

1 COOLEY LLP
MICHAEL A. ATTANASIO (151529)
2 (mattanasio@cooley.com)
BARRETT J. ANDERSON (318539)
3 (banderson@cooley.com)
CRAIG E. TENBROECK (287848)
4 (ctenbroeck@cooley.com)
SOPHIA M. RIOS (305801)
5 (srios@cooley.com)
JAYME B. STATEN (317034)
6 (jstaten@cooley.com)
4401 Eastgate Mall
7 San Diego, CA 92121
Telephone: (858) 550-6000
8 Facsimile: (858) 550-6420

9 *Attorneys for Plaintiff and Counter-Defendant*
10 *ChromaDex, Inc.*

11 *Counsel continued on following page*

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **(WESTERN DIVISION)**

15 ChromaDex, Inc.,
16 Plaintiff,
17 v.
18 Elysium Health, Inc. and Mark Morris,
19 Defendants.

20 Elysium Health, Inc.,
21 Counterclaimant,
22 v.
23 ChromaDex, Inc.,
24 Counter-Defendant.
25

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

PARTIES' PROPOSED JURY INSTRUCTIONS

Judge: Hon. Cormac J. Carney
Courtroom: 7C

Pretrial Conference: Sept. 18, 2019
Trial: October 15, 2019

1 COVINGTON & BURLING LLP
MITCHELL A. KAMIN (202788)
2 (mkamin@cov.com)
1999 Avenue of the Stars, Suite 3500
3 Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
4 Facsimile: (424) 332-4749

5 COVINGTON & BURLING LLP
PHILIP A. IRWIN (*admitted Pro Hac Vice*)
6 (pirwin@cov.com)
620 Eighth Avenue
7 New York, NY 10018-1405
Telephone: (212) 841-1000

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9 *Attorneys for Plaintiff and Counter-Defendant*
ChromaDex, Inc.

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1 Plaintiff and Counter-Defendant ChromaDex, Inc. (“ChromaDex”), Defendant
2 and Counter-Claimant Elysium Health, Inc. (“Elysium”) and Defendant Mark Morris
3 (“Morris”) hereby submit their Proposed Jury Instructions. In accordance with the
4 Court’s Standing Orders Regarding Settlement Procedures, Pre-Trial Conference, and
5 Trial, the Parties’ stipulated instructions appear first, followed by instructions
6 propounded by Plaintiff and opposed by Defendants, followed by the instructions
7 propounded by Defendants and opposed by Plaintiff. The Parties reserve the right to
8 supplement and amend these proposed jury instructions and to submit additional
9 proposed instructions based on any rulings from this Court before or at trial, or as
10 otherwise deemed proper by this Court.

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STIPULATED INSTRUCTIONS

Stipulated Preliminary Jury Instruction No. 1

DUTY OF THE JURY

Members of the Jury: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.

[**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 1.2.]

1 **Stipulated Preliminary Jury Instruction No. 2**

2 **CLAIMS AND DEFENSES**

3 To help you follow the evidence, I will give you a brief summary of the
4 positions of the parties:

5 The plaintiff in this case is ChromaDex, Inc. ChromaDex makes an ingredient
6 used in dietary supplements called nicotinamide riboside, or “NR.”

7 The defendants in this case are Elysium Health, Inc. and Mark Morris. Elysium
8 sells a dietary supplement called Basis that contains NR and another ingredient called
9 pterostilbene, or “PT.” ChromaDex used to supply Elysium with NR under the
10 tradename “NIAGEN®” and PT under the tradename “pTeroPure®.” Mark Morris is
11 a former ChromaDex employee who now works for Elysium.

12 ChromaDex makes the following claims for which it has the burden of proof:

13 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIMS 1 AND 2)**

14 ChromaDex claims that Elysium breached two written supply contracts with
15 ChromaDex by ordering ingredients and then refusing to pay for them and by using or
16 disclosing certain ChromaDex confidential information in violation of the contracts.
17 These agreements will be referred to as the “NIAGEN Supply Agreement” and
18 “pTeroPure Supply Agreement.”

19 **MISAPPROPRIATION OF TRADE SECRETS AGAINST ELYSIUM AND MORRIS (CLAIMS 3
20 AND 4)**

21 ChromaDex claims that Elysium and Morris misappropriated ChromaDex’s
22 trade secrets under both California and federal law.

23 **BREACH OF CONTRACT AGAINST MORRIS (CLAIMS 5 AND 6)**

24 ChromaDex claims that Morris breached two confidentiality agreements with
25 ChromaDex by sharing ChromaDex’s confidential information with Elysium and by
26 using ChromaDex’s information for Elysium’s purposes. These agreements will be
27 referred to as the “February Agreement” and the “Disputed July Agreement.”
28

1 **BREACH OF FIDUCIARY DUTY AGAINST MORRIS (CLAIM 7)**

2 ChromaDex claims that Morris, while a manager and vice president of
3 ChromaDex, breached his duty of loyalty to the company by acting for the benefit of
4 Elysium and to the detriment of ChromaDex.

5 **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST ELYSIUM (CLAIM 8)**

6 ChromaDex claims Elysium knowingly helped or encouraged Morris to breach
7 his duty of loyalty to ChromaDex.

8
9 Elysium makes the following counterclaims for which it has the burden of
10 proof:

11 **BREACH OF CONTRACT (COUNTERCLAIM 1)**

12 Elysium claims that ChromaDex breached the NIAGEN Supply Agreement in
13 four ways: (1) by giving a more favorable price to other customers in violation of the
14 contract, (2) by selling NR to other companies who combined it with an ingredient
15 similar to PT to make dietary supplements after ChromaDex promised not to do that,
16 (3) by failing to manufacture the NR it sold to Elysium in accordance with the
17 standard in the contract, and (4) by violating its obligation to notify Elysium of
18 information about which it was aware regarding the quality and purity of the NR it
19 sold to Elysium.

20 **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**
21 **(COUNTERCLAIM 2)**

22 Elysium claims ChromaDex breached an implied obligation in the NIAGEN
23 Supply Agreement to act honestly, fairly, and in good faith with Elysium by
24 encouraging other companies to make products containing NR and an ingredient
25 called resveratrol, which interfered with Elysium's right to receive the benefits of
26 exclusivity under the NIAGEN Supply Agreement.

1 **FRAUDULENT INDUCEMENT (COUNTERCLAIM 3)**

2 Elysium claims that ChromaDex defrauded Elysium into entering into a written
3 agreement obligating Elysium to license a trademark and pay royalties. This
4 agreement will be referred to as the “Trademark License and Royalty Agreement.”

5 ***

6 All parties deny the claims/counterclaims asserted against them. They also
7 assert a number of affirmative defenses for which have the burden of proof.

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9 [*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the
10 Ninth Circuit § 1.5 (modified).]

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Stipulated Preliminary Jury Instruction No. 3

BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

[*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 1.6.]

1 **Stipulated Preliminary Jury Instruction No. 4**

2 **BURDEN OF PROOF – CLEAR AND CONVINCING EVIDENCE**

3 When a party has the burden of proving any claim or defense by clear and
4 convincing evidence, it means that the party must present evidence that leaves you
5 with a firm belief or conviction that it is highly probable that the factual contentions of
6 the claim or defense are true. This is a higher standard of proof than proof by a
7 preponderance of the evidence, but it does not require proof beyond a reasonable
8 doubt.

9
10 [*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the
11 Ninth Circuit § 1.7; see *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (defining
12 clear and convincing evidence); see also *Sophanthavong v. Palmateer*, 378 F.3d 859,
13 866 (9th Cir. 2004) (citing *Colorado*).]
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Stipulated Preliminary Jury Instruction No. 5

MULTIPLE PARTIES

You should decide the case as to each party separately. Unless otherwise stated, the instructions apply to all parties.

[*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 1.8.]

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Stipulated Preliminary Jury Instruction No. 6

WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits that are admitted into evidence;
- (3) any facts to which the lawyers have agreed; and
- (4) any facts that I may instruct you to accept as proved.

[*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 1.9.]

1 **Stipulated Preliminary Jury Instruction No. 7**

2 **WHAT IS NOT EVIDENCE**

3 In reaching your verdict, you may consider only the testimony and exhibits
4 received into evidence. Certain things are not evidence, and you may not consider
5 them in deciding what the facts are. I will list them for you:

6 (1) Arguments and statements by lawyers are not evidence. The lawyers are not
7 witnesses. What they may say in their opening statements, will say in their
8 closing arguments, and at other times is intended to help you interpret the
9 evidence, but it is not evidence. If the facts as you remember them differ from
the way the lawyers have stated them, your memory of them controls.

10 (2) Questions and objections by lawyers are not evidence. Attorneys have a
11 duty to their clients to object when they believe a question is improper under
12 the rules of evidence. You should not be influenced by the objection or by the
court's ruling on it.

13 (3) Testimony that has been excluded or stricken, or that you have been
14 instructed to disregard, is not evidence and must not be considered. In addition
15 sometimes testimony and exhibits are received only for a limited purpose; when
16 I instruct you to consider evidence only for a limited purpose, you must do so
and you may not consider that evidence for any other purpose.

17 (4) Anything you may have seen or heard when the court was not in session is
18 not evidence. You are to decide the case solely on the evidence received at the
19 trial.

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21 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
Ninth Circuit § 1.10.]

1 **Stipulated Preliminary Jury Instruction No. 8**

2 **EVIDENCE FOR A LIMITED PURPOSE**

3 Some evidence may be admitted only for a limited purpose.

4 When I instruct you that an item of evidence has been admitted only for a
5 limited purpose, you must consider it only for that limited purpose and not for any
6 other purpose.

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9 [*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the
10 Ninth Circuit § 1.11.]

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1 **Stipulated Preliminary Jury Instruction No. 9**

2 **DIRECT AND CIRCUMSTANTIAL EVIDENCE**

3 Evidence may be direct or circumstantial. Direct evidence is direct proof of a
4 fact, such as testimony by a witness about what that witness personally saw or heard
5 or did. Circumstantial evidence is proof of one or more facts from which you could
6 find another fact. You should consider both kinds of evidence. The law makes no
7 distinction between the weight to be given to either direct or circumstantial evidence.
8 It is for you to decide how much weight to give to any evidence.

9 By way of example, if you wake up in the morning and see that the sidewalk is
10 wet, you may find from that fact that it rained during the night. However, other
11 evidence, such as a turned on garden hose, may provide a different explanation for the
12 presence of water on the sidewalk. Therefore, before you decide that a fact has been
13 proved by circumstantial evidence, you must consider all the evidence in the light of
14 reason, experience, and common sense.

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16 [*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the
17 Ninth Circuit § 1.12.]
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1 **Stipulated Preliminary Jury Instruction No. 10**

2 **RULING ON OBJECTIONS**

3 There are rules of evidence that control what can be received into evidence.
4 When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the
5 other side thinks that it is not permitted by the rules of evidence, that lawyer may
6 object. If I overrule the objection, the question may be answered or the exhibit
7 received. If I sustain the objection, the question cannot be answered, and the exhibit
8 cannot be received. Whenever I sustain an objection to a question, you must ignore
9 the question and must not guess what the answer might have been.

10 Sometimes I order that evidence be stricken from the record and that you
11 disregard or ignore the evidence. That means that when you decide the case, you must
12 not consider the stricken evidence for any purpose.

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14 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
15 Ninth Circuit § 1.13.]

1 **Stipulated Preliminary Jury Instruction No. 11**

2 **CREDIBILITY OF WITNESSES**

3 In deciding the facts in this case, you may have to decide which testimony to
4 believe and which testimony not to believe. You may believe everything a witness
5 says, or part of it, or none of it.

6 In considering the testimony of any witness, you may take into account:

- 7 (1) the opportunity and ability of the witness to see or hear or know the
8 things testified to;
- 9 (2) the witness's memory;
- 10 (3) the witness's manner while testifying;
- 11 (4) the witness's interest in the outcome of the case, if any;
- 12 (5) the witness's bias or prejudice, if any;
- 13 (6) whether other evidence contradicted the witness's testimony;
- 14 (7) the reasonableness of the witness's testimony in light of all the evidence;
15 and
16 (8) any other factors that bear on believability.

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18 Sometimes a witness may say something that is not consistent with something
19 else he or she said. Sometimes different witnesses will give different versions of what
20 happened. People often forget things or make mistakes in what they remember. Also,
21 two people may see the same event but remember it differently. You may consider
22 these differences, but do not decide that testimony is untrue just because it differs
23 from other testimony.

24 However, if you decide that a witness has deliberately testified untruthfully
25 about something important, you may choose not to believe anything that witness said.
26 On the other hand, if you think the witness testified untruthfully about some things but
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1 told the truth about others, you may accept the part you think is true and ignore the
2 rest.

3 The weight of the evidence as to a fact does not necessarily depend on the
4 number of witnesses who testify. What is important is how believable the witnesses
5 were, and how much weight you think their testimony deserves.

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7 [*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the
8 Ninth Circuit § 1.14.]

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1 **Stipulated Preliminary Jury Instruction No. 12**

2 **DEPOSITION IN LIEU OF LIVE TESTIMONY**

3 *[The parties propose that the Court issue this instruction the first time it*
4 *becomes relevant at trial.]*

5 A deposition is the sworn testimony of a witness taken before trial. The witness
6 is placed under oath to tell the truth and lawyers for each party may ask questions.
7 The questions and answers are recorded.

8 Insofar as possible, you should consider deposition testimony, presented to you
9 in court in lieu of live testimony, in the same way as if the witness had been present to
10 testify.

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12 **[Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
13 Ninth Circuit § 2.4 (modified).]

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1 **Stipulated Preliminary Jury Instruction No. 13**

2 **CONDUCT OF THE JURY**

3 I will now say a few words about your conduct as jurors.

4 First, keep an open mind throughout the trial, and do not decide what the
5 verdict should be until you and your fellow jurors have completed your deliberations
6 at the end of the case.

7 Second, because you must decide this case based only on the evidence received
8 in the case and on my instructions as to the law that applies, you must not be exposed
9 to any other information about the case or to the issues it involves during the course of
10 your jury duty. Thus, until the end of the case or unless I tell you otherwise:

11 Do not communicate with anyone in any way and do not let anyone else
12 communicate with you in any way about the merits of the case or
13 anything to do with it. This includes discussing the case in person, in
14 writing, by phone or electronic means, via email, text messaging, or any
15 internet chat room, blog, website or application, including but not
16 limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat,
17 or any other forms of social media. This applies to communicating with
18 your fellow jurors until I give you the case for deliberation, and it
19 applies to communicating with everyone else including your family
20 members, your employer, the media or press, and the people involved in
21 the trial, although you may notify your family and your employer that
22 you have been seated as a juror in the case, and how long you expect the
23 trial to last. But, if you are asked or approached in any way about your
24 jury service or anything about this case, you must respond that you have
25 been ordered not to discuss the matter and report the contact to the court.

19 Because you will receive all the evidence and legal instruction you
20 properly may consider to return a verdict: do not read, watch or listen to
21 any news or media accounts or commentary about the case or anything
22 to do with it; do not do any research, such as consulting dictionaries,
23 searching the Internet, or using other reference materials; and do not
24 make any investigation or in any other way try to learn about the case on
25 your own. Do not visit or view any place discussed in this case, and do
26 not use Internet programs or other devices to search for or view any
27 place discussed during the trial. Also, do not do any research about this
28 case, the law, or the people involved—including the parties, the
witnesses or the lawyers—until you have been excused as jurors. If you
happen to read or hear anything touching on this case in the media, turn
away and report it to me as soon as possible.

26 These rules protect each party's right to have this case decided only on evidence
27 that has been presented here in court. Witnesses here in court take an oath to tell the
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1 truth, and the accuracy of their testimony is tested through the trial process. If you do
2 any research or investigation outside the courtroom, or gain any information through
3 improper communications, then your verdict may be influenced by inaccurate,
4 incomplete or misleading information that has not been tested by the trial process.
5 Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the
6 case based on information not presented in court, you will have denied the parties a
7 fair trial. Remember, you have taken an oath to follow the rules, and it is very
8 important that you follow these rules.

9 A juror who violates these restrictions jeopardizes the fairness of these
10 proceedings, and a mistrial could result that would require the entire trial process to
11 start over. If any juror is exposed to any outside information, please notify the court
12 immediately.

13
14 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
15 Ninth Circuit § 1.15; *see, e.g., United States v. Pino-Noriega*, 189 F.3d 1089, 1096
16 (9th Cir. 1999) (noting widespread practice of instructing jurors not to discuss the case
during deliberations).]

Stipulated Preliminary Jury Instruction No. 14

NO TRANSCRIPT AVAILABLE TO JURY / TAKING NOTES

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the courtroom. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

[*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit §§ 1.17, 1.18 (modified).]

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1 **Stipulated Preliminary Jury Instruction No. 15**

2 **STIPULATIONS OF FACT**

3 *[The parties propose that the Court issue this instruction the first time it becomes*
4 *relevant at trial]*

5 The parties have agreed to certain facts to be placed in evidence as Exhibit [●].
6 You must therefore treat these facts as having been proved.

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8 **[Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
9 Ninth Circuit § 2.2.]

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1 **Stipulated Preliminary Jury Instruction No. 16**

2 **USE OF INTERROGATORIES**

3 *[The parties propose that the Court issue this instruction the first time it becomes*
4 *relevant at trial]*

5 Evidence will now be presented to you in the form of answers of one of the
6 parties to written interrogatories submitted by the other side. These answers were
7 given in writing and under oath before the trial in response to questions that were
8 submitted under established court procedures. You should consider the answers,
9 insofar as possible, in the same way as if they were made from the witness stand.

