Sheppard Mullin Richter & Hampton LLP*, 133 Cal.App.4th 658, 681 (2005) (rejecting
28 argument that unclean hands defense does not apply where “misconduct does not

1 *directly relate* to plaintiffs’ causes of action” and confirming the appropriate analysis is
2 “whether the unclean conduct *relates directly* ‘to the *transaction* concerning which the
3 complaint is made,’ i.e., to the ‘*subject matter* involved’, and not whether it is part of
4 the basis upon which liability is being asserted”). ChromaDex’s misconduct is directly
5 related to the subject matter of its claims. Further, the unclean hands defense is
6 applicable to all of ChromaDex’s claims. For example, at least one of ChromaDex’s
7 breaches—the breach of the MFN provision—relates to the sales information that lies
8 at the heart of Elysium’s trade secret misappropriation claims and breach of duty of
9 loyalty claims. ChromaDex was obligated to give Elysium its best price for NIAGEN,
10 it failed to do so, and it now complains that the sales representative responsible for the
11 relationship with Elysium—Morris—should not have disclosed such information to
12 Elysium. “Making a judicial remedy available when [Elysium’s misconduct] fail[ed]
13 to accomplish the intended result would reduce the risk inherent in [such misconduct],
14 and encourage [bad actors] such as [Elysium].” *See Adler v. Fed. Republic of Nigeria*,
15 219 F.3d 869, 877 (9th Cir. 2000), *as amended on denial of reh’g and reh’g en banc*
16 (Aug. 17, 2000). This is true whether the judicial remedy is awarded for ChromaDex’s
17 breach of contract, breach of fiduciary duty, or trade secret misappropriation claims.

18 Defendants also respond to ChromaDex’s additional positions. First,
19 ChromaDex overstates the legal proposition that *Rosen* stands for. The Court in *Rosen*
20 granted a motion to strike the unclean hands defense noting that the defendant had
21 asserted another defense, waiver, based on the same conduct and which would similarly
22 preclude the plaintiff from recovering damages. The case said nothing about striking
23 affirmative defenses because of pending counterclaims, which serve different purposes
24 and have different elements of proof. Second, as ChromaDex notes, the fact that the
25 exclusivity provision is not part of any substantive claim ameliorates the fears of
26 redundancy. (ChromaDex’s citation to *Classical Silk* in support of its second argument
27 is confusing, as it does not stand for the preceding proposition.) Third, ChromaDex
28 states that unclean hands may not be a defense to trade secret misappropriation, but

1 cases suggest otherwise. *See, e.g., Nalco Chem. Co. v. Hydro Techs., Inc.*, 149 F.R.D.
2 686, 695 (E.D. Wis. 1993) (allowing discovery for purposes of unclean hands defense
3 in trade secret misappropriation action). Additionally, that is not the only claim against
4 which the defense is asserted.

5 **Disputed Case-Specific Jury Instruction No. 70, Offered by Morris**
6 **REMEDY FOR BREACH OF FIDUCIARY DUTY – AGAINST MORRIS**

7 If you decide that ChromaDex has proved its claim against Morris for breach of
8 fiduciary duty, you must also decide how much money will reasonably compensate
9 ChromaDex for the harm.

10 ChromaDex seeks to recover damages for Morris’s unjust enrichment. Morris
11 was unjustly enriched if his breach of fiduciary duty caused Morris to receive a benefit
12 that he otherwise would not have achieved. ChromaDex claims that the salary it paid
13 Morris from February 2016 through July 2016 and the salary Elysium paid Morris from
14 August 2016 through December 2018 constitute unjust enrichment.

15 To decide the amount of any unjust enrichment, first determine the value of
16 Morris’s benefit that would not have been achieved except for his breach of fiduciary
17 duty. Then subtract from that amount Morris’s reasonable expenses.

18 In calculating the amount of any unjust enrichment, do not take into account any
19 amount that you included in determining any amount of damages for ChromaDex’s
20 actual loss.

21
22 [**Authority:** Judicial Council of California, Civil Jury Instructions 3900 (modified);
23 Judicial Council of California, Civil Jury Instructions 4410 (modified);); *Roby v.*
24 *McKesson Corp.*, 47 Cal. 4th 686, 702 (2009), *as modified* (Feb. 10, 2010) (finding that
it is necessary to identify items of damages with specificity, as double or duplicative
recovery for the same damage items is prohibited.)

