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AND QUEST DIAGNOSTICS NICHOLS  
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17 UNITED STATES DISTRICT COURT  
18 CENTRAL DISTRICT OF CALIFORNIA  
19 WESTERN DIVISION

20 CEDARS-SINAI MEDICAL CENTER,  
21 a California nonprofit public benefit  
corporation,

22 Plaintiff,

23 v.

24 QUEST DIAGNOSTICS  
INCORPORATED, a Delaware  
25 corporation, and QUEST DIAGNOSTICS  
NICHOLS INSTITUTE, a California  
26 corporation,

27 Defendants.  
28

Case No. 2:17-cv-5169-GW-FFM

**DEFENDANTS’  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
JUDGMENT AS A MATTER OF  
LAW ON CEDARS-SINAI’S  
FIRST, SECOND, AND THIRD  
CLAIMS FOR TRADE SECRET  
MISAPPROPRIATION AND  
BREACH OF CONTRACT**

Date: September 11, 2019  
Time: 8:30 a.m.  
Judge: Honorable George H. Wu  
Crt Rm: 9D

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1 **I. INTRODUCTION**

2 Plaintiff Cedars-Sinai Medical Center has failed as a matter of law to present  
3 evidence at trial that would allow a reasonable jury to find for it on any of its claims  
4 or damages theories. On the contrary, the evidence establishes that the four alleged  
5 trade secrets do not meet the definition of a trade secret, that Cedars-Sinai did not  
6 own them, and that Defendants Quest Diagnostics Incorporated and Quest  
7 Diagnostics Nichols Institute (“Quest”) neither misappropriated the alleged trade  
8 secrets nor breached the parties’ confidentiality agreement. Cedars-Sinai also has  
9 not offered sufficient evidence, under any proper legal theory, to establish damages.

10 At the most basic levels, Cedars-Sinai’s trade secret and breach of contract  
11 claims fail as a matter of law. Cedars-Sinai failed to prove that it owned the alleged  
12 secrets in the so-called draft New England Journal of Medicine (“NEJM”)  
13 manuscript (“Manuscript”), that those items were actually secret, that Quest  
14 misappropriated the information, or that any misappropriation caused any damages.  
15 The Manuscript was co-authored by individuals from organizations other than  
16 Cedars-Sinai, and Cedars-Sinai has not proven that the co-authors assigned their  
17 ownership rights to it. Rather than guarding the three relevant Manuscript items as  
18 secrets, Dr. Pimentel and Cedars-Sinai shared them and the Market Assessment far  
19 and wide—through patent applications, presentations, abstracts, and business  
20 negotiations. They did so knowing that their actions would compromise the  
21 information’s confidentiality, but they did it anyway. The unrebutted testimony and  
22 evidence establishes that Quest did not rely on the Market Assessment, and it did  
23 nothing to gain any competitive advantage while any of the alleged trade secrets  
24 were even arguably confidential. Indeed, by the time that Quest took concrete  
25 actions to develop its own test between June 2015 and its launch in 2017, the  
26 Manuscript items had been published for all to see in the May 2015 PLoS ONE  
27 article. Thus, no reasonable jury could conclude that Quest misappropriated any  
28 trade secrets or breached its confidentiality agreement with Cedars-Sinai.

1 Nor is there a legal basis for any damages. Cedars-Sinai has not presented  
2 any concrete evidence to prove either unjust enrichment or actual loss—the only two  
3 damages theories available here. Cedars-Sinai has not remotely supported is  
4 nebulous theory that it is somehow entitled to damages based on a supposed counter-  
5 offer it considered making to Quest during negotiations. There is no evidence that  
6 Cedars-Sinai actually made the counter-offer, and the parties’ confidentiality  
7 agreement expressly stated that neither side was obligated to consummate a deal.  
8 Likewise, while Dr. Christians suggested that Quest might have saved on research  
9 and development costs during the relevant time period between September 2014 and  
10 May 2015, that vague suggestion is not supported by any actual evidence or data. In  
11 fact, the evidence conclusively demonstrates that Quest did nothing of note to  
12 develop or market an IBS test during the relevant period. Thus, Cedars-Sinai’s  
13 entire theory that Quest gained a “head start” within the critical window is untrue.

14 Because Cedars-Sinai has failed to set forth evidence that would allow a  
15 reasonable jury to find for it with respect to any of its claims or its damages theories,  
16 the Court should grant judgment as a matter of law in Quest’s favor under Rule  
17 50(a) of the Federal Rules of Civil Procedure.

## 18 **II. LEGAL STANDARD**

19 Judgment as a matter of law is appropriate where “a party has been fully heard  
20 on an issue during a jury trial and the court finds that a reasonable jury would not  
21 have a legally sufficient evidentiary basis to find for the party on that issue . . . .”  
22 Fed. R. Civ. P. 50(a). The standard for judgment as a matter of law “mirrors” the  
23 summary judgment standard. *Reed v. Lieurance*, 863 F.3d 1196, 1204 (9th Cir.  
24 2017). Judgment as a matter of law is appropriate where the plaintiff’s evidence is  
25 legally insufficient to support its claims. *Id.*

26 Accordingly, Defendants are entitled to judgment as a matter of law if this  
27 Court concludes that Cedars-Sinai’s evidence does not establish the elements of their  
28 trade secret or breach of contract claims. “Trade secret claims under DTSA and



1 CUTSA share a basic set of requirements: [1] plaintiff’s ownership of the trade  
2 secret; [2] defendant’s misappropriation of the trade secret; and [3] damage to the  
3 plaintiff caused by the misappropriation.” *Johnson Controls, Inc. v. Therma, LLC*,  
4 No. SACV1800636AGKESX, 2018 WL 6133674, at \*4 (C.D. Cal. Aug. 17, 2018);  
5 *see also* Cal. Civ. Code. § 3426, *et seq.*; 18 U.S.C. § 1836, *et seq.* Failure on any  
6 one element is fatal to the claim. To succeed on its breach of contract claim, Cedars-  
7 Sinai must prove: (1) the existence of a contract; (2) Cedars-Sinai’s performance or  
8 excuse for nonperformance; (3) Quest’s breach; and (4) damage to Cedars-Sinai.  
9 *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Here, too, failure on  
10 any element is fatal to the claim. Because Cedars-Sinai’s evidence fails to satisfy  
11 the elements of their claims or to prove damages with respect to any of its claims,  
12 Defendants are entitled to judgment as a matter of law on Cedars-Sinai’s trade secret  
13 claims and breach of contract claim.

14 **III. THE COURT SHOULD GRANT JUDGMENT AS A MATTER OF**  
15 **LAW ON THE TRADE SECRET CLAIMS**

16 Quest is entitled to judgment as a matter of law as to Cedars-Sinai’s trade  
17 secret claims because the evidence set forth by Cedars-Sinai is legally insufficient to  
18 prove that: (1) it owned the alleged trade secrets in the Manuscript; (2) the three  
19 items in the Manuscript were in fact trade secrets; (3) Quest used the alleged  
20 Manuscript trade secrets prior to their publication in the PLoS ONE article; or  
21 (4) Quest used the Market Assessment.

