

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PINKERTON TOBACCO CO., LP et  
al.,

Plaintiffs,

v.

KRETEK INTERNATIONAL, INC. et  
al.,

Defendants.

Case No. 2:20-cv-08729-SB-MRW

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT [DKT.  
NO. 184]

This is one of four related cases before this Court arising from the alleged misappropriation and misuse of Plaintiffs' intellectual property for manufacturing nicotine pouch products. In this suit, Plaintiffs Swedish Match North America, LLC, Pinkerton Tobacco Co., LP, and NYZ AB (collectively, Swedish Match) allege federal and state claims for misappropriation of trade secrets against Defendants Kretek International, Inc. and Dryft Sciences, LLC. Dkt. No. [91](#) (1st Am. Compl.). Defendants move for summary judgment. Dkt. Nos. [184](#); [183-1](#) (sealed unredacted joint brief). Having considered the parties' arguments in their briefing and at the hearing on October 14, 2022, the Court finds on this record that genuine issues of material fact preclude summary judgment.

I.

Although the parties produced more than 1,500 pages of summary judgment exhibits, their motion does not contain a background section, nor have the parties included the basic historical facts underlying their case in the Joint Appendix of Facts (JAF), Dkt. No. [183-2](#). The Court therefore looks to the pleadings solely for purposes of supplementing the background of the case.

Swedish Match alleges that it and its affiliates worldwide, which operate under the umbrella of Swedish Match AB, are world leaders in the development of nicotine products. Dkt. No. [91](#) ¶¶ 15–16. Between 2013 and 2016, Plaintiffs’ affiliate Swedish Match North Europe bought Plaintiff NYZ AB, along with various trade secrets it owned, from Thomas Ericsson<sup>1</sup> and TillCe AB, a Swedish company. *Id.* ¶¶ 20, 22–25. Using those trade secrets, Plaintiff Pinkerton Tobacco Co., LP manufactures nicotine pouch products in Kentucky, and Plaintiff Swedish Match North America, LLC, sells them under the trade name ZYN. *Id.* ¶ 18. ZYN has grown to be the market leader for nicotine pouch products in the United States. *Id.*

Defendant Kretek International, Inc. (Kretek) sells a competing product, DRYFT, in the United States. Kretek initially imported DRYFT from Sweden, purchasing it from Art Factory AB from 2016 to 2018 and from The Art Factory AB (a separate company) from 2018 to 2020. [JAF](#) 15. In 2019, Kretek formed Defendant Dryft Sciences, LLC (Dryft Sciences) to manufacture DRYFT in the United States. [JAF](#) 16.

Swedish Match learned by August 2016 that DRYFT was being sold in the United States and that Thomas Ericsson was involved in its manufacture. [JAF](#) 4–5. In October 2016, counsel for Swedish Match wrote to Ericsson complaining that the manufacture of DRYFT violated Ericsson’s agreements with Swedish Match and used the trade secrets and other intellectual property Ericsson had sold to Swedish Match. [JAF](#) 8–10. Swedish Match filed an arbitration claim against TillCe AB in February 2018, which resulted in a May 2019 decision finding TillCe AB in violation of several contracts with Swedish Match. [JAF](#) 46–48. Swedish Match also executed a settlement agreement with Kretek in August 2017 to resolve Swedish Match’s contention that Kretek’s trade dress infringed the ZYN trade dress. [JAF](#) 78.

Swedish Match filed this action against Kretek and Dryft Sciences in Kentucky on February 12, 2020, alleging trade secret misappropriation. Dkt. No. [1](#). Around the same time, Plaintiffs in this case (along with two additional related entities), filed a separate patent infringement suit against Kretek, Dryft Sciences, The Art Factory AB, and TillCe AB, docketed as Case No. 2:20-cv-01322-SB-MRW (the Patent Action). Another party, Modoral Brands, Inc., purchased Dryft Science’s nicotine pouch product assets effective October 2020 and then filed a

---

<sup>1</sup> Ericsson’s surname is also sometimes spelled Eriksson in the record.