10
11 **[*Authority:* Manual of Model Civil Jury Instructions for the District Courts of the**
12 **Ninth Circuit § 2.11.]**

1 **Stipulated Preliminary Jury Instruction No. 17**

2 **EXPERT OPINION**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 You are about to hear testimony from experts who will testify to opinions and
6 the reasons for his/her opinions. This opinion testimony is allowed, because of the
7 education or experience of this witness.

8 Such opinion testimony should be judged like any other testimony. You may
9 accept it or reject it, and give it as much weight as you think it deserves, considering
10 the witness's education and experience, the reasons given for the opinion, and all the
11 other evidence in the case.

12
13 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
14 Ninth Circuit § 2.13 (June 2019); *see also* FED. R. EVID. 702-05.]

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Stipulated Preliminary Jury Instruction No. 18

EXPERTS – QUESTIONS CONTAINING ASSUMED FACTS

The law allows expert witnesses to be asked questions that are based on assumed facts. These are sometimes called “hypothetical questions.”

In determining the weight to give to the expert’s opinion that is based on the assumed facts, you should consider whether the assumed facts are true.

[*Authority*: Judicial Council of California, Civil Jury Instructions 220.]

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Stipulated Preliminary Jury Instruction No. 20

CHARTS AND SUMMARIES NOT RECEIVED INTO EVIDENCE

[The parties propose that the Court issue this instruction the first time it becomes relevant at trial]

Certain charts and summaries not admitted into evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

[Authority: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 2.14.]

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Stipulated Preliminary Jury Instruction No. 21

CHARTS AND SUMMARIES IN EVIDENCE

[The parties propose that the Court issue this instruction the first time it becomes relevant at trial]

Certain charts and summaries [may be] [have been] admitted into evidence to illustrate information brought out in the trial. Charters and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

[Authority: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 2.15.]

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1 **Stipulated Preliminary Jury Instruction No. 22**

2 **IMPEACHMENT EVIDENCE – WITNESS**

3 [The parties propose that the Court issue this instruction the first time it becomes
4 relevant at trial]

5 The evidence that a witness [*e.g., has been convicted of a crime, lied under oath*
6 *on a prior occasion, etc.*] may be considered, along with all other evidence, in
7 deciding whether or not to believe the witness and how much weight to give the
8 testimony of the witness and for no other purpose.

9
10 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
11 Ninth Circuit § 2.9 (June 2019).]

1 **Stipulated Preliminary Jury Instruction No. 23**

2 **BENCH CONFERENCES AND RECESSES**

3 From time to time during the trial, it may become necessary for me to talk with
4 the attorneys out of the hearing of the jury, either by having a conference at the bench
5 when the jury is present in the courtroom, or by calling a recess. Please understand
6 that while you are waiting, we are working. The purpose of these conferences is not
7 to keep relevant information from you, but to decide how certain evidence is to be
8 treated under the rules of evidence and to avoid confusion and error.

9 Of course, we will do what we can to keep the number and length of these
10 conferences to a minimum. I may not always grant an attorney's request for a
11 conference. Do not consider my granting or denying a request for a conference as any
12 indication of my opinion of the case or of what your verdict should be.

13
14 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
15 Ninth Circuit § 1.20.]

1 **Stipulated Preliminary Jury Instruction No. 24**

2 **OUTLINE OF TRIAL**

3 Trials proceed in the following way: First, each side may make an opening
4 statement. An opening statement is not evidence. It is simply an outline to help you
5 understand what the party experts the evidence will show. A party is not required to
6 make an opening statement.

7 The plaintiff will then present evidence, and counsel for the defendant may
8 cross-examine. Then the defendant may present evidence, and counsel for the
9 plaintiff may cross-examine.

10 After the evidence has been presented, I will instruct you on the law that applies
11 to the case and the attorneys will make closing arguments.

12 After that, you will go to the jury room to deliberate on your verdict.

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14 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
15 Ninth Circuit § 1.21.]

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1 **Stipulated Preliminary Jury Instruction No. 25**

2 **DAMAGES – PROOF**

3 It is the duty of the Court to instruct you about the measure of damages. By
4 instructing you on damages, the Court does not mean to suggest for which party your
5 verdict should be rendered.

6 Both the plaintiff, ChromaDex, and the counterclaimant, Elysium, are alleging
7 affirmative claims for damages.

8 If you find for ChromaDex on its claims, you must determine ChromaDex’s
9 damages. ChromaDex has the burden of proving damages by a preponderance of the
10 evidence.

11 If you find for Elysium on its counterclaims against ChromaDex for which it
12 seeks damages, you must likewise determine Elysium’s damages. Elysium also has
13 the burden of proving damages by a preponderance of the evidence.

14 It is for you to determine what damages, if any, have been proved. Damages
15 means the amount of money that will reasonably and fairly compensate a party for any
16 injury you find was caused by the opposing party.

17 Your award must be based upon evidence and not upon speculation, guesswork
18 or conjecture.

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20 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
21 Ninth Circuit § 5.1 (modified).]

1 **Stipulated Preliminary Jury Instruction No. 26**

2 **PUNITIVE DAMAGES**

3 It you find for ChromaDex on its claims for (i) breach of fiduciary duty or (ii)
4 aiding and abetting breach of fiduciary duty, or if you find for Elysium on its
5 counterclaim for fraudulent inducement, you may, but are not required to, award
6 punitive damages. The purposes of punitive damages are to punish a defendant or
7 counter-defendant and to deter similar acts in the future. Punitive damages may not
8 be awarded to compensate the party bringing the claim.

9 The party seeking punitive damages has the burden of proving by clear and
10 convincing evidence that punitive damages should be awarded and, if so, the amount
11 of any such damages.

12 You may award punitive damages only if you find that the defendant's or
13 counter-defendant's conduct that harmed the party seeking punitive damages was
14 malicious, oppressive or in reckless disregard of the party's rights. Conduct is
15 malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring
16 the claiming party. Conduct is in reckless disregard of the claiming party's rights if,
17 under the circumstances, it reflects complete indifference to that party's safety or
18 rights, or if the defendant or counter-defendant acts in the face of a perceived risk that
19 its actions will violate the claiming party's rights under federal law. An act or
20 omission is oppressive if the defendant or counter-defendant injures or damages or
21 otherwise violates the rights of the party with unnecessary harshness or severity, such
22 as by misusing or abusing authority or power or by taking advantage of some
23 weakness or disability or misfortune of the party seeking punitive damages.

24 If you find that punitive damages are appropriate, you must use reason in
25 setting the amount. Punitive damages, if any, should be in an amount sufficient to
26 fulfill their purposes but should not reflect bias, prejudice or sympathy toward any
27 party. In considering the amount of any punitive damages, consider the degree of
28 reprehensibility of the defendant's or counter-defendant's conduct.

1 You may impose punitive damages against one or more of the parties and not
2 others, and may award different amounts against different parties. Punitive damages
3 may be awarded even if you award a party only nominal, and not compensatory,
4 damages.

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6 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
7 Ninth Circuit § 5.5 (modified).]
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Stipulated Preliminary Jury Instruction No. 27

DAMAGES – MITIGATION

The party claiming damages has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The party opposing a claim for damages that asserts the other party has failed to mitigate its damages has the burden of proving by a preponderance of the evidence:

- (1) That the party claiming damages failed to use reasonable efforts to mitigate damages; and
- (2) The amount by which damages would have been mitigated.

[*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 5.3 (modified).]

1 **Stipulated Case-Specific Jury Instruction No. 28**

2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 1) –**

3 **INTRODUCTION**

4 ChromaDex claims that it and Elysium entered into a contract for the supply of
5 an ingredient called pTeroPure®, which is ChromaDex’s version of PT. This contract
6 is referred to as the pTeroPure Supply Agreement.

7 ChromaDex claims that Elysium breached this contract by failing to pay for PT
8 that ChromaDex delivered to Elysium in fulfillment of a purchase order.

9 ChromaDex also claims that Elysium breached this contract by using and
10 disclosing a document called the pTeroPure GRAS Report, which ChromaDex claims
11 was shared with Elysium under a confidentiality obligation in the pTeroPure Supply
12 Agreement and was not to be disclosed or used by Elysium in the way it was disclosed
13 or used.

14 ChromaDex claims that Elysium’s breaches of this contract caused harm to
15 ChromaDex for which Elysium should pay.

16 Elysium denies that it breached its contract with ChromaDex. Elysium also
17 claims certain affirmative defenses, which will be explained in a later instruction.

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19 [**Authority:** Judicial Council of California, Civil Jury Instructions 300.]
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Stipulated Case-Specific Jury Instruction No. 30

INTERPRETATION OF CONTRACT – CONSTRUCTION AS A WHOLE

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

[*Authority*: Judicial Council of California, Civil Jury Instructions 317.]

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Stipulated Case-Specific Jury Instruction No. 31

INTERPRETATION OF CONTRACT – MEANING OF ORDINARY WORDS

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

[*Authority*: Judicial Council of California, Civil Jury Instructions 315.]

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Stipulated Case-Specific Jury Instruction No. 32

INTERPRETATION OF CONTRACT – CONSTRUCTION BY CONDUCT

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

[*Authority*: Judicial Council of California, Civil Jury Instructions 318.]

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Stipulated Case-Specific Jury Instruction No. 33
INTERPRETATION OF CONTRACT – CONSTRUCTION AGAINST
DRAFTER

In determining the meaning of the words of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the words, then you should interpret the contract against the party that drafted the disputed words.

[*Authority*: Judicial Council of California, Civil Jury Instructions 320.]

1 **Stipulated Case-Specific Jury Instruction No. 36**

2 **AFFIRMATIVE DEFENSE—MITIGATION OF DAMAGES**

3 If Elysium breached the contract and the breach caused harm, ChromaDex is
4 not entitled to recover damages for harm that Elysium proves ChromaDex could have
5 avoided with reasonable efforts or expenditures. You should consider the
6 reasonableness of ChromaDex’s efforts in light of the circumstances facing it at the
7 time, including its ability to make the efforts or expenditures without undue risk or
8 hardship.

9 If ChromaDex made reasonable efforts to avoid harm, then your award should
10 include reasonable amounts that it spent for this purpose.

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12 [**Authority:** Judicial Council of California, Civil Jury Instructions 358.]
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1 **Stipulated Case-Specific Jury Instruction No. 37**

2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 2) –**

3 **INTRODUCTION**

4 ChromaDex claims that it and Elysium entered into a contract for the supply of
5 an ingredient called NIAGEN®, which is ChromaDex’s version of NR. This contract
6 is referred to as the NIAGEN Supply Agreement.

7 ChromaDex claims that Elysium breached this contract by failing to pay for
8 NIAGEN that ChromaDex delivered to Elysium in fulfillment of a purchase order.

9 ChromaDex also claims that Elysium breached this contract by disclosing three
10 documents, the “NRCl Analytical Method,” “Niagen Investigator’s Brochure,” and
11 “NR Study Data,” which ChromaDex claims were shared with Elysium under a
12 confidentiality obligation in the NIAGEN Supply Agreement and were not to be
13 disclosed or used by Elysium in the way it was disclosed or used.

14 ChromaDex claims that Elysium’s breaches of this contract caused harm to
15 ChromaDex for which Elysium should pay.

16 Elysium denies that it breached its contract with ChromaDex. Elysium also
17 claims certain affirmative defenses, which will be explained in a later instruction.

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19 [**Authority:** Judicial Council of California, Civil Jury Instructions 300 (modified).]
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1 **Stipulated Case-Specific Jury Instruction No. 39**

2 **SUBSTANTIAL PERFORMANCE**

3 Elysium contends that ChromaDex did not perform all of the things that it was
4 required to do under the contract, and therefore Elysium did not have to perform its
5 obligations under the contract. To overcome this contention, ChromaDex must prove
6 both of the following:

7 (1) That ChromaDex made a good faith effort to comply with the contract;

8
9 (2) That Elysium received essentially what the contract called for because
10 ChromaDex's failures, if any, were so trivial or unimportant that they could
11 have been easily fixed or paid for.

12 Likewise, ChromaDex contends that Elysium did not perform all of the things
13 that it was required to do under the contract, and therefore that ChromaDex did not
14 have to perform its obligations under the contract. To overcome this contention,
15 Elysium must prove both of the following:

16 (1) That Elysium made a good faith effort to comply with the contract;

17
18 (2) That ChromaDex received essentially what the contract called for because
19 Elysium's failures, if any, were so trivial or unimportant that they could
20 have been easily fixed or paid for.

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22 [**Authority:** Judicial Council of California, Civil Jury Instructions 312.]
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1 **Stipulated Case-Specific Jury Instruction No. 46**

2 **“TRADE SECRET” DEFINED**

3 To prove that particular information was a trade secret, ChromaDex must prove
4 all of the following elements:

5 (1) That the information was secret;

6 (2) That the information had actual or potential independent economic value
7 because it was secret; and

8 (3) That ChromaDex made reasonable efforts to keep the information secret.
9

10 [**Authority:** Judicial Council of California, Civil Jury Instructions 4402; *see also* Cal.
11 Civ. Proc. Code § 3426.1(d) (defining a trade secret as information that derives
12 independent economic value and that is the subject of reasonable efforts to maintain
13 secrecy).]

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1 **Stipulated Case-Specific Jury Instruction No. 47**

2 **SECURITY REQUIREMENT**

3 The secrecy required to prove that something is a trade secret does not have to
4 be absolute in the sense that no one else in the world possesses the information. It
5 may be disclosed to employees involved in ChromaDex’s use of the trade secret as
6 long as they are instructed to keep the information secret. It may also be disclosed to
7 nonemployees if they are obligated to keep the information secret. However, the trade
8 secret must not have been generally known to the public or to people who could
9 obtain value from knowing it.

10
11 [**Authority:** Judicial Council of California, Civil Jury Instructions 4403 (modified);
12 *see DVD Copy Control Assn., Inc. v. Bunner*, 31 Cal. 4th 864, 881 (2003) (“Trade
13 secrets are a peculiar kind of property. Their only value consists in their being kept
14 private.”) (internal citations and quotations omitted); *see also Courtesy Temporary*
15 *Service, Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1288 (1990) (“[R]easonable efforts
to maintain secrecy have been held to include advising employees of the existence of a
trade secret, limiting access to a trade secret on ‘need to know basis,’ and controlling
plant access.”) (internal quotations and citation omitted).]

1 **Stipulated Case-Specific Jury Instruction No. 52**

2 **IMPROPER MEANS OF ACQUIRING TRADE SECRET**

3 Improper means of acquiring a trade secret or knowledge of a trade secret
4 include, but are not limited to, breach or inducing a breach of a duty to maintain
5 secrecy.

6 However, it is not improper to acquire a trade secret or knowledge of the trade
7 secret by any of the following:

- 8 (1) Independent efforts to invent or discover the information;
9 (2) Reverse engineering; that is examining or testing a product to determine
10 how it works, by a person who has a right to possess the product;
11 (3) Obtaining the information as a result of a license agreement (or other
12 agreement) with the owner of the information;
13 (4) Observing the information in public use or on public display; or
14 (5) Obtaining the information from published literature, such as trade
15 journals, reference books, the Internet, or other publicly available
16 sources.

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18 [**Authority:** Judicial Council of California, Civil Jury Instructions 4408 (modified).]
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1 **Stipulated Case-Specific Jury Instruction No. 54**

2 **UNJUST ENRICHMENT**

3 Elysium or Morris were unjustly enriched if their misappropriation of a Trade
4 Secret caused them to receive a benefit that they otherwise would not have achieved.

5 To decide the amount of any unjust enrichment, first determine the value of
6 Elysium's or Morris's benefit that would not have been achieved except for their
7 misappropriation. Then subtract from that amount Elysium's or Morris's reasonable
8 expenses. In calculating the amount of any unjust enrichment, do not take into
9 account any amount that you included in determining any amount of damages for
10 ChromaDex's actual loss.

11 [*Authority: Judicial Council of California, Civil Jury Instructions 4410; see Ajaxo Inc.*
12 *v. E*Trade Financial Corp.*, 187 Cal. App. 4th 1295, 1305 (2010) (noting unjust
13 enrichment in the context of misappropriation of a trade secret is synonymous with
14 restitution).]
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1 **Stipulated Case-Specific Jury Instruction No. 55**

2 **LOST PROFITS**

3 To recover damages for lost profits, ChromaDex must prove it is reasonably
4 certain it would have earned profits but for Elysium’s or Morris’s conduct.

5 To decide the amount of damages for lost profits, you must determine the gross
6 amount ChromaDex would have received but for Elysium’s or Morris’s conduct and
7 then subtract from that amount the expenses ChromaDex would have had if Elysium’s
8 or Morris’s conduct had not occurred.

9 The amount of the lost profit need not be calculated with mathematical
10 precision, but there must be a reasonable basis for computing the loss.

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12 [Authority: Judicial Council of California, Civil Jury Instructions 3903N; see
13 *Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739 (2010) (“Not only must [lost
14 profit] damages be pled with particularity, but they must also be proven to be certain
15 both as to their occurrence and their extent, albeit not with mathematical precision.”
(internal quotations and citations omitted); see also *Sargon Enterprises, Inc. v. Univ.*
S. Cal., 55 Cal. 4th 747, 773-74 (2012).)]

1 **Stipulated Case-Specific Jury Instruction No. 56**
2 **PUNITIVE DAMAGES FOR WILLFUL AND MALICIOUS**
3 **MISAPPROPRIATION**

4 If you decide that Elysium’s or Morris’s misappropriation caused ChromaDex
5 harm, you must decide whether that conduct justifies an award of punitive damages.
6 The purposes of punitive damages are to punish a wrongdoer for the conduct that
7 harmed ChromaDex and to discourage similar conduct in the future.

