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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NUSCIENCE CORPORATION,

Plaintiff and Appellant,

v.

DAVID McKINNEY,

Defendant and Respondent.

B237119

(Los Angeles County
Super. Ct. No. BC448331)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed.

Jacobson Russell Saltz & Fingerman, Michael J. Saltz, Colby A. Petersen, and Blair Schlecter for Plaintiff and Appellant.

Law Offices of Stephen Abraham and Stephen E. Abraham for Defendant and Respondent.

Plaintiff/appellant NuScience Corporation (NuScience) sued defendant/respondent David McKinney (McKinney) for a variety of torts, including violations of the Uniform Trade Secrets Act, Civil Code sections 3426 et seq. (UTSA).¹ Nine months later, NuScience voluntarily dismissed its action. McKinney then filed a motion for attorney fees pursuant to section 3426.4, which permits a trial court to award reasonable attorney fees and costs to a prevailing party if it determines that a UTSA claim has been made in “bad faith.” The trial court granted the motion and awarded McKinney fees and costs of \$39,593.87.

NuScience appeals, contending that the trial court erred in awarding attorney fees because the evidence did not establish that its claim was made in bad faith. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

NuScience is a California corporation that researches, develops, and distributes oxygen-based health and beauty products, including a nutritional supplement marketed as “Cellfood.” McKinney was NuScience’s vice president of sales and marketing until his termination in August 2008. Defendant Robert Henkel (Henkel) allegedly is the nephew of the woman from whom NuScience purchased the Cellfood formula.²

I. NuScience’s Prior Litigation Against Robert Henkel

In 2008, NuScience sued Henkel and others in federal district court for misappropriation of trade secrets, federal trademark infringement, unfair competition, false advertising, and intentional interference with business relationships. (*NuScience Corporation v. Henkel et al.*, CV-08-2661-GAF.) Neither Henkel nor his codefendants appeared in that action, and in April 2009, the court entered “Findings, Conclusions &

¹ All further unidentified statutory references are to the Civil Code.

² Henkel has not appeared in the present action and is not a party to this appeal.

Judgment Pursuant to Entry of Default” (federal default judgment). As relevant to the present action, the federal default action found as follows:

Cellfood is a trade secret, of which NuScience is the rightful owner. NuScience “has taken reasonable measures to maintain the trade secret in confidence and to protect it from disclosure to competitors. NuScience’s trade secret is not generally known or available to the public or to NuScience’s competitors. NuScience’s trade secret is not easily ascertainable or easily developed.”

Henkel and his brother, Michael Henkel, purport to possess information concerning Cellfood’s ingredients and formula. Henkel has offered to sell the formula to third parties, including NuScience’s customers. Henkel also used the formula to produce and market a version of Cellfood, which he calls Deutrocell. Henkel markets Deutrocell through a business entity he formed, also called Deutrocell. Henkel’s and Deutrocell’s use of NuScience’s formula to make Deutrocell “amounts to misappropriation of NuScience’s trade secret.”

NuScience had been granted trademark registration for “Cellfood,” “Everett Storey,” and “Deutrosulfazyme.” Henkel and Deutrocell registered the domain names www.evstorey.com and www.deutrocell.com in efforts to sell their product Deutrocell. Henkel’s and Deutrocell’s websites contain a webpage stating that Deutrocell is “Uncle Ev’s” original formula underneath a photograph captioned “Everett Story.” Henkel and Deutrocell sent emails to NuScience’s customers stating, “Would you be interested in distributing EV STOREYS (*sic*) ‘ORIGINAL’ KITCHEN FORMULA (DEUTROCELL)?” Henkel’s and Deutrocell’s uses of “Ev Storey,” “Everett Storey,” and “Deutrocell” in connection with the sale of their product Deutrocell are “infringement[s] of NuScience’s [trademarks] and likely to cause confusion.”

Based on these findings, the federal court permanently enjoined defendants from selling or marketing NuScience’s trade secrets or products based on NuScience’s trade secrets; representing to third persons that they possess any of NuScience’s trade secrets; using the “Everett Storey,” “Deutrosulfazyme,” and “CellFood” trademarks and any

variation thereof; and contacting any of NuScience's competitors, suppliers, customers, or distributors. The court also awarded NuScience compensatory and punitive damages.