suit in Delaware against Swedish Match and others, seeking declarations that it was not infringing their patents or using their trade secrets. That action was transferred to this Court and docketed as Case No. 2:21-cv-05013-SB-MRW (the Modoral Action). The instant action was also transferred to this Court in September 2020. Dkt. No. [45](#). Although the cases have not been fully consolidated, the Court has coordinated their litigation schedules and has issued combined rulings on some matters, including a *Markman* hearing in the Patent Action and Modoral Action, which is now on appeal while the parties litigate their non-patent claims.<sup>2</sup>

The parties filed simultaneous joint motions for summary judgment in this action, Dkt. No. [184](#), and for partial summary judgment on the related trade secret declaratory relief claim in the Modoral Action. In this action, Kretek argues that it is entitled to summary judgment because (1) the claims are barred by the statute of limitations, (2) Swedish Match released its claims, and (3) Swedish Match lacks evidence to raise a genuine issue of material fact as to several elements of its claims. Dkt. No. [183-1](#).<sup>3</sup>

## II.

Summary judgment is appropriate where the record, taken in the light most favorable to the opposing party, shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. [56\(a\)](#); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48

---

<sup>2</sup> In another related case, filed in August 2022 and docketed at 2:22-cv-05355-SB-MRW, Dryft Sciences brings antitrust and related claims against Swedish Match. That new action has not been consolidated with the three cases that have been pending for two years.

<sup>3</sup> Kretek also purports to adopt Modoral’s arguments in its summary judgment motion in the Modoral Action. This attempt to evade the page limit in this action is improper, even apart from the fact that the summary judgment records in the two cases are not identical. See *Williams v. Cnty. of Alameda*, 26 F. Supp. 3d 925, 947 (N.D. Cal. 2014) (rejecting attempt to incorporate arguments from an earlier brief in the same case because “[i]t is wholly improper for Plaintiff to incorporate by reference legal arguments made in a brief filed in connection with a motion that is not before the Court,” which “would provide an effective means of circumventing page limits on briefs”). To the extent Kretek’s summary judgment motion simply adopts arguments from the Modoral Action, it is DENIED.

(1986). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” [Anderson](#), 477 U.S. at 255. The moving party has the initial burden of establishing that there are no disputed material facts. [Id.](#) at 256. “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact . . . the court may . . . consider the fact undisputed.” Fed. R. Civ. P. [56\(e\)\(2\)](#). Furthermore, “Rule 56[(a)] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322 (1986).

A court “may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically referenced therein.” [Carmen v. S.F. Unified Sch. Dist.](#), 237 F.3d 1026, 1030 (9th Cir. 2001). Arguments based on conjecture or unfounded belief do not raise a genuine issue of material fact. Moreover, “there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” [R.W. Beck & Assocs. v. City of Sitka](#), 27 F.3d 1475, 1481 n.4 (9th Cir. 1994) (citing [Anderson](#), 477 U.S. at 249).

### III.

#### A.

Krettek first argues that Swedish Match’s claims are time-barred. Both federal and California law impose a three-year statute of limitations on claims for trade secret misappropriation, incorporating the discovery rule. 18 U.S.C. § [1836\(d\)](#) (“A civil action . . . may not be commenced later than 3 years after the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered.”); Cal. Civ. Code § [3426.6](#) (“An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered.”). Swedish Match filed this suit on February 12, 2020, so its claims are time-barred if they accrued before February 12, 2017.<sup>4</sup>

---

<sup>4</sup> Defendant Dryft Sciences did not even exist before 2019—a point the parties have not addressed—but the Court assumes that it stands in the shoes of Krettek.

