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10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

13 ChromaDex, Inc.,
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 Plaintiff,
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 v.
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 Elysium Health, Inc. and Mark Morris,
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 Defendants.
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 20
 And Related Counter-Claims
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Case No. 8:16-cv-02277-CJC-DFM

[Assigned to the Hon. Cormac J. Carney]

**ELYSIUM HEALTH, INC.’S AND
 MARK MORRIS’S OBJECTION TO
 QUESTIONS I.C.2 AND I.C.3 OF
 [SECOND DRAFT] VERDICT
 FORM (DKT. 530)**

Trial: Sept. 21, 2021

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1 Defendant and Counterclaimant Elysium Health, Inc. and Defendant Mark
2 Morris (collectively, “Defendants”) hereby submit their position with respect to
3 Questions I.C.2 and I.C.3 of the [Second Draft] Verdict Form filed on September
4 13, 2021. (Dkt. 530 at 3.)

5 **DEFENDANTS’ POSITION**

6 At the Pretrial Conference on September 13, 2021, Defendants informed the
7 Court that Questions I.C.2 and I.C.3 presently permit the jury to award Plaintiff
8 ChromaDex, Inc. (“Plaintiff”) double-recovery for its aiding and abetting breach of
9 fiduciary duty claim. Question I.C.2 asks the jury to determine whether Elysium
10 should “be required to disgorge profits from its sales of Basis containing NR
11 purchased on June 30, 2016.” Question I.C.3 then asks the jury to determine
12 whether Elysium should also “be required to disgorge a price discount” from the
13 June 30, 2016 purchase of NR. However, any “discount” that Elysium received on
14 its purchase of NR (Question I.C.3) necessarily is included in the profit calculation
15 on the sale of Basis containing that NR (Question I.C.2). Such a result would be
16 improper and run afoul of the purpose of unjust enrichment. *See* Restatement
17 (Third) of Restitution and Unjust Enrichment § 51 (2011) (“The object of restitution
18 in [unjust enrichment] cases is to eliminate profit from wrongdoing while avoiding,
19 so far as possible, the imposition of a penalty.”). Therefore, if the jury finds for
20 Plaintiff on the aiding and abetting claim, the jury should first determine whether
21 Elysium should be required to disgorge profits. If, and only if, the answer is no, the
22 jury should then determine whether Elysium should be required to disgorge the price
23 discount.

24 In order to calculate the profit on a sale of goods, one must deduct the cost of
25 goods sold (“COGS”) from the gross sales receipts. Plaintiff’s expert—Lance
26 Gunderson—calculated Elysium’s profits by subtracting COGS from total revenue,
27 and then further subtracting selling and fulfillment costs. (*See* Lane Decl. Exh. 1 at
28 89-91, Schedules 5B and 5C.) It is indisputable that Elysium’s profits from the sale

1 of Basis necessarily take into account the price that Elysium paid for the NR (as part
2 of COGS). If Elysium had paid more for the NR (*i.e.*, if it had not obtained a
3 discount), the company’s profits would have been less. Thus, to allow Plaintiff to
4 recover damages simultaneously for *both* disgorgement of the amount of discount
5 on the price of NR *and* disgorgement of Elysium’s profits on the sale of Basis,
6 would not only result in disgorgement of Elysium’s profit, but would also result in
7 an additional penalty.

8 For example, assume Elysium normally purchases NR for \$1000, and further
9 assume Elysium obtained an unlawful discount of \$200 on its purchase of NR on
10 June 30, 2016. If Elysium then sold units of Basis containing the NR purchased on
11 June 30 for \$10,000, Elysium’s profits on those sales would be \$9,200 (assuming no
12 costs than NR). Under Question I.C.2, the jury might award full disgorgement of
13 the \$9,200 profit. Such an award already includes disgorgement of the unlawful
14 \$200 discount on the cost of NR. Otherwise, if COGS had been the normal \$1,000,
15 Elysium’s profits would have been \$9,000, not \$9,200. Thus, permitting the jury to
16 award disgorgement of the \$200 discount on top of the \$9,200 profit, would amount
17 to an additional, non-restitutionary, penalty.

18 At the Pretrial Conference, Plaintiff argued that disgorgement of both the
19 resale profits and the price discount from the June 30, 2016 order would not be a
20 double recovery because there is no certainty as to what Elysium’s profits would
21 have been had they paid the speculative price of non-discounted \$1,000 price for
22 NR. This argument is nonsensical. Whether disgorgement of both profits and the
23 alleged discount constitutes double recovery has nothing to do with what Elysium’s
24 profits would have been if they had paid the non-discounted price for NR. Either
25 way, the price of the ingredients would be reflected in the profits. And either way,
26 permitting the jury to award disgorgement of *both* Elysium’s resale profits *and* the
27 price discount “does not simply restore the status quo; it leaves the defendant worse
28 off.” *See Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1644–45 (2017) (acknowledging that

1 disgorgement in SEC enforcement proceedings differs from unjust enrichment under
2 Third Restatement and operates as penalty under 28 U.S.C. § 2462).

3 Accordingly, Defendants propose that the Court replace the current
4 instruction to the jury following Question I.C.2 (*i.e.*, “Answer Question I.C.3.”),
5 with the following instruction: “If you answered ‘yes,’ skip to Section I.D. If you
6 answered ‘no,’ answer Question I.C.3.”

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8 Dated: September 14, 2021

Respectfully submitted,

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