II. The Present Action

A. Background

NuScience terminated McKinney in August 2008. Upon McKinney's termination, the parties entered a written separation agreement pursuant to which McKinney agreed, among other things, to maintain the confidentiality of certain matters related to NuScience.

In June 2010, NuScience received an email from a man named Tom Myers, which included the following email string:

—Henkel to David McKinney, January 22, 2010: “Did you receive the samples I sent you? Let me know what you think.”

—McKinney to Henkel, January 22, 2010: “I did receive the samples and I have been using them and I have to say I am impressed. . . . [¶] I am definitely interested in seeing where we can go with this that would be profitable for all of us and offset some of the damage that has been done. Have you talked with your brother about our discussions yet? Let's talk next week and see what we can come up with. [¶] Would you be so kind as to send just a small sample of the 'seed' or whatever you call it. I am interested in comparing what I know with what you have. [¶] The other thing I was thinking about was the production issues. [¶] Are you producing the bulk and having it bottled somewhere else, or are you bottling it yourself? What is your capacity for bottling? I have some contacts in Asia that may be interested in several hundred thousand bottles if we can produce them. [¶] It goes without saying perhaps . . . all conversations and e-mails between us are strictly confidential. Whatever we do together will be completely between us. I know how hard certain individuals tried to find out who your customers are and who you may have 'sold' the formulation to. As we get further down the road with one another, we have to have a strategy that will insulate either one of our companies from further problems. I have some ideas on how we may be able to do that.”

—Henkel to McKinney, January 22, 2010: “Dave, [¶] That’s great to hear you like the product. I have spoken with my brother and we are game for any business opportunity. [¶] As far as the ‘seed’ goes, are you talking about what you said ms kim shows up with and gives to Kevin? . . . as for production, we have been selling it in one gallon jugs and five gallon buckets, bottling it ourselves. we can produce the bulk but it would have to be bottled elsewhere with those kind[s] of numbers.”

—McKinney to Henkel, January 23, 2010: “Hey Bob, [¶] Yes I am talking about what Kim is giving to Kevin I’d just like to compare the two for fun really [¶] Bulk would be ok, we can get it bottled somewhere else . . . what’s the prices on one gallon and 5 gallon?”

—Henkel to McKinney, January 23, 2010: “At this time I am not comfortable sending the ‘seed’ without a non-disclosure in place, but you are more than welcome to come here and see it all!! [¶] As for pricing, we can sell it to you for 80.00 a gallon in large lots. we sell it as a solvent with no guarantees expressed or implied.”

—McKinney to Henkel, January 23, 2010: “I understand your issue with non disclosure. Not a problem. I am interested in coming out and seeing you. I will talk to my other partner about timing and we may find ourselves on your doorstep. . . . I’ll be in touch.”

—Henkel to Tom Myers, June 26, 2010: “these e-mails are from david mckinney former vice president of nuscience corp.!!! this proves that cellfood is not gmp compliant, as the super syrup (the trade secret) is made off site (not at nuscience corp.) probably in kim rhotens garage!!!”

—Myers to cell@nuscience.com, June 26, 2010: “i got you now you liars.”

B. Complaint

NuScience filed the present action against McKinney and Henkel on October 27, 2010. The operative complaint alleges that notwithstanding the federal judgment against Henkel, McKinney sought out Henkel in 2008 or 2009 “and conspired with Henkel to do those very acts from which Henkel was enjoined by law, including but not limited to:

disclosing and conspiring to disclose Plaintiff's Trade Secrets and other confidential and proprietary information including the identity, purchasing habits and pricing for Plaintiff's customers/distributors; disclosing and conspiring to disclose Plaintiff's practices and procedures; misappropriating and conspiring to misappropriate Plaintiff's Trade Secrets and other confidential and proprietary information including the identity, purchasing habits and pricing for Plaintiff's customers/distributors; violating and conspiring to violate the Judgment in favor of Plaintiff and against Henkel prohibiting Henkel from using Plaintiff's Trade Secrets and/or customer/distributor information, and selling any product which is the same or similar to Plaintiff's product, CELLFOOD®; assisting and conspiring to assist Henkel in violating the Judgment by, among other things, purchasing a similar product from Henkel to sell and/or distribute to Plaintiff's customers/distributors; and defaming and conspiring to defame Plaintiff's business practices and business reputation. McKinney did these things with reckless disregard and malicious intent to inflict maximum damage to NuScience, its reputation, and its brand."