22 **A. Cedars-Sinai Did Not Own the Alleged Manuscript Trade Secrets**

23 A threshold failure in Cedars-Sinai’s trade secrets case is that it has failed to  
24 introduce sufficient evidence to prove that it had ownership rights in the alleged  
25 Manuscript trade secrets. The first essential element of any trade secret claim is that  
26 the plaintiff “owned” or “was a licensee of” the trade secret. CACI 4401 (2019 ed.).  
27 Thus, “a prima facie claim for misappropriation of trade secrets ‘requires the  
28 plaintiff to demonstrate [that] the plaintiff owned a trade secret . . . .’” *CytoDyn of*

1 *New Mexico, Inc. v. Amerimmune Pharm., Inc.*, 160 Cal. App. 4th 288, 297 (2008)  
2 (citation omitted); *see also* 18 U.S.C.A. § 1836 (“An *owner* of a trade secret that is  
3 misappropriated may bring a civil action under this subsection if the trade secret is  
4 related to a product or service used in, or intended for use in, interstate or foreign  
5 commerce.”) (emphasis added). Mere possession is not enough: “A plaintiff cannot  
6 recover for an alleged misappropriation of something—here a trade secret—that the  
7 plaintiff never owned.” *Intellisoft, Ltd. v. Acer Am. Corp.*, 2018 WL 6421872, at \*7  
8 (N.D. Cal. Dec. 6, 2018) (citing CACI 4401); *see also CytoDyn*, 160 Cal. App. 4th  
9 at 297; *Premier Displays & Exhibits v. Cogswell*, 2010 WL 11519494, at \*7 (C.D.  
10 Cal. Mar. 3, 2010) (citing Cal. Civ. Code § 3426.1(b)). Plaintiff’s evidence does not  
11 establish ownership. If anything, it proves that Cedars-Sinai did *not* own the alleged  
12 trade secrets—and never acted like it did—until it filed this lawsuit.

13         The Manuscript does not indicate on its face that it is owned by Cedars-Sinai,  
14 *see* PTX-264, and there is no other evidence establishing that Cedars-Sinai created,  
15 licensed, or owned it. On the contrary, the Manuscript was authored by individuals  
16 from Cedars-Sinai and two *other institutions*—Beth Israel Deaconess Medical  
17 Center (Anthony Lembo) and Salix Pharmaceuticals (Enoch Bortley and William  
18 Forbes). *Id.* Copyright law provides that the individual authors collectively are the  
19 owners of the Manuscript, *see* 17 U.S.C.A. § 101, and there is no evidence that any  
20 of them assigned or licensed their rights over the manuscript to Cedars-Sinai. Nor is  
21 there any evidence that Dr. Lembo, Dr. Bortley, Dr. Forbes, Beth Israel Deaconess  
22 Medical Center, or Salix Pharmaceuticals agreed that Cedars-Sinai could hold the  
23 Manuscript as its own trade secret. And Cedars-Sinai cannot avoid this lack of proof  
24 by claiming “ownership” over the publicly-known facts that CreativeBioMart  
25 produces CdtB and that one method for conducting a blocking step in an ELISA is to  
26 store the assay at room temperature for an hour (which, of course, is not the method  
27 that Quest used for its test). Cedars-Sinai’s theory at trial has been that it owned the  
28 Manuscript and thus the information contained within it. But its evidence has failed

1 to support that essential element of its claim. Because Cedars-Sinai lacks legally  
2 sufficient evidence to support the first element of its trade secret claims based on the  
3 Manuscript,<sup>1</sup> the Court should grant judgment as a matter of law.

4 **B. The Three Manuscript Items Were Not Trade Secrets**

5 Even if it did own the Manuscript, Cedars-Sinai was next required to establish  
6 that the three relevant items in the Manuscript—the commercial source of CdtB, the  
7 specific blocking step used, and the clinical study data—were in fact trade secrets.  
8 To do so, Cedars-Sinai was required to show with respect to each item that: (1) it  
9 was secret; (2) it had actual or potential independent economic value because it was  
10 secret; and (3) Cedars-Sinai made reasonable efforts to keep the item secret. *See*  
11 CACI 4402 (2019 ed.).<sup>2</sup> Cedars-Sinai’s evidence fails on all three elements.

12 **1. The three Manuscript items were not secret**

13 To qualify as a trade secret, the alleged trade secret must actually be secret.  
14 *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1167 (9th Cir. 1998); *Am. Paper*  
15 *& Packaging Prod., Inc. v. Kirgan*, 183 Cal. App. 3d 1318, 1326 (Ct. App. 1986).  
16 Information that is “publicly available or widely known in a given industry” is not a  
17 trade secret. *Prostar Wireless Grp., LLC v. Domino’s Pizza, Inc.*, 360 F. Supp. 3d  
18 994, 1013 (N.D. Cal. 2018); *see also Walker v. Univ. Books, Inc.*, 602 F.2d 859, 865  
19 (9th Cir. 1979). None of the Manuscript items was secret at the relevant time.

20 It is undisputed that the alleged secrets in the Manuscript were not secret after  
21 they were published in PLoS ONE. Thus, there is no dispute that any purported  
22 trade secrets that Cedars-Sinai had in the Manuscript were extinguished the minute  
23

---

24 <sup>1</sup>Nor did Cedars-Sinai put on any evidence whatsoever that it owned the Market  
25 Assessment that was prepared by Burr Pilger Mayer.

26 <sup>2</sup>The definitions of trade secrets and misappropriation are virtually the same in both  
27 the federal DTSA, 18 U.S.C. § 1839, and CUTSA, Cal. Civ. Code § 3426.1. *See*  
28 *Waymo LLC v. Uber Techs., Inc.*, No. C 17-00939, 2017 WL 2123560, at \*7 (N.D.  
Cal. May 15, 2017); *Shapiro v. Hasbro, Inc.*, No. CV1605750, 2016 WL 9024810,  
at \*7 (C.D. Cal. Aug. 15, 2016).

1 that they were published in the PLoS ONE article on May 13, 2015. *See* 1 Milgrim  
2 § 1.01 (“[I]t is axiomatic that once a secret loses its secrecy, thereafter, *i.e.*, with  
3 respect to use, disclosure and acquisition that occurs after secrecy is lost, the owner  
4 no longer has a protectable interest in the subject information.”). Dr. Pimentel  
5 himself admitted that “[p]eople are free to use the information once it’s published.”  
6 9/4/19 Tr. Vol. II 40:5-6. As a result, Cedars-Sinai has no legal basis for claiming  
7 that any actions taken to develop an IBS test after May 13, 2015 implicated Cedars-  
8 Sinai’s trade secrets. And the evidence at trial has conclusively established that  
9 Quest did not begin developing its IBS test until *after* the publication of the PLoS  
10 ONE article. *See* DX-939; 9/5/19 Tr. Vol. II 79:3-11; 9/4/19 Tr. Vol. II 132:21-23,  
11 133:17-21.