The statutory trigger for accrual—when “the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered”—presupposes that misappropriation has occurred. This is consistent with the foundational principle for statutes of limitations that a cause of action does not accrue until “the cause of action is complete with all of its elements,” and later if accrual is postponed by the discovery rule. *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999).<sup>5</sup> Kretek, however, relies on *Cypress Semiconductor Corp. v. Superior Ct.* to argue that this principle does not apply to a misappropriation claim, seizing on language in that case stating that “the misappropriation that triggers the running of the statute is that which the plaintiff suspects, not that which may or may not actually exist.” 163 Cal. App. 4th 575, 587 (2008). *Cypress* held that a plaintiff who suspects that a defendant has the requisite mental state to support a claim for misappropriation cannot wait for “direct proof of the defendant’s mental state before filing the lawsuit”; instead, the plaintiff must file suit, and any “subsequent inability to prove the requisite mental state means that the plaintiff cannot prevail on the merits of the claim but it does not retroactively affect the running of the statute of limitations.” *Id.*

To the extent *Cypress* holds that a claim for misappropriation can accrue before the alleged misappropriation occurs, it is difficult to square with either the statutory language or the general rule that a claim accrues when the cause of action is complete. Indeed, *Cypress* itself describes the discovery rule as a rule “which delays accrual until the plaintiff discovers or has reason to discover the cause of action,” which appears to be in tension with any suggestion that the discovery rule could trigger accrual before the misappropriation occurs. *Id.* at 587 (emphasis added). Moreover, if, as Kretek suggests, Swedish Match first became suspicious of Kretek in 2016, then its “exercise of reasonable diligence,” Cal. Civ. Code § 3426.6, would only have discovered misappropriation if Kretek had in fact misappropriated Swedish Match’s trade secrets as claimed.<sup>6</sup>

---

<sup>5</sup> The parties do not distinguish between the misappropriation claims under federal and state law, although they primarily cite cases applying California law. The Court assumes that any differences are immaterial here.

<sup>6</sup> Of course, “[i]t is not the law that accrual of a cause of action depends upon the existence, as a matter of fact, of a winning claim.” *Cypress*, 163 Cal. App. 4th at 585. But a party must have actual or constructive knowledge of facts necessary to support a claim, including its essential elements. See *Norgart*, 21 Cal. 4th at 398

The Court need not decide at this juncture whether to adopt the broad reading of *Cypress* urged by Kretek. Even if Swedish Match’s claim against Kretek accrued when Swedish Match first had reason to suspect misappropriation by Kretek, irrespective of whether Swedish Match “by the exercise of reasonable diligence should have . . . discovered” misappropriation, Cal. Civ. Code § [3426.6](#), genuine issues of material fact still preclude summary judgment. Specifically, it is not clear on this record that Swedish Match before February 2017 had reason to believe Kretek had the knowledge required for a misappropriation claim. *Id.* at 586 (“[T]he defendant’s state of mind is not irrelevant. Since a cause of action for misappropriation incorporates an element of knowledge on the part of the defendant, the trial court was correct in deciding that *Cypress*’s knowledge was one of the elements necessary to the cause of action.”).

The parties have not focused on the knowledge required for misappropriation of a trade secret. Misappropriation is statutorily defined in Cal. Civ. Code § [3426.1\(b\)](#) as:

- (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

---

(noting a party must be diligent in finding the facts and “file suit” within the statutory period).



- (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.

Swedish Match’s misappropriation claim relies on § [3426.1\(b\)\(2\)\(B\)\(ii\)](#). See Dkt. No. [91](#) ¶ 59 (alleging that “Defendants have engaged in use and threatened use of Swedish Match’s NP Trade Secrets without Swedish Match’s consent and have acquired the NP Trade Secrets under circumstances giving rise to duties to maintain their secrecy and limit their use.”). A violation of this provision—like the other provisions in subsection (2)(A) and (B)—requires that the Defendant has “knowledge of the trade secret.” *Id.*; [Silvaco Data Sys. v. Intel Corp.](#), 184 Cal. App. 4th 210, 224–25 (2010), *disapproved on other grounds by Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310 (2011). Thus, to misappropriate Swedish Match’s trade secrets, Kretek would have had to know the information that composes the trade secrets—and also to know or have reason to know that the information was wrongfully acquired.