NuScience alleged this conduct gave rise to eight causes of action: (1) breach of contract; (2) trade libel; (3) & (4) misappropriation of trade secrets (statutory and common count); (5) unfair business practices; (6) conspiracy; (7) civil RICO; and (8) intentional interference with contract. It sought compensatory and punitive damages, as well as an injunction enjoining defendants from disclosing or conspiring to disclose NuScience's trade secrets and other confidential and proprietary information, including the identity, purchasing habits, and pricing for NuScience's customers and distributors.

On March 18, 2011, the court entered a default against Henkel.

C. Discovery Disputes, Motion for Sanctions, and Voluntary Dismissal

On April 15, 2011, McKinney filed a motion to compel further discovery responses from NuScience. The trial court granted the motion and ordered NuScience to provide further responses to McKinney's form interrogatories and requests for production of documents.

On June 24, 2011, McKinney filed a motion for terminating sanctions. He asserted that NuScience had not provided substantive discovery responses or documents demonstrating a factual basis for its claims. McKinney asked the court to enter terminating sanctions against NuScience and monetary sanctions against NuScience and its attorney.

NuScience opposed the sanctions motion, asserting among other things that “[t]he responses provided by Plaintiff contained all information currently available.” Then, before the motion was heard, NuScience filed a request for dismissal without prejudice. In subsequent court filings, NuScience asserted that it dismissed the action “out of fear that the Henkels would retaliate by releasing NuScience’s most valuable trade secret on the Internet, despite having a meritorious claim against Defendant McKinney. If the Henkels carry out their threat and publicly release the formula for CELLFOOD®, NuScience will lose its entire business, which presently generates worldwide sales of over \$230 million.”

III. McKinney’s Motion for Attorney Fees and Costs

On August 16, 2011, McKinney filed a motion for attorney fees and costs of \$32,842.81. McKinney asserted that under section 3226.4 of the UTSA, a prevailing defendant is entitled to recover fees if the action is “objectively specious”—i.e., if it “superficially appears to have merit but there is a complete lack of evidence to support the claim.” In the present case, McKinney said, “there was not one shred of evidence that [he] ever took any information from NuScience Moreover, there was no threat that any information was ever going to be taken or disclosed by McKinney.” To the contrary, “NuScience made very clear, from the inception of its case, that it regarded the other defendants as competitors and, in fact, in front of this very court, stated that the case was being used to gather information that would be used in a separate action against the other defendants.” McKinney concluded: “Nearly a year into the case, after having stated that it had produced more than enough evidence to support its claims, NuScience has offered absolutely no evidence of misappropriation, threatened misappropriation,

imminent harm, or ongoing wrongdoing. [¶] NuScience’s absence of any evidence to support its claim has all the hallmarks of an objectively specious claim, thereby justifying an award of attorney fees to McKinney.”

NuScience opposed the motion. It urged that courts have developed a two-prong test for “bad faith”: (1) objective speciousness; *and* (2) subjective bad faith. Because McKinney did not submit any evidence of “subjective bad faith,” NuScience suggested the motion should be summarily denied. In the alternative, NuScience asserted that the January 2010 emails between McKinney and Henkel established McKinney’s disclosure of trade secrets and, thus, the action’s objective merit. NuScience also asserted that there was no evidence that it acted in subjective bad faith: “Subjective bad faith under the UTSA can be inferred from a case where the shortcomings are identified by opposing counsel, yet the plaintiff continues with the case anyway despite the inability to respond to the arguments raised regarding shortcomings. [Citation.] Had Defendant properly presented the standard for bad faith under the UTSA, he would likely argue that he pointed out various perceived shortcomings in Plaintiff’s case from the outset. However, as set forth above, Defendant’s perceived shortcomings of Plaintiff’s case are just that — perceived. Plaintiff has had a legitimate case against Defendant McKinney since inception, and the only reason the matter was dismissed was due to threats made by the Henkels to the future of NuScience if this case went forward.”