1 **ChromaDex’s position:** [Presented with competing instruction].

2
3 **Defendants’ position:** Defendants’ proposed instruction accurately reflects the
4 damages that ChromaDex is seeking for its breach of fiduciary duty claims, as reflected
5 in the Summary Judgment Order (Dkt. 413). It is also consistent with the model
6 instruction. *See* CACI 3900.

7 ChromaDex’s proposed instruction fails to specify the damages it seeks. *See*
8 *Roby*, 47 Cal. 4th at 702 (finding that it is necessary to identify items of damages with
9 specificity, as double or duplicative recovery for the same damage items is prohibited).
10 It also fails to instruct the jury that it should “not take into account any amount that [it]
11 included in determining any amount of damages for ChromaDex’s actual loss” when
12 determining unjust enrichment, even though ChromaDex’s instruction seeks both actual
13 damages and unjust enrichment. Finally, ChromaDex’s proposed instruction adds the
14 following language: “When a fiduciary personally profits by his disloyal actions, the
15 fiduciary may be required to give up the full amount of such profit, regardless of
16 whether the plaintiff suffered any damage.” This language is unnecessary to further
17 clarify the model instruction. It also fails to include the word “secret” before profit,
18 thus obscuring the holding of the case on which ChromaDex relies for the proposition.

1 **Disputed Case-Specific Jury Instruction No. 71, Offered by Elysium**
2 **REMEDY FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY –**
3 **AGAINST ELYSIUM**

4 If you decide that ChromaDex has proved its claim against Elysium for aiding
5 and abetting Morris with a breach of fiduciary duty, you must also decide the
6 appropriate remedy.

7 ChromaDex seeks to recover damages for Elysium's unjust enrichment. Elysium
8 was unjustly enriched if its aiding and abetting of a breach of fiduciary duty caused
9 Elysium to receive a benefit that it otherwise would not have achieved. ChromaDex
10 claims that profits Elysium made on sales using the ingredients from the June 30, 2016
11 order constitute unjust enrichment.

12 To decide the amount of any unjust enrichment, first determine the value of
13 Elysium's benefit that would not have been achieved except for its aiding and abetting
14 of a breach of fiduciary duty. Then subtract from that amount Elysium's reasonable
15 expenses.

16
17 *[Authority: Judicial Council of California, Civil Jury Instructions 3900 (modified);*
18 *Judicial Council of California, Civil Jury Instruction 4410 (modified); Roby v.*
19 *McKesson Corp.*, 47 Cal. 4th 686, 702 (2009), as modified (Feb. 10, 2010) (finding that
it is necessary to identify items of damages with specificity, as double or duplicative
recovery for the same damage items is prohibited.)
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** [Presented with competing instruction].

2
3 **Defendants’ position:** Defendants’ proposed instruction accurately reflects the
4 damages that ChromaDex is seeking for its breach of fiduciary duty claims, as reflected
5 in the Summary Judgment Order (Dkt. 413). It is also consistent with the model
6 instructions. *See* CACI 3900 & 4410.

7 ChromaDex’s proposed instruction fails to specify the damages it seeks. *See*
8 *Roby*, 47 Cal. 4th at 702 (finding that it is necessary to identify items of damages with
9 specificity, as double or duplicative recovery for the same damage items is prohibited).
10 Additionally, ChromaDex’s proposed instruction adds the following language: “A party
11 that actively participates in the breach of fiduciary duty by another should be required
12 to give up all money obtained through such conduct, regardless of whether the plaintiff
13 suffered any damage.” This language is unnecessary to further clarify the model
14 instruction, and is argumentative. It suggests what the jury “should” do, and it also fails
15 to include the word “secret” before profit, thus obscuring the holding of the case on
16 which ChromaDex relies for the proposition.

1 **Disputed Case-Specific Jury Instruction No. 80, Offered Only by Elysium**

2 **DEDUCTION OF DAMAGES FROM THE PRICE**

3 Elysium on notifying ChromaDex of its intention to do so may deduct all or any
4 part of the damages resulting from any breach of the contract from any part of the price
5 still due under the same contract.

6
7 [*Authority:* UCC 2-717.]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed instruction
2 on several grounds.