8 In order to recover punitive damages, ChromaDex must prove by clear and
9 convincing evidence that Elysium or Morris acted willfully and maliciously. You
10 must determine whether Elysium or Morris acted willfully and maliciously, but you
11 will not be asked to determine the amount of any punitive damages. I will calculate
12 the amount later.

13 “Willfully” means that Elysium or Morris acted with a purpose or willingness
14 to commit the act or engage in the conduct in question, and the conduct was not
15 reasonable under the circumstances at the time and was not undertaken in good faith.

16 “Maliciously” means that Elysium or Morris acted with an intent to cause
17 injury, or that Elysium’s or Morris’s conduct was despicable and was done with a
18 willful and knowing disregard for the rights of others.

19 “Despicable conduct” is conduct so vile, base, or wretched that it would be
20 looked down on and despised by ordinary decent people. Elysium or Morris acted
21 with knowing disregard if they were aware of the probable consequences of their
22 conduct and deliberately failed to avoid those consequences.

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24 [**Authority:** Judicial Council of California, Civil Jury Instructions 4411; *see* Cal. Civ.
25 Proc. Code § 3426.3(c).]
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Stipulated Case-Specific Jury Instruction No. 57

AFFIRMATIVE DEFENSE – INFORMATION WAS READILY ASCERTAINABLE BY PROPER MEANS

Elysium or Morris did not misappropriate a trade secret if Elysium or Morris prove that the trade secret was readily ascertainable by proper means at the time of the alleged disclosure or use.

There is no fixed standard for determining what is “readily ascertainable by proper means.” In general, information is readily ascertainable if it can be obtained, discovered, developed, or compiled without significant difficulty, effort, or expense. For example, information is readily ascertainable if it is available in trade journals, reference books, or published materials. On the other hand, the more difficult information is to obtain, and the more time and resources that must be expended in gathering it, the less likely it is that the information is readily ascertainable by proper means.

[*Authority*: Judicial Council of California, Civil Jury Instructions 4420.]

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1 **Stipulated Case-Specific Jury Instruction No. 58**

2 **MISAPPROPRIATION OF TRADE SECRETS UNDER FEDERAL LAW**

3 **(CLAIM 4) – ESSENTIAL FACTUAL ELEMENTS**

4 ChromaDex claims that the information it alleges to be trade secrets also
5 constitute trade secrets under federal law, and that Elysium and Morris
6 misappropriated trade secrets under federal law.

7 To succeed on this claim, ChromaDex must prove that:

8 (1) That ChromaDex owns a valid trade secret;

9 (2) That the trade secret relates to a product or service used in, or intended for
10 use in, interstate or foreign commerce; and

11 (3) Elysium or Morris misappropriated that trade secret.

12
13 The definitions of the terms “trade secret” and “misappropriation” under federal
14 law are substantially identical as the definitions of those terms under California state
15 law, on which you were instructed earlier.

16 [**Authority:** 18 U.S.C. § 1839; Pattern Civ. Jury Instr. 11th Cir. 11.1 (2019) (modified);
17 *Veronica Foods Co. v. Ecklin*, 2017 WL 2806706, at *12 (N.D. Cal. June 29, 2017)
18 (noting the definitions of “trade secret,” “misappropriation” and “improper use” in
CUTSA are “substantially identical to the definitions of those terms in the DTSA”).]

1 **Stipulated Case-Specific Jury Instruction No. 59**

2 **INTERSTATE OR FOREIGN COMMERCE**

3 ChromaDex claims that the Alleged Trade Secrets relate to a product or service
4 used in, or intended for use in, interstate or foreign commerce. Use or intended use of
5 the product or service in interstate commerce means that the product or service
6 involves travel, trade, transportation, or communication between a place in one state
7 and a place in another state. Use of the product or service in foreign commerce means
8 that the product or service involves travel, trade, transportation, or communication
9 between a place in the United States and a place outside of the United States.

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11 [**Authority:** 18 U.S.C. § 1839; Pattern Civ. Jury Instr. 11th Cir. 11.1 (2019)
12 (modified).]
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1 **Stipulated Case-Specific Jury Instruction No. 61**

2 **BREACH OF CONTRACT AGAINST MORRIS (CLAIM 5) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Morris for breach of the February Agreement,
5 ChromaDex must prove all of the following:

- 6 (1) That ChromaDex and Morris entered into the February Agreement;
7
8 (2) That ChromaDex did all, or substantially all, of the significant things that the
9 February Agreement required it to do;
10 (3) That Morris failed to do something that the contract required him to do, or
11 did something that the contract prohibited him from doing;
12 (4) That ChromaDex was harmed; and
13 (5) That Morris’s breach of contract was a substantial factor in causing
14 ChromaDex’s harm.

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16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303.]
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Stipulated Case-Specific Jury Instruction No. 63
BREACH OF CONTRACT AGAINST MORRIS (CLAIM 6) – ESSENTIAL
ELEMENTS

To recover damages from Morris for breach of the Disputed July Agreement, ChromaDex must prove all of the following:

- (1) That ChromaDex and Morris entered into the Disputed July Agreement;
- (2) That ChromaDex did all, or substantially all, of the significant things that the Disputed July Agreement required it to do;
- (3) That Morris failed to do something that the Disputed July Agreement required him to do, or did something that the Disputed July Agreement prohibited him from doing;
- (4) That ChromaDex was harmed; and
- (5) That Morris’s breach of contract was a substantial factor in causing ChromaDex’s harm.

[*Authority*: Judicial Council of California, Civil Jury Instructions 303.]

Stipulated Case-Specific Jury Instruction No. 64

CONTRACT FORMATION

ChromaDex claims that it entered into the Disputed July Agreement with Morris. To prove that a contract was created, ChromaDex must prove all the following:

- (1) That the contract terms were clear enough that the parties could understand what each was required to do;
- (2) That the parties agreed to give each other something of value; and
- (3) That the parties agreed to the terms of the contract.

If ChromaDex did not prove all of the above, then a contract was not created.

[**Authority:** Judicial Council of California, Civil Jury Instructions 302.]

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Stipulated Case-Specific Jury Instruction No. 65

CONSIDERATION

To form a contract, the parties must agree to give each other something of value. This value is referred to as “consideration.”

A party provides consideration for a contract if it:

- (1) Gives or promises to give the other party any benefit to which the receiving party is not lawfully entitled; or
- (2) Suffers or agrees to suffer any prejudice that it is not lawfully bound to suffer.

[*Authority*: Judicial Council of California, Civil Jury Instructions 203, CA CIVIL 1605).]

1 **Stipulated Proposed Case-Specific Jury Instruction No. 66**

2 **BREACH OF FIDUCIARY DUTY (CLAIMS 7 AND 8) – INTRODUCTION**

3 ChromaDex seeks to recover damages against Morris based on a claim of
4 breach of fiduciary duty and against Elysium for aiding and abetting breach of
5 fiduciary duty.

6 A “fiduciary duty” is a duty that corporate officer owes to his corporation. A
7 fiduciary duty imposes on a corporate officer a duty to act with the utmost good faith
8 in the best interests of his corporation.

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10 [*Authority*: Judicial Council of California, Civil Jury Instructions 4100 (modified).]
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1 **Stipulated Case-Specific Jury Instruction No. 69**

2 **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY (CLAIM 8) –**
3 **ESSENTIAL FACTUAL ELEMENTS**

4 ChromaDex claims that it was harmed by Morris’s breach of fiduciary duty, and
5 that Elysium is responsible for the harm because it aided and abetted Morris in his
6 breach of fiduciary duty.

7 If you find that Morris committed a breach of fiduciary duty that harmed
8 ChromaDex, then you must determine whether Elysium is also responsible for the
9 harm. Elysium is responsible as an aider and abettor if ChromaDex proves all of the
10 following:

- 11 (1) That Elysium knew that Morris was breaching or was going to breach his
12 fiduciary duty to ChromaDex;
- 13 (2) That Elysium gave substantial assistance or encouragement to Morris;
14 and
- 15 (3) That Elysium’s conduct was a substantial factor in causing harm to
16 ChromaDex.

17 Mere knowledge that a breach of fiduciary duty was being committed or was
18 going to be committed and the failure to prevent it do not constitute aiding and
19 abetting.

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21 [**Authority:** Judicial Council of California, Civil Jury Instructions 3610.]
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1 **Stipulated Case-Specific Jury Instruction No. 71**

2 **DAMAGES ON MULTIPLE LEGAL THEORIES**

3 ChromaDex seeks damages from Defendants under more than one legal theory.
4 However, each item of damages may be awarded only once, regardless of the number
5 of legal theories alleged.

6 You will be asked to decide whether Elysium and Morris are liable to
7 ChromaDex under the following legal theories:

- 8 (1) Breach of contract as to Elysium (Claims 1 and 2);
- 9 (2) Misappropriation of trade secrets as to Elysium (Claims 3 and 4);
- 10 (3) Misappropriation of trade secrets as to Morris (Claims 3 and 4);
- 11 (4) Breach of contract as to Morris (Claims 5 and 6)
- 12 (5) Breach of fiduciary duty as to Morris (Claim 7); and
- 13 (6) Aiding and abetting breach of fiduciary duty as to Elysium (Claim
14 8)

15 To the extent you find that any of the following items of damages are
16 recoverable, those items of damages are recoverable only once under any of the above
17 legal theories:

- 18 (1) ChromaDex’s actual damages;
- 19 (2) Elysium’s unjust enrichment; and
- 20 (3) Mark Morris’s unjust enrichment.

21
22 [**Authority:** Judicial Council of California, Civil Jury Instructions 3934; *see Roby v.*
23 *McKesson Corp.*, 47 Cal. 4th 686, 702 (2009), *as modified* (Feb. 10, 2010) (finding
24 that it is necessary to identify items of damages with specificity, as double or
25 duplicative recovery for the same damage items is prohibited)

1 **Stipulated Case-Specific Jury Instruction No. 72**
2 **BREACH OF CONTRACT AGAINST CHROMADEx**
3 **(COUNTERCLAIM 1) – INTRODUCTION**

4 Elysium claims that it and ChromaDex entered into a contract for the supply of
5 NIAGEN®, referred to as the NIAGEN Supply Agreement.

6 Elysium claims that ChromaDex breached this contract by selling NIAGEN® to
7 other customers at a lower price than the price at which ChromaDex sold it to
8 Elysium, but did not give Elysium a refund or credit, even though Elysium purchased
9 equal volumes or higher volumes of NIAGEN® than those other customers. Elysium
10 claims that this conduct was prohibited by the contract’s “Most Favored Nation
11 Provision.”

12 Elysium also claims that ChromaDex breached this contract by allowing or
13 enabling third parties, including its other customers, to create and sell products
14 containing both NIAGEN® and pTeroPure®, or substantially similar ingredients.
15 Elysium claims this conduct was prohibited by the contract’s “Exclusivity Provision.”

16 Elysium also claims that ChromaDex breached this contract by shipping NR to
17 Elysium that had not been manufactured in accordance with certain quality standards
18 that were required by the contract. Elysium claims this conduct violated the contract’s
19 “cGMP Provision.”

20 Elysium also claims that ChromaDex failed to inform Elysium of information it
21 learned affecting the quality and purity of the NR it sold to Elysium. Elysium claims
22 that this conduct violated the contract’s “Product Purity Provision.”

23 Elysium also claims that ChromaDex’s breaches of this contract caused harm to
24 Elysium for which ChromaDex should pay.

25 ChromaDex denies that it breached the contract. ChromaDex also claims
26 certain affirmative defenses, which will be explained in a later instruction.

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28 [**Authority:** Judicial Council of California, Civil Jury Instructions 300.]

1 **Stipulated Case-Specific Jury Instruction No. 75**

2 **AFFIRMATIVE DEFENSE – WAIVER**

3 ChromaDex claims that it did not have to provide NR that conformed to all
4 specifications in the NIAGEN Supply Agreement because Elysium gave up its right to
5 have ChromaDex perform this obligation. This is called a waiver.

6 To succeed, ChromaDex must prove both of the following by clear and
7 convincing evidence:

8 (1) That Elysium knew ChromaDex was required to provide NR manufactured
9 in accordance with Parts 210 and 211 of Title 21 of the United States Code
10 of Federal Regulations; and

11 (2) That Elysium freely and knowingly gave up its right to have ChromaDex
12 perform that obligation.

13 A waiver may be oral or written or may arise from conduct that shows Elysium
14 gave up that right.

15 If ChromaDex proves that Elysium gave up its right to receive NR in
16 accordance with certain specifications, then ChromaDex was not required to perform
17 those obligations.

18 [**Authority:** Judicial Council of California, Civil Jury Instructions 336.]
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1 **Stipulated Case-Specific Jury Instruction No. 76**

2 **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR**
3 **DEALING (COUNTERCLAIM 2) – ESSENTIAL ELEMENTS**

4 In every contract or agreement there is an implied promise of good faith and
5 fair dealing. This means that each party will not do anything to unfairly interfere with
6 the right of any other party to receive the benefits of the contract; however, the
7 implied promise of good faith and fair dealing cannot create obligations that are
8 inconsistent with the terms of the contract. Elysium claims that ChromaDex violated
9 the duty to act fairly and in good faith by encouraging other companies to sell
10 products combining NR and resveratrol, which Elysium contends is substantially
11 similar to pTeroPure. To establish this claim, Elysium must prove all of the
12 following:

- 13 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
14 (2) That Elysium did all, or substantially all of the significant things that the
15 contract required it to do;
16 (3) That all conditions required for ChromaDex’s performance had occurred;
17 (4) That ChromaDex unfairly interfered with Elysium’s right to receive the
18 benefits of the contract; and
19 (5) That Elysium was harmed by ChromaDex’s conduct.

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22 [**Authority:** Judicial Council of California, Civil Jury Instructions 325.]
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1 **Stipulated Case-Specific Jury Instruction No. 77**

2 **CONTRACT DAMAGES**

3 If you decide that Elysium has proven its claims against ChromaDex for breach
4 of contract or breach of the implied covenant of good faith and fair dealing, you also
5 must decide how much money will reasonably compensate Elysium for the harm
6 caused by the breach(es). This compensation is called “damages.” The purpose of
7 such damages is to put Elysium in as good a position as it would have been if
8 ChromaDex had performed as promised.

9 To recover damages for any harm, Elysium must prove that when the contract
10 was made, both parties knew or could reasonably have foreseen that the harm was
11 likely to occur in the ordinary course of events as result of the breach of the contract.

12 Elysium also must prove the amount of its damages. It does not have to prove
13 the exact amount of damages but you must not speculate or guess in awarding
14 damages.

15 Elysium seeks to recover for its actual damages.

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17 [**Authority:** Judicial Council of California, Civil Jury Instructions 350; *see* Cal. Civ.
18 Proc. Code § 3300.]

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Stipulated Case-Specific Jury Instruction No. 78
FRAUDULENT INDUCEMENT (COUNTERCLAIM 3) – ESSENTIAL
ELEMENTS

Elysium claims that ChromaDex induced it to enter into the Trademark License and Royalty Agreement by making a false representation on which Elysium reasonably relied, and which harmed it. To establish this claim, Elysium must prove all of the following:

- (1) That ChromaDex, through its CEO, represented to Elysium that a fact was true;
- (2) That ChromaDex’s representation was false;
- (3) That ChromaDex knew that the representation was false when it made it, or that it made the representation recklessly and without regard for its truth;
- (4) That ChromaDex intended Elysium rely on the representation;
- (5) That Elysium reasonably relied on the representation;
- (6) That Elysium was harmed; and
- (7) That Elysium’s reliance on ChromaDex’s representation was a substantial factor in causing its harm.

[**Authority:** Judicial Council of California, Civil Jury Instructions 1900.]

1 **Stipulated Case-Specific Jury Instruction No. 79**

2 **RELIANCE**

3 Elysium relied on any given misrepresentation if:

4 (1) The misrepresentation substantially influenced it to sign a contract called the
5 Trademark License and Royalty Agreement, and;

6 (2) It probably would not have signed the Trademark License and Royalty
7 Agreement without the misrepresentation.

8 It is not necessary for a misrepresentation to be the only reason for Elysium's
9 conduct.

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11 [**Authority:** Judicial Council of California, Civil Jury Instructions 1907.]

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Stipulated Case-Specific Jury Instruction No. 80
DAMAGES FOR FRAUDULENT INDUCEMENT

If you decide that Elysium has proved its claim against ChromaDex for fraudulent inducement, you must also decide how much money will reasonably compensate ChromaDex for the harm. This compensation is called “damages.”

The amount of damages must include an award for each item of harm that was caused by ChromaDex’s wrongful conduct, even if the particular harm could not have been anticipated.

Elysium does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by Elysium: royalties that Elysium paid under the Trademark License and Royalty Agreement.

[**Authority:** Judicial Council of California, Civil Jury Instructions 3900.]

1 **Stipulated Closing Jury Instruction No. 82**

2 **DUTY OF THE JURY**

3 Members of the Jury: Now that you have heard all of the evidence and the
4 arguments of the attorneys, it is my duty to instruct you as to the law of the case.

5 Each of you has received a copy of these instructions that you may take with
6 you to the jury room to consult during your deliberations.

7 It is your duty to find the facts from all the evidence in the case. To those facts
8 you will apply the law as I give it to you. You must follow the law as I give it to you
9 whether you agree with it or not. And you must not be influenced by any personal
10 likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide
11 the case solely on the evidence before you. You will recall that you took an oath to do
12 so.

13 Please do not read into these instructions or anything that I may say or do or
14 have said or done that I have an opinion regarding the evidence or what your verdict
15 should be.

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17 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
18 Ninth Circuit § 1.4 (June 2019).]

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1 **Stipulated Closing Jury Instruction No. 83**

2 **DUTY TO DELIBERATE**

3 Before you begin your deliberations, elect one member of the jury as your
4 presiding juror. The presiding juror will preside over the deliberations and serve as
5 the spokesperson for the jury in court.