12 If anything, the evidence shows that the alleged trade secrets were *never* trade  
13 secrets. Not a single Cedars-Sinai document identifies any of the three alleged trade  
14 secrets as a trade secret. Dr. Pimentel admitted that his patent applications were  
15 published before Quest ever received the Manuscript and that those applications  
16 revealed his “recipe for measuring anti-vinculin and anti-CdtB antibodies by  
17 ELISA.” 9/4/19 Tr. Vol. II 42:19-22; DX 672; *see also* 9/4/19 Tr. Vol. II 37:17-20;  
18 DX 577. Dr. Pimentel also admitted that, before he drafted the Manuscript, he had  
19 “published meeting abstracts concerning the IBS test.” 9/4/19 Tr. 38:11-13. And he  
20 further admitted that Cedars-Sinai was actively shopping the test—*i.e.*, the “secret  
21 recipe”—for a commercial partnership with “at least six different companies” during  
22 the time that it was negotiating with Quest. 9/4/19 Tr. 45:19-21.

23 **2. The three Manuscript items had no independent economic**  
24 **value based on secrecy**

25 To establish its trade secret claims, Cedars-Sinai must show that each of the  
26 three alleged trade secrets found in the Manuscript would “have independent  
27 economic value to competitors” *because of* their secrecy. *See Religious Tech. Ctr. v.*  
28 *Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp. 1231, 1250–51 (N.D. Cal.

1 1995). This element requires the plaintiff to show that “the trade secret would be  
2 useful to a competitor” and that independent duplication would “require cost, time,  
3 and effort.” Milgrim on Trade Secrets § 1.07A. But Cedars-Sinai provided no  
4 evidence that would indicate that the three specific items had independent economic  
5 value by virtue of being secret prior to their disclosure in the PLoS ONE article in  
6 May 2015. Again, if anything, the evidence proves the opposite.

7 Cedars-Sinai presented no evidence to suggest that knowing the three specific  
8 items in the manuscript would have allowed a competitor to create a better IBS test  
9 than could have been created without one or more of them. The fact that Creative  
10 BioMart happened to create the CdtB was not in fact secret. Because it was readily  
11 discernable through public sources, any value that it had did not derive from  
12 secrecy.<sup>3</sup> See Cal. Civ. Code § 3426.1(d)(1); see also *Liberty Mut. Ins. Co. v. Arthur*  
13 *J. Gallagher & Co.*, 1994 WL 715613, at \*4 (N.D. Cal. Dec. 19, 1994) (recognizing  
14 that “California courts have held that information which is readily obtainable  
15 through public sources such as directories . . . do not derive the independent  
16 economic value necessary to the existence of a trade secret.”) (citing *Knudsen Corp.*  
17 *v. EverFresh Foods, Inc.*, 336 F. Supp. 241, 244 (C.D.Cal.1971); *Aetna Bldg.*  
18 *Maintenance Co. v. West*, 39 Cal. 2d 198 (1952)). Even if it were secret, its secrecy  
19 had no independent value because others in the industry could readily have made the  
20 same CdtB. See 9/5/19 Tr. Vol. II 87:23-88:3 (“Q: Do you have any understanding  
21 whether or not Creative Biomart’s CdtB has any special properties as compared to  
22 any other CdtB? A: No. It’s bacterial protein that, you know, can be made from any  
23 of a number of vendors. There is nothing unique about that.”). Indeed, the fact that  
24 Dr. Pimentel did not indicate in his patent applications that the CdtB needed to be  
25

26 \_\_\_\_\_  
27 <sup>3</sup> While Cedars-Sinai now appears to suggest that the particular type of CdtB is a  
28 trade secret (and not just the source)—which is a new claim—that fact was not  
established either. Neither CdtB nor optimized CdtB was a secret, let alone one that  
Cedars-Sinai owned. See 9/5/19 Tr. Vol. II 76:24-77:4.

1 sourced from Creative Biomart proves that fact was not essential to his test. *See*  
2 9/4/19 Tr. Vol. II 43:24-44:7; 35 U.S.C. § 112(a) (requiring that a patent application  
3 describe the invention in “such full, clear, concise, and exact terms as to enable any  
4 person skilled in the art to which it pertains, or with which it is most nearly  
5 connected, to make and use the same”). And, at trial, Dr. Pimentel disclaimed the  
6 suggestion that “CdtB from Creative BioMart” is “a secret ingredient” in his test.  
7 9/4/19 Tr. Vol. II 56:3-5; *see also id.* at 57:12-16 (admitting the lack of any  
8 comparison between CdtB producers).

9 As to the blocking step, Cedars-Sinai does not even attempt to show that this  
10 specific step in the process was (a) secret, (b) in any way novel, or (c) necessary to  
11 the test. Rather, the evidence at trial has shown that it is a routine step used in  
12 ELISA assays, and that Dr. Pimentel did “not know if [he] w[as] the first to block in  
13 an ELISA assay with BSA and PBS for one hour at room temperature.” 9/4/19 Tr.  
14 Vol. II 86:14-87:9. Indeed, the fact that Quest did not even use the specific blocking  
15 step that Dr. Pimentel proposed in the Manuscript to develop or validate its test  
16 proves that it was not a critical element of any “secret recipe” for developing an IBS  
17 test. *See* 9/4/19 Tr. Vol. II 140:1-12; 9/5/19 Tr. Vol. II 89:24-92:25; DX-939.

18 Nor did Cedars-Sinai offer any evidence on how the supposedly secret clinical  
19 data and results derived any economic value from being secret, let alone why they  
20 were essential to the creation of an IBS test or why Quest could not have developed  
21 the test without that information. In fact, Cedars-Sinai’s counsel admitted to the  
22 Court that there is no evidence that Commonwealth ever received or utilized the  
23 information to develop its test. 9/6/19 Tr. Vol. II 123:3-20.

24 Given that the three relevant items—the commercial source of CdtB, the  
25 specific blocking step, and the clinical data—were in fact not required for the  
26 development of an IBS test, it was incumbent on Cedars-Sinai to come forward with  
27 evidence to show that each alleged trade secret had independent economic value by  
28 virtue of being secret before May 2015. Because Cedar-Sinai did not do so,

1 judgment as a matter of law is appropriate on the trade secret claims.

2 **3. Cedars-Sinai did not take reasonable steps to protect the**  
3 **three Manuscript items**

4 In addition, the evidence demonstrates that Cedars-Sinai did not take  
5 reasonable measures to maintain the alleged secrecy of the three Manuscript items.  
6 If anything, Cedars-Sinai went out of its way to *disseminate* the information.

7 “[R]easonable measures for maintaining secrecy have been held to include advising  
8 employees of the existence of a trade secret, limiting access to a trade secret on [a]  
9 ‘need to know basis,’ and controlling plant access. . . . Security measures, such as  
10 locked rooms, security guards, and document destruction methods, in addition to  
11 confidentiality procedures, such as confidentiality agreements and document  
12 labeling, are often considered reasonable measures.” *United States v. Chung*, 659  
13 F.3d 815, 825–26 (9th Cir. 2011) (citations and internal quotation marks omitted).