3 First, Elysium’s only grounds for asserting this “setoff” defense under the
4 Uniform Commercial Code § 2-717 are that ChromaDex allegedly breached the MFN
5 Provision. That, of course, is entirely duplicative of Elysium’s MFN Counterclaim and
6 Defendants’ excuse and unclean hands defenses.

7 Second, under the UCC, a seller has breached for purposes of a setoff only if “*the*
8 *goods or the tender* of delivery fail in any respect to conform to the contract.” UCC 2-
9 601. There is no dispute that ChromaDex delivered the ingredients, Elysium accepted
10 the ingredients (as opposed to rejecting it for non-conformity), and then Elysium sold
11 them all for a profit. The only alleged issues with the product that ChromaDex delivered
12 were dismissed by the Court for lack of evidence and notice. (Dkt. 413 at 5–13
13 (dismissing cGMP and product purity provision counterclaims).)

14 Second, for UCC § 2-717 to apply, the buyer must either “reject[] the goods or
15 provid[e] notice that it found the goods deficient.” *Carson Indus., Inc. v. Am. Tech.*
16 *Network, Corp.*, 2015 WL 9434694, at *3 (N.D. Cal. Dec. 24, 2015). Elysium does not
17 contest that there was no rejection here; Elysium accepted the ingredients and resold
18 them all for a tidy profit. There was also no notice. Any attempt by Elysium to suggest
19 that *other* alleged breaches of the NIAGEN Supply Agreement could have been proper
20 notice of deficient goods was rejected already by the Court in its order on summary
21 judgment, when it held that “Elysium’s objections that the Niagen was overpriced and
22 not sold exclusively were so far removed from its objection to the quality of the Niagen
23 product that the notice Elysium gave ChromaDex was insufficient as a matter of law.”
24 (Dkt. 413 at 9–10.)

25 Third, at core, this “defense” it is not a jury instruction, but rather merely a
26 recitation of a UCC provision that does not apply in this litigation. It has no bearing on
27 what the jury must decide in this case. The proposed instruction is therefore irrelevant.
28 *See, e.g., Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1063 (9th Cir.

1 2008) (finding no abuse of discretion where district court refused to give jury instruction
2 based on UCC provision because it was “irrelevant”).

3 Fourth, in the event a jury awards damages to both ChromaDex and Elysium, the
4 Court is more than capable of deducting all or part of the damages that ChromaDex
5 owes to Elysium from the amount that Elysium owes to ChromaDex. There is no need
6 for a jury instruction here. *See Order, Learning Technology Partners v. University of*
7 *the Incarnate Word*, Case No. 14-cv-4322-PJH, Dkt. 151 (N.D. Cal. Feb. 11, 2016)
8 (holding that the court could conduct the purely arithmetic task of calculating an offset
9 post-verdict and, thus, there was no need for a jury instruction).

10 Fifth, and finally, even if the Court agrees to Defendants’ proposed instruction,
11 ChromaDex requests that it include an additional statement from UCC 2-607, which
12 states that after a buyer has accepted tender, it “must within a reasonable time after he
13 discovers or should have discovered any breach notify the seller of breach or be barred
14 from any remedy.” Here, as the Court observed, Defendants purposely waited to
15 (falsely) accuse ChromaDex of contractual breaches until after they had accepted the
16 ingredient orders, with Elysium’s COO Daniel Alminana texting Morris “I am going to
17 drop that email [with the accusations] the second our ingredients are at Tishcon,” which
18 was Elysium’s manufacturer. (Dkt. 413 at 34.) Based on that, and other evidence,
19 ChromaDex intends to argue to the jury that Defendants’ plotting does not constitute
20 notice “within a reasonable time” under the UCC. The additional language is warranted.

21
22 **Defendants’ position:** Elysium’s proposed instruction informs the jury that in a
23 commercial case such as this, under the California Uniform Commercial Code, damages
24 arising from breach of a supply agreement are netted out against amounts due
25 thereunder. UCC § 2-717 states: “The buyer on notifying the seller of his intention to
26 do so may deduct all or any part of the damages resulting *from any breach of the*
27 *contract* from any part of the price still due under the same contract.” U.C.C § 2-717.
28 This point of law is salient because of Elysium’s position that the dollar values of the

1 July 30 purchase orders are offset by the credits and/or refunds owing to Elysium from
2 breach of the Most Favored Nation (“MFN”) provision as well as from other of
3 ChromaDex’s breaches. Elysium had given notice of such breaches, including the
4 violation of the MFN provision and the exclusivity provisions of the NIAGEN Supply
5 Agreement.