McKinney responded that the emails relied on by NuScience did not demonstrate that the lawsuit had merit: “NuScience could point to nothing more than an exchange in which McKinney said to Henkel, ‘show me what you have’ but did nothing to reveal any alleged trade secret.” Further, McKinney said, subjective bad faith “can be *inferred* from conduct of the plaintiff in the course of litigation.” Here, bad faith could be inferred from the facts that NuScience had not produced any evidence of the alleged misappropriation of trade secrets, had not propounded any discovery requests relating to its claims, and had “made very clear, from the inception of its case, that it regarded the other defendants as competitors and, in fact, in front of this very court, stated that the case was being used to gather information that would be used in a separate action against the other defendants.”

The trial court granted the motion on September 12, 2011. It stated: “The motion is GRANTED. The record in this case shows subjective bad faith as to defendant McKinney. See *FLIR Systems v. Parrish*, 174 Cal.App.4th 1270 (2009). Attorneys fees and costs are awarded in the amount of \$39,593.87.”

IV. Motion for Reconsideration, Motion for New Trial, and Appeal

NuScience moved for reconsideration on September 23, 2011. In support of its motion, NuScience asserted that after it took Henkel’s default on March 18, 2011, Henkel called NuScience’s attorney, Michael Saltz, and said that NuScience “better back off and leave [them] alone.” After that telephone call, Henkel and his brother began posting, through their website, threats to publish the Cellfood formula. In late March 2011, Saltz reported Henkel’s threats to the FBI, which informed Saltz it had assigned an agent to investigate and that the pending investigation should remain confidential. Then, in July 2011, Henkel told NuScience’s attorney that he would “release NuScience’s formula to the world unless Plaintiff dismissed this lawsuit pending against Robert and McKinney and that Plaintiff cease all enforcement of the federal judgment against the Henkels.” Only later did the FBI “reluctantly acquiesce[] in allowing Plaintiff to discuss various aspects of the investigation against the Henkels.”

The trial court denied the motion for reconsideration and NuScience’s subsequent motion for new trial. This timely appeal followed.

DISCUSSION

I. The UTSA

The UTSA prohibits the actual or threatened misappropriation of trade secrets. A party seeking relief under the UTSA may, in appropriate circumstances, obtain an injunction or damages. (Civ. Code, §§ 3426.2, 3426.3.) However, if a trial court determined that a plaintiff has made a claim of misappropriation in “bad faith,” it may award reasonable attorney fees and costs to a prevailing defendant.

“Bad faith” under section 3426.4 has both an objective and subjective component. (*FLIR Systems, Inc. v. Parrish, supra*, 174 Cal.App.4th 1270, 1275 (*FLIR*.) The *objective* component requires the court to consider whether the plaintiff’s claim is “objectively specious,” i.e., if it “superficially appears to have merit but there is a complete lack of evidence to support the claim. (*Gemini [Aluminum Corp. v. California Custom Shapes, Inc. (2002)]* 95 Cal.App.4th [1249,] 1261 [*Gemini*]; *CRST Van Expedited, Inc. v. Werner Enterprises (9th Cir. 2007)* 479 F.3d 1099, 1112.)” (*FLIR, supra*, at p. 1276.) In other words, because section 3426.4 is intended to act as a deterrent to specious claims, “it requires conduct more culpable than mere negligence. To be deterrable, conduct must be at least reckless or grossly negligent, if not intentional and willful. Webster’s defines specious as, among other things, “apparently right or proper: superficially fair, just, or correct but not so in reality” [Citation.] Thus, the claim must have been without substance in reality, if not frivolous.’ ([*Stilwell Development, Inc. v. Chen (C.D.Cal. Apr. 25, 1989, No. CV86 4487 GHK)* 1989 U.S. Dist. Lexis 5971, at p. *9], citing Webster’s 3d New Internat. Dict. (1986) p. 1287.)” (*Gemini, supra*, at p. 1261.)