6 You shall diligently strive to reach agreement with all of the other jurors if you
7 can do so. Your verdict must be unanimous.

8 Each of you must decide the case for yourself, but you should do so only after
9 you have considered all of the evidence, discussed it fully with the other jurors, and
10 listened to their views.

11 It is important that you attempt to reach a unanimous verdict but, of course,
12 only if each of you can do so after having made your own conscientious decision. Do
13 not be unwilling to change your opinion if the discussion persuades you that you
14 should. But do not come to a decision simply because other jurors think it is right, or
15 change an honest belief about the weight and effect of the evidence simply to reach a
16 verdict.

17
18 [**Authority:** Manual of Model Civil Jury Instructions for the District Courts of the
19 Ninth Circuit § 3.1; *see* FED. R. CIV. P. 48(b); *see also* *Murray v. Laborers Union*
20 *Local No. 324*, 55 F.3d 1445, 1451 (9th Cir. 1995) (noting that a jury verdict in a
federal civil case must be unanimous, unless the parties stipulate otherwise) (citing
Johnson v. Louisiana, 406 U.S. 356, 369-70 (1972)).]

1 **Stipulated Closing Jury Instruction No. 84**

2 **COMMUNICATIONS WITH COURT**

3 If it becomes necessary during your deliberations to communicate with me, you
4 may send a note through the clerk, signed by any one or more of you. No member of
5 the jury should ever attempt to communicate with me except by a signed writing. I
6 will not communicate with any member of the jury on anything concerning the case
7 except in writing or here in open court. If you send out a question, I will consult with
8 the lawyers before answering it, which may take some time. You may continue your
9 deliberations while waiting for the answer to any question. Remember that you are
10 not to tell anyone—including the court—how the jury stands, whether in terms of vote
11 count or otherwise, until after you have reached a unanimous verdict or have been
12 discharged.

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14 [*Authority*: Manual of Model Civil Jury Instructions for the District Courts of the
15 Ninth Circuit § 3.3; *see* Jury Instructions Committee of the Ninth Circuit, A Manual
16 on Jury Trial Procedures § 5.1.A (2013).]
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1 **Stipulated Closing Jury Instruction No. 85**

2 **RETURN OF VERDICT**

3 A verdict form has been prepared for you. [*Explain verdict form as needed.*]
4 After you have reached unanimous agreement on a verdict, your foreperson should
5 complete the verdict form according to your deliberations, sign and date it, and advise
6 the clerk that you are ready to return to the courtroom.

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8 [*Authority:* Manual of Model Civil Jury Instructions for the District Courts of the
9 Ninth Circuit § 3.5.]

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**INSTRUCTIONS PROPOUNDED BY
PLAINTIFF, OPPOSED BY DEFENDANTS**

1 **Disputed Case-Specific Jury Instruction No. 29, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 1) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the pTeroPure Supply
5 Agreement, ChromaDex must prove all of the following:

- 6 (1) That ChromaDex and Elysium entered into a contract;
7
8 (2) That ChromaDex did all, or substantially all, of the significant things that the
9 contract required it to do;
10 (3) That Elysium failed to do something that the contract required it to do, or did
11 something that the contract prohibited it from doing;
12 (4) That ChromaDex was harmed; and
13 (5) That Elysium's breach of contract was a substantial factor in causing
14 ChromaDex's harm.

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16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303 (elements of
breach of contract).]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on every element essential to a breach
3 of contract cause of action.

4 Elysium takes a different approach. Rather than simply inform the jury about
5 the essential elements of ChromaDex’s breach of contract claims in a single concise
6 instruction, Elysium seeks to have multiple, nearly identical instructions, relisting the
7 elements for breach of contract for every act that allegedly constituted a breach.
8 These seriatim instructions are unnecessary, unwieldy, and invite juror confusion. *See*
9 *Jones*, 297 F.3d at 935 (instruction was properly rejected where other instructions
10 “enabled the jury to consider th[e] issue adequately”). Elysium’s approach is also
11 contrary to Local Rule 51-2(c), which states that instructions shall “[n]ot repeat the
12 principle of law contained in any other request.”

13 Elysium’s instructions also eliminate a key term from the CACI instruction
14 without explanation. CACI No. 303 states that among the elements a plaintiff must
15 prove in a breach of contract action is that it did all, or substantially all, of the
16 “significant” things that the contract required it to do. Elysium eliminates the word
17 “significant,” which suggests to a jury that even trivial nonconformance by
18 ChromaDex could defeat its breach of contract claim. That is not the law. Elysium’s
19 instructions invite error and would unfairly prejudice ChromaDex.

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21 **Defendants’ position:** [Presented with competing instruction]
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1 **Disputed Case-Specific Jury Instruction No. 34, Offered by ChromaDex**

2 **INTRODUCTION TO CONTRACT DAMAGES (CLAIM 1)**

3 If you decide that ChromaDex has proved its claim against Elysium for breach
4 of the pTeroPure Supply Agreement, you also must decide how much money will
5 reasonably compensate ChromaDex for the harm caused by the breach. This
6 compensation is called “damages.” The purpose of such damages is to put
7 ChromaDex in as good a position as it would have been if Elysium had performed as
8 promised.

9 To recover damages for any harm, ChromaDex must prove that when the
10 contract was made, both parties knew or could reasonably have foreseen that the harm
11 was likely to occur in the ordinary course of events as result of the breach of the
12 contract.

13 ChromaDex also must prove the amount of its damages according to the
14 following instructions. It does not have to prove the exact amount of damages but you
15 must not speculate or guess in awarding damages.

16 ChromaDex claims damages for the amount it invoiced Elysium for the
17 pTeroPure® shipment.

18 ChromaDex also seeks to recover the amount of any unjust benefit that Elysium
19 obtained because of the breach of contract. This is called “unjust enrichment.”

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21 [Authority: Judicial Council of California, Civil Jury Instructions 350; see Cal. Civ.
22 Proc. Code § 3300; *Alkayali v. Hoed*, 2018 WL 3425980, at *6 (S.D. Cal. July 16,
23 2018) (“California law permits plaintiffs to seek disgorgement of a defendant’s unjust
24 enrichment as a restitutionary remedy for breach of contract.”); *Ajaxo Inc. v. E*Trade*
25 *Grp. Inc.*, 135 Cal. App. 4th 21, 56-57 (2005).]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction on contract damages because it accurately reflects ChromaDex’s theories
3 of recovery on the contract. ChromaDex’s Supplemental Initial Disclosures made
4 clear that ChromaDex intended to pursue compensatory damages and the amounts by
5 which Elysium was unjustly enriched by its contractual breaches. “California law
6 permits plaintiffs to seek disgorgement of a defendant’s unjust enrichment as a
7 restitutionary remedy for breach of contract.” *Alkayali v. Hoed*, 2018 WL 3425980, at
8 *6 (S.D. Cal. July 16, 2018). The Court should reject Elysium’s proposal omits any
9 reference to unjust enrichment and, thus does not accurately reflect ChromaDex’s
10 theories of recovery. *See Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th
11 Cir. 2011) (noting each party is “entitled to an instruction about his or her theory of
12 the case if it is supported by law and has foundation in the evidence”).

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14 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 38, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 2) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the NIAGEN Supply
5 Agreement, ChromaDex must prove all of the following:

- 6 (1) That ChromaDex and Elysium entered into a contract;
7
8 (2) That ChromaDex did all, or substantially all, of the significant things that the
9 contract required it to do;
10 (3) That Elysium failed to do something that the contract required it to do, or did
11 something that the contract prohibited it from doing;
12 (4) That ChromaDex was harmed; and
13 (5) That Elysium's breach of contract was a substantial factor in causing
14 ChromaDex's harm.

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16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303.]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on every element essential to a breach
3 of contract cause of action.

4 Elysium takes a different approach. Rather than simply inform the jury about
5 the essential elements of ChromaDex’s breach of contract claims in a single concise
6 instruction, Elysium seeks to have multiple, nearly identical instructions, relisting the
7 elements for breach of contract for every act that allegedly constituted a breach.
8 These seriatim instructions are unnecessary, unwieldy, and invite juror confusion. *See*
9 *Jones*, 297 F.3d at 935 (instruction was properly rejected where other instructions
10 “enabled the jury to consider th[e] issue adequately”). Elysium’s approach is also
11 contrary to Local Rule 51-2(c), which states that instructions shall “[n]ot repeat the
12 principle of law contained in any other request.”

13 Further, Elysium incorrectly suggests that each wrongful disclosure of
14 confidential information by Elysium must have been on its own a “substantial factor”
15 in causing ChromaDex’s harm. That is not the case. If Elysium’s wrongful acts,
16 taken collectively, were a substantial factor in causing ChromaDex’s harm, that would
17 be sufficient to establish harm for a breach of contract. *Bladeroom Grp. Ltd. v.*
18 *Emerson Elec. Co.*, 331 F. Supp. 3d 977, 988 (N.D. Cal. Aug. 3, 2018) (applying
19 “substantial factor” test to defendant’s holistic “conduct” that included, inter alia,
20 breach of confidentiality agreement related to various different confidential
21 information and trade secrets). In any event, if Elysium desires to argue to the jury
22 that each of its wrongful acts was not on its own a “substantial factor” in causing
23 ChromaDex’s harm, it may still do so using ChromaDex’s proposed instruction
24 without enlisting the Court to prejudice the jury through its incorrect proposed
25 instruction.

26 Elysium’s instructions also eliminate a key term from the CACI instruction
27 without explanation. CACI No. 303 states that among the elements a plaintiff must
28 prove in a breach of contract action is that it did all, or substantially all, of the

1 “significant” things that the contract required it to do. Elysium eliminates the word
2 “significant,” which suggests to a jury that even trivial nonconformance by
3 ChromaDex could defeat its breach of contract claim. That is not the law. Elysium’s
4 instructions invite error and would unfairly prejudice ChromaDex..

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6 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 40, Offered by ChromaDex**

2 **INTRODUCTION TO CONTRACT DAMAGES (CLAIM 2)**

3 If you decide that ChromaDex has proved its claim against Elysium for breach
4 of the NIAGEN Supply Agreement, you also must decide how much money will
5 reasonably compensate ChromaDex for the harm caused by the breach. This
6 compensation is called “damages.” The purpose of such damages is to put
7 ChromaDex in as good a position as it would have been if Elysium had performed as
8 promised.

9 To recover damages for any harm, ChromaDex must prove that when the
10 contract was made, both parties knew or could reasonably have foreseen that the harm
11 was likely to occur in the ordinary course of events as result of the breach of the
12 contract.

13 ChromaDex also must prove the amount of its damages according to the
14 following instructions. It does not have to prove the exact amount of damages but you
15 must not speculate or guess in awarding damages.

16 ChromaDex claims damages for the amount it invoiced Elysium for the
17 NIAGEN® shipment.

18 ChromaDex also seeks to recover the amount of any unjust benefit that Elysium
19 obtained because of the breach of contract. This is called “unjust enrichment.”

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21 [Authority: Judicial Council of California, Civil Jury Instructions 350; see Cal. Civ.
22 Proc. Code § 3300; *Alkayali v. Hoed*, 2018 WL 3425980, at *6 (S.D. Cal. July 16,
23 2018) (“California law permits plaintiffs to seek disgorgement of a defendant’s unjust
24 enrichment as a restitutionary remedy for breach of contract.”); *Ajaxo Inc. v. E*Trade*
25 *Grp. Inc.*, 135 Cal. App. 4th 21, 56-57 (2005).]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction on contract damages because it accurately reflects ChromaDex’s theories
3 of recovery on the contract. ChromaDex’s Supplemental Initial Disclosures made
4 clear that ChromaDex intended to pursue compensatory damages and the amounts by
5 which Elysium was unjustly enriched by its contractual breaches. “California law
6 permits plaintiffs to seek disgorgement of a defendant’s unjust enrichment as a
7 restitutionary remedy for breach of contract.” *Alkayali v. Hoed*, 2018 WL 3425980, at
8 *6 (S.D. Cal. July 16, 2018). The Court should reject Elysium’s proposal because it
9 omits any reference to unjust enrichment and, thus does not accurately reflect
10 ChromaDex’s theories of recovery. *See Hunter v. Cnty. of Sacramento*, 652 F.3d
11 1225, 1232 (9th Cir. 2011) (noting each party is “entitled to an instruction about his or
12 her theory of the case if it is supported by law and has foundation in the evidence”).

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14 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 44, Offered by ChromaDex**
2 **MISAPPROPRIATION OF TRADE SECRETS UNDER STATE LAW**
3 **(CLAIM 3) – INTRODUCTION**

4 ChromaDex claims that it is the owner of information relating to the
5 manufacture and sale of NR, including certain trade secrets.

6 The alleged trade secrets fall into four categories: (1) ingredient sales
7 information, (2) the price ChromaDex paid to obtain NR from its manufacturer, (3)
8 ChromaDex’s research and development work regarding different salts for use in
9 manufacturing NR, and (4) ChromaDex’s research and development work regarding
10 different methods for manufacturing NR. This information will be referred to as the
11 “Alleged Trade Secrets.”

12 ChromaDex claims that Elysium and Morris misappropriated the Alleged Trade
13 Secrets and that Elysium’s and Morris’s misappropriation caused it harm or caused
14 Elysium and Morris to be unjustly enriched. “Misappropriation” means the improper
15 use or disclosure of a trade secret.

16 Elysium and Morris deny that any of the Alleged Trade Secrets is a trade secret.
17 Elysium and Morris also deny that they misappropriated any of the Alleged Trade
18 Secrets. Elysium and Morris also claim certain affirmative defenses, which will be
19 explained in a later instruction.

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21 [*Authority*: Judicial Council of California, Civil Jury Instructions 4400; *see* Cal. Civ.
22 Proc. Code § 3426.1, *et seq.*]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s instruction
2 because it provides a specific, easy-to-digest description of the four categories of
3 alleged trade secrets in this case, which will orient the jurors throughout numerous
4 trade secret instructions.

5 Elysium’s instruction should be rejected because it overly generalizes the trade
6 secrets at issue and is likely to lead to jury confusion and error. *See United States v.*
7 *Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (finding district court properly rejected
8 “confusing instruction” that would be “misleading or inadequate to guide the jury’s
9 deliberation”).

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11 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 45, Offered by ChromaDex**
2 **MISAPPROPRIATION OF TRADE SECRETS UNDER STATE LAW**
3 **(CLAIM 3) – ESSENTIAL FACTUAL ELEMENTS**

4 ChromaDex claims that Defendants misappropriated some or all ChromaDex’s
5 Alleged Trade Secrets. To succeed on a claim based on alleged misappropriation of
6 any given Alleged Trade Secret, ChromaDex must prove all of the following:

- 7 (1) That ChromaDex owned the Alleged Trade Secret;
- 8 (2) That the Alleged Trade Secret qualified as a trade secret at the time of its
9 alleged misappropriation;
- 10 (3) That Elysium and/or Morris improperly used or disclosed the Alleged Trade
11 Secret;
- 12 (4) That ChromaDex was harmed, or that Elysium and/or Morris were unjustly
13 enriched; and
- 14 (5) That Elysium’s or Morris’s use or disclosure was a substantial factor in
15 causing ChromaDex’s harm, or in causing Elysium and/or Morris to be
16 unjustly enriched.

17 [**Authority:** Judicial Council of California, Civil Jury Instructions 4401.]

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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on every element essential to a
3 misappropriation claim.

4 ChromaDex objects to Defendants’ instruction on several grounds. First, it
5 does not accurately characterize the trade secrets at issue. Earlier in this case, in
6 response to an interrogatory, ChromaDex identified the four categories of information
7 that it believes Defendants misappropriated. Those are the trade secrets at issue. In
8 the same interrogatory, ChromaDex also identified specific *documents* containing
9 trade secret information that it believed had been misappropriated. Defendants’
10 proposed instruction erroneously and prejudicially purports to summarize the alleged
11 trade secrets in this case by providing a series of shorthand descriptions of *documents*
12 containing allegedly misappropriated trade secrets. Not only is this an incomplete
13 summary of the alleged trade secret information, Defendants’ shorthand descriptions
14 are impossible for jurors to understand when divorced from the specific documents
15 that they were referencing (*e.g.*, information “regarding ChromaDex’s sales to
16 another customer,” information “regarding ChromaDex’s NR sales to other
17 customers”) As such, this instruction provides no help to a jury.

18 Second, Defendants’ instruction misleadingly suggests that ChromaDex can
19 prevail on its trade secret claim only by demonstrating misappropriation of every
20 document containing information that they have listed. That position is not supported
21 by any ruling of the Court and does not belong in an instruction intended to convey
22 the essential elements of a misappropriation claim. In fact, ChromaDex can prevail if
23 it proves the misappropriation of any one of its trade secrets.

24 Finally, Defendants’ instruction misleadingly ties Elysium and Morris together
25 by suggesting, *e.g.*, that ChromaDex must prove misappropriation against *both*
26 Defendants to succeed on its claim or that they must *both* have been “unjustly
27 enriched.” In fact, ChromaDex can prove its claim against one, or both Defendants.
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Defendants' position: [Presented with competing instruction].

1 **Disputed Case-Specific Jury Instruction No. 48, Offered by ChromaDex**
2 **REASONABLE EFFORTS TO PROTECT SECRECY**

3 To establish that information is a trade secret, ChromaDex must prove that it
4 made reasonable efforts under the circumstances to keep it secret. “Reasonable
5 efforts” are the efforts that would be made by a reasonable business in the same
6 situation and having the same knowledge and resources as ChromaDex, exercising
7 due care to protect important information of the same kind. This requirement applies
8 separately to each Alleged Trade Secret.