Kretek argues that by September 2016, Swedish Match (1) knew that DRYFT was being manufactured by Ericsson and distributed by Kretek and (2) believed that Ericsson was untrustworthy and that DRYFT misappropriated Swedish Match’s trade secrets. But it does not argue—much less produce evidence to prove—that Swedish Match had reason to believe in 2016 that *Kretek* knew Swedish Match’s trade secrets used in the production of DRYFT. Selling a product made using a trade secret does not, by itself, constitute use of the trade secret. [Silvaco](#), 184 Cal. App. 4th at 224 (“One clearly engages in the ‘use’ of a secret, in the ordinary sense, when one directly exploits it for his own advantage, e.g., by incorporating it into his own manufacturing technique or product. But ‘use’ in the ordinary sense is not present when the conduct consists entirely of possessing, and taking advantage of, something that was made using the secret.”).<sup>7</sup> Thus, Swedish Match’s knowledge that Kretek was distributing DRYFT is not enough to suggest that Kretek was misappropriating Swedish Match’s trade secrets. *Id.* at 225–28 (explaining that liability for trade secret misappropriation

---

<sup>7</sup> Although “marketing goods that embody the trade secret” may constitute use of a trade secret, [MicroVention, Inc. v. Balt USA, LLC](#), No. 8:20-CV-02400-JLS-KES, 2021 WL 4734611, at \*3 (C.D. Cal. Sept. 9, 2021) (quoting [JustMed, Inc. v. Byce](#), 600 F.3d 1118, 1130 (9th Cir. 2010)), Kretek cites no cases where such marketing was found to be misappropriation in the absence of knowledge of the trade secret by the seller.

requires possession of the misappropriated information, so possession of software that used trade secrets in source code could not be misappropriation where the defendant did not have access to the source code itself, even if the defendant knew of the improper trade secret use).

At the hearing, the parties appeared to adopt a different standard, suggesting that Kretek could be liable for misappropriation based on its sale of DRYFT so long as it knew that DRYFT was made using misappropriated trade secrets, regardless of whether Kretek knew the actual trade secrets. But even if the Court were to adopt this framing, fact issues would still preclude summary judgment. Kretek produces evidence that Swedish Match in 2016 knew that Kretek was distributing DRYFT, knew that Ericsson was involved in the manufacture of DRYFT, and suspected that Ericsson was using the trade secrets he had sold to Swedish Match to manufacture DRYFT. Kretek relies heavily on an August 2016 internal Swedish Match document that discussed DRYFT, which it “found to be made in Sweden and distributed by Kretek out of southern California,” and concluded that “we do have some additional concern regarding the relationship(s) between TillCe, Burger, Northerner.com and Kretek. Several elements of confidential and/or sensitive information seem to have been compromised over the past few years and we need to discern if/how best to proceed with each of these companies moving forward.” Dkt. No. [183-5](#) at 115, 117. But this evidence does not establish as a matter of law that Swedish Match had reason to believe that Kretek knew that DRYFT was being manufactured by using Swedish Match’s trade secrets. Indeed, when Swedish Match wrote to Kretek on February 16, 2017—within the limitations period—to express its concerns about DRYFT, it asked for assistance investigating the suppliers of DRYFT and did not mention trade secrets even though it invoked its “trademark, trade dress and patent” intellectual property. Dkt. [183-6](#) at 181. On this record, viewed in the light most favorable to Swedish Match,<sup>8</sup> a reasonable jury could conclude that Swedish Match

---

<sup>8</sup> To the extent the Court relies on evidence to which an evidentiary objection was raised, the Court overrules the objection, having found the contents of the evidence could be admitted at trial. *See, e.g., Sandoval v. County of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021) (“If the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony by the author of the document—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment.”). To the extent the Court does not rely on evidence objected to by the parties, the objections are overruled as moot.



did not know or have reason to know that Kretek was misappropriating its trade secrets before February 12, 2017, when it was merely distributing DRYFT manufactured by others in Sweden.