The *subjective* component “means simply that the action or tactic is being pursued for an improper motive. Thus, if the court determines that a party had acted with the intention of causing unnecessary delay, or for the sole purpose of harassing the opposing side, the improper motive has been found, and the court’s inquiry need go no further.’ (*Summers v. City of Cathedral City (1990)* 225 Cal.App.3d 1047, 1072.)” (*Gemini, supra*, 95 Cal.App.4th at p. 1263.)

II. The Trial Court Erred in Awarding Attorney Fees Because NuScience’s Misappropriation Claim Was Not “Objectively Specious”

NuScience contends that the attorney fee award must be reversed because: (1) the trial court did not make a finding regarding “objective speciousness,” as the statute requires; (2) NuScience’s evidence was inconsistent with a finding of objective

speciousness; and (3) NuScience's evidence was inconsistent with a finding of subjective bad faith. We consider these issues below.

A. *The Trial Court's Failure to Make a Finding of Objective Speciousness*

NuScience notes that although the trial court made a finding of subjective bad faith, it did not find objective speciousness. NuScience therefore contends that the trial court applied an incorrect legal standard.

While NuScience is correct that the trial court did not make an express finding of objective speciousness, we nonetheless presume such finding. "It is a fundamental principle of appellate review that we presume that a judgment or order is correct. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852; see generally 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, pp. 394-395.) Moreover, it is the appellant's burden of providing a record that establishes error, and where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling. (*Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 194; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) From these principles, courts have developed the doctrine of implied findings by which the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Fladeboe, supra*, at p. 58; see also *County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 439 [doctrine of implied findings applies to minute order].)" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271-1272.)

Based on this principle, we presume that the trial court found that NuScience's misappropriation claim was *both* objectively specious *and* made in subjective bad faith, and we consider whether these findings were supported by the evidence.

B. NuScience’s Misappropriation Claim Was Not “Objectively Specious”

NuScience contends that the trial court erred in finding that its misappropriation claim was “objectively specious.” It urges: “[T]here is no evidence to support a finding of objective speciousness, as it is undisputed that NuScience produced an email chain (among other evidence) which constitutes at [a] minimum circumstantial evidence of an actual or threatened disclosure of trade secrets by Mr. McKinney.”

We begin by considering the standard by which we review the trial court’s implied finding of objective speciousness. Generally speaking, an appellate court reviews a fee order deferentially, for an abuse of discretion. (E.g., *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547.) In the present case, however, the relevant facts are undisputed and the only issue is whether NuScience’s pursuit of a misappropriation claim was “objectively specious.” This standard is facially objective and, thus, determined as a matter of law. As such, our review is de novo. (See, e.g., *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 32 [“any reasonable attorney” standard for awarding attorney fees under Business & Professions Code section 809.9 “is an objective standard that is applied as a matter of law. [Citation.] As such, its application is subject to independent review on appeal. [Citation.]”]; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 888 [“reasonable cause” standard for awarding attorney fees under Code of Civil Procedure section 1038 is reviewed de novo].)³

³ Citing *Gemini, supra*, 95 Cal.App.4th at page 1261, McKinney urges that we must apply a deferential “abuse of discretion” standard to the court’s finding of objective speciousness, affirming as long as ““some evidence exists in support of the factual findings”” and the decision does not exceed ““the bounds of reason.””” While we agree the quoted material accurately summarizes the standard by which we review the subjective component of bad faith under section 3426.4, it cannot apply to the objective component, which is evaluated as a matter of law. (E.g., *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 677 [where issue on review was one of law, “this court need not give deference to the conclusion of the trial court”].)

1. “Trade Secret”

To establish a cause of action for misappropriation of a trade secret, a plaintiff’s “first hurdle” is “to show that the information it seeks to protect is indeed a trade secret.” (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 (*Bunner*).) The UTSA defines “trade secret” as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that . . . [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and . . . [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code, § 3426.1, subd. (d).) “In short, the test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. (*ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 18.)” (*Bunner, supra*, at p. 251.)

