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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(WESTERN DIVISION)

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc., and Mark Morris

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

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

CHROMADEX, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTIONS *IN LIMINE* (NOS. 1–3)

Judge:	Hon. Cormac J. Carney
Courtroom:	7C
Date:	September 18, 2019
Time:	9:00 AM
Trial:	Oct. 15, 2019
Pretrial Conference:	Sept. 18, 2019

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Plaintiff and Counter-Defendant ChromaDex, Inc. ("ChromaDex") respectfully submits the following three motions *in limine* to preclude improper evidence and argument at trial and to preclude improper commentary and argument during the opening statement of Defendant and Counterclaimant Elysium Health, Inc. ("Elysium") and Defendant Mark Morris (collectively, "Defendants"). The motions are non-boilerplate and are precisely targeted at three significant trial issues.

I. MOTION *IN LIMINE* NO. 1 TO EXCLUDE EVIDENCE AND ARGUMENT RELATING TO LITIGATION OR INVESTIGATIONS INVOLVING BARRY HONIG, MICHAEL BRAUSER, AND PHILLIP FROST

ChromaDex moves for an order precluding Defendants from presenting evidence about or referencing, explicitly or implicitly, any litigation or investigations of any nature involving three individuals: Barry Honig, Michael Brauser, and Phillip Frost. This includes, but is not limited to, any reference to an investigation or litigation initiated by the U.S. Securities and Exchange Commission (the "SEC"). This also includes any statement suggesting that ChromaDex is or was managed by or affiliated with "criminals," such as the statements made by Elysium's CEO, Eric Marcotulli, to third parties. (Ex. 1 at 4 *see also* Ex. 2 at 9, Ex. 3 at 13 & Ex. 4 at 21.)[1] Such references and arguments are irrelevant to the claims or issues in this case and would be unduly prejudicial to ChromaDex. Fed. R. Evid. 402, 404.

Honig, Brauser, and Frost are or were passive investors in ChromaDex. Further, Honig and Brauser were on the board of directors of ChromaDex for a brief stint that ended when they resigned on February 25, 2015. (Ex. 5 at 24.) Frost is a distant relative of ChromaDex's current CEO, Rob Fried. In late 2018, well after Honig and Brauser had resigned from the ChromaDex board, the SEC accused Honig, Brauser, Frost, and others of participating in a "pump-and-dump" penny stock fraud scheme, orchestrated by Honig. Specifically, the SEC claimed that they manipulated stock prices in certain

[1] All citations to Exhibits ("Ex.") refer to those Exhibits attached to the Declaration of Barrett J. Anderson filed concurrently herewith.

microcap companies, then dumped their shares for a profit, leaving other investors holding the bag.[2] That alleged scheme did ***not*** involve ChromaDex or its stock and Defendants have not produced or provided any evidence to the contrary. Given Frost's high profile as a billionaire and former chairman of a large international drug company (Teva Pharmaceutical Industries Ltd.), the SEC enforcement action was widely publicized in sources such as *Barron's*, the *Financial Times*, and the *Wall Street Journal*. The SEC's action also spawned numerous investor lawsuits and a criminal investigation. At this time, Honig and Frost have entered into settlements with the SEC without admitting or denying wrongdoing, and Brauser has moved to dismiss the enforcement action against him.[3]

ChromaDex does not intend to call any of these three individuals as trial witnesses. Yet the risk remains that Defendants will unfairly seek to connect and associate ChromaDex with these individuals, their alleged "pump-and-dump" scheme, or the SEC enforcement action, all of which are unconnected to the issues in this litigation. ChromaDex's concern is based, in part, on Defendant's depositions of Fried and a ChromaDex board member named Stephen Block, in which Defendants' counsel asked numerous questions about Honig, Brauser, and Frost. Further, Elysium's Marcotulli—in a series of emails to third parties—falsely represented that ChromaDex "is run and backed by legitimate criminals" based on its ties with Honig, Brauser, and Frost. (Ex. 1 at 4; *see also* Ex. 2 at 9, Ex. 3 at 13 & Ex. 4 at 21.) Those actions suggest that Defendants may take the same approach at trial.