Kretek also argues that it does not matter whether Swedish Match had reason to suspect that *Kretek* was misappropriating its trade secrets in 2016 or that Kretek did not begin manufacturing DRYFT until 2019, because “Swedish Match had a duty to act as soon as it was aware that *someone* was treading upon its rights,” and Swedish Match plainly suspected Ericsson of misconduct in 2016. Dkt. No. [183-1](#) at 15. It is true that a broad version of the discovery rule applies in the context of trade secret misappropriation. Thus, for example, notice that a particular defendant has misappropriated one trade secret generally starts the clock as to claims against that defendant for misappropriation of other related trade secrets. See *Intermedics, Inc. v. Ventritex, Inc.*, 822 F. Supp. 634, 654 (N.D. Cal. 1993) (“[O]nce plaintiff knows or should know that a defendant who once was trusted has shown, by any act of misappropriation, that he cannot be trusted, plaintiff should understand that there is a risk that that defendant will commit additional acts of misappropriation, whether they involve repeated misappropriations of one trade secret or initial misappropriations of other confidences.”). Similarly, when a plaintiff knows that one defendant has disclosed the plaintiff’s trade secrets to another defendant, the statute of limitations generally begins to run against both defendants because “a continuing misappropriation constitutes a single claim.” Cal. Civ. Code § [3426.6](#). See *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 599 (N.D. Cal. 1989) (holding that when a software developer knew that co-creator of software had disclosed trade secrets to another company, his right to sue accrued as to both defendants when the original disclosure was made), *aff’d*, [916 F.2d 516](#) (9th Cir. 1990).

But Kretek stretches this discovery rule too far, relying on district court decisions that have described *Ashton-Tate*’s holding in broad terms. See, e.g., *Forcier v. Microsoft Corp.*, 123 F. Supp. 2d 520, 525–26 (N.D. Cal. 2000). In *Forcier*, the court discussed the rule articulated in *Intermedics* that a plaintiff who is on notice of a breach of confidentiality as to one trade secret must take action to protect all its trade secrets and then cited *Ashton-Tate* for the proposition that “[t]his is true even where the secrets at issue were sold to a third-party and used again years later.” *Id.* But, critically, the court in *Ashton-Tate* found that the third party had been misappropriating the trade secrets from the time of their initial disclosure by, among other things, using the trade secrets to develop the software it began selling years later. Thus, this Court does not read *Ashton-Tate* to suggest that a plaintiff’s claim against a third party *uninvolved* in the initial

misappropriation accrues at the time of the initial misappropriation even if the third party first obtains the trade secrets years later. Indeed, the California Court of Appeal in [Cypress](#) rejected just such a suggestion, noting the absurd consequences of the rule urged by Kretek here:

In this case, Cypress’s acquisition and use of the trade secrets was a consequence of CSI’s misappropriation and, to that extent, it was a continuation of the injury caused by CSI’s initial misappropriation. But Silvaco does not allege that Cypress was involved in CSI’s misappropriation and Silvaco seeks damages arising only from Cypress’s use of the software after it learned of the original misappropriation. Under these circumstances, if Silvaco has a claim for misappropriation against Cypress, it is a separate claim with its own limitations period. Any other interpretation of the law would lead to the absurd consequence of allowing a third-party defendant like Cypress to engage in its own misappropriation without risk of suit so long as it waited for the three years to run on the original misdeed.

163 Cal. App. 4th at 585.

To the extent *Forcier* and [MedioStream, Inc. v. Microsoft Corp.](#), 869 F. Supp. 2d 1095, 1111 (N.D. Cal. 2012)—on which Kretek likewise relies—intended to interpret *Ashton-Tate* more broadly and in contravention of *Cypress*, the Court finds them unpersuasive. Because a reasonable jury could find that Swedish Match did not discover or have reason to discover misappropriation of its trade secrets by Kretek more than three years before Swedish Match filed suit, Kretek is not entitled to summary judgment based on the statute of limitations.