14 “On the other hand, public disclosure of information through display, trade journal  
15 publications, advertising, or other carelessness can preclude protection.” Cal.  
16 Civ.Code § 3426.1 (Committee Comments); *Ameranth, Inc. v. Genesis Gaming*  
17 *Sols., Inc.*, No. SACV110189, 2015 WL 10791913, at \*3 (C.D. Cal. Jan. 2, 2015).  
18 Judged by these standards, the three Manuscript items cannot be afforded trade  
19 secret status.

20 Contrary to any efforts to maintain the secrecy of Cedars-Sinai’s alleged trade  
21 secrets, Dr. Pimentel was “actively trying to publish the contents” without any  
22 restrictions from Cedars-Sinai. 9/4/19 Tr. Vol. II 70:22-71:2. At trial, Dr. Pimentel  
23 admitted that, when Cedars-Sinai sent Quest the Manuscript, his “goal at that time  
24 was to tell the world about [his] test, including the recipe.” 9/4/19 Tr. Vol. II 60:4-6;  
25 *see also id.* at 55:8-12. And, even before sharing the Manuscript, Dr. Pimentel had  
26 revealed the supposed “secrets” in multiple patent applications. DX 564; DX 577;  
27 DX 672. Dr. Pimentel’s active efforts to publish the alleged manuscript trade secrets  
28 are the antithesis of reasonable protection measures, and should be dispositive of

1 Cedars-Sinai’s claims.

2           Moreover, the evidence at trial has shown that Cedars-Sinai failed to take  
3 even the most basic steps to maintain the confidentiality of the purported trade  
4 secrets. Although Cedars-Sinai and Quest had a general confidentiality agreement  
5 that covered non-public information, there is no evidence that Cedars-Sinai ever  
6 asked Quest to return or destroy the relevant information after negotiations broke  
7 down. In addition, the Manuscript and the three alleged “secrets” were shared with  
8 many others who did not sign a similar confidentiality agreement. *See VSL Corp. v.*  
9 *Gen. Techs., Inc.*, No. C 96-20446 RMW(PVT), 1997 WL 654103, at \*3 (N.D. Cal.  
10 July 21, 1997) (granting summary judgment on trade secret claims where plaintiff  
11 “never required that anyone sign a confidentiality agreement before being given  
12 samples and other data”); *BDT Prod., Inc. v. Lexmark Int’l, Inc.*, 124 F. App’x 329,  
13 333 (6th Cir. 2005) (affirming grant of summary judgment on trade secret claims  
14 where plaintiff did not require a confidentiality agreement before disclosing trade  
15 secret information and therefore “did not take reasonable steps to maintain the  
16 secrecy of its alleged trade secrets”). The Manuscript was freely shared between Dr.  
17 Pimentel, his co-authors (several of whom are not associated with Cedars-Sinai), and  
18 various medical journals. And, when Cedars-Sinai shared the Manuscript with  
19 Quest, it expressly told Quest that the objective was to get the Manuscript published  
20 in a medical journal. *See* 9/6/19 Tr. Vol. II 127:17-128:13. There is no evidence of  
21 any confidentiality obligations imposed on the co-authors, the institutions with  
22 whom they are associated, or the journals. There is no evidence that Cedars-Sinai  
23 even oversaw the distribution of the Manuscript, let alone that Cedars-Sinai ever told  
24 anyone—the various authors, the various journals, the various reviewers, the various  
25 institutions—what to do or not to do with the Manuscript. Nor is there any evidence  
26 that the co-authors, who had ownership rights, could not exercise (or did not  
27 exercise) those rights to copy and distribute the Manuscript to others without any  
28 confidentiality obligations in place.



1 Cedars-Sinai’s suggestion that industry practice requires journals and authors  
2 to maintain confidentiality misses the point. The question is whether *Cedars-Sinai*  
3 took reasonable, pro-active steps to ensure the Manuscript was kept *secret*. Relying  
4 on general expectations of confidentiality does not meet that threshold, especially  
5 where the evidence indicates that Cedars-Sinai did nothing special to maintain strict  
6 confidentiality over the Manuscript. *See BDT Prod.*, 124 F. App’x 329, 331-333.  
7 Treating it like any other normal manuscript by merely assuming that various  
8 authors, institutions, unidentified reviewers, and unknown employees would all  
9 maintain its secrecy is insufficient for Cedars-Sinai to demonstrate that *it* employed  
10 reasonable measures to maintain secrecy.

11 The DTSA and CUTSA both require that the trade secret holder must take  
12 active, measured steps to maintain the secrecy of its proprietary information. But  
13 Cedars Sinai has put on no evidence of any policies regarding the treatment of trade  
14 secrets (other than their own practice to mark some documents as “confidential”).  
15 By failing to establish that they implemented reasonable procedures to protect the  
16 relevant information or treat it differently from other business information, Cedars-  
17 Sinai is barred from now claiming the items as “trade secrets.” As the leading  
18 treatise explains, Cedars-Sinai “may not take liberties with [its] own secret, may not  
19 lightly or voluntarily hazard its leakage or escape, and at the same time hold others  
20 to be complete obligated to observe it.” 1 Milgrim § 1.04.

21 In sum, despite now labeling them as “trade secrets,” Cedars-Sinai never  
22 identified nor treated the Manuscript items as trade secrets when they were disclosed  
23 to Quest in 2014. Thus, as a matter of law, those three items cannot be trade secrets  
24 under the CUTSA and DTSA.

25 **C. Quest Did Not Misappropriate the Alleged Manuscript Trade**  
26 **Secrets**

27 Cedars-Sinai’s trade secret claims also fail because Quest did not  
28 misappropriate the Manuscript items for its benefit. *See* CUTSA § 3426.1; 18

1 U.S.C. § 1839(5). Because the alleged trade secrets in the Manuscript were  
2 published in PLoS ONE and lost any possible trade secrets status on May 13, 2015,  
3 the question is whether Quest misappropriated the three items identified in the  
4 Manuscript between September 11, 2014 (when Cedars-Sinai provided the  
5 Manuscript to Quest) and May 13, 2015 (when the Manuscript was published).  
6 There is no evidence that Quest did so. In fact, all evidence is to the contrary.