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[2] *See* U.S. Securities & Exchange Commission, SEC Charges Microcap Fraudsters for Roles in Lucrative Market Manipulation Schemes (Sept. 7, 2018), https://www.sec.gov/news/press-release/2018-182.

[3] *See* U.S. Securities & Exchange Commission, Barry Honig and Three Other Defendants Settle with SEC in Market Manipulation Case (July 12, 2019), https://www.sec.gov/litigation/litreleases/2019/lr24529.htm; U.S. Securities & Exchange Commission, SEC Settles with Multiple Defendants in Market Manipulation Case and Amends Complaint as to Thirteen Remaining Defendants (Mar. 22, 2019), https://www.sec.gov/litigation/litreleases/2019/lr24431.htm; Law360, Suspects in $27M Pump-And-Dump Seek Exit from SEC Suit (June 20, 2019), https://www.law360.com/articles/1171153/suspects-in-27m-pump-and-dump-seek-exit-from-sec-suit.

Any argument about or references to the alleged misconduct of these individuals is irrelevant under Federal Rule of Evidence 401 and should be excluded under Rule 402. At the threshold, the SEC has not alleged that these individuals took any action, illegal or not, in connection with ChromaDex or its stock. *See* Complaint, *SEC v. Honig et al.*, No. 1:18-cv-08175 (No. 1) (S.D.N.Y. Sept. 9, 2018). Nor does the alleged conduct by these individuals have any connection to the claims and issues in this case. Elysium's Third Amended Counterclaims ("TACC") has no allegations concerning Honig or Frost, and includes only one allegation that suggests Brauser—who Elysium admits "has, to Elysium's knowledge, no position within ChromaDex"—made some phone calls to Elysium and/or its investors in December 2016. (Dkt. 103, TACC ¶ 119.) But those phone calls are not relevant to this case for many reasons, including because Brauser was not acting, or authorized to act, for ChromaDex and because the alleged factual bases for the claims and defenses in the case occurred months before. (*See, e.g.*, *id.* ¶¶ 46, 82 (alleging negotiations between ChromaDex and Elysium began in 2013 and Elysium placed its last orders of ingredients from ChromaDex on June 30, 2016).) Because there is no fact "of consequence" that Defendants could show to be "more or less probable" by referencing that these individuals are investors or former board members of ChromaDex, or any litigation in which they may be involved, such references are irrelevant and should be excluded. Fed. R. Evid. 402.

In addition, references to the alleged conduct or litigation involving these individuals would be substantially more prejudicial than probative under Rule 403. The only reason Defendants could seek to raise these issues would be to attempt to paint ChromaDex as an unsavory organization, based solely the subsequent and unrelated legal issues experienced by these three individuals. This insinuation is not supported by any facts, and thus has no probative value. No member of ChromaDex's management that ever interacted or negotiated with Elysium in the relevant time period for this case has been implicated in any criminal investigation, let alone convicted of a crime. And with respect to Honig, Brauser, and Frost, the SEC's enforcement action

has nothing to do with ChromaDex. Any reference to unrelated litigation or investigations would present a substantial risk that the jury could find that ChromaDex's evidence, witnesses, and arguments are unworthy of belief or otherwise unfairly punish ChromaDex during the trial. *See Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001), *opinion amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) (holding testimony suggesting a prevalence of corruption and fraud in the Korean business community was "far more prejudicial than probative and should have been excluded under Rule 403").

For those reasons, the Court should preclude Defendants from introducing evidence or arguing that ChromaDex is associated with "criminals" or referencing any litigation or investigations involving Honig, Brauser, or Frost, and exclude any evidence of the same, such as the communications sent by Marcotulli to various third parties. (*See, e.g.*, Exs. 1, 2, 3 & 4).

