

1 COOLEY LLP  
 2 MICHAEL ATTANASIO (151529)  
 3 (mattanasio@cooley.com)  
 4 BARRETT J. ANDERSON (318539)  
 5 (banderson@cooley.com)  
 6 JASMIN F. MOTLAGH (311639)  
 7 (jmotlagh@cooley.com)  
 8 DYLAN K. SCOTT (332796)  
 9 (dscott@cooley.com)  
 10 RACHAEL M. HELLER (335636)  
 11 (rheller@cooley.com)  
 12 4401 Eastgate Mall  
 13 San Diego, CA 92121-1909  
 14 Telephone: (858) 550-6000  
 15 Facsimile: (858) 550-6420

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

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

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

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

**CHROMADEx’s OPPOSITION TO  
 DEFENDANTS’ OBJECTION TO  
 QUESTIONS I.C.2 AND I.C.3 OF  
 THE COURT’S VERDICT FORM**

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

Judge: Hon. Cormac J. Carney  
 Courtroom: 9B  
 Date: September 21, 2021  
 Time: 8:30 a.m.

Trial: September 21, 2021

1 Plaintiff and Counter-Defendant ChromaDex, Inc., hereby submits its opposition  
2 to Defendant and Counterclaimant Elysium Health, Inc. and Defendant Mark Morris’s  
3 Objection to Questions I.C.2 and I.C.3 of the Court’s Verdict Form. (Dkt. 535.)<sup>1</sup>

4 **I. THE COURT SHOULD REJECT DEFENDANTS’ VEILED AND**  
5 **UNTIMELY MOTION FOR SUMMARY JUDGMENT**

6 Two years after the parties filed their motions for summary judgment, and just  
7 one week before trial begins, Defendants argued for the first time at the pretrial  
8 conference that ChromaDex should not be permitted to pursue its price-discount theory  
9 of damages on its breach of fiduciary duty and aiding and abetting claims. Defendants’  
10 backdoor attempt to obtain dismissal of an entire damages theory is an argument for  
11 summary judgment that Defendants should have, and could have, raised two years ago  
12 when the parties briefed their respective motions.

13 Defendants had not one, but *two* opportunities to raise this double-recovery  
14 argument in their original and supplemental summary judgment briefing. Indeed, both  
15 of Defendants’ briefs focused almost exclusively on attacking ChromaDex’s damages  
16 theories. (Defs.’ Opening Br., Dkt. 230-1 at 10–19; Defs.’ Supplemental Br., Dkt. 373  
17 at 3–17.) The Court observed as much in its decision rejecting those arguments.  
18 (Dkt. 413 at 24 (“Elysium and Mark Morris also move for summary judgment on some  
19 portion of all of ChromaDex’s claims because they argue ChromaDex’s damages  
20 evidence is fatally insufficient[.]”).) Despite those repeated opportunities, Defendants  
21 never once raised this double-recovery argument before, and offer no excuse for why  
22 they should be allowed to do so now. This disguised summary judgment motion should  
23 be denied for that reason alone.

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<sup>1</sup> ChromaDex maintains its position that the Court should exercise its complete discretion to require a general verdict in order to avoid jury confusion, (Dkt. 536), but opposes Defendants’ objection in the event the Court decides to use the proposed special verdict form, (Dkt. 541).

1 **II. CHROMADEX IS NOT DOUBLE-COUNTING**

2 As recognized by the Court in its order on summary judgment, both Elysium’s  
3 resale profits and price discount are distinct and separate items of damages. They are  
4 therefore independently recoverable. The law on damages is clear: “where separate  
5 items of compensable damages are shown by distinct and independent evidence, the  
6 plaintiff is entitled to recover the entire amount of his damages.” *King v. U.S. Bank*  
7 *Nat’l Ass’n*, 53 Cal. App. 5th 675, 719 (2020) (citing *Tavaglione v. Billings*, 4 Cal. 4th  
8 1150, 1159 (1993)) (emphasis added). In contrast, the possibility of “[d]ouble or  
9 duplicative recovery” is only present when a plaintiff seeks relief “for *the same* items  
10 of damage.” *Id.*; see also *Schnabel v. Lui*, 302 F.3d 1023, 1039 (9th Cir. 2002) (holding  
11 district court did not commit clear error in awarding separate damages on “identical  
12 evidence” of wrongful conduct where breach of contract damages were based on  
13 unaccounted profits and fraudulent inducement damages were based on lost opportunity  
14 to resell to other vendors). And only when there is “substantial basis in the record for  
15 concluding such damages [a]re duplicative” is it proper for a court to take away from  
16 the jury the discretion to award separate damages. *King*, 53 Cal. App. 5th at 720.