9 In determining whether ChromaDex made reasonable efforts to keep particular
10 information secret, you should consider all of the facts and circumstances. Among the
11 factors you should consider are the following:

- 12 (1) Whether documents or computer files containing the information were
13 marked with confidentiality warnings;
- 14 (2) Whether ChromaDex instructed its employees to treat the information as
15 confidential information;
- 16 (3) Whether ChromaDex restricted access to the information to persons who
17 had a business reason to know the information;
- 18 (4) Whether ChromaDex kept the information in a restricted or secured area;
- 19 (5) Whether ChromaDex required employees or others with access to the
20 information to sign confidentiality or nondisclosure agreements;
- 21 (6) Whether ChromaDex took any action to protect the specific information,
22 or whether it simply relied on general measures taken to protect its
23 business information as a whole;
- 24 (7) The extent to which and general measures taken by ChromaDex would
25 prevent the unauthorized disclosure of the information; and
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1 (8) Whether there were other reasonable measures available to ChromaDex
2 that it did not take.

3 The presence of absence of any one or more of these factors is not necessarily
4 determinative.

5 [*Authority*: Judicial Council of California, Civil Jury Instructions 4404.]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the CACI model.

3 Defendants’ proposed instruction, by contrast, is argumentative and misleading.
4 Defendants seeks to expand the CACI instruction by adding three irrelevant “factors”
5 that the jury can consider in weighing whether ChromaDex made reasonable efforts to
6 keep particular information secret. These factors reflect only the defense theories in
7 the case and are misleading. For example, Defendants’ proposed instruction invites
8 the jury to find that “disclosing information to others, including other customers”
9 weighs against a finding that ChromaDex took reasonable steps to keep information
10 secret. Absent context about how or why information was disclosed, however, merely
11 “disclosing information to others” says nothing about ChromaDex’s efforts to keep
12 information secret. For example, ChromaDex may have shared information under a
13 non-disclosure agreement, and Defendants’ proposed instruction improperly suggests
14 that the jury may ignore that possibility. Defendants’ other two “factors” are similarly
15 argumentative and unhelpful to the jury in that they have little to do with whether
16 ChromaDex made reasonable efforts to keep particular information secret.

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18 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 49, Offered by ChromaDex**
2 **“INDEPENDENT ECONOMIC VALUE” EXPLAINED**

3 Information has independent economic value if it gives the owner an actual or
4 potential business advantage over others who do not know the information and who
5 could obtain economic value from its disclosure or use.

6 In determining whether any given Alleged Trade Secrets had actual or potential
7 independent economic value because it was secret, you may consider the following:

- 8 (1) The extent to which ChromaDex obtained or could obtain economic
9 value from the information in keeping it secret;
- 10 (2) The extent to which others could obtain economic value from the
11 information if it was not secret;
- 12 (3) The amount of time, money, or labor that ChromaDex expended in
13 developing or acquiring the specific information; and
- 14 (4) The amount of time, money, or labor that would be saved by a competitor
15 who used this information.

16 The presence or absence of any one or more of these factors is not necessarily
17 determinative.

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19 [**Authority:** Judicial Council of California, Civil Jury Instructions 4412 (modified);
20 *see* Rest.3d, Unfair Competition, § 39 at 430, cmt. 3 (indicating that the business or
21 technical information should be sufficiently valuable and secret to afford an actual or
22 potential economic advantage over others; the advantage need not be great, but it must
23 be more than trivial); *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (1997) (“As
24 a general principle, the more difficult information is to obtain, and the more time and
25 resources expended by an employer in gathering it, the more likely a court will find
26 such information constitutes a trade secret.”); *Shippers, a Div. of Illinois Tool Works,*
27 *Inc. v. Fontenot*, 2013 WL 12092056, at *3 (S.D. Cal. Sept. 23, 2013) (a party’s
28 “efforts to acquire” information is relevant).

1 **ChromaDex’s position:** Both parties make minor modifications to the CACI
2 instruction. The Court should adopt ChromaDex’s proposed instruction. ChromaDex
3 merely seeks to clarify that, in determining whether particular information alleged to
4 be a trade secret has actual or potential independent economic value because it was
5 secret, jurors may consider the amount of time, money, or labor that a company
6 expended in “acquiring” the information, not just “developing” it. This modification
7 is necessary because some jurors may not understand the term “developing” to
8 encompass the compilation of information, when the law recognizes that compiling
9 information can have independent economic value. *Morlife, Inc. v. Perry*, 56 Cal.
10 App. 4th 1514, 1522 (1997) (“As a general principle, the more difficult information is
11 to obtain, and the more time and resources expended by an employer in gathering it,
12 the more likely a court will find such information constitutes a trade secret.”);
13 *Shippers, a Div. of Illinois Tool Works, Inc. v. Fontenot*, 2013 WL 12092056, at *3
14 (S.D. Cal. Sept. 23, 2013) (ruling a party’s “efforts to acquire” information is relevant
15 in the independent economic value inquiry).

16 Defendants modify the standard CACI instruction by replacing the word
17 “information” with “trade secret information.” This additional language is
18 unnecessary and confusing. Whether information has actual or potential independent
19 economic value is a necessary *precondition* for that information to be a trade secret.
20 Cal. Civ. Code § 3426.1(d)(1). Here, Defendants seek to instruct the jury on when
21 “[t]rade secret information” has independent economic value. The implication is that
22 there are trade secrets that do *not* have independent economic value, which is contrary
23 to law. Because Defendants instruction is likely to confuse the jury, it should be
24 rejected.

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26 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 50, Offered by ChromaDex**
2 **MISAPPROPRIATION BY DISCLOSURE**

3 Elysium or Morris misappropriated a trade secret by disclosure if Elysium or
4 Morris:

5 (1) disclosed the information without ChromaDex’s consent; and

6 (2) did any of the following:

7 a. acquired knowledge of the trade secret by improper means; or

8 b. **[in the case of Elysium]** at the time of disclosure, knew or had
9 reason to know, that its knowledge of ChromaDex’s trade secret
10 came from or through Morris, and that Morris had a duty to
11 ChromaDex to keep the information secret;

12 c. **[in the case of Elysium]** at the time of disclosure, knew or had
13 reason to know that its knowledge of ChromaDex’s trade secret
14 came from or through Morris, and that Morris had previously
15 acquired the trade secret by improper means.

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17 **[Authority:** Judicial Council of California, Civil Jury Instructions 4406.]
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ChromaDex’s position: The Court should adopt ChromaDex’s proposed instruction because it tracks the standard CACI model and applies to multiple potential theories of liability.

Defendants’ position: [Presented with competing instruction].

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Disputed Case-Specific Jury Instruction No. 51, Offered by ChromaDex
MISAPPROPRIATION BY USE

Elysium or Morris misappropriated a trade secret by use if Elysium or Morris:

(1) used the trade secret without ChromaDex’s consent; and

(2) did any one of the following:

- acquired knowledge of the trade secret by improper means; or
- at the time of use, knew or had reason to know that the knowledge of the trade secret was acquired under circumstances creating a legal obligation to limit use of the information; or
- **[in the case of Elysium]** at the time of use, knew or had reason to know that its knowledge of the trade secret came from or through Morris, and that Morris had a duty to ChromaDex to limit use of the information.

[Authority: Judicial Council of California, Civil Jury Instructions 4407 (modified).]

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ChromaDex’s position: The Court should adopt ChromaDex’s proposed instruction because it tracks the standard CACI model.

Defendants’ position: [Presented with competing instruction].

1 **Disputed Case-Specific Jury Instruction No. 53, Offered by ChromaDex**
2 **REMEDIES FOR MISAPPROPRIATION OF TRADE SECRET**

3 If ChromaDex proves that Elysium or Morris misappropriated its trade secrets,
4 then ChromaDex is entitled to recover damages if the misappropriation caused
5 ChromaDex to suffer an actual loss or Elysium or Morris to be unjustly enriched.

6 If Elysium’s or Morris’s misappropriation did not cause ChromaDex to suffer
7 an actual loss or Elysium or Morris to be unjustly enriched, ChromaDex may still be
8 entitled to a reasonable royalty for no longer than the period of time the use could
9 have been prohibited. However, I will calculate the amount of any royalty.

10
11 [**Authority:** Judicial Council of California. Civil Jury Instructions 4409: *see* Cal. Civ.
12 Proc. Code § 3426.3(a) (“A complainant may recover damages for the actual loss
13 caused by misappropriation. A complainant also may recover for the unjust
enrichment caused by misappropriation that is not taken into account in computing
damages for actual loss.”).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it tracks the standard CACI model.

3 ChromaDex objects to Elysium’s instruction for two reasons. First, it
4 misleadingly ties Elysium and Morris together by suggesting, *e.g.*, that ChromaDex
5 must prove misappropriation against *both* Elysium and Morris to recover damages or
6 that they must *both* have been “unjustly enriched” for ChromaDex to get restitution.
7 In fact, ChromaDex need only prove its claim against one Defendant to recover.
8 Second, Elysium omits optional language from the CACI instruction that would
9 advise the jury that, even if it finds that ChromaDex suffered no actual loss and that
10 Defendants were not unjustly enriched, ChromaDex may still be entitled to some
11 recovery. ChromaDex’s Supplemental Initial Disclosures made clear that ChromaDex
12 intended to pursue a reasonable royalty, and stands ready to offer evidence to assist
13 the Court in determining such a royalty when and if appropriate. That language is
14 necessary to properly instruct the jury on the law. *At. Inertial Sys., Inc. v. Condor*
15 *Pac. Indus. of Cal., Inc.*, 545 F. App’x 600, 601 (9th Cir. Oct. 30, 2013) (holding
16 district court erred “in ruling, at damages stage, that the jury’s finding of no harm
17 precluded a reasonable royalty”).

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19 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 60, Offered by ChromaDex**

2 **BREACH OF CONTRACT AGAINST MORRIS (CLAIM 5) –**

3 **INTRODUCTION**

4 ChromaDex claims that it entered into confidentiality agreement with Morris in
5 February 2016. This will be referred to as the “February Agreement.”

6 ChromaDex claims that Morris breached this contract by conveying
7 ChromaDex’s trade secrets and confidential information and documents to Elysium
8 and by failing to return or destroy ChromaDex documents when his employment with
9 ChromaDex ended, and by misusing ChromaDex documents for Elysium’s benefit
10 after he left ChromaDex.

11 ChromaDex also claims that Morris’s breaches caused harm to ChromaDex for
12 which Morris should pay.

13 Morris denies that he breached the agreement. He also claims certain
14 affirmative defenses, which will be explained in a later instruction.

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16 [**Authority:** Judicial Council of California, Civil Jury Instructions 300.]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction rather than Elysium’s because it provides a more accurate reflection of
3 ChromaDex’s claim. ChromaDex’s claim for breach of the February Agreement is
4 not limited to Morris’s improper use and disclosure of ChromaDex’s confidential and
5 trade secret information, as Elysium’s instruction suggests. ChromaDex’s claim also
6 encompasses Morris’s misuse of certain *proprietary* information (e.g., ChromaDex
7 presentations) after his employment terminated. ChromaDex objects to Elysium’s
8 instruction because it artificially narrows the scope of ChromaDex’s claim.

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10 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 62, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST MORRIS (CLAIM 6) –**
3 **INTRODUCTION**

4 ChromaDex claims that it entered into confidentiality agreement with Morris in
5 July 2016. This will be referred to as the “Disputed July Agreement.”

6 ChromaDex claims that Morris breached this contract by conveying
7 ChromaDex’s trade secrets and confidential information and documents to Elysium,
8 by failing to return or destroy ChromaDex documents when his employment with
9 ChromaDex ended, and by misusing ChromaDex documents for Elysium’s benefit
10 after he left ChromaDex.

11 Morris denies that he entered into a valid contract with ChromaDex in July
12 2016.

13 Morris also denies that he breached any contract and that any of the information
14 was a trade secret. Mr. Morris also claims certain affirmative defenses which will be
15 explained in a later instruction.

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17 [**Authority:** Judicial Council of California, Civil Jury Instructions 300.]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction rather than Elysium’s because it provides a more accurate reflection of
3 ChromaDex’s claim. ChromaDex’s claim for breach of the Disputed July Agreement
4 is not limited to Morris’s improper use and disclosure of ChromaDex’s confidential
5 and trade secret information, as Elysium’s instruction suggests. ChromaDex’s claim
6 also encompasses Morris’s misuse of certain *proprietary* information (e.g.,
7 ChromaDex presentations) after his employment terminated. ChromaDex objects to
8 Elysium’s instruction because it artificially narrows the scope of ChromaDex’s claim
9 and because it is argumentative, e.g., by including the detail that the contract was
10 signed on Morris’s “last day of employment.”

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12 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 67, Offered by ChromaDex**
2 **OFFICER WHO PARTICIPATES IN MANAGEMENT IS A FIDUCIARY OF**
3 **THE CORPORATION AS A MATTER OF LAW**

4
5 An officer of a corporation who participates in management of the corporation,
6 exercising some discretionary authority, is a fiduciary of the corporation.
7 Participation in management does not require “top-level” control. So long as the
8 officer has some discretion in managing corporate affairs, he or she is a fiduciary of
9 the corporation.

10 A nominal officer with no management authority is not a fiduciary.

11
12 [**Authority:** 1 California Forms of Jury Instruction MB300C.08 (modified); *GAB Bus.*
13 *Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc.*, 83 Cal. App. 4th 409, 420, 99
14 Cal. Rptr. 2d 665, 672 (2000), *as modified* (Sept. 14, 2000), *as modified on denial of*
15 *reh’g* (Sept. 26, 2000) (“We conclude an officer who participates in management of
16 the corporation, exercising some discretionary authority, is a fiduciary of the
17 corporation as a matter of law. Conversely, a ‘nominal’ officer with no management
18 authority is not a fiduciary. Whether a particular officer participates in management is
19 a question of fact. We expect that in most cases this test will be easily met.”).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction. It is faithful to the letter and spirit of the model jury instruction cited as
3 authority by both ChromaDex and Defendants and is furthermore a correct and
4 complete statement of the law as held by the court in *GAB Business Services Inc. v.*
5 *Lindsey & Newsom Claim Services, Inc.*, 83 Cal. App. 4th 409 (2000), *as modified*
6 (Sept. 14, 2000), *as modified on denial of reh’g* (Sept. 26, 2000). In *GAB Business*
7 *Services*, the court concluded that “top level control” by a corporate officer—
8 specifically, a “regional vice president”—was not required “to impose a fiduciary
9 duty” on that officer. *Id.*

10 ChromaDex understands that Defendants intend to argue to the jury that Morris
11 did not owe ChromaDex a fiduciary duty because he was a vice president of the
12 company and not in the “C-suite” of executive officers. ChromaDex’s proposed
13 instruction is thus proper because it is “vital to plaintiff[’s] case” and “cannot be
14 readily deduced from simply reading” the plain model jury instruction. *Hunter v.*
15 *Cnty. of Sacramento*, 652 F.3d 1225, 1234–35 (9th Cir. 2011). ChromaDex is entitled
16 to its instruction explaining the standard in more detail because “‘juries are not
17 clairvoyant’ and will not know to follow a particular legal principle ‘unless they are
18 told to do so.’” *Id.* at 1235 (rejecting plain model jury instruction as “‘an incomplete,
19 and therefore incorrect, statement of the law’” (quoting *Norwood v. Vance*, 591 F.3d
20 1062, 1066 (9th Cir. 2010)); *see also Norwood*, 591 F.3d. at 1067 (vacating verdict
21 because “court’s failure to give additional guidance on deference rendered the
22 instruction incomplete and misleading”). For the same reasons, the Court should
23 reject Morris’s incomplete and misleading proposed instruction.

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25 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 68, Offered by ChromaDex**
2 **BREACH OF FIDUCIARY DUTY (CLAIM 7) – ESSENTIAL FACTUAL**
3 **ELEMENTS**

4 ChromaDex claims that Morris breached the fiduciary duty of loyalty and the
5 ChromaDex was harmed as a result. A corporate officer owes his corporation
6 undivided loyalty. To establish this claim, ChromaDex must prove all of the
7 following:

- 8 (1) That Morris was a corporate officer of ChromaDex;
- 9 (2) That Morris knowingly acted against ChromaDex’s interests, or in favor
10 of Elysium’s interests, with respect to ChromaDex’s ingredients
11 business;
- 12 (3) That ChromaDex did not give informed consent to Morris’s conduct;
- 13 (4) That ChromaDex was harmed; and
- 14 (5) That Morris’s conduct was a substantial factor in causing ChromaDex’s
15 harm.

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17 [*Authority*: Judicial Council of California, Civil Jury Instructions 4102.]
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it is both legally and factually supported. First, it is faithful to the
3 model instruction in CACI No. 4102, which provides that the second element include
4 a “description of the transaction.” Second, ChromaDex alleges and evidence
5 discovered in this case supports that Morris both (1) acted against ChromaDex’s
6 interests by withholding information from ChromaDex and urging it to take actions
7 that would damage it and (2) also acted in favor of Elysium’s interests over
8 ChromaDex’s by passing it ChromaDex corporate opportunities and assisting Elysium
9 in its efforts to reach out to ChromaDex’s critical business partners and therefore
10 undermine ChromaDex’s ability to sustain all aspects of its ingredients business.
11 ChromaDex’s proposed instruction properly encompasses all of Morris’s wide-
12 ranging misconduct.

13 Defendants incorrectly include the phrase “at the time Morris was a corporate
14 officer of ChromaDex” in the second element. That is wrong because it is duplicative
15 of the first element, and therefore unnecessary. *See Jones*, 297 F.3d at 935 (affirming
16 rejection of instruction where “the district court gave other instructions that enabled
17 the jury to consider th[e] issue adequately”). Defendants’ attempt to introduce
18 repetition into their proposed instruction should be rejected as misleading to the jury.
19 *See United States v. Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (district court
20 properly rejected “confusing instruction” that would be “misleading or inadequate to
21 guide the jury’s deliberation”).