II. MOTION *IN LIMINE* NO. 2 TO BAR CHARACTERIZATION OF OR REFERENCE TO AN ALLEGEDLY "FRAUDULENT" SPREADSHEET

ChromaDex moves for an order barring Defendants' counsel from referring to a spreadsheet sent to Elysium by then-ChromaDex CEO Frank Jaksch on June 13, 2016 ("the June 13 Spreadsheet"), as "fraudulent," or any similar label, during their opening statement and throughout trial unless an appropriate evidentiary foundation is established and leave of court obtained. To be clear, ChromaDex is not seeking to bar Defendants from referencing the Spreadsheet at all; instead, ChromaDex merely seeks to prevent Defendants from describing it as "fraudulent" or "dishonest," or using similarly pejorative and argumentative terms before the jury. ChromaDex believes that Defendants will be unable to establish a factual basis at trial for their accusations of fraud, and thus an *in limine* ruling is necessary to prevent the irreparable prejudice to ChromaDex that would accompany such an unsupported and premature argument.

In its TACC, Elysium labels this document the "Fraudulent Spreadsheet," and alleges that ChromaDex "manipulated" it with the intent to mislead Elysium. (TACC

¶ 73.) During a meet-and-confer call about this motion *in limine*, Defendants' counsel refused to agree not to call the June 13 Spreadsheet "fraudulent" in their opening statement. (Declaration of Barrett J. Anderson in Support of ChromaDex's Motions *in Limine* (Nos. 1–3) ("Anderson Decl.") ¶ 3.) ChromaDex denies the allegation and believes that no evidence supports Elysium's characterization of the Spreadsheet.

"An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring). Characterizing evidence as "fraudulent" or "manipulated" or the like is not an objective summary of what a party expects it will present to the jury or make it easier for the jury to understand; it is instead a transparent attempt to color that evidence through pejoratives. It is within the Court's discretion to preclude such commentary at the outset. *See Sec. & Exch. Comm'n v. Goldstone*, 2016 WL 4507454, at *12–13 (D.N.M. July 20, 2016) ("[T]he SEC cannot make speculative arguments or characterize the liquidity reports in any way during its opening statement. Argument does not belong in opening statements . . . . Specifically, the SEC cannot say that the reports were doctored or that the Defendants intentionally withheld the margin call information from the liquidity reports unless more evidence comes to light before trial." (internal citations omitted)).

ChromaDex does not believe that there is any evidence that the June 13 Spreadsheet was "fraudulent." That document contains a summary of terms from agreements that ChromaDex had executed with other customers for supplying them with an ingredient called nicotinamide riboside ("NR"). (Ex. 6 at 33–43 (showing all pages titled "NR Supply Agreements Summary for Elysium 06.13.2016.xlsx".) Elysium alleges that Jaksch sent the Spreadsheet with the "blinded" tab in an attempt to hide information that Elysium would need to know to determine whether ChromaDex was following the "most favored nations" clause of its NR supply agreement with

Elysium ("the MFN Provision"). (TACC ¶ 77.) As Elysium concedes, however, in order to evaluate ChromaDex's fidelity to the MFN Provision (even under Elysium's erroneous interpretation), one would need to know specific order dates, prices per kilogram for those orders, and the amounts of those orders. (Dkt. 230-1, Defendants' Memorandum of Law in Support of their Motion for Partial Summary Judgment, at 5 & 9 (contending Elysium's damages under the MFN Provision are calculated using specific order dates, prices, and amounts). Yet even a cursory look at the June 13 Spreadsheet (including the "unblinded" tabs shared with Elysium) reveals that it ***does not*** contain specific dates, prices, or amounts of any orders. (Ex. 6 at 33–43.) Consequently, Jaksch could not have been "hiding" anything, because none of the information in the June 13 Spreadsheet—whether blinded or unblinded—has a bearing on the MFN Provision dispute. Elysium's theory of fraud makes no sense.