7 Cedars-Sinai failed to connect Quest's conduct during the September 2014 to  
8 May 2015 time period with any evidence of misappropriation. The simple fact that  
9 Quest had the Manuscript in its possession during this time period is not enough to  
10 satisfy this factor. That Quest theoretically could have used the three alleged trade  
11 secrets before publication of the PLoS ONE article does not mean that Quest *used*  
12 the trade secrets. In reality, the evidence has shown that Quest did not even obtain  
13 internal approval for the IBS project until June 2015—a month after the Manuscript  
14 was published. *See, e.g.*, 9/9/19 Tr. Vol. I 51:21-52:4; 9/5/19 Tr. Vol. II 79:3-11. It  
15 did not begin lab work until March 2016. *See, e.g.*, 9/4/19 Tr. Vol. II 132:21-23,  
16 133:17-21; DX-939—*ten months* after the alleged trade secrets were published. This  
17 timeline is confirmed by Quest's documents as well as the testimony of all of  
18 Quest's witnesses—including Ms. Ray, Mr. Fleckenstein, Mr. Plewman, Dr. Naides,  
19 and Ms. Abolhosn. Indeed, Rania Abolhosn, who developed Quest's test, testified  
20 that Quest performed the first anti-vinculin and anti-CdtB ELISA on March 31,  
21 2016. 9/4/19 Tr. Vol. II 134:3-15. The laboratory notebook that Ms. Abolhosn used  
22 to record her research, consistent with corporate policy, conclusively confirms that  
23 fact. DX-939 at QUEST\_00000139-146. And Ms. Abolhosn's in-court testimony  
24 established that she became aware of Dr. Pimentel's test protocol only by reading  
25 the PLoS ONE article while conducting a literature review of public sources in  
26 February 2016. *See* 9/4/19 Tr. Vol. II 135:6-17, 143:4-13, 147:7-9, 149:7-15.

27 Indeed, Quest's witnesses testified they relied solely on publicly-available  
28 information and Quest's own significant experience with developing ELISA assays

1 to develop Quest’s IBS test. Dr. Naides testified that Quest did not “use any of  
2 Cedars-Sinai[’s] confidential information to design its test.” 9/5/19 Tr. Vol. II 83:4-  
3 6. Ms. Abolhosn testified that she “never was shown a manuscript” and instead used  
4 only published materials, including the PLoS ONE article and published patent  
5 applications, as a starting point for the experimental design. 9/4/19 Tr. Vol. II  
6 135:6-17. The laboratory notebook contains all the information that Ms. Abolhosn  
7 relied upon when she designed the first test for IBSDetex, and it confirms that  
8 everything that Ms. Abolhosn possessed and relied upon was public, including the  
9 information made public by Dr. Pimentel and Cedars-Sinai. DX-939.

10 Indeed, rather than relying on the 2014 version of the Manuscript, Quest’s  
11 development team relied primarily on its own expertise, research, and  
12 experimentation. Dr. Naides and Ms. Abolhosn were very experienced at  
13 developing ELISA assays and used this knowledge in developing IBSDetex. *See*  
14 9/5/19 Tr. Vol. II 72:4-19, 83:7-10 (“[W]e had the PLoS One article that had been  
15 published, as a start, plus we have had years of expertise developing these assays, so  
16 we were using our own know-how.”). As Dr. Naides explained, the test that Cedars-  
17 Sinai was shopping in 2014 “was a routine ELISA” and “the reagents were available  
18 commercially and off the shelf.” 9/5/19 Tr. Vol. II 77:3-4. When Quest developed  
19 its test *after* the 2015 publication of the PLoS ONE article, it did not use any of the  
20 information that Dr. Pimentel had provided in 2014. *See* 9/5/19 Tr. Vol. II 77:13-5,  
21 83:4-6 (“Q: Did Quest use any of Cedars-Sinai’s confidential information to design  
22 its test? A: No.”), 85:18-21 (“Q: [D]id you ever give Dr. Popov or Rania Abolhosn  
23 or Olga Zhukov, Dr. Pimentel’s draft manuscript? A: No.”). Instead, it conducted a  
24 literature review of *publicly available* information—including the PLoS ONE  
25 article—and set out to conduct normal research and development through laboratory  
26 experimentation.

27 Contrary to Cedars-Sinai’s suggestion that Quest gained a critical “head start”  
28 in the window between its receipt of the Manuscript and the PLoS ONE article’s

1 publication, Quest did not actively develop any IBS test during that period. *See*  
2 9/5/19 Tr. Vol. II 79:25-80:4. Instead, it did not approve an IBS project until June  
3 2015, it did not begin research and development until March 2016, and it did not  
4 actually launch the test until April 2017. 9/5/19 Tr. Vol. II 79:3-5, 83:1-25. And the  
5 unrebutted testimony established that Quest did not “use any information at all from  
6 Dr. Pimentel’s draft manuscript” in the period before its publication. 9/5/19 Tr. Vol.  
7 II 80:21-81:3.

8 Thus, as to each of the three manuscript items, it is clear from the evidence  
9 that Quest either did not use them at all or used them only long after their  
10 publication in the PLoS ONE article. At most, the only evidence that Cedars-Sinai  
11 has set forth is Dr. Pimentel’s unsupported suspicion that Quest used information  
12 from the Manuscript to develop its test. But that “mere speculation” is insufficient  
13 to “create a factual dispute.” *Danjaq LLC v. Sony Corp.*, 1999 WL 317629, at \*1  
14 (C.D. Cal. Mar. 11, 1999); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
15 252 (1986) (“The mere existence of a scintilla of evidence in support of the  
16 plaintiff’s position will be insufficient.”). And, in all events, the actual evidence  
17 regarding Quest’s development of its test overwhelmingly *refutes* that suspicion.

18 **1. Quest did not misappropriate the commercial source of CdtB**

19 As explained above, Quest did not authorize or begin development of  
20 IBSDetex until long after the PLoS One article was published. The first time Quest  
21 purchased Creative BioMart CdtB was on March 3, 2016, long after the PLoS One  
22 article was published. *See* 9/4/19 Tr. Vol. II 136:2-15; DX-939. The laboratory  
23 notebook documents the purchase of all the reagents Quest used to begin its  
24 development of IBSDetex, and it shows that all of the reagents purchased for the  
25 IBS test were purchased in March 2016 or later. DX-939; 9/4/19 Tr. Vol. II 136:2-  
26 137:22, 149:16-22. Ms. Abolhosn testified that Quest’s selection of CdtB came  
27 from the public PLoS ONE article and that Quest selected CdtB from Creative  
28 BioMart in March 2016. 9/4/19 Tr. Vol. II 135:6-13. There is no evidence of Quest

1 using Creative BioMart as the source of CdtB for its IBS test prior to March 2016.  
2 Because Quest did not order CdtB from Creative BioMart until roughly ten months  
3 *after* Dr. Pimentel and his colleagues publicly identified Creative BioMart as the  
4 source of the CdtB in their PLoS ONE publication, there is no evidence that Quest  
5 misappropriated this supposed “trade secret.”