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23 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 710 Offered Only by ChromaDex**
2 **DAMAGES FOR BREACH OF FIDUCIARY DUTY (CLAIM 7) AND AIDING**
3 **AND ABETTING BREACH OF FIDUCIARY DUTY (CLAIM 8)**

4 If you decide that ChromaDex has proved its claim against Morris for breach of
5 fiduciary duty and/or that ChromaDex has proved its claim against Elysium for aiding
6 and abetting Morris’s breach of fiduciary duty, you must also decide how much
7 money will reasonably compensate ChromaDex for the harm. This compensation is
8 called “damages.”

9 The amount of damages must include an award for each item of harm that was
10 caused by Morris’s or Elysium’s wrongful conduct, even if the particular harm could
11 not have been anticipated.

12 ChromaDex does not have to prove the exact amount of damages that will
13 provide reasonable compensation for the harm. However, you must not speculate or
14 guess in awarding damages.

15 ChromaDex seeks to recover for its actual damages. ChromaDex also seeks to
16 recover the amount of any unjust benefit that Elysium or Morris obtained because of
17 the breach of fiduciary duty and/or aiding and abetting. This is called “unjust
18 enrichment.”

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21 [*Authority*: Judicial Council of California, Civil Jury Instructions 3900.]
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1 **ChromaDex’s position:** The Court should adopt this proposed instruction
2 because ChromaDex seeks damages, both actual and disgorgement of Defendants’
3 unjust enrichment, for its claims for breach of fiduciary duty against Morris and for
4 Elysium’s aiding-and-abetting of that breach. The proposed instruction is consistent
5 with the CACI No. 3900 and with the law related to damages for breach of fiduciary
6 duty claims. *Sonoma Pharms., Inc. v. Collidion, Inc.*, 2018 WL 3398940, at *8 (N.D.
7 Cal. June 1, 2018) (“Plaintiff may pursue damages or unjust enrichment as remedies
8 for breach of [defendant’s] continuing fiduciary duties.”). And Elysium has offered
9 no reason why ChromaDex is not entitled to an instruction regarding its asserted
10 damages for those claims. The instruction should therefore be adopted as proposed.
11 *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) (holding “each
12 party is entitled to an instruction about his or her theory of the case if it is supported
13 by law and has foundation in the evidence”).

14
15 **Defendants’ position:** The cited instruction, CACI No. 3900, relates to
16 compensatory damages for torts. There is no authority for seeking damages for unjust
17 enrichment, which by definition are not compensatory, under this theory.

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1 **Disputed Case-Specific Jury Instruction No. 73, Offered by ChromaDex**
2 **BREACH OF CONTRACT AGAINST CHROMADEx (COUNTERCLAIM 1) –**
3 **ESSENTIAL ELEMENTS**

4 To recover damages from ChromaDex for breach of contract, Elysium must
5 prove all of the following:

- 6
- 7 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
- 8 (2) That Elysium did or was excused from doing all, or substantially all, of the
9 significant things that the contract required it to do;
- 10 (3) That ChromaDex failed to do something that the contract required it to do;
- 11
- 12 (4) That Elysium was harmed; and
- 13 (5) That ChromaDex’s breach of contract was a substantial factor in causing
14 Elysium’s harm.

15
16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303 (elements of
breach of contract).]

1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed
2 instruction because it properly instructs the jury on every element essential to a breach
3 of contract cause of action, which is all this instruction needs to accomplish.
4 Elysium’s desire to present a sequence of nearly identical instructions, relisting the
5 elements for breach of contract for every alleged breach is unnecessary, unwieldy, and
6 invites juror confusion. *See Jones*, 297 F.3d at 935 (affirming rejection of instruction
7 where “the district court gave other instructions that enabled the jury to consider th[e]
8 issue adequately”). These seriatim instructions are also contrary to Local Rule 51-
9 2(c), which states that instructions shall “[n]ot repeat the principle of law contained in
10 any other request.” And the proposed instructions are also confusing and misleading
11 and would prejudice ChromaDex because, taken together with the other proposed
12 instructions, they unnecessarily repeat and therefore may give extra weight to
13 Elysium’s allegations in the mind of the jury. *See United States v. Anderson*, 741 F.3d
14 938, 947 (9th Cir. 2013) (district court properly rejected “confusing instruction” that
15 would be “misleading or inadequate to guide the jury’s deliberation”).

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17 **Defendants’ position:** [Presented with competing instruction].
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1 **Disputed Case-Specific Jury Instruction No. 74, Offered Only by ChromaDex**

2 **INTERPRETATION OF CONTRACT – EXCLUSIONS TO LIABILITY**

3 In interpreting the contract as a whole, you are to take into account any
4 limitations to liability. The NIAGEN Supply Agreement provides for the following
5 limitation to liability:

6 ALL CLAIMS MADE WITH RESPECT TO THE PRODUCT
7 SHALL BE DEEMED WAIVED BY ELYSIUM HEALTH
8 UNLESS MADE IN WRITING AND RECEIVED BY
9 CHROMADDEX WITHIN THIRTY (30) DAYS OF
10 DELIVERY [] ELYSIUM HEALTH MUST MAKE ANY
11 CLAIM FOR NON-CONFORMING NIAGEN, BREACH OF
12 WARRANTY WITH RESPECT TO THE NIAGEN SOLD,
13 OR ANY CLAIM OF ANY NATURE WHATSOEVER WITH
14 RESPECT TO THE NIAGEN SOLD HEREUNDER IN
15 WRITING WITHIN THIRTY (30) DAYS AFTER ELYSIUM
16 HEALTH'S RECEIPT OF NIAGEN; AND [] ELYSIUM
17 HEALTH IRREVOCABLY WAIVES AND RELEASES ALL
18 CLAIMS THAT ARE NOT PROPERLY MADE WITHIN
19 SAID PERIOD.

20 [Authority: NIAGEN Supply Agreement, signed by ChromaDex and Elysium; see
21 also Judicial Council of California, Civil Jury Instructions 317 (directing jury to
22 consider the contract as a whole.)
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1 **ChromaDex’s position:** The Court should adopt ChromaDex’s proposed jury
2 instruction because it is a correct statement of the limited liability provision in the
3 contract between the parties. The jury should be instructed that, in addition to the
4 isolated provisions of the contract that each party asserts were breached by the other,
5 it should also consider this limited liability provision as part of “the whole contract . . .
6 so that all parts make sense when taken together.” CACI No. 317. Because the
7 proposed instruction “fairly and adequately cover[s]” the limited liability provision,
8 “correctly state[s] the law” on interpreting contracts, and is not “misleading,” it should
9 be adopted. *See United States v. Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (district
10 court properly rejected “confusing instruction” that would be “misleading or
11 inadequate to guide the jury’s deliberation”).

12
13 **Defendants’ position:** This is an attempt to point the jury toward a factual
14 allegation under the guise (and cloaked in the authority of) a jury instruction. The jury
15 is properly instructed under the parties’ stipulated instructions to read the contract as a
16 whole, and can read the document themselves.

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**INSTRUCTIONS PROPOUNDED BY
DEFENDANTS, OPPOSED BY PLAINTIFF**

1 **Disputed Preliminary Jury Instruction No. 19, Offered Only by Elysium and**
2 **Morris**

3 **CONFLICTING EXPERT TESTIMONY**

4 If the expert witnesses disagreed with one another, you should weigh each
5 opinion against the others. You should examine the reasons given for each opinion
6 and the facts or other matters that each witness relied on. You may also compare the
7 experts' qualifications.

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9 [*Authority*: Judicial Council of California, Civil Jury Instructions 221.]
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1 **ChromaDex’s position:** The parties have stipulated to two instructions
2 concerning expert testimony. (Stipulated Preliminary Jury Instruction Nos. 17 and
3 18). Elysium seeks to add a third (CACI No. 221), which ChromaDex believes to be
4 cumulative and unnecessary. The jury will already have heard the Ninth Circuit’s
5 model instruction 2.13, which makes clear “opinion testimony should be judged like
6 any other testimony,” that jurors “may accept it or reject it, and give it as much weight
7 as [they] think it deserves, considering the witness’s education and experience, the
8 reasons given for the opinion, and all the other evidence in the case.” Elysium’s
9 proposal to add another, largely duplicative instruction, based on a California model,
10 is not needed. *See also Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002)
11 (affirming rejection of instruction where “the district court gave other instructions that
12 enabled the jury to consider th[e] issue adequately”); L.R. 51-2(c) (noting that “[e]ach
13 requested instruction shall . . . [n]ot repeat the principle of law contained in any other
14 request.”).

15 **Defendants’ position:** This is an accurate statement of the law and standard
16 form instruction. See Judicial Council of California, Civil Jury Instructions 221. It is
17 warranted here because both sides intend to introduce expert testimony, and the
18 experts are likely to offer conflicting testimony.
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1 **Disputed Case-Specific Jury Instruction No. 29 (Part 1), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 1) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the pTeroPure Supply
5 Agreement based on the allegation of Elysium's failure to pay for the PT delivery,
6 ChromaDex must prove all of the following:

- 7 (1) That ChromaDex and Elysium entered into a contract;
8
9 (2) That ChromaDex did all, or substantially all, of the things that the contract
10 required it to do;
11 (3) That Elysium failed to do something that the contract required it to do, or did
12 something that the contract prohibited from doing;
13 (4) That ChromaDex was harmed; and
14 (5) That Elysium's breach of contract was a substantial factor in causing
15 ChromaDex's harm.

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17 [*Authority*: Judicial Council of California, Civil Jury Instructions 303.]
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1 **Disputed Case-Specific Jury Instruction No. 29 (Part 2), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 1) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the pTeroPure Supply
5 Agreement based on the allegation that ChromaDex used and disclosed the GRAS
6 Report, ChromaDex must prove all of the following:

- 7 (1) That ChromaDex and Elysium entered into a contract;
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9 (2) That ChromaDex did all, or substantially all, of the things that the contract
10 required it to do;
11
12 (3) That Elysium failed to do something that the contract prohibited it from
13 doing, or did something that the contract prohibited it from doing;
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15 (4) That ChromaDex was harmed; and
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17 (5) That Elysium’s breach of contract was a substantial factor in causing
18 ChromaDex’s harm.

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[**Authority:** Judicial Council of California, Civil Jury Instructions 303.]

1 **ChromaDex’s position:** [Presented with competing instruction].

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Defendants’ position: Harm is an element of a claim for breach of contract, and harm is compensable only if the defendant’s breach was a “substantial factor” in causing that harm. See Judicial Council of California, Civil Jury Instructions 303. Elysium’s proposed instructions require the jury to consider whether each individual alleged breach was a substantial factor in causing some harm. ChromaDex’s proposed instruction does not call for the jury to draw a causal link between any specific breach it might find and any harm. Beyond impermissibly allowing the jury to award damages without finding that any one breach was a substantial factor in causing ChromaDex’s harm, a jury verdict based on ChromaDex’s instruction could not be meaningfully reviewed. In the absence of any indication as to which acts the jury found to be breaches and which breaches the jury found to be substantial factors in causing ChromaDex’s harm, this Court (and any reviewing court) would have no method for determining whether the jury’s (unstated) findings were supported by sufficient evidence.

1 **Disputed Case-Specific Jury Instruction No. 34, Offered by Elysium**

2 **INTRODUCTION TO CONTRACT DAMAGES (CLAIM 1)**

3 If you decide that ChromaDex has proved its claim against Elysium for breach
4 of the pTeroPure Supply Agreement, you also must decide how much money will
5 reasonably compensate ChromaDex for the harm caused by the breach. This
6 compensation is called “damages.” The purpose of such damages is to put
7 ChromaDex in as good a position as it would have been if Elysium had performed as
8 promised.

9 To recover damages for any harm, ChromaDex must prove that when the
10 contract was made, both parties knew or could reasonably have foreseen that the harm
11 was likely to occur in the ordinary course of events as result of the breach of the
12 contract.

13 ChromaDex also must prove the amount of its damages according to the
14 following instructions. It does not have to prove the exact amount of damages but you
15 must not speculate or guess in awarding damages.

16 ChromaDex claims damages for the amount it invoiced Elysium for the
17 pTeroPure® shipment.

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19 [**Authority:** Judicial Council of California, Civil Jury Instructions 350.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Elysium objects to the reference to “unjust enrichment”
4 in ChromaDex’s proposed jury instruction. To the extent unjust enrichment is
5 available for breach of contract, the Plaintiff does not allege unjust enrichment for the
6 contract breach in the operative complaint nor does it seek remedies on that theory,
7 barring recovery under that theory here. See Fifth Amended Complaint, ECF No. 153
8 at ¶¶ 150-166 & pp. 48–49.

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1 **Disputed Case-Specific Jury Instruction No. 38 (part 1), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 2) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the NIAGEN Supply
5 Agreement based on the allegation of Elysium’s failure to pay for the NIAGEN
6 delivery, ChromaDex must prove all of the following:

- 7 (1) That ChromaDex and Elysium entered into a contract;
- 8 (2) That ChromaDex did all, or substantially all, of the things that the contract
9 required it to do;
- 10 (3) That Elysium failed to do something that the contract required it to do;
- 11 (4) That ChromaDex was harmed; and
- 12 (5) That Elysium’s breach of contract was a substantial factor in causing
13 ChromaDex’s harm.

14 [*Authority*: Judicial Council of California, Civil Jury Instructions 303 (modified).]

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1 **Disputed Case-Specific Jury Instruction No. 38 (part 2), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 2) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the NIAGEN Supply
5 Agreement based on the allegation that Elysium disclosed the NRcl Analytical
6 Method, ChromaDex must prove all of the following:

- 7 (1) That ChromaDex and Elysium entered into a contract;
8
9 (2) That ChromaDex did all, or substantially all, of the things that the contract
10 required it to do;
11 (3) That Elysium did something that the contract prohibited it from doing;
12 (4) That ChromaDex was harmed; and
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14 (5) That Elysium’s breach of contract was a substantial factor in causing
15 ChromaDex’s harm.

16 [*Authority*: Judicial Council of California, Civil Jury Instructions 303 (modified).]
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1 **Disputed Case-Specific Jury Instruction No. 38 (part 3), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 2) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the NIAGEN Supply
5 Agreement based on the allegation that Elysium disclosed the NIAGEN Investigator’s
6 Brochure, ChromaDex must prove all of the following:

- 7 (1) That ChromaDex and Elysium entered into a contract;
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9 (2) That ChromaDex did all, or substantially all, of the things that the contract
10 required it to do;
11 (3) That Elysium did something that the contract prohibited it from doing;
12 (4) That ChromaDex was harmed; and
13 (5) That Elysium’s breach of contract was a substantial factor in causing
14 ChromaDex’s harm.

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16 **[Authority:** Judicial Council of California, Civil Jury Instructions 303 (modified).]
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1 **Disputed Case-Specific Jury Instruction No. 38 (part 4), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST ELYSIUM (CLAIM 2) – ESSENTIAL**
3 **ELEMENTS**

4 To recover damages from Elysium for breach of the NIAGEN Supply
5 Agreement based on the allegation that Elysium disclosed the NR Study Data,
6 ChromaDex must prove all of the following:

- 7 (1) That ChromaDex and Elysium entered into a contract;
- 8 (2) That ChromaDex did all, or substantially all, of the things that the contract
9 required it to do;
- 10 (3) That Elysium did something that the contract prohibited it from doing;
- 11 (4) That ChromaDex was harmed; and
- 12 (5) That Elysium's breach of contract was a substantial factor in causing
13 ChromaDex's harm.

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16 [**Authority:** Judicial Council of California, Civil Jury Instructions 303 (modified).]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** Harm is an element of a claim for breach of contract,
4 and harm is only compensable if the defendant’s breach was a “substantial factor” in
5 causing that harm. *See* Judicial Council of California, Civil Jury Instructions 303.
6 Elysium’s proposed instructions require the jury to consider whether each individual
7 alleged breach was a substantial factor in causing some harm. ChromaDex’s proposed
8 instruction does not call for the jury to draw a causal link between any specific breach
9 it might find and any harm. Beyond impermissibly allowing the jury to award
10 damages without finding that any one breach was a substantial factor in causing
11 ChromaDex’s harm, a jury verdict based on ChromaDex’s instruction could not be
12 meaningfully reviewed. In the absence of any indication as to which acts the jury
13 found to be breaches and which breaches the jury found to be substantial factors in
14 causing ChromaDex’s harm, this Court (and any reviewing court) would have no
15 method for determining whether the jury’s (unstated) findings were supported by
16 sufficient evidence.

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1 **Disputed Case-Specific Jury Instruction No. 40, Offered by Elysium**

2 **INTRODUCTION TO CONTRACT DAMAGES (CLAIM 2)**

3 If you decide that ChromaDex has proved its claim against Elysium for breach
4 of the NIAGEN Supply Agreement, you also must decide how much money will
5 reasonably compensate ChromaDex for the harm caused by the breach. This
6 compensation is called “damages.” The purpose of such damages is to put
7 ChromaDex in as good a position as it would have been if Elysium had performed as
8 promised.

9 To recover damages for any harm, ChromaDex must prove that when the
10 NIAGEN Supply Agreement was made, both parties knew or could reasonably have
11 foreseen that the harm was likely to occur in the ordinary course of events as result of
12 the breach of the contract.

13 ChromaDex also must prove the amount of its damages according to the
14 following instructions. It does not have to prove the exact amount of damages but you
15 must not speculate or guess in awarding damages.