In any event, Elysium's suggestion that it was misled by the June 13 Spreadsheet is a red herring. As of June 13, 2016, Mark Morris had already provided to Elysium confidential sales information from ChromaDex (without ChromaDex's knowledge or authorization) that showed the actual dates, prices, and amounts of specific NR orders placed by a large ChromaDex customer: Live Cell Research ("Live Cell" or "Living Cell"). (Ex. 7 at 69.) About 20 minutes after receiving that sales information from Morris, Elysium—intending to deceive ChromaDex—requested the exact same information from Jaksch by email, claiming that it needed "sales and price data of NR that ChromaDex has sold to other customers" for a potential investor. (Ex. 8 at 111.) Jaksch, faithful to ChromaDex's policy of not sharing its trade secret sales information, told Elysium that he was "not sure how much [he was] going to be able to share about other NR customer relationships." (*Id.*)

Elysium did not relent. It requested ChromaDex's sales information again, which it already possessed, both on a phone call and an email sent on June 3, 2016. (Ex. 6 at 29.) On June 11, Elysium continued to pressure Jaksch, claiming that a future "sizable order" from Elysium depended on it obtaining the information from Jaksch that it had

already improperly received from Morris. (*Id.*) Elysium even asked Morris to pressure Jaksch on its behalf, which he gladly agreed to do because he was "extremely motivated to get this resolved :)". (Ex. 7 at 71–73.)

Ultimately, Jaksch determined that he could potentially assist Elysium—which he (wrongly) believed was asking in good faith—and also respect ChromaDex's confidential information by providing, not specific sales order information, but rather a blinded summary of certain terms of its existing NR supply agreements. On June 13, 2016, Jaksch sent the Spreadsheet attached to an email that identified it as "a blinded summary of supply agreements for NR" and warned that the "deal terms vary substantially depending on" a number of different variables. (Ex. 6 at 29; *see also* TACC ¶ 73.) The "blinded" tab, as promised, contained an anonymized summary of the terms of ChromaDex's NR supply agreements. The "unblinded" tabs contained, among other things, those companies' names, as well as additional companies with whom ChromaDex ***had not signed supply agreements***. For example, the summary of terms for Live Cell—a company with which ChromaDex was negotiating, but had no executed supply agreement—were identified on the unblinded tabs in the "DATE" column as "PENDING." (Ex. 6 at 35 & 39.) Because Jaksch said only that the June 13 Spreadsheet was a summary of supply agreements, not "pending" negotiations, it was plainly not fraudulent. And, as discussed above, the "unblinded" tabs did ***not*** include specific order dates, prices, or amounts, nor did Jaksch ever agree to send such specific sales order information to Elysium.

Because the "blinded" tab included exactly what Jaksch told Elysium the June 13 Spreadsheet contained—a "summary of terms of supply agreements for NR"—the Spreadsheet was not fraudulent, and Elysium will be unable to prove otherwise. Accordingly, Elysium should be barred from characterizing the spreadsheet as "fraudulent" (or any similarly loaded term) during its opening statement, and at any time during trial absent an evidentiary showing and leave of court.

III. MOTION *IN LIMINE* NO. 3 TO PRECLUDE EVIDENCE OR ARGUMENT TO THE JURY RELATING TO CHROMADEX'S TERMINATION OF CERTAIN CONTRACT TERMS WITH, AND ITS REFUND OF ROYALTY PAYMENTS TO, SOME OF ITS CUSTOMERS

Finally, ChromaDex moves for an order precluding Defendants from presenting evidence or argument to the jury concerning (1) ChromaDex's termination of certain provisions in several of its NR supply agreements regarding use of its trademark, NIAGEN®, and (2) its refund or promise to refund royalties to those of its customers that paid them. ChromaDex terminated those contract terms and refunded those royalty payments (or, with respect to Elysium, covenanted to refund them at the conclusion of this case) solely to purge the allegations of patent misuse averred by Elysium in its TACC and did not in any way intend those actions as an admission that the terms or royalties were improper. Because there is substantial risk of misleading or confusing the jury with this evidence, ChromaDex requests that it be excluded from the jury trial.