## 6                   2.     **Quest did not misappropriate the blocking step**

7           Quest also did not misappropriate the second alleged trade secret—blocking  
8 wells in 3% BSA and 1x PBS for 1 hour at room temperature. Cedars-Sinai did not  
9 even attempt to offer any evidence that Quest used the “blocking step” before May  
10 2015, nor could it. Indeed, Dr. Christians conceded that none of the Quest  
11 documents before May 2015 even mentioned this blocking step. 9/6/19 Tr. Vol. II  
12 35:17-37:13. By the time Quest experimented with blocking steps while developing  
13 the test in March 2016, the alleged trade secret blocking step had been in the public  
14 domain through the PLoS ONE article for ten months. Moreover, the *actual*  
15 blocking step that Quest used for its IBS test is *different* from the one described in  
16 the Manuscript. DX-939; DX-937; 9/5/19 Tr. Vol. II 91:11-92:25; 9/4/19 Tr. Vol. II  
17 133:10-13, 140:10-12. Quest’s standard operating procedure for IBSDetex—which  
18 Dr. Christians described as “set in stone,” 9/6/19 Tr. Vol. II 40:16-40:18—shows  
19 blocking “for 2-3 hours at room temperature or overnight (12-24 hours)  
20 refrigerated.” DX-937. And Dr. Pimentel acknowledged that he was not the first  
21 one to use the blocking step described in the Manuscript for ELISAs. *See* 9/4/19 Tr.  
22 Vol. II 86:16-87:9.

## 23                   3.     **Quest did not misappropriate the clinical data and results**

24           Finally, Quest never used the clinical data and results in the Manuscript,  
25 including the reported cutoff values for anti-CdtB and anti-vinculin. Dr. Naides  
26 confirmed that Quest did not use the cutoffs determined by Cedars-Sinai. 9/5/19 Tr.  
27 Vol. II 87:8-22 (“Q: Did Quest use the clinical data in the PLoS One paper or in the  
28 manuscript in order to set its clinical cutoff? A: No.”). Cedars-Sinai’s expert, Dr.

1 Christians, admitted that Quest did not use them. 9/6/19 Tr. Vol. II 56:3-6 & 19-22.  
2 And, again, by the time Quest performed any work to develop its own cutoffs, in  
3 March 2016, all of the information related to this alleged trade secret had been in the  
4 public domain for ten months.

5 Contrary to Cedars-Sinai's suggestion, the November 2013 and December  
6 2014 emails from Dr. Naides say nothing about whether Quest misappropriated the  
7 clinical data and results. DX-960; PTX-78. On its face, the November 2013 email  
8 has nothing to do with whether Quest misappropriated the clinical data from the  
9 Manuscript between September 2014 and May 2015. It is from tenth months earlier,  
10 and requests public information. In it, Dr. Naides commented on a public abstract  
11 from Dr. Pimentel's presentation to the American College of Gastroenterology. DX-  
12 960. In response to Luke Fleckenstein's email forwarding the abstract, Dr. Naides  
13 stated that the IBS test would be "interesting and an affirmative test, if the data  
14 passes inspection." *Id.* Dr. Naides then asked, "Can we see the anti-vinculin data?  
15 The abstract does not get into detail nor numbers." *Id.* Mr. Fleckenstein responded  
16 a few days later by providing the public, non-confidential slides from the  
17 presentation, which contained the data Dr. Naides requested. *Id.* As for the  
18 December 2014 email, it does not address the clinical data or anything else related to  
19 the Manuscript. PTX-78. And it is undisputed that Dr. Naides and his team did not  
20 perform any lab work until March 2016, well after Dr. Pimentel and his co-authors  
21 published the purportedly secret clinical data and results in PLoS One.

22 **D. Quest Did Not Misappropriate the Alleged Market Assessment**  
23 **Trade Secret**

24 In October 2014, in an attempt to demonstrate the purported worth of a  
25 license, Cedars-Sinai provided to Quest what Cedars-Sinai claimed at the time was  
26 an "independent" IBS market assessment presentation prepared by consultant Burr  
27 Pilger Mayer (the "Market Assessment"). The Market Assessment was nothing  
28 more than marketing materials. Moreover, while Cedars-Sinai initially claimed that

1 the Market Assessment was a trade secret and that Quest misappropriated it, Cedars-  
2 Sinai’s expert witness ignored it in his analyses. And there is no evidence that the  
3 Market Assessment was owned by Cedars-Sinai (as opposed to Burr Pilger Mayer)  
4 or that it was the subject of any reasonable measures to maintain secrecy.

5 While Cedars-Sinai has offered nothing but rank speculation that Quest ever  
6 relied on the Market Assessment, the actual evidence shows that Quest never used  
7 the Market Assessment in the development of IBSDetex. To the contrary, Quest’s  
8 witnesses confirmed that they would not have relied on a third-party’s self-serving  
9 promotional materials. *See, e.g.*, 9/9/19 Tr. Vol. I 32:9-11. Having not rebutted that  
10 testimony, Cedars-Sinai is not entitled to rely on conflicting and unsupported  
11 speculation to support its claim.

12 **IV. THE COURT SHOULD GRANT JUDGMENT AS A MATTER OF**  
13 **LAW ON THE BREACH OF CONTRACT CLAIM**

14 To succeed on its breach of contract claim, Cedars-Sinai must prove: (1) the  
15 existence of a contract; (2) Cedars-Sinai’s performance or excuse for  
16 nonperformance; (3) Quest’s breach; and (4) damage to Cedars-Sinai. *Oasis W.*  
17 *Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Its evidence is legally  
18 insufficient to support its claim.

19 Cedars-Sinai’s breach of contract claim is based on the Confidentiality  
20 Agreement between Quest and Cedars-Sinai. Cedars-Sinai alleges that Quest  
21 breached that agreement by using proprietary information that Cedars-Sinai  
22 provided to Quest under the agreement, for a purpose other than to evaluate a  
23 potential business opportunity with Cedars-Sinai. This claim overlaps with Cedars-  
24 Sinai’s trade secret claims. Cedars-Sinai has identified the “proprietary  
25 information” under the agreement as the same information that forms the basis of the  
26 trade secrets claims. And the agreement contains a provision stating that Quest  
27 “shall not be liable to [Cedars-Sinai] with respect to the use or disclosure of such  
28 information as can be established by credible evidence to . . . be publicly known,

1 without fault on Recipient’s part, subsequent to the disclosure of such information to  
2 Recipient.” PTX-164 § 2(a). Thus, as with the trade secret claims, Cedars-Sinai’s  
3 breach of contract claim requires it to prove that Quest used the alleged proprietary  
4 information and did so *before* the information became public.

5 For the reasons discussed above regarding the trade secrets claims, Cedars-  
6 Sinai’s breach of contract claim likewise fails. Quest did not breach the  
7 Confidentiality Agreement because the alleged “proprietary information” was  
8 already public when Quest used it—if it was ever used at all. Moreover, as every  
9 witness from Quest has testified, Quest did not use any of Cedars-Sinai’s alleged  
10 proprietary information to develop its IBS test. *See supra*. Instead, Quest relied on  
11 its own market research, a literature review including the PLoS ONE article, Quest’s  
12 researchers’ own significant experience with developing diagnostic tests, and prior  
13 art. *See supra*. Hence, under the terms of the Confidentiality Agreement, Quest  
14 cannot be liable for breach. *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, No.  
15 CV 09-4609-JFW (RZX), 2010 WL 11597436, at \*11 (C.D. Cal. June 7, 2010)  
16 (granting summary judgment on claim for breach of contract because plaintiff  
17 “failed to demonstrate that it owns the ... program, or that any of the defendants  
18 used its keyword return-on-investment data.”).