16 ChromaDex claims damages for the amount it invoiced Elysium for the
17 NIAGEN shipment.

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19 [**Authority:** Judicial Council of California, Civil Jury Instructions 350.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Elysium objects to the reference to “unjust enrichment”
4 in ChromaDex’s proposed jury instruction. To the extent unjust enrichment is
5 available for breach of contract, the Plaintiff does not allege unjust enrichment for the
6 contract breach in the operative complaint nor does it seek remedies as on that theory,
7 barring recovery under that theory here. *See* Fifth Amended Complaint, ECF No. 153
8 at ¶¶ 150-166 & pp. 48–49.

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1 **Disputed Case-Specific Jury Instruction No. 41, Offered Only by Elysium**
2 **AFFIRMATIVE DEFENSE – UNJUST ENRICHMENT**

3 Elysium claims that if ChromaDex is awarded damages it will be unjustly
4 enriched because ChromaDex has defrauded Elysium into entering into the Trademark
5 License and Royalties Agreement, and already collected royalties pursuant to that
6 agreement, which Elysium claims ChromaDex was not entitled to.

7 ChromaDex was unjustly enriched if its fraudulent inducement of Elysium to
8 enter into the Trademark License and Royalties Agreement caused it to receive a
9 benefit that it otherwise would not have achieved.

10 To decide the amount of any unjust enrichment, first determine the value of
11 ChromaDex's benefit that would not have been achieved except for its fraudulent
12 inducement. Then subtract from that amount the amount of damages, if any, to which
13 you find ChromaDex would otherwise be entitled. In calculating the amount of any
14 unjust enrichment, do not take into account any amount that you included in
15 determining any amount of damages for Elysium's actual loss.

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17 [**Authority:** *Acculmage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941,
18 958 (N.D. Cal. 2003) (citing *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723 (Cal. Ct.
App. 2000)).]

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed
2 instruction on “unjust enrichment” for three reasons. First, Elysium is asserting an
3 *affirmative counterclaim* for fraudulent inducement that seeks the repayment of
4 royalties paid under the Trademark License and Royalties Agreement—*i.e.*, the same
5 relief Elysium seeks via this “affirmative defense.” By instructing the jury on both the
6 counterclaim and the “affirmative defense,” Elysium invites double recovery and juror
7 confusion. That is reason alone to reject it. *See United States v. Anderson*, 741 F.3d
8 938, 947 (9th Cir. 2013) (district court properly rejected “confusing instruction” that
9 would be “misleading or inadequate to guide the jury’s deliberation”). Second,
10 Elysium cites no legal authority, and ChromaDex is aware of none, providing that
11 unjust enrichment is an affirmative defense that should be decided by a jury. Third,
12 Elysium is asserting *another* counterclaim for “unjust enrichment,” also based on the
13 payment of royalties under the Trademark License and Royalties Agreement, which
14 the parties have agreed will be decided by the Court, not a jury. Elysium should not
15 be permitted put this issue back in front of the jury by simply reframing it as an
16 “affirmative defense.”

17
18 **Defendants’ position:** This affirmative defense has been alleged by the
19 Defendants and is supported by evidence in the record. The two agreements referred
20 to in this instruction reference each other as collectively representing the
21 understanding of the parties. The proposed instruction generally conforms to the
22 parties’ stipulated instruction on unjust enrichment.

1 **ChromaDex’s position:** The Court should reject Elysium’s proposed
2 instruction because this is not a proper affirmative defense and would invite juror
3 confusion. To prevail on its affirmative claim for breach of contract, ChromaDex
4 must show that it has performed all conditions on its part or that it was excused from
5 performance. *Consol. World Investments, Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th
6 373, 380 (1992). If Elysium can show that ChromaDex “materially breached” the
7 agreement, then it would also show that ChromaDex would not have established an
8 element in its *affirmative case*. (See CACI No. 303.) Elysium cites no legal authority,
9 and ChromaDex is aware of none, providing that “performance excused by breach” is
10 an affirmative defense. The CACI instructions that Elysium cites concern the
11 defenses of “unilateral mistake of fact” (CACI No. 330) and fraud (CACI No. 335),
12 which are wholly different issues. The potential for confusion is only compounded
13 here because Elysium’s instruction does not include any definition (much less a
14 legally precise definition) of the term “materially.”

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16 **Defendants’ position:** Defendants have alleged numerous material breaches
17 by ChromaDex of the Niagen Supply Agreement. If the jury credits the evidence
18 presented by Elysium, the jury will be entitled to find that Elysium’s performance was
19 excused by ChromaDex’s breaches. *Cross v. Itron, Inc.*, 890 F.2d 420 (9th Cir. 1989)
20 (“Cross correctly argues that a party who breaches [an agreement] cannot recover for
21 the nonperformance of the other party.”); *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590,
22 1602 (2012) (holding that one who breaches a contract “cannot recover for a
23 subsequent breach by the other party”).

1 **Disputed Case-Specific Jury Instruction No. 43, Offered Only by Defendants**

2 **AFFIRMATIVE DEFENSE – UNCLEAN HANDS**

3 Elysium claims as a defense that ChromaDex’s misconduct precludes its
4 enforcements of ChromaDex’s claims. To establish this defense, Elysium must prove
5 that ChromaDex’s conduct was unconscionable and resulted in prejudice to Elysium.

6 ChromaDex’s misconduct must be connected with ChromaDex’s claims and of
7 such a prejudicial nature that it would be unfair to allow ChromaDex to rely on claims
8 for breach of contract. If that is established by Elysium, then ChromaDex is barred
9 from claiming breach of contract.

10
11 [*Authority*: 1-3F California Forms of Jury Instruction MB300F.29 (2017).]

1 **ChromaDex’s position:** Elysium’s proposed instruction should be rejected for
2 two reasons. First, unclean hands is an equitable defense, and Elysium has neither a
3 constitutional nor statutory right to have the jury decide this equitable defense. *See A-*
4 *C Co. v. Sec. Pac. Nat. Bank*, 173 Cal. App. 3d 462, 473–74 (1985). Elysium’s sole
5 authority for this instruction (a model form) concedes that unclean hands is “usually
6 tried by the court.” 1-3F California Forms of Jury Instruction MB300F.29 (2017); *see*
7 *also* Order, *Learning Technology Partners v. University of the Incarnate Word*, Case
8 No. 14-cv-4322-PJH, Dkt. 151 (N.D. Cal. Feb. 11, 2016) (“[B]ecause there is no
9 CACI instruction or Ninth Circuit model instruction on the issue, and because unclean
10 hands is an issue properly decided by the court, the jury will not be given an
11 instruction on unclean hands.”).

12 Second, Elysium’s instruction misstates the law. For the doctrine of unclean
13 hands to apply, the “conduct must be so *intimately connected* to the injury of another
14 with the matter for which he seeks relief, as to make it inequitable to accord him such
15 relief.” *CFM Commc’ns, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1238
16 (E.D. Cal. 2005) (*Estate of Blanco*, 86 Cal. App. 3d 826, 833 (1978)). Even the
17 model instruction Elysium cites uses the phrase “intimately connected.” Elysium’s
18 instruction, however, eliminates the word “intimately,” rendering it inaccurate and
19 misleading. Indeed, it is not even clear what “claims” Elysium is seeking to defeat
20 with this affirmative defense. The first half of Elysium’s instruction seems to suggest
21 that the jury can reject *all* of ChromaDex’s claims based on some hazy notion of
22 misconduct, while the second half refers only to the breach of contract claim. In light
23 of these defects, this instruction would only serve to confuse and mislead a jury. *See*
24 *United States v. Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (district court properly
25 rejected “confusing instruction” that would be “misleading or inadequate to guide the
26 jury’s deliberation”).

27
28 **Defendants’ position:** Elysium’s proposed instruction on the affirmative

1 defense of unclean hands follows jury instruction MB300F.29 in California Forms of
2 Jury Instructions (Mathew Bender). Pursuant to the authorities cited in the comments
3 to that instruction, it is appropriate to submit the equitable defense of unclean hands to
4 the jury when the “theories in support of the unclean hands defense [are] intertwined
5 with the parties' legal causes of action and raise[] questions of fact and credibility
6 properly submitted to a jury.” *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th
7 612, 623 (1992). Here, Defendants have alleged and produced evidence showing that
8 ChromaDex fraudulently induced Elysium to enter into a contractual relationship with
9 ChromaDex, and that it breached numerous key provisions of that contractual
10 relationship, while taking action to replace Elysium in the direct-to-consumer market
11 Elysium had created. The defense is therefore intertwined with the legal and factual
12 issues to be decided by the jury, making the proposed instruction on unclean hands
13 proper.

1 **Disputed Case-Specific Jury Instruction No. 44, Offered by Elysium and Morris**
2 **MISAPPROPRIATION OF TRADE SECRETS UNDER STATE LAW**
3 **(CLAIM 3) – INTRODUCTION**

4 ChromaDex claims that it is the owner of certain information relating to the
5 manufacture and sale of NIAGEN, including information falling into four categories:
6 customer and sales information, pricing information, and information relating to
7 research and development, including with a potential partner:

8 ChromaDex claims that this information consisted of trade secrets and that
9 Elysium and Mr. Morris misappropriated them. “Misappropriation” means the
10 improper acquisition, use, or disclosure of the trade secrets.

11 ChromaDex also claims that Elysium and Mr. Morris’s misappropriation caused
12 ChromaDex harm, or caused Elysium and Mr. Morris to be unjustly enriched.

13 Elysium and Mr. Morris deny that any of the alleged trades secrets is a trade
14 secret. Elysium and Mr. Morris also deny that they misappropriated any of the
15 information alleged. Elysium and Mr. Morris also claim certain affirmative defenses,
16 which will be explained in a later instruction.

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18 [**Authority:** Judicial Council of California, Civil Jury Instructions 4400.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** Defendants object to the statement “This information
4 will be referred to as the ‘Alleged Trade Secrets.’” ChromaDex seeks to lump
5 numerous discrete pieces of information together and categorize them all as its “Trade
6 Secrets.” ChromaDex is required to prove that each challenged item is a trade secret,
7 and this instruction improperly relieves them of this burden, assumes the conclusion,
8 and prejudices the jury to assume that there is something distinct and special about
9 any particular piece of information based on the fact that it is assigned a label.
10 Presumably for this reason, the standard jury instruction provides that the plaintiff
11 should “insert a general description of alleged trade secret[s]” and then “select short
12 term to describe, e.g., information”.

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1 **Disputed Case-Specific Jury Instruction No. 45, Offered by Elysium and Morris**
2 **MISAPPROPRIATION OF TRADE SECRETS UNDER STATE LAW**
3 **(CLAIM 3) – ESSENTIAL FACTUAL ELEMENTS**

4 ChromaDex claims that Elysium and Mr. Morris have misappropriated trade
5 secrets belonging to ChromaDex. To succeed on this claim, ChromaDex must prove
6 all of the following:

7 (1) That ChromaDex owned the following:

- 8
- 9 i. Information regarding sales by another customer, live Cell, of NR
10 containing products;
- 11 ii. The amounts of live Cell's purchases from ChromaDex;
- 12 iii. Information regarding ChromaDex's PT sales in specific channels;
- 13
- 14 iv. Live Cell's NR purchasing history, including dates, volumes, and
15 prices;
- 16 v. Information regarding the identity of a ChromaDex business and
17 partner and a possible alternative method for manufacturing NR;
- 18 vi. The price ChromaDex paid to its contract manufacturer for NR on
19 a per-kilo basis;
- 20 vii. Information regarding ChromaDex's sales to another customer;
- 21 viii. Information regarding ChromaDex's NR sales to other customers;
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- 23 ix. Identities of non-public ingredient customers and purchasing
24 history of ChromaDex ingredient customers from 2012-2016;
- 25 x. Information regarding ChromaDex's research and development
26 work on the viability of using different salts for manufacturing NR.

27 (2) That this information was a trade secret at the time of the misappropriation;

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1 (3) That Elysium and Mr. Morris improperly acquired, used or disclosed trade
2 secrets;

3 (4) That ChromaDex was harmed, or that Elysium and Morris were unjustly
4 enriched; and

5 (5) That Elysium's and Mr. Morris's acquisition, use, or disclosure was a
6 substantial factor in causing ChromaDex's harm, or in causing Elysium and
7 Mr. Morris to be unjustly enriched.

8 [**Authority:** Judicial Council of California, Civil Jury Instructions 4401.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** In addition to objecting to the phrase “Alleged Trade
4 Secret” for the reasons stated in connection with Proposed Jury Instruction No. 46,
5 Defendants object to the language “some or all” of ChromaDex’s Alleged Trade
6 Secrets, and “any given” Alleged Trade Secret. ChromaDex has offered no evidence
7 that the disclosure of “any given” alleged trade secret or any particular subset of
8 alleged trade secrets caused it harm; rather, it has offered an expert opinion relying on
9 harm caused by all of Defendants’ alleged conduct or, at a minimum, Defendants’
10 alleged misappropriation of all of the alleged trade secrets. Further, the cases
11 addressing jury verdicts arising from misappropriation of multiple alleged trade
12 secrets appear uniform in tasking the jury with determining trade secret status for each
13 alleged item, along with whether each alleged item was misappropriated. *See e.g., O2*
14 *Micro Intern. Ltd. v. Monolithic Power Sys. Inc.*, 399 F. Supp. 2d 1064, 1076 (N.D.
15 Cal. 2005) (describing jury finding specific to each alleged trade secret); *ATS Prod.*
16 *Inc. v. Ghiorso*, 2012 WL 253315 (N.D. Cal. Jan. 26, 2012) (same); *Ice Corp. v.*
17 *Hamilton Sundstrand Corp.*, 615 F. Supp. 2d 1256, 1263 (D. Kan. 2009) (describing
18 jury findings specific to each alleged trade secret).

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1 **Disputed Case-Specific Jury Instruction No. 48, Offered by Elysium and Morris**
2 **REASONABLE EFFORTS TO PROTECT SECRECY**

3 To establish that information is a trade secret, ChromaDex must prove that it
4 made reasonable efforts under the circumstances to keep it secret. “Reasonable
5 efforts” are the efforts that would be made by a reasonable business in the same
6 situation and having the same knowledge and resources as ChromaDex, exercising
7 due care to protect important information of the same kind. This requirement applies
8 separately to each item that ChromaDex claims to be a trade secret.

9 In determining whether ChromaDex made reasonable efforts to keep particular
10 information secret, you should consider all of the facts and circumstances. Among the
11 factors you should consider are the following:

- 12 (1) Whether documents or computer files containing the information were
13 marked with confidentiality warnings;
- 14 (2) Whether ChromaDex instructed its employees to treat the information as
15 confidential information;
- 16 (3) Whether ChromaDex restricted access to the information to persons who
17 had a business reason to know the information;
- 18 (4) Whether ChromaDex kept the information in a restricted or secured area;
- 19 (5) Whether ChromaDex required employees or others with access to the
20 information to sign confidentiality or nondisclosure agreements;
- 21 (6) Whether ChromaDex took any action to protect the specific information,
22 or whether it relied on general measures taken to protect its business
23 information and assets;
- 24 (7) The extent to which and general measures taken by ChromaDex would
25 prevent the unauthorized disclosure of the information;
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- 1 (8) Whether there were other reasonable measures available to ChromaDex
2 that it did not take with respect to protecting the document;
- 3 (9) Whether ChromaDex disclosed the information to others, including other
4 customers;
- 5 (10) Whether the parties' agreements contemplated or required that this
6 information be disclosed to Elysium;
- 7 (11) Whether ChromaDex consented, explicitly or implicitly, to the
8 disclosure.

9 The presence of absence of any one or more of these factors is not necessarily
10 determinative.

11 [**Authority:** Judicial Council of California, Civil Jury Instructions 4404.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Defendants have no objection to ChromaDex’s
4 instruction standing alone. However, if the Court allows ChromaDex to use the phrase
5 “Alleged Trade Secret” instead of “information” when instructing the jury on the
6 definition of “trade secret,” Defendants request that the phrase “Alleged Trade Secret”
7 be used in this instruction as well. Here, it is ChromaDex that suffers if the jury is
8 predisposed to assume that because information is called an “Alleged Trade Secret” it
9 ought to be treated like a trade secret. If ChromaDex is allowed to create the
10 possibility of such an inference in the definition of “trade secret” it should be bound
11 by the same inference in the remaining elements of the claim.

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1 **Disputed Case-Specific Jury Instruction No. 49, Offered by Elysium and Morris**
2 **“INDEPENDENT ECONOMIC VALUE” EXPLAINED**

3 Trade secret information has independent economic value if it gives the owner
4 an actual or potential business advantage over others who do not know the
5 information and who could obtain economic value from its disclosure or use.

6 In determining whether particular information alleged to be a trade secret had
7 actual or potential independent economic value because it was secret, you may
8 consider the following:

- 9 (1) The extent to which ChromaDex obtained or could obtain economic
10 value from the information in keeping it secret;
- 11 (2) The extent to which others could obtain economic value from the
12 information if it was not secret;
- 13 (3) The amount of time, money, or labor that ChromaDex expended in
14 developing the information; and
- 15 (4) The amount of time, money, or labor that was saved by a competitor who
16 used the document.

17 The presence or absence of any one or more of these factors is not necessarily
18 determinative.

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20 [**Authority:** Judicial Council of California, Civil Jury Instructions 4412.
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** For the same reasons discussed above, Defendants

4 object to the alteration of the standard form (“short term to describe, e.g.,

5 information”) to “any given Alleged Trade Secret.” The phrase “particular

6 information” comports with the instruction and is not prejudicial. Defendants also

7 object to the inclusion of “or acquiring” in the third prong of the instruction. The

8 form instruction provides that the jury may consider “[t]he amount of time, money or

9 labor that ChromaDex expended in *developing* the specific information” alleged to be

10 trade secret; it does not include “or acquiring.” It is unclear whether or under what

11 theory information merely “acquired” by a party can be that party’s trade secret.