Elysium seeks a declaration in this action that ChromaDex committed "patent misuse" by conditioning access to its patented NR ingredient on customers licensing its NIAGEN trademark. As a legal matter, if proven by clear and convincing evidence, "misuse" can render a patent unenforceable, but only until the patentee demonstrates "purge" of that misuse. *U.S. Gypsum Co. v. Nat'l Gypsum Co.*, 352 U.S. 457, 465 (1957); *see also Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 2014 WL 12587050, at *8 (C.D. Cal. Dec. 16, 2014) (requiring "clear and convincing evidence" of patent misuse). As stated in its Fifth Amended Complaint ("FAC"), ChromaDex categorically "denies that it ever engaged in any act of alleged patent misuse," including by entering voluntary agreements with some (but not all) of its customers that included a term that obligated them to use the NIAGEN® trademark (the "Use Provisions") or by negotiating royalty payments from some of its customers as part of their supply relationships. (Dkt. 153, FAC ¶ 145.) That remains ChromaDex's position. (Dkt. 233-1, ChromaDex's Memorandum in Support of its Partial Motion for Summary Judgment, at 12–15 (arguing ChromaDex did not misuse its patents).)

Notwithstanding its position on the merits, and in a preemptive attempt to eliminate this issue from the case, ChromaDex terminated any Use Provisions with, and refunded or covenanted to refund any royalties paid by, its customers (together, "the Purge"). (FAC ¶¶ 145, 148.) ChromaDex made clear that the Purge was "not an admission of any wrongdoing," but rather was "intended to prophylactically and completely eliminate issues in this and any other dispute related to ChromaDex's patents by purging any and all allegedly unlawful conduct with respect to all allegations by Elysium of patent misuse." (*Id.* ¶ 149.)

ChromaDex understands that, despite the unequivocal statements in the FAC, Defendants will seek to portray the Purge as an admission of wrongdoing by ChromaDex. (Anderson Decl. ¶ 3.) Such an argument by Defendants is improper because it would, by necessity, require the "classic 'trial within a trial' that Rule 403 seeks to prevent." *Hart v. RCI Hosp. Holdings, Inc.*, 90 F. Supp. 3d 250, 280 (S.D.N.Y. 2015). To assess whether the Purge was an admission (it was not) or, instead, a practical business decision aimed at eliminating one aspect of a legal dispute (as it was), the parties would need to present additional evidence as to reasons behind and for ChromaDex's decision, as well as argue to the jury the complexities of the patent misuse defense and the purge doctrine. The Court would also need to explain to the jury the obscure legal principles of "patent misuse" and "purge," which are equitable issues "noted to be fraught with potential abuse, including 'unfair prejudice, confusion of issues, or misleading the jury,' resulting in the loss of 'fundamental fairness of the adjudication.'" *Cordance Corp. v. Amazon.com, Inc.*, 2009 WL 2252556, at *1 (D. Del. July 28, 2009) (citation omitted). Conducting such a mini-trial on the Purge would add "palpable delay" and "carry a substantial risk of confusing the jury." Fed. R. Evid. 403. Therefore, to avoid unnecessary delay and the risk of prejudice to ChromaDex, Defendants should be precluded from presenting evidence and argument related to the Purge to the jury. *Id.*

ChromaDex does not, however, object to evidence and argument pertaining to the Purge from being presented to this Court. Patent misuse is an equitable issue for which there is no right to a jury trial. *Cordance*, 2009 WL 2252556, at *1 (holding "district courts may retain and decide equitable issues"). As such, and to avoid the likelihood of a "mini-trial," as well as the well-established and substantially unfair prejudice associated with presenting patent misuse claims to a jury, ChromaDex intends to request that this Court retain and decide the patent misuse counterclaim. In any event, evidence and argument related to the Purge should not be allowed to go to the jury.

IV. CONCLUSION

For the foregoing reasons, ChromaDex respectfully requests that the Court grant its three motions *in limine*.

Dated: August 21, 2019

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