19 **V. THERE IS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS TO**  
20 **AWARD DAMAGES FOR ANY OF CEDARS-SINAI’S CLAIMS**

21 The law allows a plaintiff to recover for trade secret misappropriation based  
22 on (1) actual loss suffered by the plaintiff caused by the misappropriation (the  
23 revenue that plaintiff lost as a result of defendant’s alleged misappropriation); or  
24 (2) to the extent it does not overlap, the amount the defendant was unjustly enriched  
25 by misappropriating the trade secret (the actual benefits defendant received). CACI  
26 4409; CACI 4410; Cal. Civ. Code § 3426.3(a); 18 U.S.C. § 1836. In both instances,  
27 a plaintiff must tie the damages theory directly to the allegedly misappropriated  
28 trade secret. *See Litton Syst., Inc. v. Ssangyoung Cement Indus. Co.*, 107 F.3d 30, \*8



1 (Fed. Cir. 1997). These are well-settled concepts.

2 Yet, Cedars-Sinai has failed to present evidence to support either category of  
3 damages. Cedars-Sinai has vaguely implied that it should be entitled to the  
4 supposed counter-offer it considered making for a multimillion dollar up-front  
5 payment and 12% royalty rate. But it has not proven that any such counter-offer was  
6 ever conveyed to Quest, what its precise details were, or whether Quest ever  
7 intended to accept it. More important, though, this theory does not fit into either  
8 category of damages: It does not support a theory that Quest was unjustly enriched,  
9 and Cedars-Sinai cannot use it to prove actual loss because the parties’  
10 Confidentiality Agreement expressly stated that there was no “commitment by either  
11 party to purchase the other party’s products or services or to refrain from entering  
12 into any arrangement with a third party.” PTX-164 § 4. In addition, Cedars-Sinai  
13 has not proven that Quest foreclosed it from pursuing business opportunities with  
14 other third parties. On the contrary, the evidence affirmatively confirms that Cedars-  
15 Sinai was actively negotiating with others at the time. 9/4/19 Tr. Vol. II 49:3-13.

16 Cedars-Sinai has also advanced Dr. Christians’ nebulous theory that Quest  
17 saved some unspecified amount of research and development costs during the period  
18 between its receipt of the Manuscript and the PLoS ONE article’s publication. But  
19 the evidence at trial conclusively demonstrates that Quest did *not* conduct any  
20 research and development during that period. Quite the opposite. Quest did not  
21 even approve the project for research and development until June 2015—one month  
22 *after* the PLoS ONE article’s publication—and it did not begin actual research and  
23 development until 9 months later in March of 2016. Thus, there is no evidence of  
24 any cost savings associated with Quest’s receiving the Manuscript prior to the PLoS  
25 One article’s publication. Rather than grapple with those facts, Dr. Christians offers  
26 no meaningful analysis, but instead only rank speculation based on vague references  
27 to research and development costs for unrelated clinical studies. And Cedars-Sinai  
28 does not even attempt to offer any other concrete proof of any unjust enrichment or

1 actual loss damages—because there is none. As the Court noted, “there is no  
2 evidence that [Quest] utilized the trade secret aspects in order to get a head start” in  
3 the relevant period of time. 9/6/19 Tr. Vol. II 121:6-7. Nor are there “any figures  
4 that can be utilized for any sort of damages calculation.” 9/6/19 Tr. Vol. II 121:11-  
5 12. The jury thus has no evidence on which to base an award.

6 Likewise, there is no legal basis for Cedars-Sinai to recover the (unproven)  
7 cost of developing its IBS test from scratch. Cedars-Sinai has not provided any  
8 evidence that Quest’s alleged actions impaired the value of Cedars-Sinai’s  
9 confidential information or prevented it from exploiting them. For starters, Quest  
10 did not deprive Cedars-Sinai of the ability to commercialize its test. In fact, Cedars-  
11 Sinai *did* commercialize the test, as demonstrated by Cedars-Sinai’s agreement with  
12 Commonwealth, long before Quest brought its own IBS test to market. Moreover,  
13 Cedars-Sinai could not have suffered any loss from any alleged misappropriation of  
14 the clinical data because Salix Pharmaceuticals, not Cedars-Sinai, funded that  
15 portion of the study, *see* 9/4/19 Tr. Vol. II 72:15-25, and, again, Quest did not even  
16 arguably divert any business away from Cedars-Sinai during the relevant period  
17 because Quest did not have any IBS test on the market during that period. Nor did  
18 Quest gain any unjust enrichment from any of the alleged trade secrets, given that  
19 Quest did not develop its test until *after* the alleged secrets were published. And,  
20 even setting all of those problems aside, Cedars-Sinai makes absolutely no effort to  
21 apportion any alleged loss within the *total* costs associated with the general IBS-  
22 related research and development Dr. Pimentel conducted over the years.

23 Nor is there any evidentiary basis whatsoever to support an argument for  
24 damages based on willful and malicious misappropriation. As thoroughly explained  
25 above, Cedars-Sinai has not introduced legally sufficient evidence to prove that  
26 Quest misappropriated any trade secrets from Cedars-Sinai—because Quest did not  
27 even begin development on its IBS test until after the Manuscript items were in the  
28 public domain, and it never relied on the Market Assessment at all. Given that

1 paucity of evidence on misappropriation *simpliciter*, Cedars-Sinai certainly has not  
2 met the much more onerous clear and convincing standard for willful and malicious  
3 misappropriation. The Quest employees involved in the development and launch of  
4 IBSDetex have testified that they did not utilize the alleged trade secret information  
5 at all during the relevant time period, *see supra*, and Cedars-Sinai has not shown  
6 otherwise. On this record, there is no legal basis for awarding any damages, let  
7 alone exemplary damages or attorney’s fees for willful and malicious  
8 misappropriation.

9 Because Cedars-Sinai has not offered any material, credible evidence to  
10 support a damages award—and the existing evidence refutes Cedars-Sinai’s late-  
11 breaking theories—the Court should rule that, as a matter of, Cedars-Sinai is not  
12 entitled to any damages award.