12 ChromaDex cites authority for the proposition that “a party’s ‘efforts to

13 acquire’ information is relevant,” but this does not suggest the definition of “trade

14 secret” may be expanded in the way ChromaDex suggests.

1 **Disputed Case-Specific Jury Instruction No. 50, Offered by Elysium and Morris**
2 **MISAPPROPRIATION BY DISCLOSURE**

3 If you find information to be a trade secret, Elysium or Mr. Morris
4 misappropriated ChromaDex's trade secret by disclosure if Elysium or Mr. Morris:

5 (1) disclosed the information without ChromaDex's consent; and

6 (2) did any of the following:

- 7 a. acquired knowledge of the trade secret by improper means; or
8 b. at the time of disclosure, knew or had reason to know that its
9 knowledge of ChromaDex's trade secret came from or through
10 Morris and that Morris had a duty to ChromaDex to keep the
11 information secret.

12 [**Authority:** Judicial Council of California, Civil Jury Instructions 4406 (modified).]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** In this case, ChromaDex has made numerous allegations
4 related to use or disclosure of information it deems confidential, under numerous
5 different theories including breach of contract. Under these facts, it is crucial to
6 remind the jury that the misappropriation charge relates only to information that it
7 finds to be a “trade secret” and not to other information, such as information alleged
8 or found to be confidential information pursuant to a contract but that is not trade
9 secret.

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1 **Disputed Case-Specific Jury Instruction No. 51, Offered by Elysium and Morris**
2 **MISAPPROPRIATION BY USE**

3 If you find information to be a trade secret, Elysium or Morris misappropriated
4 a trade secret by use if Elysium or Morris:

5 (1) used the trade secret without ChromaDex's consent; and

6 (2) did any one of the following:

- 7 • acquired knowledge of the trade secret by improper means; or
8 • at the time of use, knew or had reason to know that the knowledge
9 of the trade secret was acquired under circumstances creating a
10 legal obligation to limit use of the information; or
11 • **[in the case of Elysium]** at the time of use, knew or had reason to
12 know that its knowledge of the trade secret came from or through
13 Morris, and that Morris had a duty to ChromaDex to limit use of
14 the information.

15 [**Authority:** Judicial Council of California, Civil Jury Instructions 4407 (modified).]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** In this case, ChromaDex has made numerous allegations
4 related to use or disclosure of information it deems confidential, under numerous
5 different theories including breach of contract. Under these facts, it is crucial to
6 remind the jury that the misappropriation charge relates only to information that it
7 finds to be a “trade secret” and not to other information, such as information alleged
8 or found to be confidential information pursuant to a contract but that is not trade
9 secret.

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1 **Disputed Case-Specific Jury Instruction No. 53, Offered by Elysium and Morris**
2 **REMEDIES FOR MISAPPROPRIATION OF TRADE SECRET**

3 If ChromaDex proves that Elysium and Morris misappropriated its trade secrets,
4 then ChromaDex is entitled to recover damages if the misappropriation caused
5 ChromaDex to suffer an actual loss or Elysium and Morris to be unjustly enriched.

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7 [*Authority*: Judicial Council of California, Civil Jury Instructions 4409.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** ChromaDex has not sought a royalty or offered any
4 evidence from which a reasonable royalty could be calculated, so there is no reason
5 for a royalty instruction in this case. *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App.
6 4th 612, 628 (1992) (“Just as Burroughs presented no evidence of the degree of
7 Unilogic’s enrichment, Burroughs likewise presented no evidence that would allow
8 the court to determine what royalty, if any, would be reasonable under the
9 circumstances.”); *Pollara v. Radiant Logistics, Inc.*, No. CV 12-344 GAF (JEMX),
10 2014 WL 12703792, at *1 (C.D. Cal. Apr. 18, 2014) (“if the Court were asked to
11 award a royalty, it would require evidence in the form of expert testimony to value a
12 proper royalty rate for the alleged trade secrets in this case.”).

1 **Disputed Case-Specific Jury Instruction No. 60, Offered by Morris**

2 **BREACH OF CONTRACT AGAINST MORRIS (CLAIM 5) –**

3 **INTRODUCTION**

4 ChromaDex claims that it entered into a confidentiality agreement with Mr.
5 Morris in February 2016 in connection with Mr. Morris’s employment with
6 ChromaDex.

7 ChromaDex claims that Mr. Morris breached this contract by disclosing
8 ChromaDex’s confidential and trade secret information during and after his
9 employment, and by keeping copies of certain confidential and trade secret
10 information when after his employment with ChromaDex ended.

11 ChromaDex also claims that Mr. Morris’s breach of this contract caused harm
12 to ChromaDex for which Mr. Morris should pay.

13 Mr. Morris denies that he breached the contract. He also claims certain
14 affirmative defenses, which will be explained in a later instruction.

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16 [**Authority:** Judicial Council of California, Civil Jury Instructions 300.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** Defendants object to the inclusion of “misusing
4 ChromaDex documents for Elysium’s benefit after he left ChromaDex” as one of the
5 claimed breaches. ChromaDex’s claim is that Mr. Morris violated a requirement to
6 return information to ChromaDex when he left their employ; the contract does not
7 address “misuse” of information and ChromaDex does not allege that “misuse” would
8 breach the contract.

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1 **Disputed Case-Specific Jury Instruction No. 62, Offered by Morris**

2 **BREACH OF CONTRACT AGAINST MORRIS (CLAIM 6) –**

3 **INTRODUCTION**

4 ChromaDex claims that it entered into a confidentiality agreement with Mr.
5 Morris on July 15, 2016, the last day of Mr. Morris’s employment.

6 ChromaDex claims that Morris breached this contract by taking information
7 from ChromaDex with him when he ended his employment at ChromaDex.

8 ChromaDex also claims that Morris breached this contract by disclosing
9 ChromaDex’s pricing information to Elysium.

10 ChromaDex also claims that Mr. Morris breached this contract by disclosing to
11 Elysium the information it alleges to be ChromaDex’s trade secrets, in addition to
12 other information it claims Mr. Morris was required to keep confidential under the
13 contract.

14 Mr. Morris denies that he entered into a valid contract with ChromaDex on July
15 15, 2016.

16 Mr. Morris also denies that he breached the contract and that any of the
17 information was a trade secret. Mr. Morris also claims certain affirmative defenses
18 which will be explained in a later instruction.

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20 [**Authority:** Judicial Council of California, Civil Jury Instructions 300.]

1 **ChromaDex’s position:** [Presented with competing instruction].

2

3 **Defendants’ position:** Defendants object to the inclusion of “misusing
4 ChromaDex documents for Elysium’s benefit after he left ChromaDex” as one of the
5 claimed breaches. ChromaDex’s claim is that Mr. Morris violated a requirement to
6 return information to ChromaDex when he left their employ; the contract does not
7 address “misuse” of information and ChromaDex does not allege that “misuse” would
8 breach the contract.

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1 **Disputed Case-Specific Jury Instruction No. 67, Offered by Elysium and Morris**
2 **CORPORATE OFFICER**

3 An officer of a corporation who participates in management of the corporation,
4 exercising some discretionary authority, is a fiduciary of the corporation.

5 A nominal officer with no management authority is not a fiduciary.

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7 [**Authority:** 1 California Forms of Jury Instruction MB300C.08.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** ChromaDex’s proposed instruction includes argument
4 and a title which itself is its own separate (and baseless) instruction, stating an
5 “OFFICER WHO PARTICIPATES IN MANAGEMENT IS A FIDUCIARY OF THE
6 CORPORATION AS A MATTER OF LAW.” The instruction includes improper
7 argument based on ChromaDex’s interpretation of caselaw, arguing that “Participation
8 in management does not require ‘top-level’ control. So long as the officer has some
9 discretion in managing corporate affairs, he or she is a fiduciary of the corporation.”
10 In contrast, Elysium’s proposed instruction accurately states the law and is consistent
11 with the form instruction.

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1 **Disputed Case-Specific Jury Instruction No. 68, Offered by Elysium and Morris**
2 **BREACH OF FIDUCIARY DUTY (CLAIM 7) – ESSENTIAL FACTUAL**
3 **ELEMENTS**

4 ChromaDex claims that it was harmed by Mr. Morris’s breach of the fiduciary
5 duty of loyalty. A corporate officer owes his corporation undivided loyalty. To
6 establish this claim, ChromaDex must prove all of the following:

- 7 (1) That Morris was a corporate officer of ChromaDex;
8 (2) That at the time Morris was a corporate officer of ChromaDex, he
9 knowingly acted against ChromaDex’s interests with respect to the
10 business relationship between ChromaDex and Elysium;
11 (3) That ChromaDex did not give informed consent to Morris’s conduct;
12 (4) That ChromaDex was harmed; and
13 (5) That Morris’s conduct was a substantial factor in causing ChromaDex’s
14 harm.

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16 [*Authority*: Judicial Council of California, Civil Jury Instructions 4102.]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** Defendants’ proposed instruction follows the form

4 instruction, which includes in the second element that the defendant acted against

5 plaintiff’s “interests in connection with [insert description of transaction, e.g.,

6 ‘purchasing a residential property’]”. ChromaDex’s proposed instruction leaves out

7 the factual predicate entirely, and instead merely calls on the jury to find that Morris

8 “acted against ChromaDex’s interests.” Defendants’ instruction conforms to the form

9 instruction by specifying the nature of the interest that Morris is alleged to have

10 interfered with.

11 Moreover, in this case ChromaDex’s instruction creates an erroneous statement

12 of the law by failing to specify that Morris breached his fiduciary duty only if he acted

13 against ChromaDex’s interests “at the time Morris was a corporate officer of

14 ChromaDex.” After Morris left ChromaDex, he was employed by Elysium. A finding

15 that Morris, as an employee of Elysium, acted against ChromaDex’s interests would

16 not be sufficient to support a finding that Morris had breached any fiduciary duty to

17 ChromaDex. The instruction must accordingly be modified to be consistent with the

18 law.

1 **Disputed Case-Specific Jury Instruction No. 73 (part 1), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST CHROMADEx (COUNTERCLAIM 1) –**
3 **ESSENTIAL ELEMENTS**

4 To recover damages from ChromaDex for breach of the NIAGEN Supply
5 Agreement based on the allegation that ChromaDex violated the Most Favored
6 Nations Provision, Elysium must prove all of the following:

- 7
- 8 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
 - 9 (2) That Elysium did or was excused from doing all, or substantially all, of the
10 things that the contract required it to do;
 - 11 (3) That ChromaDex failed to do something the contract required it to do, or did
12 something the contract prohibited it from doing;
 - 13 (4) That Elysium was harmed; and
 - 14 (5) That ChromaDex's breach of contract was a substantial factor in causing
15 Elysium's harm.
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17 [*Authority*: Judicial Council of California, Civil Jury Instructions 303.]
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1 **Disputed Case-Specific Jury Instruction No. 73 (part 2), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST CHROMADDEX (COUNTERCLAIM 1) –**
3 **ESSENTIAL ELEMENTS**

4 To recover damages from ChromaDex for breach of the NIAGEN Supply
5 Agreement based on the allegation that ChromaDex violated the Exclusivity
6 Provision, Elysium must prove all of the following:

- 7
- 8 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
- 9 (2) That Elysium did or was excused from doing all, or substantially all, of the
10 things that the contract required it to do;
- 11 (3) That ChromaDex failed to do something the contract required it to do, or did
12 something that the contract prohibited it from doing;
- 13 (4) That Elysium was harmed; and
- 14 (5) That ChromaDex's breach of contract was a substantial factor in causing
15 Elysium's harm.
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17 [**Authority:** Judicial Council of California, Civil Jury Instructions 303.]
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1 **Disputed Case-Specific Jury Instruction No. 73 (part 3), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST CHROMADEx (COUNTERCLAIM 1) –**
3 **ESSENTIAL ELEMENTS**

4 To recover damages from ChromaDex for breach of the NIAGEN Supply
5 Agreement based on the allegation that ChromaDex violated the cGMP Provision,
6 Elysium must prove all of the following:

- 7
- 8 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
 - 9 (2) That Elysium did or was excused from doing all, or substantially all, of the
10 things that the contract required it to do;
 - 11 (3) That ChromaDex failed to do something the contract required it to do, or did
12 something the contract prohibited it from doing;
 - 13 (4) That Elysium was harmed; and
 - 14 (5) That ChromaDex's breach of contract was a substantial factor in causing
15 Elysium's harm.

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17 [**Authority:** Judicial Council of California, Civil Jury Instructions 303.]

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1 **Disputed Case-Specific Jury Instruction No. 73 (part 4), Offered by Elysium**
2 **BREACH OF CONTRACT AGAINST CHROMADDEX (COUNTERCLAIM 1) –**
3 **ESSENTIAL ELEMENTS**

4 To recover damages from ChromaDex for breach of the NIAGEN Supply
5 Agreement based on the allegation that ChromaDex violated the Purity Provision,
6 Elysium must prove all of the following:

- 7
- 8 (1) That Elysium and ChromaDex entered into the NIAGEN Supply Agreement;
 - 9 (2) That Elysium did or was excused from doing all, or substantially all, of the
10 things that the contract required it to do;
 - 11 (3) That ChromaDex failed to do something the contract required it to do, or did
12 something the contract prohibited it from doing;
 - 13 (4) That Elysium was harmed; and
 - 14 (5) That ChromaDex's breach of the contract was a substantial factor in causing
15 Elysium's harm.
- 16

17 [**Authority:** Judicial Council of California, Civil Jury Instructions 303; *Letizia v.*
18 *Facebook Inc.*, 267 F. Supp. 3d 1235, 1253 (N.D. Cal 2017) (recognizing contractual
19 duties of reasonableness under California law).]
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1 **ChromaDex’s position:** [Presented with competing instruction].

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3 **Defendants’ position:** For the reasons previously stated, it is Elysium’s
4 position that the jury should be instructed on each alleged breach separately. That
5 position is supported by the requirement that harm be specifically attributable to
6 specific breaches and is further justified by the practical necessity of specificity in
7 order for the jury’s verdict to be meaningfully reviewable.

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1 **Disputed Case-Specific Jury Instruction No. 81, Offered Only by Elysium**
2 **DEDUCTION OF DAMAGES FROM THE PRICE**

3 Elysium on notifying ChromaDex of its intention to do so may deduct all or any
4 part of the damages resulting from any breach of the contract from any part of the
5 price still due under the same contract.

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7 [*Authority*: UCC 2-717.]
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1 **ChromaDex’s position:** The Court should reject Elysium’s proposed
2 instruction. At core, it is not a jury instruction, but rather merely a recitation of a
3 UCC provision that may or may not apply in this litigation. Even if applicable, that
4 provision would only apply by its terms only if and when *Elysium* made a decision
5 about deducting its hypothetical damages; it has no bearing on what the jury must
6 decide in this case. The proposed instruction is therefore irrelevant. *See, e.g.,*
7 *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1063 (9th Cir. 2008)
8 (finding no abuse of discretion where district court refused to give jury instruction
9 based on UCC provision because it was “irrelevant”). And the proposed instruction is
10 also confusing and misleading because, taken together with the other proposed
11 instructions, it inappropriately directs the jury’s attention to what could happen after it
12 renders its verdict, rather than on the fact issues it must decide. *See United States v.*
13 *Anderson*, 741 F.3d 938, 947 (9th Cir. 2013) (district court properly rejected
14 “confusing instruction” that would be “misleading or inadequate to guide the jury’s
15 deliberation”).

16 Further, in the event a jury awards damages to both ChromaDex and Elysium,
17 the Court is more than capable of deducting all or part of the damages that
18 ChromaDex owes to Elysium from the amount that Elysium owes to ChromaDex.
19 There is no need for a jury instruction here. *See Order, Learning Technology Partners*
20 *v. University of the Incarnate Word*, Case No. 14-cv-4322-PJH, Dkt. 151 (N.D. Cal.
21 Feb. 11, 2016) (holding that the court could conduct the purely arithmetic task of
22 calculating an offset post-verdict and, thus, there was no need for a jury instruction).

23
24 **Defendants’ position:** Elysium’s proposed instruction informs the jury that in a
25 commercial case such as this, under the California Uniform Commercial Code,
26 damages arising from breach of a supply agreement are netted out against amounts
27 due thereunder. This point of law is salient because of Elysium’s position that the
28 dollar values of the July 30 purchase orders are offset by the credits and/or refunds

1 owing to Elysium from breach of the MFN Provision as well as from other of
2 ChromaDex's breaches.

3
4 Dated: September 11, 2019

COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
SOPHIA M. RIOS (305801)
JAYME B. STATEN (317034)

5
6
7
8
9 /s/ Michael A. Attanasio

10 Michael A. Attanasio (151529)

11 *Attorneys for Plaintiff and Counter-Defendant
ChromaDex, Inc.*

12 *The filer, Michael A. Attanasio, attests that the other signatory listed, on whose behalf*
13 *the filing is submitted, concurs in the filing's content and has authorized the filing.*

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BAKER & HOSTETLER LLP
MICHAEL R. MATTHIAS (057728)
ELIZABETH M. TRECKLER (282432)
JOSEPH N. SACCA (*admitted pro hac vice*)
ESTERINA GIULIANI (*admitted pro hac vice*)
BENJAMIN D. PERGAMENT
(*admitted pro hac vice*)
KRISTIN L. KERANEN
(*admitted pro hac vice*)

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16
17
18
19
20
21 /s/ Joseph N. Sacca

22 Joseph N. Sacca (*admitted pro hac vice*)

23 *Attorneys for Defendant and Counterclaimant*
24 *Elysium Health, Inc. and*
25 *Defendant Mark Morris*
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27
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