6 ChromaDex mischaracterizes the holdings of the cases it cites in opposition to
7 this instruction. *Nationwide Transp. Finance* does not stand for the proposition that
8 UCC-based instructions are improper; rather, the UCC-based instruction in that case
9 was irrelevant because the court rejected the plaintiff’s theory that the UCC applied
10 under the facts of the case. The implication is that had the UCC applied, an instruction
11 based on it would have been proper like any other applicable statutory provision.
12 ChromaDex also misrepresents the court’s unpublished order in *Learning Technology*,
13 which stated that “as to offset, the parties agree that this defense results in a purely
14 arithmetic task that can be conducted by the court post-verdict.” Thus, it was through
15 a stipulation of the *parties*, not a “holding” of the court, that the jury instruction was
16 deemed unnecessary.

17
18
19
20
21
22
23
24
25
26
27
28

1 **Disputed Case-Specific Jury Instruction No. 81, Offered Only by Elysium**
2 **OFFSET**

3 Mutual demands are held between ChromaDex and Elysium for breach of
4 contract. To the extent you find that both ChromaDex and Elysium have made valid
5 demands, the lesser demand should be applied against the other and only the balance
6 recovered.

7
8 [**Authority:** Cal. Code Civ. Proc. § 431.70; *Plut v. Fireman's Fund Ins. Co.*, 85 Cal.
9 App. 4th 98, 106-7 (2001)]

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed instruction
2 because it is unnecessary and will only serve to confuse the jury. In the event a jury
3 awards damages to both ChromaDex and Elysium, the Court is more than capable of
4 deducting all or part of the damages that ChromaDex owes to Elysium from the amount
5 that Elysium owes to ChromaDex. There is no need for a jury instruction here. *See*
6 *Order, Learning Technology Partners v. University of the Incarnate Word*, Case No.
7 14-cv-4322-PJH, Dkt. 151 (N.D. Cal. Feb. 11, 2016) (holding that the court could
8 conduct the purely arithmetic task of calculating an offset post-verdict and, thus, there
9 was no need for a jury instruction).

10 And the proposed instruction is also confusing and misleading because, taken
11 together with the other proposed instructions, it inappropriately directs the jury’s
12 attention to what could happen after it renders its verdict, rather than on the fact issues
13 it must decide. *See United States v. Anderson*, 741 F.3d 938, 947 (9th Cir. 2013)
14 (district court properly rejected “confusing instruction” that would be “misleading or
15 inadequate to guide the jury’s deliberation”).

16
17 **Defendants’ position:** Elysium’s proposed instruction informs the jury that it is
18 appropriate to offset the damages of one party against the damages of another to avoid
19 a “superfluous exchange of money between the parties.” *Plut*, 85 Cal. App. 4th at 107.
20 This point of law is salient because of Elysium’s position that the dollar values of the
21 July 30 purchase orders are offset by the credits and/or refunds owing to Elysium from
22 breach of the Most Favored Nation provision and other breaches of the NIAGEN Supply
23 Agreement and Amendment, as well as from the damages Elysium suffered from
24 ChromaDex’s fraudulent inducement of Elysium to enter into the Trademark License
25 and Royalty Agreement.

1 Dated: September 3, 2021

COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
JASMIN F. MOTLAGH (311639)
DYLAN K. SCOTT (332796)
RACHAEL M. HELLER (335636)

2
3
4
5
6 /s/ Michael A. Attanasio

7 Michael A. Attanasio (151529)

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

10
11 *The filer, Michael A. Attanasio, attests that the*
12 *other signatory listed, on whose behalf the*
13 *filing is submitted, concurs in the filing's*
14 *content and has authorized the filing.*

15 Dated: September 3, 2021

COHEN WILLIAMS LLP
MARC S. WILLIAMS (198913)
REUVEN L. COHEN (231915)
BRITTANY LANE (323440)

KAPLAN HECKER & FINK LLP
JOHN C. QUINN (*pro hac vice*)

16
17
18
19
20 /s/ Marc S. Williams

21 Marc S. Williams (198913)

22 *Attorneys for Defendant and Counterclaimant*
23 *Elysium Health, Inc. and*
24 *Defendant Mark Morris*