## B.

Kretek next argues that Swedish Match released its trade secret claims when it executed a settlement agreement with Kretek in August 2017 in connection with their trade dress dispute. Kretek raised a similar argument in its summary judgment motion in the Patent Action. The Court rejected it, finding that the release did not mention patents and released only claims “arising out of or relating in any manner to the Dispute” and that the parties had produced conflicting extrinsic evidence as to whether they believed they were settling claims beyond their trade dress dispute. [Pinkerton Tobacco Co., LP v. Art Factory AB](#), No. 2:20-CV-01322-SB-MRW, 2021 WL 4902497 (C.D. Cal. June 11, 2021). For similar reasons, fact issues preclude the Court from finding as a matter of law that Swedish

Match released its trade secret misappropriation claims against Kretek in their 2017 settlement agreement. Kretek cites to some additional evidence it obtained after the Court's ruling in the Patent Action and, for the first time in its reply brief, raises an estoppel theory. Dkt. No. [199-1](#) at 6. "The district court need not consider arguments raised for the first time in a reply brief." [Zamani v. Carnes](#), 491 F.3d 990, 997 (9th Cir. 2007). In any event, Kretek's new evidence does not alter the Court's conclusion that fact issues preclude summary judgment on the issue of release.

### C.

Kretek's remaining arguments challenge the merits of Swedish Match's misappropriation claims. Kretek contends that (1) there is no evidence that Art Factory or The Art Factory used Swedish Match's trade secrets to produce DRYFT, (2) there is no evidence that Dryft Sciences used Swedish Match's trade secrets to produce DRYFT, (3) there is no evidence that Kretek acquired the trade secrets by improper means, and (4) Swedish Match did not take reasonable measures to protect its alleged trade secrets. The Court finds that genuine issues of material fact preclude summary judgment on these issues. While much of the evidence is circumstantial, "[i]t is settled law in this Circuit that circumstantial evidence is sufficient to withstand summary judgment, especially in cases where direct proof of wrongdoing is difficult to obtain," including "cases involving . . . misappropriation of trade secrets." [Friedman v. Quest Int'l Fragrances Co.](#), 58 F. App'x 359 (9th Cir. 2003) (citing [Droeger v. Welsh Sporting Goods Corp.](#), 541 F.2d 790, 792 (9th Cir. 1976)).

First, Swedish Match has raised fact issues as to whether Art Factory and The Art Factory used its trade secrets. Kretek began purchasing DRYFT from Art Factory—a company affiliated with Ericsson—less than six months after Ericsson sold his nicotine pouch intellectual property to Swedish Match, and Swedish Match's analysis of samples of DRYFT sold in the United States showed that DRYFT's composition, with the exception of the nicotine source, was essentially identical to the composition of the ZYN that Swedish Match produced using the trade secrets it bought from Ericsson. [JAF](#) 80, 91–93.<sup>9</sup> On this record, a

---

<sup>9</sup> This evidence is further bolstered by the opinion of Swedish Match's expert, Dr. Krister Holmberg, that DRYFT almost certainly could not have been manufactured without using Swedish Match's trade secrets. [JAF](#) 96. However, the Court does

reasonable jury could conclude that the circumstantial evidence, including Ericsson’s involvement and the speed of Art Factory’s development of DRYFT, shows that Art Factory (and The Art Factory, which evidently continued supplying the same product to Kretek in 2018) made DRYFT using Swedish Match’s trade secrets. See *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 973 (9th Cir. 1991) (affirming preliminary injunction and finding likelihood of success on misappropriation claim where “[a]s a practical matter, it would be difficult for a person developing the same technology for two clients not to use knowledge gained from the first project in producing the second”).