13 **A. Cedars-Sinai Has Not Proven Unjust Enrichment**

14 The law permits a plaintiff to recover the amount of a defendant’s “unjust  
15 enrichment” caused by the misappropriation. The authorities make clear that unjust  
16 enrichment is designed to allow the plaintiff to “claim the infringer’s profits.” Weil,  
17 Roman L., et al., LITIGATION SERVICES HANDBOOK: THE ROLE OF THE FINANCIAL  
18 EXPERT (“LITIGATION SERVICES HANDBOOK”), Ch 19 at p. 14 (6th ed. 2017).  
19 “Normally only the defendant’s actual profits can be used as a measure of damages  
20 in cases where profits can be proved, and the defendant is normally not assessed  
21 damages on wholly speculative expectations of profits.” *Univ. Computing Co. v.*  
22 *Lykes-Youngstown Corp.*, 504 F.2d 518, 536 (5th Cir. 1974). “The defendant must  
23 have actually put the trade secret to some commercial use. . . . If the defendant  
24 enjoyed actual profits, a type of restitutionary remedy can be afforded the plaintiff –  
25 either recovering the full total of defendant’s profits or some apportioned amount  
26 designed to correspond to the actual contribution the plaintiff’s trade secret made to  
27 the defendant’s commercial success.” *Id.* at 539; *see also Carbo Ceramics, Inc. v.*  
28 *Keefe*, 166 Fed. Appx. 714, 723-24 (5th Cir. 2006). Here, record evidence makes

1 clear that Quest made \$137,014 in profits from its IBS test—and Cedars-Sinai has  
2 not proven that Quest enjoyed any cost savings related to the alleged trade secrets  
3 during the relevant period. *See* 9/9/19 Tr. 65:2-66:1. Thus, that \$137,014 is the  
4 absolute ceiling on what Cedars-Sinai might recover as unjust enrichment. But even  
5 that amount was not unjust enrichment from any trade secret misappropriation or  
6 breach of contract because the evidence shows that Quest developed its IBS test  
7 without relying on any of Cedars-Sinai’s confidential information and long after the  
8 information was published in the PLoS ONE article.

9 **B. Cedars-Sinai Has Not Proven Actual Loss**

10 Cedars-Sinai similarly has made no meaningful attempt to prove any “actual”  
11 loss. The Litigation Services Handbook provides well-understood examples of  
12 “actual loss”:

13 If the owner would have produced the product exclusively,  
14 the owner suffers reduced sales and thus lost profits on the  
15 infringing sales. The owner may have also lost sales on  
16 noninfringed goods as a result of the infringement. Profits  
17 on these, too, are recoverable. In addition to the lost  
18 profits on sales, the infringement further reduced the  
19 owner’s profits through less obvious effects on the owner’s  
20 cost structure.

21 LITIGATION SERVICES HANDBOOK, Ch. 19, page 10. “Actual loss is measured by lost  
22 profits.” *Cacique, Inc. v. Stella Foods, Inc.*, 2002 WL 705675, at \*6 (Cal. Ct. App.  
23 Apr. 24, 2002). To prove lost profits, the plaintiff must establish that it “did not  
24 make sales that were diverted to the wrongdoer, or the owner incurred increased  
25 expenses in connection with the sales that it did make, or the owner cut its prices to  
26 compete with the wrongdoer.” *Id.*

27 Cedars-Sinai has not shown that it lost any profits based on Quest’s actions  
28 during the relevant time period. Because Quest did not develop its test until long

1 after the PLoS ONE article’s publication—and did not market its test until after  
2 Cedars-Sinai had ceased marketing its test with Commonwealth—it clearly did not  
3 divert any sales from Cedars-Sinai before that publication date. Nor did it cause  
4 Cedars-Sinai to suffer any other loss during that period. On the contrary, nothing of  
5 note happened between September 2014 and May 2015—except that Cedars-Sinai  
6 reached a licensing agreement with Commonwealth and launched its own test,  
7 without any interference or competition from Quest.

8 Left with no measure of actual loss, Cedars-Sinai has vaguely suggested that  
9 its test was less profitable because Quest—a “giant” in the industry—chose not to  
10 partner with it. But Quest was under no contractual obligation to go into business  
11 with Cedars-Sinai, *see* PTX-164 § 4, and the evidence shows that its decision to pass  
12 on the opportunity to purchase a license from Cedars-Sinai was not based on any  
13 trade secret misappropriation, but instead on its accurate assessment that Cedars-  
14 Sinai lacked valid intellectual property rights over its test. Cedars-Sinai’s claims are  
15 not based on any allegations that Quest engaged in any fraud during negotiations.  
16 Nor has Cedars-Sinai proven that Quest in any way prevented it from partnering  
17 with a different “giant” in the industry, like LabCorp.

18 **C. Cedars-Sinai Has Not Proven Breach of Contract Damages**

19 Cedars-Sinai’s claim for damages based on breach of contract are legally  
20 deficient for similar reasons. Under California law, the measure of damages for  
21 breach of contract “is the amount which will compensate the party aggrieved for all  
22 the detriment proximately caused thereby, or which, in the ordinary course of things,  
23 would be likely to result therefrom.” Cal. Civ. Code § 3300; *Ajaxo Inc. v. E\*Trade*  
24 *Grp. Inc.*, 135 Cal. App. 4th 21, 56 (2005) (for a breach of a confidentiality  
25 agreement, a jury “must determine what additions to the injured party’s wealth  
26 (expected gains) have been prevented by the breach and what subtractions from his  
27 wealth (losses) have been caused by it.”). This compensation may include damages  
28 for actual loss to the plaintiff or (to the extent they are not duplicative) a defendant’s

1 unjust enrichment may be used to measure damages for breach of a confidentiality  
2 agreement. *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App'x 665, 669  
3 (9th Cir. 2010) (“We hold that, under California law, a defendant’s unjust  
4 enrichment can satisfy the ‘damages’ element of a breach of contract claim, such  
5 that disgorgement is a proper remedy”) (*citing Ajaxo*, 135 Cal. App. at 56-57  
6 (disgorgement appropriate where defendant was unjustly enriched by breaching a  
7 non-disclosure agreement)); *Artifex Software, Inc. v. Hancorn, Inc.*, No. 16-CV-  
8 06982-JSC, 2017 WL 4005508, at \*3 (N.D. Cal. Sept. 12, 2017) (*citing Grail*  
9 *Semiconductor, Inc. v. Mitsubishi Elec. & Elecs. USA, Inc.*, 225 Cal. App. 4th 786,  
10 795-96 (2014) (concluding that the trial court did not err in finding that the amount  
11 the breaching party would have paid to license the technology could be used to  
12 measure the damages resulting from breach of a non-disclosure agreement).

13 As discussed above, Cedars-Sinai has failed to prove either unjust enrichment  
14 or actual loss with respect to any of the Manuscript items or the Market Assessment.  
15 The evidence conclusively establishes that Quest did not utilize any of the  
16 information in the Manuscript to develop its test, nor did it rely on Cedars-Sinai’s  
17 promotional materials in the Market Assessment. Thus, Quest clearly did not use  
18 that information to its advantage or to Cedars-Sinai’s disadvantage during the period  
19 before its publication in the PLoS ONE article. On the contrary, Quest conducted its  
20 own research and development work and its own market assessment *after* the PLoS  
21 One article’s publication. Thus, Cedars-Sinai is entitled to no damages on its breach  
22 of contract claim, for the same reasons that it is entitled to no damages on its trade  
23 secret claims.

## 24 VI. CONCLUSION

25 For the foregoing reasons, pursuant to Federal Rule of Civil Procedure 50(a),  
26 Quest respectfully requests that the Court grant judgment as a matter of law in favor  
27 of Quest on all of Cedars-Sinai’s claims and damages theories.

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