NuScience contends that its Cellfood formula and customer lists are trade secrets. In support, NuScience submitted the declaration of Kevin Negrete, a NuScience officer, which stated among other things as follows:

“2. . . . The primary product that NuScience develops and sells is known as CELLFOOD®. CELLFOOD® is the world’s best selling oxygen and nutrient supplement The technology and formula used to make CELLFOOD® is one of NuScience’s best-kept trade secrets and NuScience has taken reasonable measures to maintain the trade secret in confidence and protect it from disclosure to competitors. NuScience’s trade secret is not generally known or available to its competitors, is not easily ascertainable, and is not easily developed. NuScience is the only producer of this type of formula. NuScience’s worldwide sales of its products utilizing its trade secret are over \$230 million.

“3. NuScience is in possession of a customer/distributor list of international purchasers of its CELLFOOD® product, which includes, among other things, the identity of customers/distributors, pricing per customer/distributor, and the purchasing habits of the customers/distributors. The list was the result of a substantial amount of time,

energy, and money on the part of NuScience and included special financial arrangements made based on the credit status of each customer/distributor. This customer/distributor list is confidential and proprietary information and constitutes a trade secret as it is not generally known or available to NuScience's competitors, is not easily ascertainable, and is not easily developed. NuScience's customer/distributor list had economic value in that it contained information not generally known within the trade and represented many years of research and client communications. NuScience made reasonable efforts to insure that the customer list remained a secret by disclosing the list only to those employees who needed the information to perform their jobs, and only after they signed a confidentiality agreement binding themselves to keep such information secret.

“4. McKinney, as a result of his high level position at NuScience, was privy to NuScience's trade secrets and other confidential information, including but not limited to production technologies, manufacturing procedures, technical know-how, and customer information. . . .”

NuScience also submitted (1) McKinney's employment agreement, in which McKinney acknowledged that he would have access to trade secret, confidential, and proprietary information, and agreed not to reveal this information to any other person or business, and (2) McKinney's separation agreement, in which he “acknowledge[d] and agree[d] to continue to maintain the confidentiality of all Company confidential and proprietary information as provided by the Employment Agreement.

Finally, NuScience submitted the federal default judgment, in which the court found that Cellfood's technology and formula is a trade secret, that NuScience is the rightful owner of the trade secret, and that NuScience has taken reasonable measures to maintain the trade secret in confidence and protect it from disclosure to competitors.

Through all of this evidence, NuScience established a prima facie case that the Cellfood formula and its customer lists were “trade secrets.”

2. Actual or Threatened Misappropriation

As used in the UTSA, “misappropriation” means:

“(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

“(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

“(A) Used improper means to acquire knowledge of the trade secret; or

“(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

“(i) Derived from or through a person who had utilized improper means to acquire it;

“(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

“(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

“(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.” (§ 3426.1, subd. (b).)

In support of its claim of misappropriation, NuScience introduced evidence, in the form of the federal court findings and judgment, that Henkel purports to possess Cellfood’s formula and has used the formula to produce a version of Cellfood marketed as “Deutrocell.” NuScience also introduced evidence that McKinney and Henkel exchanged emails in early 2010, which indicated that Henkel had sent McKinney a “sample” with which McKinney purported to be “impressed.” McKinney told Henkel that he was “definitely interested” in “seeing where we can go with this that would be profitable for all of us” and asked whether Henkel had spoken with his brother about their earlier discussions. He expressed interest in comparing the “seed” from which Henkel produced the sample with “what I know.” He further inquired about Henkel’s capacity for bottling his product and suggested that “I have some contacts in Asia that may be

interested in several hundred thousand bottles if we can produce them.” Henkel responded that he and his brother “are game for any business opportunity” and suggested entering a nondisclosure agreement.