Second, Swedish Match has raised genuine issues of material fact as to whether Dryft Sciences (which Kretek created in 2019 to manufacture DRYFT) used Swedish Match’s trade secrets. The uncontroverted evidence is that Kretek sent representatives to The Art Factory’s facility in Sweden to observe the DRYFT manufacturing process in 2018 and 2019, *JAF* 68–69; one of Kretek’s employees reported that Kretek had “[s]uccessfully captured a detailed recipe for how to make the Dryft ingredients,” *JAF* 70; and various Kretek employees acknowledged that Ericsson communicated with them and assisted Dryft Sciences in setting up the process for manufacturing DRYFT, *JAF* 117–21. Although Kretek produces evidence that its manufacturing process differed from Swedish Match’s, trade secret misappropriation encompasses not only direct copying but also the use of a trade secret as a starting point to accelerate research or production. See *MicroVention, Inc. v. Balt USA, LLC*, No. 8:20-CV-02400-JLS-KES, 2021 WL 4734611, at \*3 (C.D. Cal. Sept. 9, 2021) (“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’ for purposes of misappropriation. 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.’” (cleaned up)). Viewing the evidence in the light most favorable to Swedish Match, a reasonable jury could find that Kretek and Dryft Sciences used Swedish Match’s trade secrets to develop and produce DRYFT.

Third, there are genuine issues of material fact as to whether Kretek acquired the trade secrets by improper means. Swedish Match produces some evidence

---

not at this stage rule on Kretek’s objections to Dr. Holmberg’s opinions and instead finds that fact issues exist irrespective of Dr. Holmberg’s declaration.

suggesting that Kretek had at least constructive notice that Ericsson may have misappropriated Swedish Match's trade secrets, such that it should have inquired further. See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 718 (2d Cir. 1992) (explaining that claim for wrongful acquisition of a trade secret requires only constructive notice, which is satisfied when "from the information which he has, a reasonable man would infer a breach of confidence, or if, under the circumstances, a reasonable man would be put on inquiry and an inquiry pursued with reasonable intelligence and diligence would disclose the breach" (cleaned up)). Ericsson informed Kretek in March 2017 that Swedish Match was "after me" and raised the possibility that The Art Factory and Kretek would be "hit" in the future. *JAF* 125. In July 2018, Ericsson wrote to Kretek about his conversations with a solicitor, the prospect of losing his case against Swedish Match, and his concern that "[a]s a consequence DRYFT are at risk." *JAF* 127; Dkt. No. *183-7* at 32 of 164. Kretek responded by offering to help Ericsson. *JAF* 129. Kretek was aware of and concerned about the arbitration between Swedish Match and Ericsson but did not investigate the claims against Ericsson. *JAF* 130–34. Under these circumstances, a jury could find that Kretek acquired Swedish Match's trade secrets by improper means because it had reason to know of Ericsson's misappropriation and chose not to inquire further. See *Baxter Healthcare Corp. v. HQ Specialty Pharma Corp.*, 157 F. Supp. 3d 407, 426 (D.N.J. 2016) (denying summary judgment on trade secret misappropriation claim because defendant could be liable if it "was willfully blind to the circumstances indicating [scientist's] improper use of [plaintiffs'] trade secrets").

Finally, the parties produce competing evidence as to whether Swedish Match took reasonable precautions to protect its alleged trade secrets (including whether its protective orders and the trust it placed in certain contractors were sufficient) and whether it knew that Ericsson might be sharing its trade secrets with others. *JAF* 37–41, 154–55; Dkt. No. *183-7* at 121–22 of 164. "The determination of whether 'reasonable efforts' have been taken is quintessentially fact-specific," and "[o]nly in extreme cases is it appropriate to take the issue away from the jury." *Mattel, Inc. v. MGA Ent., Inc.*, No. CV 04-9049 DOC RNBX, 2011 WL 3420571, at \*2 (C.D. Cal. Aug. 4, 2011). Kretek has not shown that this is an "extreme case" in which the summary judgment record indisputably establishes that Swedish Match's precautions were unreasonable. Kretek therefore is not entitled to summary judgment.

IV.

Because genuine issues of material fact exist as to all of Kretek's arguments, its motion for summary judgment is DENIED.

Date: October 27, 2022

A handwritten signature in black ink, appearing to read 'S. Blumenfeld, Jr.', written over a horizontal line.

Stanley Blumenfeld, Jr.  
United States District Judge