17 Defendants’ newfound theory that Elysium’s undeserved price discount on the  
18 June 30, 2016 ingredient orders is “necessarily included in the profit calculation,”  
19 (Dkt. 535 at 1), is inconsistent with this authority and speculative to boot. Elysium  
20 received the price discount and profited to the tune of \$8.3 million, as analyzed from  
21 real-world facts by ChromaDex’s expert, Lance Gunderson. But what would have  
22 happened if Elysium had paid the full price? Neither Mr. Gunderson nor Defendants’  
23 expert, Dr. Iain Cockburn, analyzed that counterfactual scenario. And Defendants offer  
24 no other evidence suggesting that Elysium’s profits would have been the same in that  
25 hypothetical world. For example, Elysium could have raised the retail price on its  
26 consumer product, Basis, thus earning higher revenues and the same (or even higher)  
27 profits than the actual \$8.3 million. That is certainly plausible, as established by the  
28 testimony of Elysium’s Rule 30(b)(6) witness, who testified that the company adjusted

1 its marketing based on its inventory of key ingredients like NR, and agreed that the  
2 company’s revenue from “the sale of Basis [is] dependent on its advertising.” (Ex. 1 at  
3 126:22–24; *see generally id.* at 125:21–129:19.)<sup>2</sup> In contrast to that evidence,  
4 Defendants offer only an unsupported statement that “the company’s profits would have  
5 been less” had Elysium paid more for the ingredients. (Dkt. 535 at 2.) That conclusory  
6 pronouncement is pure speculation, and it overlooks an entirely conceivable outcome  
7 in which Elysium paid the full price for the ingredients but made the same profits. In  
8 that situation, the undeserved price discount that Elysium received is still in play no  
9 matter the profits that Elysium ultimately made.

10 All of this is to say that Defendants’ argument is, at base, a factual dispute for the  
11 jury. Defendants may argue that, in the alternate reality in which Elysium paid an  
12 additional \$600,000 for the ingredients, it would still have made exactly the \$8.3 million  
13 in resale profits. ChromaDex will argue to the contrary. The outcome is for the jury to  
14 decide. *See Lavan v. City of Los Angeles*, 2014 WL 12693524, at \*9 (C.D. Cal. July  
15 24, 2014) (denying summary judgment because “[t]his fact-bound question remains for  
16 the jury, and the jury alone”); *Broadcom Corp. v. Emulex Corp.*, 2011 WL 13133846,  
17 at \*1 (C.D. Cal. Aug. 2, 2011) (denying summary judgment because “[t]he Court must  
18 not weigh disputed evidence with respect to a disputed material fact” because “[t]hose  
19 determinations are left for the jury”); *Huff v. Los Angeles Cty. Sheriffs Dep’t*, 2017 WL  
20 10510922, at \*8 (C.D. Cal. Dec. 8, 2017) (denying summary judgment because “[a]  
21 jury must . . . resolve the conflicts between the evidence.”).

22 Moreover, when the jury will be “instructed not to award duplicative damages,”  
23 then courts “presume the jury [will] follow[] that instruction.” *King*, 53 Cal. App. 5th  
24 at 720. Here, the Court’s proposed Instruction No. 57 informs the jury to only award  
25 damages one time each for “Elysium’s price discount for the purchase of NR” and  
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28 <sup>2</sup> “Ex.” refers to the exhibit attached to the Declaration of Barrett J. Anderson.

1 “Elysium’s profits from the resale of ChromaDex’s ingredients.” (Dkt. 540 at 61.) That  
2 is sufficient to address Defendants’ concerns here.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court should reject Defendants’ proposed  
5 revisions to the Court’s draft verdict form.

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Dated: September 15, 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)

/s/ Michael A. Attanasio

Michael A. Attanasio (151529)

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