The email exchange provided a reasonable basis on which to file the present action for misappropriation.⁴ As we have said, misappropriation under section 3426.1 includes unauthorized “*use of a trade secret.*” (Italics added.) “Use” is broadly defined: “Employing the confidential information in manufacturing, production, *research or development*, marketing goods that embody the trade secret, or *soliciting customers* through the use of trade secret information, all constitute use. (Rest.3d Unfair Competition, § 40, com. c, p. 455.)” (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383, italics added.) “[I]nternal experimentation with trade secret information not resulting in a market product can constitute use.” (*02 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.* (N.D.Cal. 2005) 399 F.Supp.2d 1064, 1072.) ““There are no technical limitations on the nature of the conduct that constitutes “use” of a trade secret As a general matter, any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a “use” under this Section. Thus, marketing goods that embody the trade secret, employing the trade secret in manufacturing or production, relying on the trade secret to assist or accelerate research or development, or soliciting customers through the use of information that is a trade secret all constitute “use.”” (Restatement (Third) of Unfair Competition § 40, cmt. c (1995) (citation omitted).)” (*JustMed, Inc. v. Byce* (9th Cir. 2010) 600 F.3d 1118, 1130; see also *Agency Solutions.Com, LLC v. TriZetto Group, Inc.* (E.D.Cal. 2011) 819 F.Supp.2d 1001, 1028-1029 [same].)

In the present case, the email exchange is evidence that McKinney and Henkel were engaged in “internal experimentation with” the Cellfood formula, a trade secret. Specifically, the emails state that McKinney had been “*using* [the samples]” and intended to compare “what I know with what you have.” (Italics added.) McKinney proposed

⁴ We note that McKinney virtually ignored the email exchange in his respondent’s brief, focusing instead on developments after the case was filed.

jointly pursuing a business venture “that would be profitable for all of us,” and Henkel responded that he and his brother “are game for any business opportunity.” McKinney and Henkel also specifically discussed production, bottling, and sales of the product: “The other thing I was thinking about was the production issues. [¶] Are you producing the bulk and having it bottled somewhere else, or are you bottling it yourself? What is your capacity for bottling?”

The email exchange also is evidence that McKinney intended to use NuScience’s customer lists to market to buyers “in Asia that may be interested in several hundred thousand bottles.” Since McKinney was unlikely to have derived information about customers interested in the Cellfood product *other than* through his employment with NuScience, a trier of fact reasonably could conclude that McKinney intended to use the information he derived from NuScience’s customer lists to market a competing product.

For all of these reasons, we conclude that NuScience produced evidence of actual or threatened misappropriation.

3. Damages

McKinney contends finally that an essential element of NuScience’s misappropriation claim is damages, and thus that NuScience’s failure to offer damages evidence is fatal to its misappropriation claim. We do not agree.

Section 3426.2 of the UTSA permits a court to enjoin “actual *or threatened*” misappropriation of trade secrets, as well as to award damages for misappropriation. (§§ 3426.2, subd. (a), 3426.3.) “It is well established that the plain and ordinary meaning of the word ‘or’ is ‘to mark an alternative such as “either this or that” [citations].’ (*Houge v. Ford* (1955) 44 Cal.2d 706, 712.) Therefore, the use of the word ‘or’ in Civil Code section 3426.2, subdivision (a) plainly means that an injunction may be based either on actual misappropriation or on threatened misappropriation. (See *Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 603 [‘or’ used in statute to designate alternatives].) [¶] Accordingly, Civil Code section 3426.2, subdivision (a) ‘explicitly provides for two

types of misappropriations—actual and threatened.’” (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 524 (*Central Valley*).

By its nature, a *threatened* misappropriation is one that has not yet occurred—and thus it cannot have caused the trade secret holder to suffer actual damages. Because the statute explicitly authorizes the issuance of an injunction in the case of a threatened misappropriation, damages cannot be an essential element of the cause of action. (See *Central Valley, supra*, 162 Cal.App.4th at pp. 527-529 [discussing elements of cause of action for threatened misappropriation].)⁵

DISPOSITION

The order awarding attorney fees is reversed. NuScience is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

⁵ Because we have concluded that the trial court erred in finding that NuScience’s misappropriation claim was objectively specious, we do not consider whether the claim was pursued in bad faith.